

**IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ON
GERMAN ADMINISTRATIVE LAW**

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INDEX

1. GERMANY AND INTERNATIONAL LAW

1.1 Germany as a party to human rights treaties

1.2 Impact of human rights law on the German legal order

**2. IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS**

2.1 Prohibition of torture

2.2 Length of proceedings

3. IMPACT OF SELECTED UNITED NATIONS HUMAN RIGHTS CONVENTIONS

*3.1 Convention against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment (CAT)*

3.2 Convention on the Rights of Persons with Disabilities (CRPD)

4. WEB SITES

1. GERMANY AND INTERNATIONAL LAW

In the German constitution, the Basic Law (BL) from 1949, Germany made a fundamental decision to become a member of the international community and opened up its national legal order for cooperation and integration. This is clearly laid down in the preamble, in Artt. 24, 25 and 59 BL; Art. 23 BL deals with the European integration process in particular.

1.1 Germany as a party to human rights treaties

Germany has signed and ratified most of the major human rights treaties both on the international and the European level. Shortcomings are with regard to the amendments to the European Social Charter and to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The government withdrew most of the reservations to human rights treaties; in 2011 the declaration that the Convention on Children's Rights is not directly applicable was withdrawn.

1.2 Impact of human rights law on the German legal order

Art. 59 (2) BL requires the formal consent of the Federal Parliament (Bundestag) for all treaties which affect matters of legislation or concern the political relations of the Federal Republic. This formal consent is given by a specific statute which gives a treaty the status of federal law, ranking below the constitution.

International human rights treaties are, once they are transformed, federal law and, therefore, can be altered by a *lex posterior*. As the German legal order respects the obligations resulting from international law, the *lex posterior* will be interpreted in the light of the treaty.

It depends on the content of the treaty whether it and the incorporating statute are directly applicable. This question is generally answered positively for self-executing treaties. Human rights guarantees fall under this category and thus can be invoked before

national courts and authorities. Being part of the federal law, international human rights law is binding for the executive and the judiciary (Art. 20 (3) BL).

International law requires States to bring their domestic statutes into conformity with their international obligations. Failure to do so will result in an international delinquency but will not have an automatic effect on the national legal system.

2. IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The Convention (ECHR) has been, as an international treaty, transformed into the German legal order via Art. 59 (2) BL. The rights and freedoms enshrined therein are directly applicable and can be invoked in German courts and national authorities. As they (only) have the rank of federal (not: constitutional) law an individual constitutional complaint (Verfassungsbeschwerde) cannot be brought before the Federal Constitutional Court claiming that the ECHR had been violated. The Federal Constitutional Court makes only reference to the ECHR when interpreting the Basic Rights.

Art. 34 ECHR empowers every individual to complaint to the European Court of Human Rights which is compulsory for the contracting parties since 1998. The Court's judgments are binding for the state concerned pursuant to Art. 46 ECHR (inter partes). They are understood as an autonomous interpretation of the convention.

On a very prominent occasion,¹ the Federal Constitutional Court has ruled that "[t]he binding effect of a decision of the ECtHR extends to all state bodies and in principle

¹ FEDERAL CONSTITUTIONAL COURT, JUDGMENT 14 OCTOBER 2004 – 2 BvR 1481/04, BVERfGE 111, 307 - GÖRGÜLÜ.

imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20 (3) of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention.”

“The nature of the binding effect depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law.”

The Federal Constitutional Court added that “[a] complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law”, thus granting constitutional redress in these cases. The Federal Constitutional Court with this order underlined the importance of the European Court’s judgments and of the ECHR as a legally binding instrument for the protection of human rights. Germany, in 2006, introduced a new possibility to re-open civil procedures after the Court has found Germany violating the Convention (§ 580 No. 8 ZPO); a similar provision for criminal procedures already existed.

By the end of 2011, a new complaint procedure for delayed procedures was enacted (§ 198f GVG, §§ 97a-e BVerfGG). It shall encourage courts to speed up and provides, in case they fail to do so, compensation. This amendment became necessary after the European Court’s judgment in the case *Rumpf vs. Germany* (2.9.2010) - cf. *infra* 2.2.

The following section will briefly outline the impact of several ECHR provisions as interpreted by the Court on German administrative law.

2.1 Prohibition of torture

Art. 3 ECHR reads: “No one shall be subjected to torture or inhuman or degrading treatment or punishment.”

Many cases result from police action: personal search, arrest, pre-trial detention, the treatment of asylum-seekers at the border, and interrogation methods may be some of the most critical points. These methods were also at stake in the case *Gaefgen v. German* (no. 22978/05, GC judgment 1. July 2010). The applicant had kidnapped and murdered a child. He was arrested and interrogated by the police because he was suspected of having kidnapped the boy. The Deputy Chief of the Frankfurt police ordered a police officer to threaten the applicant with considerable physical pain, and, if necessary, to subject him to such pain in order to make him reveal the boy's whereabouts. The police officer threatened the applicant who, for fear of being exposed to the measures he was threatened with, disclosed the whereabouts of the boy's body some ten minutes thereafter.

