

LIBERTIES

RULE OF LAW REPORT

2024

GERMANY

#ROLREPORT2024



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FOREWORD

This country report is part of the Liberties Rule of Law Report 2024, which is the fifth annual report on the state of rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties). Liberties is a non-governmental organisation (NGO) promoting the civil liberties of everyone in the EU, and it is built on a network of national civil liberties NGOs from across the EU. Currently, we have member organisations in Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden, as well as a contributing partner organisation in Latvia.

Liberties, together with its members and partner organisations, carries out advocacy, campaigning and public education activities to explain what the rule of law is, what the EU and national governments are doing to protect or harm it, and gathers public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.

The 2024 report was drafted by Liberties and its member and partner organizations, and it covers the situation during 2023. It is a ‘shadow report’ to the European Commission’s annual rule of law audit. As such, its purpose is to provide the European Commission with reliable information and analysis from the ground to feed its own rule of law reports, and to provide an independent analysis of the state of the rule of law in the EU in its own right.

Liberties’ report represents the most in-depth reporting exercise carried out to date by an NGO network to map developments in a wide range of areas connected to the rule of law in the EU. The 2024 report includes 19 country reports that follow a common structure, mirroring and expanding on the priority areas and indicators identified by the European Commission for its annual rule of law monitoring cycle. Thirty-seven member and partner organisations and one independent human rights expert contributed to the compilation of these country reports.

[Download the full Liberties Rule of Law Report 2024 here](#)

TABLE OF CONTENTS

About the authors	4
Key concerns	5
Justice system	6
Anti-corruption framework	11
Media environment and media freedom	13
Checks and balances	17
Civic space	20
Disregard of human rights obligations and other systemic issues affecting the rule of law environment	27
Contacts	30

GERMANY

About the authors

GFF (Gesellschaft für Freiheitsrechte /Society for Civil Rights)



GFF (Gesellschaft für Freiheitsrechte /Society for Civil Rights) is a donor-funded organisation that defends fundamental and human rights by legal means. The organisation promotes democracy and civil society, protects against disproportionate surveillance and advocates for equal rights and social participation for everyone. To that end, the GFF conducts strategic litigation, lodges constitutional complaints against laws that violate fundamental rights and contributes its legal expertise to social debates. The Berlin-based non-profit organisation was founded in 2015 and is funded primarily through individual donations and the contributions of its supporting members.

GFF was supported by the following organisations:



FragDenStaat: FragdenStaat is a project established by the Open Knowledge Foundation e.V. and is the central contact point for freedom of information in Germany. FragDenStaat brings information to the public that was previously gathering dust in filing cabinets. Whether it's an email by a lobbyist, an environmental report, meeting minutes or a calendar entry – FragDenStaat helps liberate and publish it by using the Freedom of Information Law (Informationsfreiheitsgesetz, IFG).



LobbyControl: LobbyControl is a non-profit association that educates about power structures and influence strategies in Germany and the EU. LobbyControl advocate for transparency, democratic control and clear limits on influencing politics and the public.

Key concerns

As a general assessment, the federal government has made progress on some reforms, amendments to the Judiciary Act and the reform of custodial sanctions. Considering the recommendations made by the European Commission in their annual rule of law report, the federal government and the *Länder* have not agreed on an approach to provide additional funding for judicial positions and the digital transformation of the judiciary.

As regards the anti-corruption framework, the German Parliament introduced new transparency requirements regarding the financing of political parties and election campaigns. The reform is a step in the right direction. The lobby register law (Lobbyregistergesetz, LobbyRG) was also reformed, its scope widened, and the transparency increased. Regarding the recommendations made by the European Commission in their annual rule of law report in this area, there were no steps taken to strengthen the rules for future employment after leaving office, neither for ministers of the federal government, parliamentary state secretaries nor for high-ranking public officials. A legislative footprint has still not been proposed by the federal government.

As far as the media environment and media freedom, freedom of the press is increasingly under pressure. Physical and legal attacks on journalists have increased. Germany

also dropped five places in the press freedom ranking of Reporters Without Borders ranking compared to last year.

In relation to the recommendations of the European Commission, Germany has still not taken forward the plan to create a legal basis for a right to information of the press as regards federal authorities. As for checks and balances, deadlines for stakeholder consultation in the legislative process are often unreasonably short. Draft legislation does not require a synopsis, which seriously hampers readability. There was no country specific recommendation in this area from the Commission to report on.







Regarding the civic space, the legal uncertainties with the tax-exempt status of CSOs have not been resolved. Excessive use of force, blanket bans of assemblies and criminal investigations of political movements have further restricted civic space. When considering the recommendations in the Commission's rule of law report, while the reform of the tax code is part of the coalition treaty of the current government and reforms were scheduled for 2023, no reforms to protect public participation and advocacy, work of civil society organisations were initiated.

As it relates to the disregard of human rights obligations and other systemic issues affecting the rule of law environment, the government has taken no action to address the known problems of documentation of police

violence, and systematic and disproportionate restrictions of the rights of refugees entering Germany. There was no country specific recommendation in this area from the Commission.

Justice system

State of play (versus 2023)

-  Justice system
-  Anti-corruption framework
-  Media environment and freedom of expression and of information
-  Checks and balances
-  Enabling framework for civil society
-  Systemic human rights issues

Legend

Regression No progress Progress



Key recommendations

- *The federal government must reform Sec. 353d of the Criminal Code. In its current form, Sec. 353d violates the freedom of the press by subjecting journalists to criminal liability for publishing court documents, regardless of the context.*
- *The federal government and the Länder need to reach an agreement on the extension and consolidation of the 'pact for the rule of law', or other avenues to increase funding for judicial positions and the digital transformation of the judiciary.*

Judicial independence

Appointment and selection of judges, prosecutors and court presidents

In Germany, lay judges, known as *Schöff*innen*, often participate in criminal proceedings and have the same voting rights as professional judges. There are around 40,000 lay judges in Germany. In recent years, far-right parties such as the Alternative for Germany (Alternative für Deutschland, AfD) and the National Democratic Party of Germany

(Nationaldemokratische Partei Deutschland, NPD) have repeatedly called on their members and supporters to become lay judges.

The German Judiciary Act (Deutsches Richtergesetz, DRiG) is to be amended to prevent extremists from serving as lay judges. In future, lay judges should not be allowed to be appointed if there are doubts about their loyalty to the constitution. This is proposed in a government bill to amend the DRiG. The intention is to make more visible the obligation of lay judges to be loyal to the constitution,

which has already been confirmed by the Federal Constitutional Court and to explicitly emphasize its significance.¹

Irremovability of judges; including transfers, dismissal and retirement regime of judges, court presidents and prosecutors

In November 2023, the German Bundestag passed an amendment to the Federal Disciplinary Act (Bundesdisziplinargesetz) that will make disciplinary proceedings against federal civil servants easier and quicker in the future. This aim is to make it easier to remove enemies of the constitution from the civil service. According to the bill, swift and effective punishment of misconduct is intended to strengthen the reputation of the civil service and confidence in the integrity of the administration. The amendment to the Bundesdisziplinargesetz will streamline the lengthy disciplinary complaint procedure. In the future, civil servants can be removed from the civil service by means of an administrative disciplinary order. Previously, the competent authorities had to bring disciplinary proceedings before the Administrative Court. This means that in future, for example, an extremist judge can be dismissed from the civil service more quickly. The law still provides sufficient

procedural safeguards against an abuse of the streamlined procedure. The disciplinary order is subject to full judicial review by the administrative courts. In future, an appeal procedure will also be provided as an additional remedy in the case of disciplinary orders for demotion, removal from civil servant status or withdrawal of pension.²

