

Germany

German Institute for Human Rights

International accreditation status and SCA recommendations

In November 2015, the German NHRI was re-accredited with A status. Among its recommendations, the SCA flagged out that government representatives and members of parliament should not be voting members of the Board of Trustees. 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 as encompassing monitoring, inquiring, and investigating human rights violations.

Impact of 2020 rule of law reporting

Follow-up by State authorities

Some measures were taken in relation to certain concerns raised in ENNHRI 2020 Rule of Law Report.

First, as regards the enabling environment for civil society, the country chapter on Germany of the ENNHRI 2020 Rule of Law Report raised concerns regarding a 2019 ruling of the Federal Financial Court concerning the criteria for civil society organisations to benefit from tax privileges for non-profit associations with a public benefit purpose. While this issue still awaits resolution, the 2020 Annual Tax Law (*Jahressteuergesetz*) amended some grounds for tax privileges for non-profit associations, including support for people who have been discriminated against on grounds of their gender identity or sexual orientation. However, this is still a far cry from the changes that civil society organisations have advocated for. Among other things, (work for) "human rights" has not been accepted as a ground for tax privilege (see also below, section on human rights defenders and civil society space).

Secondly, as regards independent police complaint bodies and checks and balances, the 2020 ENNHRI rule of law report pointed out the lack of independent police complaints bodies at the Länder level. In 2020, Bremen, Berlin, Brandenburg and Hesse tabled or adopted acts to establish police ombudspersons who shall process complaints by citizens or police officers. However, none of these bodies has the power to investigate independently and to bring cases to court.

Impact on the Institution's work

Protection and promotion of human rights and the rule of law is one of the three core aims in the Institute's strategic planning for 2019–2023. The Institute has engaged with authorities on rule of law issues on several occasions. For example, it approached the Foreign Office in support of the Polish Ombudsman and jointly organised a conference with the Polish NHRI on protecting the rule of law and the importance of an independent judiciary. It used a conference on the 70th anniversary of the ECHR, jointly organised with the German Foreign Office and Ministry of Justice and Consumer Protection, to gather political and public support for a strong system of human rights protection through the European Court of Human Rights, as the Court is an important guardian of the rule of law. The Institute also promoted the Commission's characterisation of NHRIs as an integral part of a state under the rule of law.

The Institute did not take any specific follow-up initiatives based on the ENNHRI 2020 Rule of Law Report. This is due in part to the topics covered by the Commission's rule report which do not specifically fall in the ambit of the Institute's mandate (e.g., corruption) or are covered by the Institute from a different perspective (e.g., justice system where our focus currently lies on providing training to judges and prosecutors and fostering inter-institutional dialogue to improve prosecution of rightwing, racist and antisemitic crimes).

Independence and effectiveness of the NHRI

Changes in the regulatory framework applicable to the Institution

The Institute's regulatory framework has not changed since the previous report.

Enabling space

Generally speaking, the Institute has very good working relationships with state authorities. Its expertise is highly regarded, and authorities are well aware that its status as NHRI is different from civil society organisations.

However, when Parliament holds a hearing on a draft law, the GIHR is not entitled to participate ex officio, but needs to be invited by a parliamentary party.

Moreover, sufficient financial resources play an important part in securing an enabling environment for an NHRI. While there has been a comparatively small increase in institutional funding for the GIHR in 2019, it should be noted that the requirement of the Institute's broad mandate is not adequately reflected by the current level of funding. In particular, the Institute needs more financial resources for research and monitoring.

Developments relevant for the independent and effective fulfilment of the NHRIs' mandate

As any other organisation the Institute's work has been affected by the ongoing Covid-19 pandemic. Fortunately, the Institute was able to provide the necessary infrastructure for remote work and much of the Institute's work, which consists of research and reporting, can well be done remotely (see below, in the section concerning impacts of COVID-19 pandemic and measures taken to address it).

