

## Germany

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*German Institute for Human Rights*

### Independence and effectiveness of the NHRI

#### International accreditation status and SCA recommendations

In November 2015, the German NHRI was re-accredited with A status. Among its recommendations, the SCA encouraged the NHRI to advocate for the formalization of a clear, transparent and participatory selection and appointment process for the GIHR's Board of Trustees and flagged out that government representatives and members of parliament should not be members of, nor participate in that body. The SCA also highlighted the need for the NHRI to receive additional funding corresponding to its additional mandates and encouraged the GIHR to advocate for appropriate amendments to its enabling law that would clarify and strengthen its protection mandate.

#### Human rights defenders and civil society space

A judgment by the Federal Tax Court of January 2019 has narrowed civil society space through a **restrictive interpretation of the statutory criteria for CSOs to benefit from tax privileges** (as non-profit associations benefitting to the public). Consequently, the ability of a number of organisations to function and proceed with their work in order to actively participate in democratic discourse and social welfare has been affected or at least jeopardized. Many other organisations expect to be affected sooner or later by administrative decisions applying the judgment. The GIHR has been in close contact with the civil society coalition on the issue.

#### *References*

- For further details, please see <https://www.zivilgesellschaft-ist-gemeinnuetzig.de/> (in German only).

## Checks and balances

Two issues can be reported which are linked to checks and balances.

The first is the **insufficient control of arms exports**. The German Government promotes a restrictive policy of arms exports and its internal guidelines on arms exports control prohibit arms exports in the event of armed internal conflicts and where there are reasonable grounds to suspect abuse for internal repression or persistent and systematic human rights violations. They also prohibit exports to countries involved in or threatening to become involved in armed conflicts, or where there is a threat of an outbreak of armed conflict or where existing tensions and conflicts would be triggered, maintained or aggravated by the export. However, in practice the application of these internal guidelines remains deficient and weapons are exported to countries involved in armed conflicts. The GIHR has repeatedly argued for stricter controls of arms exports, in particular by means of a law that would formally bind the Government and not only through internal guidelines. A formal legal basis should also include the duty to provide a reasoned explanation to Parliament. This in turn would enable an informed political discussion on arms exports as a means of security policy providing more overall legitimacy to the policies and decisions involved. The Institute also advocates for more European coherence in regulating arms exports, instead of the current race to the bottom.

In the area of legal protection against covert **surveillance**, as well as intelligence oversight, problems remain particularly in the context of international intelligence cooperation which has become significantly more opaque due to the legalisation and de facto establishment of automated data exchange via joint intelligence databases, such as the European Counter Terrorism Group, which largely elude control by national supervisory bodies, thus, making access to legal protection against intelligence measures almost impossible. Also, oversight of automated access by intelligence agencies to various databases, such as the Central Register of Foreign Nationals, has become more difficult, as the logging of such access is now decentralized. Accordingly, 16 data protection commissioners are in charge of handling oversight instead of the Federal Commissioner.

### References

- On arms export: Report of the GIHR to the Federal Parliament on the Development of the Human Rights Situation in Germany 2018 ([German full text](#), [English executive summary](#)) and 2019 (follow-up report, [German full text](#), [English executive summary](#)).

## Functioning of justice systems

International human rights bodies have been recommending for more than two decades that Germany establish **independent complaint bodies for investigating alleged human rights violations by members of the police force**. However, little has been done to establish such independent mechanisms vested with enough resources and broad mandates in each of the 16 Länder. So far, only Rhineland-Palatinate, Baden-Württemberg and Schleswig-Holstein have established independent complaint bodies. In general, the deficits of effective prosecution of police violence nonetheless remain since the established bodies' mandates resemble those of ombudspersons and, thus, lack investigation powers. The GIHR has published two studies on this topic.

Another area where delivery of fair and effective justice meets with considerable obstacles is **racist violence**. The terror acts of the right-wing NSU terror group showed that the police and judiciary in Germany did not sufficiently recognise racist violence. The judicial process as well as several parliamentary committees of inquiry, both on the federal and *Länder* level, uncovered huge structural problems and a widespread institutional racism. The reports published by the committees of inquiry recommended structural reforms of security and law enforcement agencies to improve the effective combating of racist crime.