The Court held: "Having regard to the relevant factors for characterising the treatment to which the applicant was subjected, the Court is satisfied that the real and immediate threats against the applicant for the purpose of extracting information from him attained the minimum level of severity to bring the impugned conduct within the scope of Article 3."

But: "Contrasting the applicant's case to those in which torture has been found to be established in its case-law, the Court considers that the method of interrogation to which he was subjected in the circumstances of this case was sufficiently serious to amount to inhuman treatment prohibited by Article 3, but that it did not reach the level of cruelty required to attain the threshold of torture." The Court dismissed unanimously the applicant's claim for just satisfaction.

Meanwhile, the officer who made the threat of violence against Gaefgen was convicted by national courts of inducing abuse of authority in 2004 and was sentenced to a year's probation.

Another case decided recently by the Court² dealt with the seven-day placement of a prisoner in a security cell in order to prevent him from attacking prison staff. The cell had a surface of approximately 8.46 square meters and was equipped with a mattress and a squat toilet and was, therefore, not suited for long-term accommodation. But the prison authorities did not consider the applicant's placement in this cell as a long-term measure. From the circumstances of the case and the general practice, the Court concluded that there are sufficiently strong, clear and concordant indications that the applicant had been naked during the entire period of his stay in the security cell. The domestic authorities had knowledge of these indications.

The Court considered that "to deprive an inmate of clothing is capable of arousing feelings of fear, anguish and inferiority capable of humiliating and debasing him." While, as a rule, inmates were placed without clothes in the security cell in order to prevent them from inflicting harm on themselves, a German court examining the facts of the case at an earlier stage by hearing witnesses could not establish for certain whether there was a serious danger of self-injury or suicide during the time of the applicant's placement in the cell. Furthermore, there was no indication that the prison authorities had considered the use of less intrusive means, such as providing the applicant with tear-proof clothing, as recommended by the European Committee for the Prevention of Torture.

Thus, the Court held that, as the government failed to submit sufficient reasons which could justify such harsh treatment as to deprive the applicant of his clothes during his entire stay, the applicant has been subjected to inhuman and degrading treatment contrary to Article 3.

2.2 Length of proceedings

² ECtHR, JUDGMENT FROM 7 JULY 2011 (NO. 20999/05), HELBIG V. GERMANY

For several occasions, Germany had been held to violate Art. 6 because of the excessive length of proceedings before the domestic courts, a problem underlying the most frequent violations of the Convention found in respect of Germany. In the first pilot judgment against Germany³, the Court held that Germany had to introduce within one year an effective domestic remedy against excessively long court proceedings.

Complying with this judgment, Germany enacted a new law providing for a remedy against excessive length of proceedings (§ 198f GVG, §§ 97a-e BVerfGG) which entered into force on 3 December 2011.

The new procedure offers a twofold approach. The first step requires those affected to file a complaint about the delay to the court that in their view is working too slowly. This helps to avoid proceedings of excessive length from the outset. By way of the delay objection, judges receive the opportunity to remedy the situation. If the proceedings continue their delay despite the complaint, in the second step a claim for compensation may be filed. In this compensation proceeding, the affected citizens receive, as a general rule, €1,200 per year for so-called non-pecuniary disadvantage - for example, for psychological and physical burdens caused by the long proceeding - to the extent that reparations of another type are not sufficient. In addition to compensation for non-pecuniary disadvantage, there is additionally appropriate compensation for pecuniary disadvantage, for example if the unreasonably long proceedings lead to a company's insolvency.

It has to be added that this new claim to compensation is not dependent upon fault. In addition to the new compensation rules, claims for official liability may also be lodged if the delay is based upon culpable violation of official duties. In such cases, comprehensive compensation for damage may be claimed, for example compensation for lost profits.

³ **ECTHR**, JUDGMENT FROM 2 SEPTEMBER 2010 (NO. 46344/06), RUMPF V. GERMANY.

3. IMPACT OF SELECTED UNITED NATIONS HUMAN RIGHTS CONVENTIONS

The treaties to which Germany is a party are transformed into the German legal order via Art. 59 (2) BL as well. The rights and freedoms enshrined therein are directly applicable and can be invoked in German courts and national authorities. On the international level, though, no court of human rights does exist. Here, expert bodies monitor the implementation of the human rights treaties by the States Parties. Monitoring takes place with regard to all treaties in form of the state reporting procedure periodically reviewing progress and problems in compliance. In the course of time, most of the human rights treaties have been amended by an optional protocol offering an individual complaint procedure. Some of the treaty bodies have been given the right to undertake country visits. All decisions and recommendations of the treaty bodies resulting from the various procedures are not legally binding to States Parties. Nevertheless, there is a strong expectation that States Parties comply to them as they accepted the monitoring system when they ratified the treaties. It can be said a state will comply with international human rights norms when its international reputation is at stake.

