

State of the Rule of Law in Europe in 2022

Reports from National Human Rights Institutions

Germany



Germany

German Institute for Human Rights

Impact of 2021 rule of law reporting

Follow-up by State authorities

Due to the general election in September 2021, there have been no legislative or administrative initiatives addressing the issues raised in the 2021 ENNHRI rule of law report. With the formation of a new government coalition, which is comprised of the Social Democratic Party, the Green Party and The Liberal Democratic Party, more progressive legislation is expected on a variety of issues concerning human rights and rule of law (e.g. LGBTIQ* rights, evaluation of security laws, non-profit organizations) according to the coalition agreement.

References

- Coalition agreement:
<https://www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1>

Follow-up initiatives by the Institution

While the Institute has not taken any specific follow-up initiative based on the 2021 report, it did raise, within the framework of the September 2021 general election, specific issues highlighted in the report and advocated for their inclusion in the respective election manifestos as well as in the coalition agreement of the new government coalition (e.g. independent complaint bodies for police and structural reforms to address racial profiling).

NHRI's Recommendations to National and European policy makers

The Institute recommends that the German federal and state parliaments schedule annual public dialogues with civil society actors/academia on the EU Commission's annual rule of law report in their relevant parliamentary committees.

Independence and effectiveness of the NHRI

The new government coalition does not include the Christian Democratic Party anymore, which used to block the increase of financial resources for the Institute. The coalition agreement of the new government coalition has specifically committed to increase the financial and human resources of the Institute.

International accreditation status and SCA recommendations

In November 2015, the German NHRI was re-accredited with A status (1). 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. The SCA also included recommendations calling for a broader and more transparent process for selection and appointment, a clear and objective dismissal procedure for members of the Board, and stronger provisions on protection for members of the Board from legal liability for acts undertaken in good faith in their official capacity. On these recommendations, the German NHRI will provide clarification to the SCA regarding the Institute's structure and German law in the context of its reaccreditation in March 2022, and it is of the opinion that no legal or statutory changes are necessary in relation to these matters.

References

- (1) https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/GANHRI/SCA_FINAL_REPORT_-_NOVEMBER_2015-English.pdf

Regulatory framework

The Institute (hereinafter also referred to as "GIHR") has a legislative basis and the national regulatory framework applicable to the institution has not changed since the 2021 report. The NHRI has the mandate to contribute to access to justice for individuals, through awareness-raising and amicus curiae briefs in human rights cases, especially before the Federal Constitutional Court (upon request by the Court, following a proposal by the Institute).

Enabling and safe space

The relevant state authorities have good awareness of the NHRIs' mandate, independence and role.

The Institute does not have a special right of access to information but can only use the general right of access to information. However, so far information requests by the Institute to federal and state ministries have been fulfilled mostly.

The Institute has the general mandate to give "policy advice", i.e. to advise parliaments and governments on the federal and state levels. However, there is no legal obligation for these actors to involve the Institute in all stages of legislation or policy making with human rights implications. At the stage of draft legislation, the Institute is, in fact, generally invited along with other relevant stakeholders to comment on draft legislation. In previous reports the Institute has already raised the issue that oftentimes the deadlines for such input are very short (a few days). The Institute usually publishes these statements on its website.

As mentioned in last year's report the Institute can only participate in parliamentary hearings on a draft law when it is invited by a political party.

Thus, the Institute recommends that the federal parliament changes its rules of procedure extending a standing invitation to the Institute to participate in parliamentary hearings or submit a written statement on draft laws with human rights implications and to accept any written submission of the Institute on draft laws and to circulate them as official parliamentary documents.

Beyond its general power to give advice to parliaments and governments, which includes making recommendations, the Institute may also be invited to participate in independent commissions of experts established to formulate recommendations regarding a specific or structural human rights issue (e.g. prevention of violence in institutions for people with disabilities or police reforms).

The addressees of the NHRI's recommendations are not legally obliged to provide a timely and reasoned reply.

The Institute is required to submit an annual report on the situation of human rights in Germany to the federal parliament. The Institute presents this report shortly before international human rights day, and the federal parliament uses the plenary discussion on human rights on that day to also discuss the report; subsequently, the report is an agenda item of the Committee on Human Rights and Humanitarian Aid. According to the Law on the GIHR, parliament "should" respond to the report, but is not obliged to. So far, no such response has been formulated.

Measures are in place to protect and support the NHRI, heads of institution and staff against threats and harassment and any other forms of intimidation. Among others, where necessary, the Institute staff can apply to the authorities and have access to their address in civil registries blocked. Some staff working on sensitive issues such as right-wing extremism have made use of this possibility. The Institute supports such applications with an official letter from the director.