The case of former judge Jens Maier illustrates the challenge the dismissal of extremist judges posed under the previous legal framework. Maier served as a member of the Bundestag from 2017 to 2021 for right-wing party Alternative für Deutschland - AfD and is considered a right-wing extremist by the Saxon State Office for the Protection of the Constitution.³ After leaving the Bundestag, Maier applied to return to the judiciary and was subsequently reinstated as a judge.⁴ Disciplinary proceedings ended in 2023 with Jens Maier being permanently removed from his office.⁵

Promotion of judges and prosecutors

Decisions on the promotion of judges – in particular the selection of court presidents and judges in the federal courts – are still made by members of the state or federal government in

1 Deutscher Bundestag, Drucksache 20/8761; <https://www.lto.de/recht/justiz/j/schoeffen-richtergesetz-verfassungstreue-rechtsstaat-extremismus/>

2 Bundestag Ds. 20/6435; https://www.haufe.de/oeffentlicher-dienst/personal-tarifrecht/disziplinarverfahren-gegen-bundesbeamte-sollen-einfacher-werden_144_610244.html

3 https://de.wikipedia.org/wiki/Jens_Maier

4 <https://taz.de/AfD-Politiker-geht-zurueck-in-die-Justiz/!5826772/>

5 <https://rsw.beck.de/aktuell/daily/meldung/detail/bgh-afd-politiker-jens-maier-muss-in-vorzeitigen-ruhestand>

cooperation with parliamentary bodies, not by the judiciary itself.

In many cases, judges are only selected for top positions if they are associated with the major political parties. This is due to the fact that when new judges are appointed to the highest courts, e.g. the Federal Constitutional Court, half of the judges are elected by the German Federal parliament and half by the Federal Council (Bundesrat). The election committee is made up of the parliamentary groups represented in the Bundestag and is determined according to the rules of proportional representation.⁶ Although some organisations constantly call for greater independence or at least transparency, there have been no serious initiatives in 2023 to minimize or end government influence on the judiciary, or to establish firm procedural guarantees for judicial independence of the judiciary.

This could become particularly problematic in view of the 2024 state elections in Saxony, Thuringia and Brandenburg in 2024. AfD, which has been classified as right-wing extremist by the Thuringian Office for the Protection of the Constitution, is in first place in current polls for the 2024 state elections in Thuringia: with 34% of the vote.⁷ In Saxony,

an INSA poll puts the AfD at 37%, well ahead of the Christian Democratic Union of Germany (Christlich Demokratische Union Deutschlands, CDU) at 29%, and in Brandenburg at 32%.⁸ If far-right parties do win parliamentary majorities, there is a risk that top positions will no longer be filled by democratic judges.

Quality of justice

Resources of the judiciary (human/financial/material)

Although there were about 22,000 judges in Germany in 2020, there will not be enough personnel in the German courts to handle all the cases, leading to serious delays in the judicial process. This affects all branches of the judiciary.

In 2023, the Federal Constitutional Court ruled that an excessively long detention review procedure violates the fundamental right to effective legal protection. It ruled this in the case of a criminal defendant who had been in pre-trial detention for almost a year before the first review. “Effective legal protection also means legal protection within a reasonable period of time”, the Federal Constitutional

6 <https://www.bundestag.de/richterwahl#:~:text=text%3F%3F%3F&text=Die%2016%20Richter%20des%20Bundesverfassungsgerichts,Absatz%201%20Satz%201%20BVerfGG>

7 <https://www.rnd.de/politik/afd-in-thueringen-34-prozent-wuerden-rechtsextremistische-partei-laut-insa-umfrage-waehlen-Q5JD7NQPIZJAVCIEEK7QAU6B3E.html>

8 <https://www.fr.de/politik/afd-regierung-umfrage-ostdeutschland-sachsen-anhalt-thueringen-brandenburg-link-cdu-zr-92575784.html>; <https://www.sueddeutsche.de/politik/wahlen-erfurt-umfrage-afd-kommt-in-thueringen-auf-34-prozent-dpa.urn-newsml-dpa-com-20090101-231109-99-882552>

Court emphasized.⁹ Criminal proceedings were also delayed in many other cases in 2023. In North Rhine-Westphalia, for example, there were 226,000 open investigations at the end of March 2023.¹⁰

Use of assessment tools and standards (e.g. ICT systems for case management, court statistics and their transparency, monitoring, evaluation, surveys among court users or legal professionals)

The practice of publishing court decisions remains totally inadequate (see below). Unfortunately, court decisions are not generally and centrally published. Only individual high courts, such as the Federal Constitutional Court or the Federal Court of Justice, publish their judgements. The free and publicly accessible case law database “OpenJur” has been sued because a published court decision was only partially anonymized. The mistake had been made by the court, not OpenJur. The core question is whether OpenJur is liable for decisions published by the courts, and whether OpenJur has a proactive duty to check for any anonymization errors. Should OpenJur be held liable for anonymization errors by third parties, this could mean the end for the non-profit

project, which is only financed by donations. After all, the case involves a financial risk of almost 13,000 € for OpenJur in the first instance alone.¹¹

Fairness and efficiency of the justice system

Length of proceedings

The denial of interim relief measures for access to information claims, even those of journalists and public watchdogs, remains a problem as it impairs the efficiency of the justice system and undermines the right of access to information.

In addition to the problem that journalists and the public are denied access at a time when the information is most relevant, the risk increases that relevant information is being deleted or goes missing in the course of the proceedings. This risk is especially high when it comes to digital communication, such as SMS, e-Mails or messenger communication. There have been numerous cases in which SMS or messenger communication of politicians and public officials has been deleted, despite its relevance in ongoing parliamentary investigation, or in one case, being the subject of a legal dispute.¹²

9 <https://www.lto.de/recht/nachrichten/n/bverfg-2bvr82523-haftpruefung-fortdauer-olg-frankfurt-untersuchungshaft/#:~:text=Befindet%20sich%20ein%20Beschuldigte%20länger,die%20Fortdauer%20der%20Haft%20rechtfertigen>

10 <https://www.lto.de/recht/justiz/j/staatsanwaltschaft-nrw-personalmangel-demografischer-wandel-arbeitsbelastung-unbesetzte-stellen/>

11 <https://www.faz.net/aktuell/feuilleton/medien/klage-gegen-openjur-bedroht-deren-existenz-19112613.html>; https://openjur.de/i/openjur_wird_verklagt.html

12 Vivian Kube and Hannah Vos, [Oops, we löscht it again!](#), 13 November 2023, Legal Tribunal Online.

Execution of judgements

In 2023, the German Bundestag decided to halve the length of alternative custodial sentences in future by reducing the conversion factor from fines to alternative custodial sentences to 2:1. The system of alternative custodial sentences has been the subject of much doctrinal debate in the past. Previously, if a person was unable to pay a fine, s/he had to spend one day in prison for every day of the fine. With the halving introduced by the reform, a person sentenced to 50 daily rates, for example, will only have to spend 25 days in prison. In the future, offenders must also be explicitly informed of the possibility of performing community service as an alternative to imprisonment.

