

JURISTRAS

**How can the role of the European Court of Human
Rights be enhanced?
Recommendations for Germany
Policy Paper**

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Executive summary

Empirical research carried out in Germany by the authors showed that most human rights cases arising in the country are resolved at a national level, in highly contentious cases mainly by the Federal Constitutional Court. Regarding the scope of the project, it was also observed that most of the cases taken to Strasbourg are declared inadmissible. Finally, in the event that an adverse judgement is found against Germany, the judgments are usually implemented promptly by the responsible state authority. Some exceptions have occurred in cases relating to the field of family law and overlong court proceedings. Despite this good record, some flaws have been detected. These shall be addressed in this policy paper with some recommendations for national policy makers and practitioners. These flaws concern more general matters, rather than specific human rights issue areas or single human rights violations. The broader issues concern proper awareness of the Council of Europe and its litigation system, the lack of translations of the European Court of Human Rights' (ECtHR) judgments, and the dissemination system for judgments in Germany. Another issue is that the implementation of judgments against Germany and other states is carried out and monitored by state authorities, which can lead to a conflict of loyalty. Looking more into the decisions of the ECtHR, certain issue areas can be detected in the cases stemming from Germany and in the few adverse judgments from the ECtHR. One concerns the asylum process within Germany. Asylum seekers have frequently sought to use the ECtHR to change the decisions of the Federal Office for Migration. In some cases, applicants facing expulsion from Germany alleged that a violation of Article 3 European Convention on Human Rights (ECHR) would occur if the expulsion were enforced. In other cases, foreigners had been expelled from Germany with a permanent prohibition on re-entry. Some judgments against other states regarding residence permits triggered a discussion amongst practitioners on how to implement this development within the national legal order. As well as these cases, other cases against Germany decided by the ECtHR refer to a broader, less homogenous spectrum of marginalised individuals who have brought petitions concerning health care issues, freedom of opinion and religious beliefs. On the basis of this research, seven recommendations are formulated in this paper as follows: general awareness building of the Council of Europe, awareness building of Germany's legal obligations, establishment of an independent monitoring and advisory body, translation and dissemination of ECtHR's judgments within Germany, translation of ECtHR's judgments at the level of the Council of Europe, enhancing the independent monitoring mechanisms in public and private psychiatric clinics and institutions and establishing an information network amongst practitioners.

Summary of report's findings: Supranational rights litigation, implementation and the domestic impact of Strasbourg Court jurisprudence. A case study on Germany

The German team carried out empirical research on the effect of the ECtHR's judgments on the domestic legal order, their role in German Parliament and in the work of national human rights organizations, and on the public awareness of the Council of Europe's protection system. The basis of this research is composed of 28 interviews held with 30 interviewees, among them practitioners involved in implementing decisions, judges and human rights experts. Moreover, the research took into account relevant ECtHR and domestic case law, articles in the general media and in law journals, statements by human rights organizations and press releases relating to ECtHR judgments. Documents from the public record of the German Federal Parliament complete the empirical material. The scope of the empirical research, published in form of a case study, covered mainly judgments relating to *civil and political rights* guaranteed by the ECHR in Art. 8 - Art. 11 as well as those *relating to marginalized* groups in Germany.

The case study on Germany has clearly shown that the ECHR and the judgments of ECtHR against Germany, at least within the areas covered by the scope of this project, have a limited influence on the domestic legal system and on political debate. The vast majority of human rights violations are redressed through the existing domestic mechanisms. The predominant role of the domestic mechanisms is reflected in the low number of adverse judgments against Germany (between 1978 and 2008, Germany was found in 14 judgments to have violated the ECHR regarding the rights under study), the relatively low public awareness of the work done by the ECtHR, the low political importance of the ECtHR's judgments in the Federal Parliament, the low importance of ECtHR's judgments among the work of most non-governmental organizations, and – in comparison with other legal orders - in the debate following an adverse judgment about its binding force. When it comes to the judiciary, it can be assumed they comply in general with the judgments of the ECtHR, although it seems dissemination of these judgments could be improved. On the other hand the study also showed that the ECtHR and the ECHR have had an impact in some specific areas. This is true for the administration, judiciary or the legislature in the following areas under examination: immigration law concerning residence status stemming from respect for family life and the principle of *non-refoulement*, the notion of a public figure and role of domestic jurisdiction in prohibiting publication of photos, the prohibition of emetics to gain evidence in criminal