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

The Institute has successfully addressed the issue of adequate funding with political parties before the general elections of September 2021. As mentioned above, the coalition agreement of the new government coalition promises to increase the Institute's financial and human resources. The Institute will now address this issue during the budgetary negotiations of 2022.

In March 2021, during the discussion of the 2020 GIHR Report on the Human Rights Situation in the Committee on Human Rights and Humanitarian Aid, the Institute raised the issue of the Institute's involvement in legislation and policy making, specifically the need for the federal parliament to change its rules of procedure to include the Institute in all parliamentary hearings concerning human rights issues in Germany. The GIHR will continue to advocate for this change with the new federal parliament.

NHRI's recommendations to national and regional authorities

The Institute recommends that:

- The federal parliament substantively increases the Institute's financial and human resources in the upcoming budgetary cycle.
- The federal parliament in its next revision of its rules of procedure includes a provision whereby the Institute is invited ex officio to parliamentary hearings (standing invitation), is invited to submit a written statement on all draft laws with human rights implications and that these statements will be circulated as official parliamentary documents.
- On the state level, governments provide a legal basis as well as permanent and sufficient funding when designating the Institute as monitoring body under art. 33 of the UN Convention on the Rights of Persons with Disabilities (CRPD).

Human rights defenders and civil society space

In its last report the Institute raised the issue of tax privileges for CSOs and the need for legal reforms. The situation is unchanged due to the federal elections in September 2021, but the coalition agreement takes up the issue, so that a change can be expected in the nearer future.

Laws and practices negatively impacting on civil society space and/or on human rights defenders' activities

As mentioned in the previous 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 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 jeopardised. The legal situation remains unchanged, but according to the coalition agreement, new government is willing to address the issue.

While a proposal for a Democracy Promotion Law had been introduced in May 2021, the legislative work could not be concluded before the elections in September 2021. The proposal mainly intended to create a reliable legal framework for federal funding activities aimed at strengthening the democratic engagement of civil society organisations.

Sustainable and long-term funding from the federal level for civil society structures to promote democracy remains an unsolved issue in Germany as funding is often limited to the maximum of a three-year project cycle. The new government coalition has pledged to tackle the issue and the presentation of a new draft law is expected for 2022.

References

- https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Position_Paper_International_recognition_of_a_human_right_to_a_clean_healthy_sustainable_environment.pdf

Access to and involvement of civil society actors in law and policy making

As mentioned in the previous report there has been a tendency, equally noted by CSOs, to provide very short timeframes for stakeholder consultations. While ministries, federal and state 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 CSOs 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.

Given the reduced legislative activity since the previous report due to the general election in September 2021, the reference provided remains pertinent.

References

- 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>

NHRI's role in promoting and protecting civil society space and human rights defenders

The Institute has continued to support the human rights defenders protection programme of the Ministry of Foreign Affairs (Elisabeth-Selbert-Initiative). With the coming into power of the Taliban in Afghanistan members and staff of the Afghanistan Independent Human Rights Commission (AIHRC) have come under extreme danger; human rights work has become virtually impossible. Together with the Asia Pacific Forum of NHRIs the Institute has successfully advocated for the inclusion of members and particularly exposed staff in the German evacuation list. Thus, some members and staff of the AIHRC and their families have been relocated to Germany and received a residence permit. The GIHR is advocating for continuing these evacuation efforts, also extending to other human rights defenders, and has published a study on Germany's human rights obligations in this regard.

References

- Grund- und menschenrechtliche Verantwortung nach dem Abzug aus Afghanistan Zu den Schutzpflichten Deutschlands für besonders schutzbedürftige Afghan*innen: NHRI's recommendations to national and regional authorities: https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analyse_Grund_und_menschenrechtliche_Verantwortung_nach_dem_Abzug_aus_Afghanistan.pdf

With regard to Germany the Institutes recommends that the new Government tackles the issue of tax privileges so that the grounds for such privileges cover promotion and protection of human rights, climate protection, and promotion of democracy and rule of law.

Checks and balances

The concerns raised in last year's report remain valid. In particular, the issue of lack of time for stakeholder participation during the legislative process remains a concern in Germany (see also the section above).

Following the PSPP ruling of the Federal Constitutional Court (FCC), in May 2020 the EU Commission started an infringement procedure against Germany in June 2021. It appears that the case has now been quietly settled. This raises transparency concerns as it is unclear what promises were made or on what conditions the infringement procedure has been settled (1).