However, the entry into force of the regulation has now been postponed from October 1 2023 to February 1 2024.¹³

Quality and accessibility of court decisions

The lack of transparency of Court decisions due to the fact that no legal obligation to publish such decisions is in place continues to be a problem for the quality of the justice system. It is highly likely that the current rates of public court decision is similar to the statistics summarized

in 2021, according to which only less than 1% of court decisions are being published.¹⁴ Even for the highest courts, an obligation to publish only arises if the decisions are deemed “worthy of publication” by the courts. However, this criterion is only assessed by the judges themselves, without any possibility of legal review. Many courts lack any systematic procedure for publications, so that judges are not even aware of how to initiate the publication of their own decisions.

Sec. 353d No. 3 of the Criminal Code (Strafgesetzbuch – StGB) prohibits, without exception, any publication of the text of documents relating to ongoing criminal proceedings. Therefore, the access to court decisions other than final judgments is almost completely excluded for the general public. Journalists face criminal prosecution if they publish such decisions or cite those in their reports, even if they make sure that the rights of privacy of the affected person and the right to fair trial are being respected, and an overriding public interest is clearly apparent. Several journalist unions, a lawyer association and other NGOs claim that the criminalization of publication of court decisions by Sec. 353d No.3 StGB is against the German Federal Constitution and the case law of the European Court of Human Rights.¹⁵

13 <https://www.lto.de/recht/nachrichten/n/beschluss-bundestag-halbierung-ersatzfreiheitsstrafe-reform-sanktionsrecht/>; <https://www.lto.de/recht/hintergruende/h/ersatzfreiheitsstrafe-haft-gefaengnis-geldstrafe-umrechnung-it-software-bund-laender-bayern-linke/>

14 Hanjo Hamann, “Der blinde Fleck der deutschen Rechtswissenschaft - Zur digitalen Verfügbarkeit instanzgerichtlicher Rechtsprechung“, JZ 2021, 656.

15 See joined press statement, 11 January 2024, <https://fragdenstaat.de/blog/2024/01/11/strafrechtsreform-zur-abschaffung-von-353d-nr-3-stgb-nutzen/>; ECtHR, 28 June 2011, Pinto Coelho v. Portugal, application no. 28439/08.

Anti-corruption framework

Key recommendations

- *Conflict of interest regulation needs to be strengthened especially for high-ranking public officials and members of parliament; regulation of post-employment activities should be improved substantially, and the scope widened to include high-ranking public officials of top-level government bodies.*
- *The recently reformed lobby register should be complemented by a comprehensive decision-making footprint/legislative footprint.*
- *The criminal law on bribery of parliamentarians should be strengthened.*

Framework to prevent corruption

Integrity framework including incompatibility rules (e.g.: revolving doors)

The rules governing post-office employment are still in need of a comprehensive reform. The cooling-off period for members of the federal government should be extended from the current maximum of 18 months, and sanctions should be introduced. For high-ranking officials, the weak rules for all civil servants are not sufficient. For this group, the mechanism for preventing conflicts of interest should be brought closer to the system for members of the government, where an advisory body makes a public recommendation on the need for a cooling-off period in each individual case.

General transparency of public decision-making (including public access to information such as lobbying, asset disclosure rules and transparency of political party financing)

Lobby transparency

The reform of the lobby register law (Lobbyregistergesetz – LobbyRG) addressed many of the shortcomings of the existing register. For example, lobby consultancies and other hired lobbyists must now declare precisely who they are working for to influence which decision and how much they earn per mandate. In addition, all registrants are required to provide information on which laws they are trying to influence and what their main interest is in the decision-making process. This includes an obligation to upload written statements. This applies to national laws and regulations, but also if the lobbying activities relate to a German government's position on EU legislation.

Another improvement is that it is no longer possible to refuse to provide information on lobbying expenses or sources of income. It is now mandatory for all registrants to provide an estimate of their expenditure, an overview of their main sources of income and to make transparent private contributions and public funding above a certain threshold.

The scope of the law has been moderately broadened to include lobbying activities directed at the lower levels of government ministries, but this is not enough, as non-leading officials are still outside its scope. Another shortcoming of the new law is that the exemptions for employers' associations, trade unions, churches and other religious organisations have not been reduced.

Political parties and campaign financing

The recent reform of the Political Parties Act (Parteiengesetz, PartG) included some measures to increase transparency in the financing of political parties and third-party election campaigns. The threshold for the immediate publication of individual donations to parties was moderately lowered from €50,000 to €35,000. The general threshold of €10,000, above which individual donations must be published in the annual accountability reports, was not lowered though. Both thresholds remain too high and should be lowered significantly.

A good improvement is that, for the first time, political parties will have to report in detail on income from sponsorship in their accountability reports. This has been a long-standing demand of transparency NGOs.

Another welcome step is the introduction of rules on third-party election campaigns. Parties are now required to either accept or reject third-party support in the form of campaign activities. If they accept, the financing of the third-party campaign must be made transparent according to the same rules that apply to political parties.

Rules on preventing conflicts of interest in the public sector

The rules for preventing conflicts of interest should be updated, as several cases involving high-ranking public officials in government ministries have shown this year. In 2023, several cases of conflicts of interest have been documented. For example, CDU politician Inge Gräßle, who is a shareholder of the Uniper Group, used her mandate to inquire information about public investment in Uniper.¹⁶ For the management of financial conflicts of interest, it is particularly important to introduce some form of asset disclosure, which currently does not exist at all for members of government and high-ranking public officials.

16 <https://www.abgeordnetenwatch.de/recherchen/nebentaetigkeiten/wie-abgeordnete-in-eigener-sache-politik-machen>

Investigation and prosecution of corruption

Criminalisation of corruption and related offences

The criminal law on corruption and bribery of members of parliament still needs to be strengthened. This is clearly illustrated by several cases related to the public procurement of facial masks during the Covid-19 pandemic. Several parliamentarians used their position as members of parliament and their privileged access

to the Ministry of health (Bundesministerium für Gesundheit) and other relevant authorities to make deals in exchange for substantial provisions and personal gain. However, the criminal prosecution had to be dropped because the Criminal Code only criminalises corrupt conduct when and if it is related to the sphere of parliament.¹⁷ Thus, members of parliament who use their influence in government for private gain cannot be legally prosecuted. This is in stark contradiction to the public's perception of what should be legal and what should be illegal.

Media environment and media freedom

Key recommendations

- *The federal government needs to introduce legislation to create a right to information of the press as regards federal authorities; Bavaria and Lower-Saxony need to introduce freedom of information at the Länder level.*
- *The federal government needs to introduce effective safeguards against SLAPPs, by implementing the EU Commission's recommendation on strategic lawsuits against public participation, which is in force since April 2022.*

Online media

Competence and powers of bodies or authorities supervising the online ecosystem

In Germany, the regulation and supervision of the online ecosystem are

closely tied to the evolution and adoption of the Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG). The act has been designed to combat the spread of illegal content and hate speech on social media. The Federal Office of Justice (Bundesamt der Justiz, BfJ) monitors the compliance of

17 <https://www.sueddeutsche.de/politik/corona-maskenaffaere-nuesslein-sauter-1.5467427>; <https://de.wikipedia.org/wiki/Maskenaff%C3%A4re>.

online platforms with the rules outlined in the NetzDG and can further issue sanctioning proceedings.