procedures, the burden of the costs for interpretation in criminal procedures and the position of politically active civil servants. The developments in the wake of the judgment in the *Görgülü v. Germany* case (no. 74969/01) have enhanced the overall importance of the ECHR within Germany. The impact has also been noteworthy within criminal procedure, which was not under study but should be mentioned nevertheless. In some areas, such as the case of the dismissal of a civil servant due to political activities and in cases concerning secret state surveillance, some elements of a broader impact or broader societal aim can be observed. It has to be emphasised that the mere possibility that a judgment may be brought before the ECtHR often in and of itself has an effect. The domestic judge knows that his or her decision can be contested and examined by the ECtHR itself. This means the domestic court must explain its judgment comprehensibly. It forces the sitting judge, where appropriate, to take ECtHR case law into account, as the judgment might otherwise lead to litigation against Germany with compensation for the applicant. This inter-relationship of the domestic legal and judicial system and the European Convention system has an effect on its own that cannot be measured by statistics or journal articles. It is very likely that this inter-relationship also has an effect on the protection of vulnerable groups.

When it comes to the implementation of the analyzed case law, the execution system appears to function well and the reception of judgments seems common, although some aspects could be enhanced. Looking at the implementation of single judgments, the case of the conscious disregard of the ECtHR in the wake of the *Görgülü* judgment by a Higher Regional Court appears to be an exception. It is however an outstanding depiction of the sometimes ambiguous attitude towards international standards in Germany.

This leads to the conclusion that human rights protection in Germany is still primarily delivered through domestic mechanisms. As such, relevant German governmental bodies, non-governmental organizations and practitioners tend to focus on the domestic sphere. Admittedly, the domestic mechanisms do function effectively. However, at the same time they obfuscate developments at an ECtHR level and hinder understanding of the interrelated nature of both protection systems. It is also true that the ECHR and the ECtHR play an important role in cases which challenge the sovereignty of the state (as for immigration cases) and when the ECtHR can rectify particular problems within Germany. In this regard it serves as a subsidiary institution. Finally, the ECtHR provides, with its case law, the basis for a broader understanding of a common European human rights legal order.

Recommendations

1. General awareness building of the Council of Europe and its relationship with national systems

In recent years, the focus of the media, many non-governmental human rights organizations and government has concerned the supranational organizations of the European Union. It is, however, important to foster awareness of the interrelated nature of the national legal order, the supranational system of the European Union *and* the supranational legal order of the Council of Europe. In this regard, the irreplaceable role of the Council of Europe in fostering the rule of law, democracy and human rights should be highlighted. Developments in Germany were and will not be isolated. Germany's developments in democracy, human rights, and the principle of the rule of law were reflected in the Council of Europe's activities. At the same time the Council of Europe's activities have influenced domestic politicians, legal practitioners and human rights organizations. This interrelationship will also apply to future developments. Using the experience of the last few decades, the Council of Europe, with its mechanisms of dialogue and judicial oversight within 47 member states, can help to address future developments that might further challenge the network of states and organizations, rather than single states. One prerequisite to ensuring the knowledge and experience of the Council of Europe is valued and used, is to build public awareness of the Council of Europe's valuable contribution in the past and what it can offer in the future. Only then will it be possible to empower each individual to understand the mutual inter-dependency of the systems and the role they can take within it. Governments will then be better placed to spend funds the Council of Europe requires, without facing a recalcitrant position from the public.

Recommendation: The Federal Government should promote an understanding of the common European fundamental human rights order and the interrelatedness of the legal orders among its citizens. This can be achieved by financially supporting human rights projects and by referring in governmental publications, where appropriate, to the Council of Europe's activities. The state legislature should incorporate human rights as a voluntary subject in legal academic education. National non-governmental human rights organizations are encouraged to take the findings and activities of the Council of Europe's human rights protection mechanisms further into consideration.

2. Building awareness of legal obligations stemming from the ECtHR's judgments

The understanding of the binding force of ECtHR judgments should be enhanced with regard to three different elements. These are adverse judgments against Germany, judgments against other member states of the Council of Europe, and the Germany's accountability for European Union legislation that respects the ECHR and the ECtHR's judgments.