The Institute is a member of the advisory council of the Federal Anti-Discrimination Agency (FADA). It has now been several years that the Government has not filled the position of director of the agency. The Advisory Council of the FADA is proposing a substantive organizational change so as to strengthen the independence of the FADA (2).

The powers of police, public prosecutors and secret services have been considerably expanded over the past 20 years, yet quite a few of these laws were declared unconstitutional by the Federal Constitutional Court, forcing the legislature to amend them. The Institute had been advocating since 2006 for a human rights-based evaluation of security legislation. The issue has been taken up by the new government which promised in its coalition agreement to undertake such an evaluation (3).

References

- (1) <https://www.tagesspiegel.de/politik/ezb-urteil-des-bundesverfassungsgerichts-warum-der-konflikt-zwischen-karlsruhe-und-europa-etwas-zu-still-beerdigt-wurde/27864242.html>
- (2) https://www.antidiskriminierungsstelle.de/DE/ueber-uns/beirat/beschluesse_des_beirats/beschluesse_des_beirats_node.html
- (3) <https://www.institut-fuer-menschenrechte.de/publikationen/detail/die-evaluation-von-sicherheitsgesetzen>

Trust amongst citizens and between citizens and the public administration

According to a recent survey public trust in institutions has slightly fallen over the last year. This concerns politicians and political parties, police and courts (including the FCC), but also media. Some of this loss could be due to poor communication and late action during the pandemic.

References

- <https://www.n-tv.de/politik/Weniger-Ostdeutsche-haben-Vertrauen-in-die-Polizei-article23049926.html>; <https://www.n-tv.de/politik/Vertrauen-in-Politik-sinkt-vor-allem-in-den-Kanzler-article23036025.html>

NHRIs as part of the system of checks and balances

The Institute continues to participate in the legislative and policy process through the provision of policy advice through written statements, participation in public hearings and engagement with various political actors.

During the 2021 election campaign the Institute has advocated for a thorough evaluation of security legislation, to address the concerns mentioned above.

NHRI's recommendations to national and regional authorities

The Institute recommends the EU and other regional bodies to:

- Address incisive sanctions to states that systematically undermine the independence of the judiciary, in particular when systematically ignoring judgments of the Court of Justice of the EU and the European Court of Human Rights in this regard.
- Ensure systematic election monitoring, including amendments of electoral laws to the disadvantage of opposition parties and unfair conditions for opposition parties during the electoral campaign; non-recognition of election results in cases of widespread and systematic violations.

Functioning of the justice system

The situation remains largely unchanged compared to last year's report.

Challenges with access to justice for persons with disabilities, women victims of gender-specific violence, victims of human trafficking, and victims of racist violence continue to persist.

While the reform of guardianship law (Betreuungsrecht) is a step towards more self-determination for persons with a legal guardian, there are still provisions in the new legislation that are incompatible with the human rights laid down in the CRPD. The reform is an attempt to lay the legal groundwork ensuring that courts order guardianships only to the extent absolutely necessary (necessity principle). However, a person can still be placed under guardianship against their "natural will" under certain circumstances and provisions creating the legal bases for coercive measures, such as placement in an institution or medical treatment against the will of the subject, still stand. (1)

An additional point to note is that, with the entry into force of amendments to the anti-hate speech legislation in social media (Netzwerkdurchsetzungsgesetz), prosecutors and courts are understaffed to deal with the (expected) high numbers of cases that will reach the authorities if social media enterprises fulfill their reporting obligations.

References

- (1) https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Menschenrechtsbericht/Executive_Summary_Annual_Report_Development_Human_Rights_Situation_Germany_2021.pdf

Role of the NHRI in contributing to the effective functioning of the justice system

The Institute continues its work as described in the 2020 report. On the issue of access to justice for women victims of gender-specific violence and victims of human trafficking the Institute started the second phase of a project, funded by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, that aims at establishing a monitoring body for the Council of Europe (CoE) Istanbul Convention on preventing and combating violence against women and domestic violence and a monitoring body for the CoE Anti-Trafficking Convention. (1)

The Institute also continued a project, funded by the Federal Ministry of Justice, that aims at 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. with combatting racist violence and in dealing with racist discrimination by the justice system.

References

- (1) https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Weitere_Publikationen/Leitbild_Berichterstattungsstelle_geschlechtsspezifische_Gewalt.pdf

NHRI's recommendations to national and regional authorities

The Institute recommends that the federal and state governments:

- set up independent bodies to receive complaints from persons claiming to be victims of human rights violations by the police, e.g. excessive violence or racist practices;
- strengthen counselling and assistance services, offered by civil society, for persons affected by racist police practices;

- systematically incorporate human rights education across all subject areas in the initial and advanced training and professional development for all police officers, and the personnel of other law enforcement, prosecutorial and judicial authorities, especially on the role of international human rights law within the German legal order and on antisemitism, racism (especially against Roma and Sinti, racism against Muslims).