However, the regulatory landscape has changed with the emergence and adoption of the Digital Services Act (DSA). The DSA, which aims to establish a comprehensive regulatory framework for digital services and providers across the EU, has arguably rendered the NetzDG somewhat irrelevant. As discussions unfold regarding the competence and powers of bodies overseeing the online ecosystem, it becomes apparent that the regulatory landscape is undergoing significant changes – at least in Germany. Since August 2023, the DSA applies to the very large online platforms (VLOPs) such as Meta, Amazon, Google, and TikTok. As a result, the NetzDG is no longer applicable. The VLOPs are required to report to the European Commission directly, which in turn renders the BfJ powerless when dealing with the major platforms. Furthermore, it is furthermore whether the ongoing proceedings initiated by the BfJ against large platforms such as X and Meta will be concluded.

By February 2024, the DSA will apply to all online services and providers. To ensure proper implementation of the new regulatory framework, the DSA requires that the EU member states appoint so-called digital services coordinators (DSCs) by the same deadline. The DSCs will serve as points of contact for civil society, researchers, and more. Moreover, the DSC is responsible for monitoring the compliance to

the DSA by providers and platforms based in Germany.

The federal government is currently in the process of adopting the Digital Services Law (Digitale-Dienste-Gesetz, DDG), which comprises the implementation of the DSA in Germany and further appoints the national DSC in Germany. The DDG draft law intends to appoint the Federal Network Agency (Bundesnetzagentur, BNetzA) as Germany's DSC, but does not foresee a role for the BfJ, which has been appointed under the NetzDG. The current draft further outlines the implementation of the DSA in Germany and touches upon the tasks and responsibilities of the DSC. It also discusses the future role of the media regulators.

In addition to these changes, it is also important to note that the federal government is already behind schedule. This means that the DDG will not be adopted by February 2024, and as a result, Germany will initially not have a DSC supervising the online ecosystem.

Public trust in media

According to a study commissioned by the German broadcaster WDR, most Germans consider media coverage to be credible.¹⁸ Particularly during periods of crises, public service providers and daily newspapers are regarded as valuable and essential sources of information. Yet, the study also reveals that fewer institutions

18 <https://www.tagesschau.de/inland/gesellschaft/vertrauen-glaubwuerdigkeit-medien-100.html#:~:text=Öffentlich%20Rechtlichen%20Radiosendern%20wird%20mit,Angeboten%20sind%20es%2052%20Prozent>

today enjoy the same level of trust as they did during the COVID-19 pandemic, as shown in the comprehensive study commissioned by WDR in the fall of 2020. Since then, trust in the federal government, the Bundestag and the Federal Constitutional Court has significantly declined. Similarly, trust in entities such as the police, Stiftung Warentest (a German consumer organisation), and consumer protection agencies has also decreased from previously high levels. However, public-service broadcasters maintain a higher level compared to other media, including newspapers and private radio broadcasters, even though they are also experiencing a decrease in trust. Despite this decrease, most Germans still find public-service broadcasters to be indispensable.

A 2023 study by the Konrad Adenauer Foundation (Konrad Adenauer Stiftung - KAS) found that 58 % of East Germans trust political news reported by public media, while 73 % of West Germans do the same. This growing gap in trust between East and West suggests a growing scepticism among East Germans regarding public media. Despite this divergence, the overall trust in public media remains high.¹⁹

Safety and protection of journalists and other media actors

Frequency of verbal and physical attacks

Germany has slipped five places to 21st place in the press freedom ranking of Reporters Without Borders (Reporter ohne Grenzen - ROG). The reason is, among other things, the increasing number of attacks on journalists: with 103 physical attacks on media professionals, ROG documents the highest level since the counting began in 2015. In the calendar year 2021 there were 80 attacks, in 2020 there were 65. “Many governments and social groups are trying to prevent critical reporting,” said ROG board spokesman Michael Rediske. This means that the number of attacks in Germany has risen to a record high.²⁰

Lawsuits and prosecutions against journalists (including SLAPPs) and safeguards against abuse

Legal safeguards against SLAPPs (strategic lawsuits against public participation) are still almost completely lacking; similarly, there are no government-funded information or support structures for affected journalists.

There have been a number of lawsuits against journalists and media outlets in Germany in 2023 that can be qualified as SLAPPs. Among

19 <https://www.tagesspiegel.de/gesellschaft/glaubwuerdigkeit-der-offentlich-rechtlichen-medien-vertrauen-der-ost-deutschen-sinkt-auf-58-prozent-9952497.html>

20 <https://taz.de/Pressefreiheit-in-Deutschland/!5931475/>

them are intimidation attempts by the law firm of the band “Rammstein”, which has threatened potential victims of abuse with legal proceedings if they testify against the lead singer of the band, Till Lindemann.²¹

Confidentiality and protection of journalistic sources (including whistleblower protection)

In 2023, a regional court decision weakened the protection of journalistic sources in Germany. The Berlin Regional Court found that a specific non-disclosure agreement between the journalist and the source is required for a duty of confidentiality (decision of July 6 2023). The Press Code, which regulates confidentiality and whistleblower protection in journalism, is not legally binding; without a separate agreement, there is no protection of sources.

Equally critical is a decision by the Stuttgart Higher Regional Court (November 7 2023), which ruled that the search and confiscation of storage media from a radio-journalist was lawful. The reason for the measures was an article by the radio station that linked to an archive of a banned association. The public prosecutor deemed this to be a criminal offence of supporting a banned association. The journalist concerned filed a constitutional complaint against the decision, claiming that it constituted a serious violation of the freedom of the press.

The Whistleblower Protection Act (Hinweisgeberschutzgesetz, HinSchG), which came into force in 2023, does not strengthen the protection of whistleblowers who contact the press either: in principle it is not possible to inform the press directly about misconducts, even if the public interest would prevail. The strict requirements are likely to further discourage disclosures.

Access to information and public documents

In contrast to the recommendation of the EU Commission in its 2023 Rule of Law Report, Germany has still not taken forward the plan to create a legal basis for a right to information of the press as regards federal authorities, even though it is included in the coalition agreement. However, even regarding the authorities of the *Länder*, journalists do not have the right to access documents but only to have their questions answered. To gain access to public documents, they need to base their claims on the freedom of information acts of the *Länder*, which still do not exist in Bavaria and Lower-Saxony.²² Furthermore, there are considerable differences among the *Länder* as some include broad exceptions, such as the transparency legislation of Saxony. Many *Länder* such as Berlin have not updated their legislation, even though this has been on the agenda and in the coalition contracts for many years.²³

21 https://www.t-online.de/unterhaltung/stars/id_100188992/rammstein-skandal-lindemann-schaltet-anwaelt-ein-geht-in-die-offensive.html

22 <https://netzpolitik.org/2022/neues-transparenzgesetz-fuer-sachsen-wir-hinken-teilweise-weit-hinterher/>.

23 <https://netzpolitik.org/2022/sachverstaendiger-heimgeschickt-spd-blockiert-erneut-berliner-transparenzgesetz/>.