## References

- On complaints bodies for alleged police violence:
  - Nach den Morden in Hanau - Menschenrechtliche Verpflichtungen zum Schutz vor und zur effektiven Strafverfolgung von rassistischer und rechtsextremer Gewalt umsetzen, Position paper, 2020, [https://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/Publikationen/Stellungnahmen/Stellungnahme\\_Nach\\_den\\_Morden\\_in\\_Hanau.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Stellungnahmen/Stellungnahme_Nach_den_Morden_in_Hanau.pdf)
  - On racist violence: [GIHR, Werden die Empfehlungen des NSU-Untersuchungsausschusses des Bundestags tatsächlich umgesetzt?, Position paper 2017.](#)
- On complaints bodies for alleged police violence:
  - [Eric Töpfer / Tobias Peter, Unabhängige Polizeibeschwerdestellen. Was kann Deutschland von anderen europäischen Staaten lernen?, GIHR Analysis 2017](#)
  - [Eric Töpfer, Unabhängige Polizei-Beschwerdestellen - Eckpunkte für ihre Ausgestaltung, GIHR Policy Paper No. 27, 2014.](#)
- On racist violence:
  - [GIHR, Werden die Empfehlungen des NSU-Untersuchungsausschusses des Bundestags tatsächlich umgesetzt?, Position paper 2017.](#)

## In-focus section on COVID-19 measures

### Most significant impacts of measures taken in response to the COVID-19 outbreak on the rule of law in the country

The German Institute for Human Rights acknowledges the effort made by the federal and Länder governments to adopt proportionate measures, which is particularly evidenced by the **transparency** on the reasons for taking specific measures and on the uncertainties underlying the prognoses as well as by the **time-limitations** of the measures taken, which permit and oblige the governments to review the measures taken and their impact. The GIHR also notes that there is a growing awareness of the impact that contact restrictions have and will have on all human rights – civil and political rights as well as economic and social rights. According to polls the majority of the population supports those measures so far. With the increasing discussions on softening the restrictions, this majority is shrinking.

While the concerns of **persons in vulnerable situations** have been raised since the first measures were taken, they have not been systematically integrated into the balancing considerations. For example, states (Länder) have extended the prohibition of visits to persons in long-term care institutions without making it a priority at the same time that

these institutions receive protective gear or are supported in strengthening electronic communication for the persons concerned. At the same time, it can be observed that there is an increasing awareness that the right of women and children to be protected against domestic violence and children's right to education must be respected, and that there are concomitant reaction by governments. No comparable broad awareness and government reactions can however be observed with respect to homeless persons and asylum seekers in accommodation centres.

The legal community has been vocal in raising concerns that the hastiness and speed with which laws and regulations have been passed, has resulted in **ambiguous and unclear wording** leading to difficulties in implementation and policing **of the regulations** due to diverging interpretations by individual state agents and state bodies. State governments have concretized the regulations by public explanations as well as by amending the regulations. In particular, concerns have been raised as to whether the *Infektionsschutzgesetz* (Law on Infection Protection) provides a sufficiently clear legal basis for the measures taken, in particular those restricting human rights of persons who are not infected or suspected of being contagious. Moreover, under the amended law, the *Länder*(states) governments are empowered to enact regulations in this respect. Under German constitutional law, such a delegation of powers to the executive must be sufficiently clear as to content, purpose, and extent. The legal debate as to whether the amended Law on Infection Protection meets this standard is ongoing.

Since the enactment of relevant regulations, courts have upheld a large number of the implementation measures and regulations. However, some **courts**, including the Federal Constitutional Court, have begun to grant interim relief against regulations that are overly broad, especially if they contain an across-the-board prohibition (e.g. of religious services or demonstrations) and do not provide for exceptions in cases where protective measures (physical distance, hygiene, masks) are taken.

The German Institute for Human Rights continues to monitor the situation. We have published a position paper on how human rights must guide policy measures as well as a position paper on the rights of older persons in the Corona pandemic, and a position paper on the right to health of persons with disabilities in the Corona pandemic. The GIHR will continue to produce more detailed reports on various human rights issues, in particular how COVID-19 measures impact the most vulnerable in our society.

### *References*

- GHR Statement "[Corona Crisis: Human Rights Must Guide the Political Response](#)"; further press releases and statements on the rights of homeless persons, older persons, persons with disabilities, children, and refugees' rights are available [here](#) (mostly in German)