Media freedom, pluralism and safety of journalists

The Institute does not carry out systematic monitoring in this area. As mentioned in the 2021 report, it remains of concern that in the context of demonstrations against the Corona protection measures, journalists' organisations have reported an increasing number of attacks against, and harassment of, journalists by demonstrators.

References

- <https://www.reporter-ohne-grenzen.de/nahaufnahme/2021>

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

The Institute takes the view that the pandemic response has been often late and deficient, thus failing to ensure prompt and effective measures able to tackle the threats posed by the COVID-19 outbreaks in accordance with fundamental rights and freedoms.

Emergency regimes and related measures

Generally speaking, the Institute takes the view that the main problem in Germany throughout the pandemic has been that the political response to the pandemic has been consistently late and deficient, ignoring scientific evidence and advice by scientific experts and advisory bodies, and downplaying the dangers and need for effective measures to combat the pandemic. While it is important to discuss the legality of measures addressing the pandemic that would limit rights and freedoms, politics has oftentimes 'hidden' behind a general claim of potential unconstitutionality of proposed measures instead of discussing in a nuanced way the specific purposes and expected impact and side-effects of measures. This fuels a misguided understanding about human rights whereby rights and freedoms cannot be limited.

In this sense it is important that the Federal Constitutional Court (FCC) in a recent ruling confirmed the legality of the measures taken during the third wave of the pandemic including curfews and contact restrictions.⁽¹⁾ It recognised that rights to life and to health

as well as the need to maintain the proper functioning of the healthcare system are “exceptionally significant interests of the common good in their own right”. (2) It emphasized that the state must show a sufficient evidentiary basis for its measures, but that “[w]here scientific knowledge is tentative and the legislator’s possibilities to draw sufficiently reliable conclusions are therefore limited, it is enough for the legislator to proceed on the basis of a context-appropriate and tenable assessment of the available information and evidence.” It thereby handed back to politics responsibility for addressing the Covid-19 pandemic to politics, requiring them to take into account the continuing increase in scientific knowledge for its assessment of the proportionality of measures encroaching on human rights.

Another negative human rights impact of the repeated insufficient and late response to the pandemic and the exponential growth of the virus is that the longer a state waits to take measures, the more restrictive they will need to be to adequately address the pandemic and prevent the worst. Thus, in Germany, the lack of preventive measures during the summer has resulted in a fourth wave in the fall of 2021, which will continue well into 2022 causing unnecessary deaths and a rising number of people suffering chronic illness. This fourth wave as well as the uncertainties around the new escape variant Omicron make further restrictions necessary. Thus, lack of early and consistent, but time-limited measures to address the pandemic has each time reliably led to the need to impose very tough measures and for a much longer period than if the same or similar measures had been taken early on.

References

- <https://www.dw.com/en/covid-german-constitutional-court-rules-emergency-brake-measures-were-legal/a-59975212>
- https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/_bvg21-101.html

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

The lack of a coherent and honest response to the pandemic has fuelled the radicalisation of protests against the pandemic measures – positions which are now being supported by, and merging with, right-wing extremism. This has led to further polarisation making a growing number of people not only unreceptive to public health messaging and vaccination campaigns, but also disenchanted from the basic values of democracy, rule of law and human rights in general. The increasing number of open death threats against

politicians (1), (2), (3) as well as attacks and threats against vaccination centres and doctors shows how far this radicalisation has got to (4), (5).

References

- (1) <https://www.dw.com/en/german-police-investigating-anti-vax-assassination-plot-against-saxony-leader-michael-kretschmer/a-60058223>
- (2) <https://www.dw.com/en/germany-torchlit-rally-against-covid-measures-in-saxony-prompts-outcry/a-60020777>
- (3) <https://www.zeit.de/politik/deutschland/2021-12/corona-protest-karl-lauterbach-impfgegner-koeln>
- (4) <https://www.tagesschau.de/inland/angriffe-impfzentren-101.html>
- (5) <https://www.tagesschau.de/inland/gesellschaft/drohungen-impfung-aerzte-101.html>

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

As reported last year, 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. Due to falling case numbers and relaxation of Covid-19 restrictions during the early summer 2021 more and more in person meetings became possible. However, with rising case numbers during the fall and uncertain perspectives regarding the escape variant Omicron, it is unclear when the Institute will be able to resume in person activities as before the pandemic.