The lack of systematic digitalization and proper filing of documents increases to hamper the rights to access information. Even though the Federal Constitution obliges state authorities to document their actions truthfully and completely, there is almost no legislation in place that concretizes this constitutional principle. The large part of handling of official information is only regulated by internal directives or data security measures. At federal level, the so-called Registry Directive (Registraturrechtlinie) was issued within the framework of Sec.12(2) of the Joint Rules of Procedure of the Federal

Ministries. In addition, various ministries have issued their own records directives. These directives, however, remain very vague and lack concrete guidelines on how to handle digital communication. In addition, they do not include any concepts of how to implement the filing of such data in practice, any enforcement mechanism or any sanctions. Therefore, it is up to each public official how to file their own documents, and there is little possibility for the public to control or to enforce that documents are being archived correctly.²⁴

Checks and balances

Key recommendations

- *The federal government needs to end the practice of excessively short deadlines for public participation in stakeholder consultations in the legislative process, which de facto prevented public participation in several complex legislative projects in 2023.*
- *The readability of draft legislation needs to be improved, e.g. an obligatory use of synopsis for draft bills.*

Process for preparing and enacting laws

Framework, policy and use of impact assessments, stakeholders/public consultations (particularly consultation of judiciary on judicial reforms), and transparency and quality of the legislative process

Improving the readability of draft legislation is a pressing concern in an era of growing political disenchantment and the proliferation of false claims and conspiracy theories. One reason for the poor readability of many draft laws is the technique of amending laws by means of amendment orders. As a result of this technique, proposed amendments only make sense when viewed in conjunction with the standards being amended. The often complex

24 <https://www.lto.de/recht/meinung/m/fragdenstaat-akteneinsicht-behoerden-loeschen-sms/>

amendments to already complex legislation are therefore difficult to understand. This problem could be solved by introducing an obligation to provide a synopsis, which would allow a direct comparison between the current and future wording of the norms. Despite criticism from civil society and the parliamentary opposition, a synopsis requirement has still not been introduced.²⁵

According to Sec. 47 (3) of the Joint Rules of Procedure of the Ministries, interest representatives and associations must be given the opportunity to submit statements on draft laws ‘in a timely manner.’ The internal guideline for this is a deadline of 4 weeks.

In practice, ministries are increasingly setting shorter deadlines for the involvement of associations in legislative processes, sometimes just a few days or even hours. Reasons that could justify such short deadlines are not apparent.

Examples of this in 2023 include:

- Amendment to the Climate Protection Act 2023: Deadline of less than 2 working days

- Amendment to the Federal Intelligence Service Act 2023: Deadline of 24 hours²⁶
- Amendment to the Clean Vehicle Procurement Act: 2 working days²⁷
- Amendment to the Sanctions Enforcement Act II: less than 2 working days
- Electricity Price Brake Act (Strompreisbremsegesetz): 20 hours.²⁸

Civil society actors have repeatedly expressed criticism of this practice,²⁹ without any changes having been made so far. Effective participation of associations is not possible without sufficient time for statements.

Independent authorities

Germany has established a Commissioner for Data Protection and Freedom of Information at the federal level and in the 14 Länder that have adopted freedom of information legislation. While these institutions have in some cases made a significant contribution to strengthening the right to access information and supporting individuals and civil society, there remain several shortcomings. First, the election of such

25 Bundestag Ds. 19/26315; <https://verfassungsblog.de/die-lesbarkeit-von-gesetzentwurfen/#commentform>

26 <https://netzpolitik.org/2023/bnd-gesetz-bundeskanzleramt-simuliert-verbaendebeteiligung-mit-24-stunden-frist/>

27 <https://twitter.com/JensHilgenberg/status/1663437302113157120>

28 <https://anwaltverein.de/de/newsroom/verbaendeanhoerung-kurze-fristen-fuehren-prozess-ad-absurdum>; <https://netzpolitik.org/2023/bnd-gesetz-bundeskanzleramt-simuliert-verbaendebeteiligung-mit-24-stunden-frist/>

29 <https://gi.de/meldung/offener-brief-ausreichende-fristen-fuer-verbaendebeteiligung>

commissioners is highly non-transparent and therefore not in line with the EU General Data Protection Regulation.³⁰ Second, while these commissioners have far-reaching powers in the area of data protection, such as the right to issue orders, their room for manoeuvre in relation to freedom of information is limited to the function of an Ombudsperson. They advise citizens who make requests under freedom of information laws, mediate between the person making the request and the authority in the event of a dispute, can draw attention to shortcomings and call for legal reforms through activity reports to parliaments and recommendations. In addition, they can also visit authorities and issue complaints if they disregard the provisions of freedom of information legislation. However, they lack any means to enforce their legal opinion against the authorities. In addition, the Commissions have much less financial resources and personnel at their disposal when it comes to freedom of information.³¹

Electoral framework

Enabling environment for the exercise of the right to vote: voter registration systems, accessibility of polling stations, remote/e-voting arrangements, threats and intimidati

The German federal parliament (Bundestag) and the Berlin House of Representatives (Abgeordnetenhaus Berlin) elections on September 26 2021, in Berlin were seriously

flawed: long queues formed outside polling stations, ballot papers were missing or incorrect, there were too few polling booths and some polling stations had to be temporarily closed or stayed open much longer than planned. As a result, the House of Representatives and district elections had to be completely repeated in February 2023.

In December 2023, the Federal Constitutional Court annulled the election to the Bundestag in a further 31 constituencies in the state of Berlin and the associated postal voting districts. Instead of 431 - as decided by the review committee of the Bundestag - a new election must be held in 455 constituencies. A date for the partial re-run of the Bundestag election has already been set for February 11 2024.³²

30 <https://fragenstaat.de/blog/2023/06/27/wir-unterstuetzen-bewerbung-von-malte-engeler-in-sachsen-anhalt/>

31 <https://www.lto.de/recht/meinung/m/akteneinsicht-fragenstaat-informationsfreiheit-beauftragte-machtlos.>

32 <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2023/bvg23-119.html>; <https://www.tagesschau.de/inland/berlin-wahl-wiederholung-106.html>

Civic space

Key recommendations

- *The tax law that is de facto regulating most civil society organisations in Germany must be reformed to allow and protect public participation and advocacy work of civil society organisations.*
- *Section 129 of the Criminal Code must be reformed to ensure it is not used to criminalize political movements.*

Freedom of association

Equal treatment among CSOs, including by reference to CSOs' focus of activities, type of activities, and geographical location of activities

After the Federal Fiscal Court (Bundesfinanzhof, BFH) revoked the non-profit status of the campaign organisation Campact and the anti-globalisation network Attac for excessive political involvement, Campact is now calling on the tax authorities to review the non-profit status of the Taxpayers' Association (Bund der Steuerzahler, BdSt) and its associations in the *Länder*. Backed by a legal report, Campact claims that the BdSt is not politically neutral and therefore does not meet the criteria for non-profit status. This action reflects a wider conflict over the equal treatment of civil society organisations, in particular the extent to which political activities by left- and right-wing organisations are compatible with non-profit

status. The funding framework for civil society organisations, including the availability of and access to public funding, rules on fundraising, rules on foreign funding, tax rules (e.g. tax advantages for organisations with charitable or public benefit status, eligibility to receive donations through the allocation of citizens' income tax for charitable purposes, eligibility to use public facilities at low or no cost etc.).

Other

The legal uncertainties concerning public participation and political activity of civil society organisations with tax-exempt status (public benefit organisations) have not been resolved,³³ albeit the coalition treaty stipulating a reform that would improve the situation of civil society organisations. While in the middle of the year a reform plan with the intended improvements was announced for 2023, no further legislative reforms have been initiated – we expect the reform in 2024.

33 Liberties Rule of Law Report 2020, Germany, p. 12.; Liberties Rule of Law Report 2021, Germany, p. 17.

At the same time, *Bund* and *Länder* finance ministers implemented an administrative decree from 2022 (*Anwendungserlass der Abgabenordnung*)³⁴ that increases the legal uncertainty of civil society organisations tax exemption status in case of significant political activity.