3.1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Under this treaty to which it is a party, Germany is obliged to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” (Art. 2 (1) CAT). The Committee Against Torture reviews state reports every four years (Art. 19 CAT) and can, after a state recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention (Art. 22 CAT), deal with individual communications.

In its views on the first individual application against Germany,⁴ the issue at stake was whether the forced return of the author to Turkey would violate the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. Referring to its well-established practice, the Committee held that the complainant has failed - as it was necessary - to establish a foreseeable, real and personal risk of being tortured if he were to be returned to Turkey. Therefore, Germany's decision to return the complainant to Turkey did not constitute a breach of Art. 3 CAT. A second case is still pending.

Greater impact results from the state reporting procedure. In its concluding observations to the fifth periodic report of Germany,⁵ the Committee urged Germany to give strong and comprehensive support to the victims of human trafficking. Furthermore, it urged Germany to strictly regulate the use of physical restraints in prisons, psychiatric hospitals, juvenile prisons and detention centers for foreigners with a view to further minimizing its use in all establishments and ultimately abandoning its use in all non-medical settings.

The Committee was concerned at information that alleged victims of ill-treatment by the police are not aware of complaint procedures beyond reporting their complaints to the police, who in some cases refused to accept allegations of misconduct by the police. Additionally, there were reported cases of ill-treatment of persons in a vulnerable situation who have declined to file a complaint against the police out of fear of counter-complaints by the police or other forms of reprisals. With regard to this, the Committee recommended

⁴ COMMITTEE AGAINST TORTURE, COMMUNICATION NO. 214/2002, DECISION OF 12 MAY 2004, UN DOC. CAT/C/32/D/214/2002.

⁵ COMMITTEE AGAINST TORTURE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION, CONCLUDING OBSERVATIONS OF THE COMMITTEE AGAINST TORTURE, GERMANY, 12 DECEMBER 2011, UN DOC. CAT/C/DEU/CO/5.

that the State party take appropriate measures to ensure that information about the possibility and procedure for filing a complaint against the police is made available and widely publicized, including by being prominently displayed in all police stations of the Federal and Länder Police. Furthermore, all allegations of misconduct by the police should be duly assessed and investigated, including cases of intimidation or reprisals in particular against persons in vulnerable situation as a consequence of the complaints of ill-treatment by the police.

With regard to reported practices of routine surgical alterations in children born with sexual organs that are not readily categorized as male or female, also called intersex persons, the Committee recommended the effective application of legal and medical standards following the best practices of granting informed consent to medical and surgical treatment of intersex people, including full information, orally and in writing, on the suggested treatment, its justification and alternatives. Germany should undertake investigation of incidents of surgical and other medical treatment of intersex people without effective consent and adopt legal provisions in order to provide redress to the victims of such treatment, including adequate compensation. The Committee stressed the necessity of education and training of medical and psychological professionals on the range of sexual, and related biological and physical, diversity and the proper information of patients and their parents of the consequences of unnecessary surgical and other medical interventions for intersex people.

With regard to refugees and international protection and the transfers of persons under the Dublin II Regulation to Greece, the Committee encouraged Germany to prolong the suspension of forced transfers of asylum-seekers to Greece, unless the situation in the country of return significantly improves. The Committee is concerned that under article 34a, paragraph 2, of the German Law on Asylum Procedure, lodging of an appeal does not have suspension effect on the impugned decisions. It therefore recommended that the State party abolish the legal provisions of the Asylum Procedures Act excluding suspensive effects of the appeals against decision to transfer an asylum-seeker to another State participating in the Dublin system.

Additionally, the Committee called on the State party to guarantee access to independent, qualified and free-of-charge procedural counselling for asylum-seekers before a hearing is carried out by asylum authorities, guarantee access to legal aid for needy asylum-seekers after a negative decision, as long as the remedy is not obviously without a prospect for success.

3.2 Convention on the Rights of Persons with Disabilities (CRPD)

Following the entry into force of this instrument in March 2009, Germany has to comply with its provisions and implement them. The aim is to fully realize human rights of persons with disabilities in Germany. In order to better fulfill these obligations, a CRPD National Monitoring Body had to be established. Its task is to monitor the implementation of the treaty norms in Germany and to promote and protect the rights enshrined in the Convention. It is not mandated to handle complaints or provide legal advice. Requests on individual cases cannot be dealt with. The CRPD National Monitoring Body shall give policy advice, conduct practice-oriented research, organize events, provide information and interact with civil society.

The CRPD National Monitoring Body is located with the German Institute for Human Rights in Berlin that has been mandated to assume the function of an independent national body.

4. WEB SITES

http://curia.europa.eu/jcms/jcms/j_6/ - European Court of Human Rights

www.ohchr.org - Office of the UN High Commissioner for Human Rights

<http://www.institut-fuer-menschenrechte.de/> - Deutsches Institut für Menschenrechte / German National Human Rights Institution