Human rights defenders and civil society space

As described in ENNHRI 2020 Rule of Law Report, a judgment by the Federal Tax Court of January 2019 has narrowed civil society space through a restrictive interpretation of the statutory criteria for civil society organisations (CSOs) to benefit from tax privileges (as non-profit associations benefitting to the public). Consequently, the ability of a number of organizations 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. While the Federal Ministry of Finance had suspended the implementation of the abovementioned judgment and promised a draft to amend the applicable law, it now seems that discussions within the ministry, within the government and among the federal and Länder ministries are currently stuck, and no further development is expected this year (due to federal elections on 26 September). In the meantime, the CSO affected by the judgement has recently lodged its appeal to the Federal Constitutional Court. (1) Generally speaking, it is recommended that the law providing tax privileges to certain CSOs be revised and modernised so as to reflect a contemporary understanding of what "activities of benefit to the public" means and how an enabling space for CSOs can be secured in today's world.

Freedom of assembly has been curtailed for the purpose of preventing the spread of COVID-19. It should however be noted that these measures were not targeted against human rights defenders, neither de jure nor de facto. During the first wave in the spring of 2020, the first measures enacted by the states of the federation (Länder) were framed as absolute prohibitions. However, the Federal Constitutional Court decided in an urgent procedure that the applicable norms had to be understood in a way that required the competent authority to examine whether the assembly could be carried out under precautionary hygiene measures, so as to do justice to the high value of freedom of association in a democratic society (2).

In 2020 the Institute has advised the Foreign Office in the development of a protection programme for human rights defenders. The programme has been launched in 2020 under the name of Elisabeth-Selbert-Initiative and is expected to be further developed in 2021. (3)

References

- (1) <https://www.attac.de/presse/detailansicht/news/gemeinnuetzigkeit-bundesfinanzhof-haelt-an-umstrittenem-urteil-fest-1/>
- (2) https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/04/rk20200415_1bvr082820.html
- (3) <http://ennhri.org/news-and-blog/germany-launches-protection-programme-for-human-rights-defenders-at-risk/>; <https://www.ifa.de/en/fundings/elisabeth-selbert-initiative>; <https://www.ifa.de/foerderungen/elisabeth-selbert-initiative>

Checks and balances

Access to legislative and policy processes/participation of rightsholders

There has been a tendency, equally noted by CSOs, to provide very short timeframes for stakeholder consultations. While ministries, federal and Länder level alike, regularly request written comments from CSOs and the Institute on draft legislative proposals, the timeframe for submitting responses varies greatly from a day or two to several weeks. Providing only very little time for submitting responses might obviously discourage CSO from providing input at all (and, at times, has caused CSOs and the Institute to refrain from submitting input) and it creates the impression that stakeholder consultations are a mere formality and not taken seriously. (1)

Fairness of the electoral process

Following two judgements by the Federal Constitutional Court, so-called overhang seats (*Überhangmandate*) have been declared unconstitutional and have to be compensated for with additional seats. These resulted from the specific electoral system that combines proportional representation with elements of a majority voting system as well as from the increased number of political parties and decreased number of votes received by the two main parties. As a result, the total number of seats has grown so much that, after the next federal elections, it may exceed 1,000. (2) While all parties agree that an electoral law reform is necessary, the compromise

achieved between the parties of the ruling coalition government is expected to heavily favour the currently largest party. Furthermore, many legal experts do not expect that the new law will effectively reduce the number of seats so as to maintain a functioning parliament and hence argue that many parts of the law are unconstitutional. Although opposition parties have lodged a complaint with the Federal Constitutional Court, a decision is not expected to be rendered very shortly so that the next parliamentary elections will take place according to the new law.

Implementation of judgements of supranational courts

With its PSPP ruling in May 2020, the Federal Constitutional Court (FCC) caused concerns among critics that EU-sceptic governments could use the ruling to undermine the respect for and domestic implementation of judgements by the Court of Justice of the EU (CJEU). The judgements and its possible effects have been widely discussed in Germany, including at a conference jointly organised by the Institute and the Polish Ombudsman. One main argument by the proponents of the judgment (and from within the Court as well) against the allegation that the judgement would be used by EU-sceptic governments was that the CJEU should actually have exercised more control and oversight, not less.