Binding force of adverse judgments against Germany

The binding force of ECtHR judgments within Germany has been challenged a few times within Germany, both within the judicial system and in comment from the media and politicians. For example, the binding force was challenged in a Higher Regional Court case in Germany regarding a father's visiting rights. In this case the judges deliberately did not abide by the ECtHR's findings. The media also questioned the binding force of ECtHR judgments after a case concerning the notion of public figure and the publication of photographs from private scenes. Finally, politicians questioned the binding force in the wake of the judgment concerning the introduction of an acceleration procedure for overlong court proceedings. Even though the general attitude is that ECtHR judgments must be followed, these examples show the need to encourage understanding of the nature of the ECtHR's judgments. The Federal Constitutional Court emphasised in a decision from 2004 that '[...] the binding effect of statute and law also includes a duty to take into account the guarantees of the Convention and the decisions of the ECtHR as part of a methodologically justifiable interpretation of the law' (no. 2 BvR 1481/04, para. 47). This understanding has two aspects. Firstly, the ECHR and the ECtHR's judgments bind all responsible bodies of any state authority directly within the framework of the German Basic Law. Secondly, the German Basic Law does not waive its sovereignty without precautions. As such, the ECtHR's judgments must be taken *into account*, but not implemented or executed automatically. The authorities may deviate from the ECtHR's judgments *exceptionally* when there is no methodologically justifiable interpretation to avoid an infringement of the German Basic Law. However, this is the *exception* and so should it remain.

Importance of judgments against other states

Even less clear is the situation regarding the binding force of judgments against states other than Germany. Admittedly, such judgments do not bind Germany directly. However, as the German authorities must take the ECHR into account in the interpretation of the ECtHR, this

necessarily includes a consideration of judgments against other states. Furthermore, in the event of settled case law on a topic within the ECtHR, the likelihood of an adverse finding decision against Germany can be predicted when comparable factual circumstances exist. To avoid a breach of the ECHR and an adverse judgment against Germany, as well as avoiding the burden on the potential litigant in a human rights matter to pursue his or her case through all available channels, case law against other states must be taken into account.

Germany's accountability with regard to European Union legislation

The ECtHR holds all member states of the Council of Europe accountable for their legislation and administrative practice. The ECtHR does not distinguish in this regard as to whether the legislation is based on European Union legislation or not. This means states cannot argue that a judgment, a law or a decision of a state authority is based on European Union legislation and that therefore the state is not accountable. Every state must respect the ECHR, on national level in its national organs and also in its role as a member of the European Union. As each member state of the European Union is also a member of the Council of Europe and thus a party to the ECHR, states are encouraged to take a common approach in human rights matters.

Recommendation: State authorities should be encouraged, on both federal and state (Länder) levels, to promote understanding of the binding force of ECtHR's judgments on its bodies. This applies to the binding force of judgments against Germany, the relevance of judgments against other states and the EHCR and ECtHR's relevance to European Union legislation. State authorities are also encouraged to promote respect for the ECHR within the European Union legislative procedures. Members of Parliament are encouraged to take judgments of the ECtHR further into consideration when scrutinizing state activities or adopting bills; in doing so, the understanding of the judgments' binding force can become common knowledge. Legal practitioners and judicial organizations should promote legal understanding of the binding force of judgments as well as the necessary knowledge of the case law with seminars and workshops.

3. Establishment of an independent monitoring and advisory body

In Germany, the Agent for Matters relating to Human Rights within the Ministry of Justice represents the Federal Government before the ECtHR. After an adverse judgment, the Agent then has the task of promoting and supervising its implementation among state authorities or making any other necessary steps, such as the payment of the just satisfaction when required. This role thus encompasses two main tasks: to represent the government before the ECtHR and ensure the implementation of ECtHR judgments, to the extent that this requires action from state authorities. In general, this system functions well and there exist some obvious advantages. The Agent can ascertain how the judgment should be implemented due to their knowledge of the case. The payments of just satisfaction are done by the same office and can be ordered without delay. The knowledge of the case law is concentrated and therefore accessible for state representatives and Member of Parliaments. Nevertheless, some issues arise. It seems likely that in contentious cases the Agent might not be able to promote the implementation of the judgment as he or she might like. This could arise if the Parliament held a different stance from the Federal Government or because the Federal Government, wanting to keep a good human rights record, is loath to explore the potential wider implications of an individual case. Parliament, as the main organ with the means of providing a check on the executive, should be empowered to easily inform itself about the ECtHR judgments without receiving filtered information from the Federal Government itself. Furthermore, an independent monitoring body for ECtHR related activity within Germany could also serve as a first contact point for potential litigants. Taking the low number of adverse judgments against Germany into account (an average six to seven judgments finding a violation each year between 1999 and 2008), a comparatively high amount of cases are brought against Germany (some 2,500 allocated cases pending in December 2008). Such an institution could even diminish the workload of the Agent and the Court, as it could inform potential litigants in basic terms of the necessary requirements for an application to the ECtHR.