The pressure on civil society organisations that maintain political activities remains. Some have increasingly faced legal action and threats by political opponents aiming to prevent them from publicly expressing criticism and generally from continuing their advocacy work. Anti-democratic actors, mostly right-wing extremists and the AfD, use the legal situation to intimidate organisations whose work is contrary to the party's ideology.³⁵ They continue to publicly discredit non-profit organisations that work against right-wing extremism and demand that their tax-exempt status be revoked. They argue that tax-exempt civil society organisations are not allowed to publicly criticize a political party or to identify right-wing extremist positions or antisemitism within the party, basing their arguments on the Attac case law of the Federal Fiscal Court. Many civil society organisations

withdraw from public debates because of the legal uncertainties, and because of a case law by the Federal Fiscal Code³⁶ that only allows tax-exempt civil society organisations to engage in political matters if strictly necessary to pursue the activities included in the Fiscal Code. A survey from 2023 by Civil Society in Numbers (*Zivilgesellschaft in Zahlen, ZiviZ*) showed that 5% of all NGOs reduced their political activities, due to this provision.³⁷

The legal uncertainties also seem to have influenced administrative proceedings, which take unreasonably long and thus become an additional burden for some organisations. For instance, in the case of the Democratic Center in Ludwigsburg (*Demokratisches Zentrum Ludwigsburg*), the civil society organisation waited almost three years for a decision by the financial authorities on whether their tax status remains withdrawn, inter alia, on grounds of breaching the principle of neutrality by taking a clear stance against right-wing extremism, after the first announcement of withdrawal in June 2019.³⁸ The resulting financial insecurity threatens the very existence of such donation-based local civil society organisations.³⁹

34 Administrative decree on tax code application, published by the Ministry of Finance, 12 January 2022, 2022/0001873, p. 5f.

35 See for example the case of "Fulda stellt sich quer".

36 Judgment of the Federal Financial Court of 10 January 2019, V R 60/17; Judgment of the Federal Finance Court of 10 December 2020, V R 14/20.

37 Schubert, Peter; Tahmaz, Birthe; Krimmer, Holger. Erste Befunde des ZiviZ-Survey 2023: Zivilgesellschaft in Krisenzeiten: Politisch aktiv mit geschwächten Fundamenten, 2023, p. 25.

38 For further information, see: <https://freiheitsrechte.org/themen/demokratie/demoz>

39 For another case, in which the decision of the financial authorities took more than two years after the tax declarations were submitted, see <https://freiheitsrechte.org/pm-stellungnahme-changeorg/>.

Furthermore, the loss of the tax exemption status excludes civil society organisations from many sources of public funding – as one of the most common requirements of state sponsored programs or direct government grants is the status as a tax-exempt organisation, especially in the field of civil society subsidies programs.⁴⁰

Public participation and political activity for civil society organisations are further restricted because, according to the current legal situation, any organisation that is mentioned in the public reports of the internal intelligence services (Landesämter or Bundesamt für Verfassungsschutz) is practically automatically deprived of its tax-exempt status. This is due to a reversal of proof in the fiscal code (section 51, paragraph 3, sentence 2 of the tax code Abgabenordnung, AO), according to which organisations – once mentioned in such a report – must prove that they are not extremist in order to uphold the tax-exempt status.⁴¹ In addition, as the sources of the intelligence services are often confidential, the civil society organisations do not have access to the information on which the claims are being made and can hardly rebut it. The possibilities of legal protection are therefore extremely narrowed. This restrictive financing framework creates chilling effects on civil society organisations that might prevent financially less stable local organisations from engaging in public debates.

Such chilling effects, as well as the generally sanction-like character of the tax law, may amount to an infringement on the right of civil society organisations to pursue political goals (provided that they do so by using lawful and democratic means and provided that the aims advocated for are compatible with the fundamental principles of democracy) that is guaranteed to them as freedom of expression and freedom of association under Articles 10 and 11 of the European Convention on Human Rights (ECHR).⁴²

Criminalisation of activities, including humanitarian or human rights work

Climate activists in Germany have increasingly resorted to actions of peaceful civil disobedience to express their criticism of the German government's failure to reduce carbon emissions. Activist group Last Generation has repeatedly used sit-in protests to block road traffic in German cities, which can be punishable as coercion.

However, public prosecutors and courts have increased pressure on the activists. In December 2022 and May 2023, raids were carried out across Germany, and bank accounts and a website were confiscated on the grounds that Last Generation is a criminal organisation according to Sec. 129 of the German Criminal Code (Strafgesetzbuch – StGB). The

40 The latest example of this is [the draft of the democracy support act](#).

41 See for instance, the case of Vereinigung der Verfolgten des Naziregimes – Bund der Antifaschistinnen und Antifaschisten VVN-BdA, an association founded by Holocaust survivors.

42 See legal analysis by Prof. Dr. Wiater, <https://freiheitsrechte.org/pm-rechtsgutachten-gemeinnuetzigkeit/>

application of this norm to peaceful climate protest has far-reaching consequences for the entire climate movement that cannot yet be fully assessed. Section 129 StGB is usually applied in the milieu of organized crime, not against a political movement that is accused of petty offences. The investigations based on Section 129 StGB allow the use of investigative measures that deeply interfere with the fundamental rights and lead to a chilling effect far beyond the Last Generation.⁴³

Access to justice, including rules on legal standing, capacity to represent collective interest at court, and access to legal aid

Germany implemented the Directive on Collective Redress (Verbandsklagenrichtlinienumsetzungsgesetz, VRUG) on July 7 2023. The implementation of the Directive strengthens collective redress for consumers significantly. The adoption of the implementation law was preceded by a process of lengthy negotiations between the policy officers of the Federal Ministry of Justice (Bundesministerium der Justiz) and the Federal Ministry for the Environment (Bundesministerium für Umwelt). The latter had repeatedly pressed for greater consideration of consumer law issues in the draft. There was a threat of EU infringement proceedings over the project, as the implementation deadline had already expired on December 25 2022.

Freedom of peaceful assembly

Rules on organisation, authorisation of and participation in assemblies

In 2023, a travel ban was imposed on activist and chairman of the Association of Persecutees of the Nazi Regime - League of Anti-Fascists (Vereinigung der Verfolgten des Naziregimes - Bund der Antifaschistinnen und Antifaschisten, VVN-BdA), prohibiting him from participating in an anti-fascist protest in Bulgaria. The Federal Police thus massively interfered with the plaintiff's freedom of assembly on the basis of a provision in the Passport Act, allegedly to protect the "reputation of the Federal Republic of Germany". With the support of GFF and the VVN-BdA, the activist is taking legal action against the travel ban, arguing that the possibility of imposing travel bans must not be misused to undermine freedom of assembly.⁴⁴

Bans on protests

Germany has seen an increasing use of general rulings to ban peaceful assemblies in 2023. Since the end of 2022, several cities, including Munich, Aschaffenburg, Nuremberg, and Braunschweig, have imposed extensive bans on climate protests, leading to fines of up to €3,000 for violations. Munich, for example, banned climate-related protests on over 300 streets for almost a month in December 2022, as well

43 <https://freiheitsrechte.org/uploads/documents/Demokratie/Green-Legal-Spaces-Report-2023.pdf>