Public trust in institutions

Trust of citizens in state authorities, including the public administration and courts has changed under the influence of the COVID-19 pandemic. While trust in government and parliament was at a medium height in 2019, trust has increased during the pandemic; in recent weeks, however, the level of trust has sunk due to a perceived lack of foresight with a long-term perspective, direction and decisiveness on the part of decision-makers and a perceived lack of effectivity of the measures taken.

Despite a generally high trust in the police, concerns have increased as to right-wing extremist tendencies and institutional blindness towards racism and antisemitism within the police and security forces. This was caused by the repeated detection of such statements and actions within the forces (e.g., in chat groups, through hoarding of weapons or Nazi devotional objects). Moreover, in 2020 the issue of structural racism within the police was widely debated in the wake of the death of George Floyd and worldwide protest against police brutality. Resulting calls (3) for an independent study into racial profiling practices and structural racism among security forces led to division among the Government. The Ministry of Interior consistently refused such a study and has only conceded so far as to include this aspect into a broader three-year study on everyday life of police officer. (4) Experts and opposition parties have denounced this study as being of little use to actually contribute to solving the problem. (5)

The NHRI in the system of checks and balances

The Institute regularly engages with political actors in relevant legislative and policy processes. In 2020 these included e.g., engagement to introduce children's rights into the constitution; engagement to delete the word "race" from the constitutional provision on discrimination and replace it with "racist discrimination"; introduction of a law on human rights due diligence for business enterprises. The broad support for the Institute's proposal on racist discrimination, particularly from organizations of victims of racist discrimination, is a strong proof of the need for an NHRI that has the resources to work on an issue for a long time to bring about.

In 2020, the Federal Constitutional Court requested the Institute to submit an amicus curiae in a constitutional complaint concerning the prioritization ("triage") of severely ill Corona patients.

In its 2019/2020 report to Parliament on the human rights situation in Germany, the Institute brought to the attention of the legislature the practical impact of earlier legislative changes with respect to the deportation of rejected asylum seekers with severe illnesses. The findings of the report, viz. that severely ill persons were deported in violation of Germany's international human rights obligations, were taken up in legislative debates, also by members of the governing coalition parties; so far, however, no legislative action has been taken to remedy the situation.

The main obstacle affecting the NHRI's engagement as part of the system of checks and balances is the lack of resources, which limits the extent of activities and range of issues that the Institute can work on.

References

- (1) A recent example was stakeholder consultation on the 2nd Cybersecurity Law where CSOs were given only two days to draft and submit their comments <https://gi.de/meldung/offener-brief-ausreichende-fristen-fuer-verbaendebeteiligung>
- (2) <https://www.dw.com/en/germany-seeks-electoral-reform-to-avoid-xxl-bundestag/a-54694043>
- (3) https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Stellungnahme_Racial_Profiling_Bund_Laender_muessen_polizeil_Praxis_ueberpruefen.pdf
- (4) <https://www.dw.com/en/germany-commissions-study-to-address-racism-in-police-force/a-55867763>

- (5) <https://www.br.de/nachrichten/deutschland-welt/opposition-kritisiert-seehofers-geplante-polizei-studie,Sla9MtY>

Functioning of the justice system

The current legal framework and its implementation currently affects access to justice by certain vulnerable groups.

Access to justice is hindered for persons with disabilities due to the existing law on guardianship, which is based on the concept of substituted decision-making. Presently, a legislative proposal is pending before the Federal Parliament, which would bring about a change to assisted decision-making. However, some elements of the draft are still not in line with the CRPD, as forced treatment and forced restraints, e.g., would still be permissible under certain circumstances. It is not yet clear whether the draft law will be adopted before the end of the legislative period in September 2021. The GIHR, as Germany's CRPD Monitoring Body, has published a position paper on the matter (1).