Recommendation: The Federal Government or the Federal Parliament should consider the establishment of an independent monitoring institution on a federal level which can assist potential litigants in a first assessment of their case and advise on the requirements of admissibility, assist Members of Parliament by serving them with comprehensive information regarding ECtHR case law, mediate between different

interests in contentious cases, monitor the execution of judgments and promote understanding of the interrelated multi-level protection system of human rights encompassing the German Basic Law, the ECHR and the fundamental rights of the European Union.

4. Translation and dissemination of European Court of Human Rights' judgments in Germany

The translation and systematic publication of all relevant judgments on a national level should be promoted and enhanced as a first step. A recent project funded by the Federal Government (Federal Ministry for Justice) to translate and publish all relevant decisions is rectifying the current situation in Germany to a degree. Additionally, the translation of adverse judgments against Germany provided by the Federal Government on the Federal Ministry of Justice's website as well on the Council of Europe's website, have eased access to the case law. Private websites and publications that summarize translated judgments complement the government's publications helpfully. The weekly law journal *Neue Juristische Wochenschrift* also regularly covers ECtHR decisions. These developments are all excellent steps towards establishing a systemized collection of all relevant judgments and decisions in an easily accessible German translation. If, however, states want to promote a common legal space, the task of completing sufficient, comprehensive and unified translations for the use of all states can only be achieved on a Council of Europe level (see recommendation No. 5). Nevertheless, translating judgments on a state level is a beginning and should be encouraged.

Recommendations: All relevant judgements of the ECtHR, including all judgments against Germany, should be translated into German and published systematically in several volumes. Dissemination can be enhanced by domestic law journals and other means of publications.

5. Translation of ECtHR's judgments at the Council of Europe level

The advantages of national translations can be taken a step further. To make the judgments of the ECtHR more accessible in every country of the Council of Europe and thus facilitate their implementation, a common approach to translations should be taken at a Council of Europe level. To achieve a common and unified body of legal terms, member states should be

encouraged to provide the necessary financial means to employ lawyers and translators who could work on the basis of a common thesaurus to guarantee the best translation possible. This programme could be achieved in several steps. Firstly, the full text of judgments could be translated on a common thesaurus in the languages of the countries concerned. Secondly, all relevant judgments (assumably some 300 cases each year) should be translated in all languages of the member states of the Council of Europe. Such a programme would also provide a greatly improved basis for better implementation within Germany.

Recommendation: The Federal Government and the Federal Parliament are encouraged to promote and financially support a project to translate all relevant judgments of the ECtHR in all languages and to build coalition support for this at the Committee of Ministers .

6. Enhancing the independent monitoring mechanisms in public and private psychiatric clinics and institutions where needed

The ECtHR adjudged in 2005 a case against Germany (Storck v. Germany, no. 61603/00) going back into the 1970s in which it found a state legislation lacked sufficient and independent monitoring procedures for persons deprived of their liberty on the basis of a psychological disorder. This applied to both private institutions and public clinics. The situation has since been enhanced considerably by the state authorities and the federal legislature. Nevertheless, due to the severe implications of deprivation of liberty without consent and the inability of mentally handicapped persons to pursue their own case, state legislators should assess their regulations and practices concerning safeguard mechanisms.

Recommendation: State legislatures and state authorities should assess their legislation and make amendments where needed to guarantee an effective and sufficient monitoring of confinements in psychiatric clinics, including private institutions.

7. Establishment of an information network amongst practitioners

It is important for those who are working as practitioners to be informed about adverse judgments against Germany and other states of the Council of Europe. The need to be informed about all judgments is linked to the understanding of the jurisdiction of the ECtHR,

which affects all countries of the Council of Europe. Due to the vast amount of cases originating from Strasbourg, it is useful to handle these cases in form of a network of experts in which different people keep other participants of the network informed about latest developments in particular issue areas. A good practice is the network accessible in the internet under www.migrationsrecht.net

Recommendations: Judges of the different branches of the German system are encouraged to establish an internet-based platform to share information on developments and judgments of the ECtHR. Federal and state administration bodies, especially in the field of immigration law, should consider the same.