44 <https://freiheitsrechte.org/ueber-die-gff/presse/pressemitteilungen-der-gesellschaft-fur-freiheitsrechte/gff-und-bund-der-antifaschistinnen-klagen-gegen-ausreiseverbot-fuer-aktivisten-hinderung-an-protestteilnahme-im-ausland-verletzt-die-versammlungsfreiheit>; <https://taz.de/Klage-gegen-Ausreiseverbot/!5942055/>

as for the entire duration of the International Motor Show in August 2023. However, the Administrative Court in Munich overturned a ban issued by Aschaffenburg due to its failure to meet legal requirements. The city of Stuttgart issued the most severe restrictions, imposing a general ruling that banned all unannounced sit-ins by climate activists from July 2023 until the end of the year. The duration of this ban, which lasted almost six months, raises doubts about its proportionality. The Federal Administrative Court has previously deemed blanket bans on assemblies unconstitutional, even for periods as short as 13 days. Furthermore, general orders have been used to ban assemblies and prevent large-scale protests in the context of the evacuation of the protest camp in Lützerath. The district of Heinsberg initially issued a comprehensive ban on entering and staying in the area, while the assembly authority imposed a ban on assembly in the vicinity of Lützerath for the same period. It is worth noting that the practice of banning protests through general orders is not limited to climate activism. Demonstrations on various topics are increasingly being prevented in this manner.⁴⁵

In the aftermath of the terrorist attacks by Hamas on Israel on October 7th, several cities issued general ruling prohibiting pro-Palestinian assemblies. Several courts have declared the blanket bans unlawful in this context, while other courts upheld the general rulings.⁴⁶

Bans on the use of symbols/slogans in protests

In early November, Federal Minister of the Interior Nancy Faeser of the Social Democratic Party of Germany (Sozialdemokratische Partei Deutschland, SPD) banned the Palestinian slogan, “From the River to the Sea, Palestine will be free.” The reason given: The slogan is an emblem of the banned organisations Hamas and Samidoun. Anyone who violates the ban can now be prosecuted under Section 20 of the Associations Act (Vereinsgesetz) and Section 86a of the Criminal Code. Fines and prison sentences of up to three years are possible.⁴⁷ Previously, the slogan had not been considered punishable in itself. This is due to the fact that the meaning of the slogan is disputed and, according to the case law of the Federal Constitutional Court, the criminal courts are obliged to apply the non-punishable interpretation to ambiguous statements if they cannot rule them out for other reasons in the individual case.

Attacks and harassment

Legal harassment, including Strategic Lawsuits Against Public Participation (SLAPPs), prosecutions and convictions of civil society actors

In 2023, an increasing number of right-wing networks have issued warning letters and

45 <https://freiheitsrechte.org/uploads/documents/Demokratie/Green-Legal-Spaces-Report-2023.pdf>

46 <https://verfassungsblog.de/pro-palastina-als-unmittelbare-gefahr/>

47 <https://taz.de/Umstrittene-Palaestinenserparole/!5969471/>

filed lawsuits to exert pressure on people in activism, politics, science, art and journalism. Interventions frequently affect people who publicly express criticism of right-wing extremist structures and content. In the past, people or institutions that speak out publicly against right-wing extremist structures, parties and actors have repeatedly been the target of intimidation, threats or physical assaults. For example, Sahak Ibrahimkhil received a SLAPP in 2023 after he reposted and commented on a photo that had been circulating on the internet for several years. The picture shows, among others, the former President of the Federal Office for the Protection of the Constitution Hans-Georg Maaßen and the right-wing populist journalist Roland Tichy. A few weeks later, Ibrahimkhil received two warning letters in the post. He was told to delete the post and to undertake under penalty of law never to distribute the image and his comments again. The lawyers also demanded that Ibrahimkhil reimburse the costs incurred for the two letters.

This strategic use of legal proceedings to silence criticism threatens freedom of expression. The victims of a SLAPP are often unable to defend themselves because there is no meaningful protection. More than three quarters of those affected by SLAPPs from right-wing activists who have not taken legal action against a warning cite financial reasons.⁴⁸

Digital surveillance

GFF, together with a Facebook user, is taking legal action against Meta to prevent the company from conducting automated scans of messenger messages. GFF seeks, through this lawsuit, to establish the illegality of broad chat controls. Meta justifies its actions by citing a temporary exemption for scans related to child abuse material.⁴⁹

Attacks, threats and hate speech online

In April 2023, the Federal Ministry for Justice (Bundesministerium der Justiz, BMJ) published key points of its planned law against digital violence, as has been announced in the coalition agreement in 2021. According to the BMJ's initial ideas, the law will make it easier to request information for those targeted by digital violence and will also introduce court-ordered account suspensions to efficiently combat digital violence. Feedback on the published key points has been mixed, with some civil society organisations worried that the reform of information claims will be too far-reaching. The law is expected to be adopted in 2024.

In 2023, the Frankfurt Regional Court reached a landmark decision on content liability on social media: In the event of the posting of illegal content, such as hate comments, the individual associated with the account from which it was posted is obligated to ensure its removal.

48 <https://fragdenstaat.de/blog/2023/06/20/im-ersten-moment-war-ich-einfach-nur-uberfordert/>; <https://fragdenstaat.de/aktionen/gegenrechtsschutz/>

49 https://freiheitsrechte.org/themen/freiheit-im-digitalen/chatkontrolle_facebook

This obligation persists even if the individual becomes aware of the content, receives a request to delete it, and denies personal responsibility for the post, citing potential unauthorized access to the account by someone else.⁵⁰

Law enforcement capacity to investigate online threats and attacks

The number of officers in the Federal Police Office (Bundeskriminalamt, BKA) is set to be increased in 2024 as part of the implementation of the DSA in Germany, however, the necessity to sensitize law enforcement to digital threats and violence has not been recognized. The needed training for law enforcement is also not touched upon in the key points of the planned law against digital violence.

Other

Measures to facilitate access to law enforcement or to file legal proceedings against digital violence are put on the back burner; neither the planned law against digital violence nor the law implementing the DSA in Germany address this issue.

The planned act on the promotion of democracy (Demokratiefördergesetz) addresses support structures for those affected by discrimination and extremism; while digital violence is not mentioned specifically, this is already a significant development and a step in the right

direction. However, no progress has been made in the adoption of the law as the coalition parties cannot find an agreement.

Public participation

Rules and practices on dialogue with civil society

In Germany, there is little regulated citizen participation and it is practised mainly at municipal level (in the area of building and planning law). It is used less frequently at state and federal level, where participation takes place via written statements. Individuals can submit their comments directly to the authority, which must also respond in writing. These procedures tend to have a very low deliberative quality, as there can be little real exchange of ideas with mutual influence on the point of view. The current forms of legally regulated citizen participation are therefore often perceived as inflexible and outdated, and proposals to modernize the procedures have not yet been legally implemented.⁵¹

Impact of civic space of emergency and crisis situations

On May 8 and 9, 2023, the end of the Second World War and the liberation from National Socialism were once again commemorated in Berlin. As in the previous year, the Berlin police had issued a general order banning the display

50 <https://hateaid.org/luecke-geschlossen-hateaid-und-claudia-roth-schaffen-praecedenzfall/>