Access to justice for women victims of gender-specific violence, including domestic violence, depends on the availability of counselling services and, for victims of sexual violence, of easily accessible rape crisis or sexual violence referral centres providing medical and forensic examination as well as trauma support and counselling (Article 25 Istanbul Convention). The funding of counselling services for gender-specific violence is precarious, as funding is not permanent but depends on actual demand, thus rendering it difficult to cover running costs and to keep staff. With respect to referral centres, a study of the GIHR has shown the need for stepping up the cooperation between medical, forensic and counselling services and to develop structures that ensure access for women in rural areas (2).

Access to justice for victims of racist violence depends on the identification by the justice system of the racist motivation of the perpetrator. So far, there is no evidence whether the pertinent legal changes (Sect. 46 of the Penal Code) and the concomitant internal rules for the investigating authorities are effectively applied in practice. Within a project funded by the Federal Ministry of justice and consumer protection, the GIHR is supporting pilot states (Länder) to strengthen the justice system in dealing effectively with combatting racist violence and in dealing with racist discrimination by the justice system. The project reveals the difficulty stemming from the fact that institutions cannot describe the needs they have in this regard as long as they do not have a human rights based understanding of racism. Therefore, the Institute is continuously calling for

training of the actors within the justice system on racism and racist discrimination (see, e.g., on the Federal Cabinet's Plan for Combating Right-wing extremism and Racism. (3)

References

- (1) https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Stellungnahme_Referentenentwurf_BMJV_Entwurf_Gesetzes_Reform_Vormundschafts_Betreuungsrecht.pdf
- (2) https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analyse_Akutversorgung_nach_sexualisierter_Gewalt.pdf
- (3) https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Stellungnahme_zu_geplantem_Massnahmenpaket_Kabinettsausschuss_Bekaempfung_Rechtsextremismus_Rassismus.pdf

Media pluralism and freedom of expression

The Institute has not carried out any systematic monitoring in this regard. In the context of demonstrations against the Corona protection measures, journalists' organizations have reported attacks against, and harassment of, journalists by demonstrators.

Impact of measures taken in response to COVID-19 on the national rule of law environment

Most significant impacts of measures taken in response to the COVID-19 outbreak on the rule of law and human rights protection

Overall, parliamentary oversight of the measures taken was limited, due to the fact that the pertinent federal law gives the federal and state governments the power to act by decree (*Verordnung*). Although general debates are heard in the parliaments, the parliaments of the Länder have not used constitutionally available means of turning their general oversight into a specific oversight, e.g., by making the decrees (or the duration of specific measures) depending on parliamentary consent. The federal parliament consented to the prolongation of the "epidemic

situation of national extent" (*epidemische Lage von nationaler Tragweite*), which triggers the (time-limited) power of the Federal Minister of Health and Ministers of the Länder to act by decree. However, on these occasions, parliament did not use its powers to review, in detail, the measures taken. One notable exception from this general lack of parliamentary inclusion in the law-making process was the amendment of the Infection Protection Act to adopt a nationwide "emergency break". The amendment was adopted in response to a perceived unresponsiveness of state governments in face of a third wave of infections.

While parliaments have not taken measures to weigh and to protect human rights, courts have done so. However, the less clarity there is about a strategy behind the measures taken (because there is no in-depth parliamentary debate, and the debates of the circle of the prime ministers of the Länder and the chancellor are behind closed doors), the more difficult it is for courts to carry out a proper assessment of the proportionality of a single measure against which the individual case is directed. Thus, the primary role of parliaments in protecting human rights is further weakened.

The Institute dealt with these implications through statements, press releases, and in its annual report to parliament on the situation of human rights in Germany, which was taken up in parliamentary debates.

Most important challenges due to COVID-19 for the NHRI's functioning

The Institute overall managed to cope well with the challenges brought by the COVID-19 pandemic. It has converted many of its public events to online formats, which has often and successfully attracted a larger audience than events that would have taken place in person in Berlin. However, activities such as outreach to members of parliament and political parties, or other activities that require a trustful and confidential environment became difficult or impossible to carry out. While the overall fulfilment of the Institute's mandate remained effective, some projects and activities had to be postponed or even cancelled.