51 https://kommunalwiki.boell.de/index.php/Formelle_Buergerbeteiligung; <https://www.buergergesellschaft.de/mitentscheiden/grundlagen-leitlinien/grundlagen/herausforderungen-der-buergerbeteiligung>

of Russian and Ukrainian flags at assemblies at Soviet memorials in three districts in Berlin on these days. The police had stated that this was to prevent conflicts and clashes against the backdrop of the Russian war of aggression. A German-Ukrainian woman took legal action against the general order - with success: the court lifted the ban on the display of “flags and banners with Ukrainian references and images

of the Ukrainian head of state as well as the playing and singing of Ukrainian marching and military songs”. The ban on Ukrainian flags is - in the words of the court - “obviously unlawful”. Those who exercise their fundamental rights to publicly declare their support for the Ukrainian nation and its historical victims in the defeat of National Socialism are not a threat to public safety.⁵²

Disregard of human rights obligations and other systemic issues affecting the rule of law environment

Key recommendations

- *The federal government must phase out border controls at the German borders to Austria, Poland and the Czech Republic, which are contrary to European law.*
- *The federal government needs to reform Section 201 of the Criminal Code to decriminalize the recording of police operations in public.*
- *The police must restrict the use of so called “pain-grips” against peaceful protesters.*

Systemic human rights violations

Widespread human rights violations and/or persistent protection failures

Part of the authorities’ crackdown on climate activists in Germany has been the frequent use of so-called pain grips to break up non-violent

protests such as sit-ins and road blockades. Police use nerve pressure and leverage techniques to inflict severe pain in order to force participants of the sit-in to leave the road. Pain grips can have long-term physical and psychological consequences for those affected. The use of pain grips represents a massive violation of fundamental rights that cannot be justified in the context of the dissolution of peaceful

52 <https://www.rnd.de/politik/tag-der-befreiung-am-8-mai-berlin-erlaesst-flaggenverbot-rund-um-sow-jetische-denkmaeler-5KGVKFA4NBHYLBNOMSLQJDC3SI.html>

assemblies. Because the infliction of pain is not a by-product of the use of force, but the purpose of the measure itself, its use may even constitute a violation of the prohibition against torture. In any case, in many situations it is disproportionate and therefore unlawful because milder means are available to achieve the purpose. For example, carrying away is equally effective in breaking up sit-in blockades. In order to have the legality of the use of pain grips reviewed by the courts, an activist, supported by the Society for Civil Rights (Gesellschaft für Freiheitsrechte, GFF), has filed a lawsuit with the Berlin Administrative Court.⁵³

Central Register of Foreigners

All people living in Germany without German citizenship are registered in the Central Register of Foreigners (Ausländerzentralregister, AZR). In total, around 16,000 public authorities and more than 150,000 government employees can access the register, including the immigration authorities, job centre, youth welfare offices, federal and state police, the Office for the Protection of the Constitution and the Federal Intelligence Service. Eleven refugees, supported by a civil society coalition, have lodged a constitutional complaint against the amended law on the AZR. The constitutional complaint is directed against the fact that

asylum decisions and court rulings are stored in full text in the AZR. These documents often contain highly sensitive information such as individual persecution, political convictions or sexual orientation. The complainants oppose unrestricted access to the data in the AZR by the police and intelligence services. Parallel to the constitutional complaint, the coalition and two refugees have filed a lawsuit with the Ansbach Administrative Court to stop the transfer of their data to the police and intelligence services. The expanded AZR violates fundamental rights and puts asylum seekers at risk.⁵⁴

Impunity and/or lack of accountability for human rights violations

In 2023, the state of evidence to document police violence remains difficult. Using video material as evidence involves significant legal risks. According to the case law of several district courts, it constitutes a criminal offence to record police operations in picture and sound.⁵⁵ In many cases, police confiscate the smartphone or camera or immediately file criminal charges because the recording of film with the accompanying audio is supposedly prohibited under Section 201 of the German Criminal Code. This is one of the reasons why it is difficult to document unlawful police actions which

53 <https://freiheitsrechte.org/uploads/documents/Demokratie/Green-Legal-Spaces-Report-2023.pdf>

54 <https://freiheitsrechte.org/ueber-die-gff/presse/pressemitteilungen-der-gesellschaft-fur-freiheitsrechte/verfassungsbeschwerde-gegen-erweitertes-azr>

55 OLG Zweibrücken, Beschluss vom 30. Juni 2022, Az. 1 OLG 2 Ss 62/21; for a summary of the decision see <https://www.lto.de/recht/hintergruende/h/olg-zweibruecken-1olg2ss-smartphone-aufnahme-polizei-einsatz-film-ton-201-stgb-straftbar/>.

often amount to human rights violations, e.g. in cases of racial profiling. In 2023, the Hanau Regional Court has now ruled that if a police officer's body cam is switched on during a police operation, the person filming on the other side with filming and recording the sound is not liable to prosecution. According to the court, the recording with the body cam ensures that statements made by police officers can no longer be considered "non-public" within the meaning of the criminal provision §201 of the German Criminal Code (violation of the confidentiality of the spoken word). However, the legal situation remains uncertain. In order to provide clarity for both those affected and the police, it would be helpful, for example, for the legislator to intervene or for the Federal Court of Justice to issue a ruling.⁵⁶

Implementation of decisions by supranational courts, such as the Court of Justice of the EU and the European Court of Human Rights

In April 2022, the Court of Justice of the European Union found that there should be – in principle – no border controls in the European Union. In a case concerning Austria, the CJEU ruled that border controls may only

be reintroduced in the event of a serious threat to public order or internal security and may only be limited to a period of six months and not extended at will.⁵⁷ Despite this clear ruling by the CJEU, Germany has continued its border controls at the German-Austrian border in 2023,⁵⁸ clearly violating the requirements set out by the CJEU.⁵⁹

In mid-October 2023, Germany introduced border controls at the borders with Poland, the Czech Republic and Switzerland. Against the backdrop of the continued and unlawful controls at the border with Austria, this gives rise to concerns that the recently introduced border controls could also be extended over a long time. The tightened controls have the potential to be fatal for asylum seekers, despite the clear legal situation. Whether at the borders with Poland, the Czech Republic, Austria or Switzerland, practitioners have long been aware that people who have tried to apply for asylum have nevertheless been turned away. Moreover, available statistics support the suspicion that individual border sections are systematically turning people away illegally.⁶⁰

56 <https://www.lto.de/recht/hintergruende/h/lg-hanau-1qs2322-polizei-einsatz-filmen-smartphone-straftbar-201-stgb-strafrecht-bodycam/>

57 ECJ, Judgement Cases C-368/20 and C-369/20, 26 April 2022.

58 <https://www.tagesschau.de/inland/innenpolitik/grenzkontrollen-verlaengert-100.html>; <https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2023/12/grenzkontrollen-binnengrenzen.html>

59 <https://www.investigate-europe.eu/de/2022/schengen-abkommen-eu-grenzkontrollen-illegal-eugh/>

60 <https://www.proasyl.de/news/rechtswidrige-abweisungen-auch-an-deutschen-grenzen/>; <https://www.lto.de/recht/nachrichten/n/eugh-c14322-zurueckweisung-binnengrenze-drittstaatenangehoeriger-rueckfuehrungsricht-line/>

Contacts

Gesellschaft für Freiheitsrechte (GFF) *Society for Civil Rights*

The GFF is a Berlin-based not-for-profit-NGO founded in 2015. Its goal is to establish a sustainable structure for successful Strategic Litigation for Human and Civil Rights (HCR) in Germany, bringing together plaintiffs with excellent litigators in order to challenge infringements of HCR in court.

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The Civil Liberties Union for Europe

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of 19 national civil liberties NGOs from across the EU.

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