



Panel: Law in the Domestic Courts of Other Nations

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Summary

Domestic Effect of International Law:

The Case of Germany and Austria in the Field of Human Rights

Even more than 50 years after the ratification of the European Convention on Human Rights by the Federal Republic of Germany, the question about the effects of the Convention and the judgments of the European Court of Human Rights (ECHR) upon the German legal system cannot be answered easily.

The starting point is that the Convention itself, as an agreement under international law, does not make provision for the details of its incorporation into domestic law. Germany has used this scope of action, by declaring the Convention applicable in the national legal area by means of a federal law expressing parliamentary approval of this international agreement. This gives the Convention the rank of a federal law within the domestic legal system. Thus, the Convention has a lower rank than the constitution, but it nevertheless has binding effect, as applicable statute law, on all executive and administrative bodies as well as on all German courts.

The Convention's rank as statute law is enhanced by the particular German notion of "openness towards international law"

(Völkerrechtsoffenheit and Völkerrechtsfreundlichkeit) of the national legal system.

Article 24 of the German constitution explicitly encourages public authorities to take international law into account and it takes for granted that international commitments are complied with and implemented faithfully. The Convention attains therefore a special significance, which in fact goes beyond the rank of a simple federal law.

The Convention has been interpreted in the case law of the ECHR. It is true that ECHR judgments merely take effect *inter partes*. The ECHR's landmark judgments, however, have an effect that goes far beyond the individual case because it is for the ECHR to interpret and to further develop the Convention.

The Federal Constitutional Court, in its *Görgülü* decision of 14 October 2004 (BVerfGE 111, 307, 319), explicitly emphasised the "particular importance of the decisions of the ECHR [...] because they reflect the current state of development of the Convention and its protocols." This expressly acknowledges the effect of the ECHR judgments as precedents.

Three general effects *erga omnes* that are detached from an individual case can be derived from this jurisprudence: First, all bodies of the executive power and all domestic courts must observe the Convention. Second, as applicable statute law, the Convention has a direct effect and every German judge and administrative official is bound by it. Third, in the event that national provisions are contrary to it, they must be interpreted, in

accordance with the notion of the German legal system's "openness" towards international law, in a manner that is compatible with the Convention.

To the extent that in particular cases national provisions exist which are contrary to the Convention and which are not amenable to interpretation in conformity with the Convention, the German legislature is called upon to take corrective action.

For example, as a reaction to corresponding judgments passed by the ECHR, domestic provisions in the field of criminal procedure regarding the passing on of interpreters' fees to foreign language offenders have been revised and amended in accordance with a ruling of the ECHR (Judgment of 23 October 1978 – EuGRZ 1979 – Luedicke, Belkacem und Koç).

Finally, the Convention and the ECHR's judgments also have a constitutional law dimension. Although they rank below constitutional law, they have an influence on the understanding of the constitution. At an early point in time, the Federal Constitutional Court established that the Convention must be consulted in order to determine the meaning and the scope of human rights provisions in the national constitution (BVerfGE 74, 358, 370, with reference to BVerfGE 35, 311, 320). The Federal Constitutional Court has thus made the Convention a key standard of judicial review.

The Görgülü case has also raised a less fundamental but more important "practical" question, i.e. the execution of judgments passed by the ECHR

in the context of cases where a balance must be found between various interests of the parties concerned, and which are characterised by multipole legal relations in connection with fundamental rights, as it is often the case in family law. Here, the Federal Constitutional Court has rejected the idea of schematic execution of the ECHR's judgments. In the Görgülü case, for instance, apart from the complainant's legal position, the rights of the foster parents and the child itself had to be taken into account as well. Where such multipole legal relations in connection with fundamental rights are present, it is the task of the domestic courts to fit a judgment that has been passed by the ECHR into the differentiated and graduated system of national law. The Federal Constitutional Court has underlined that in such cases a schematic enforcement of a judgment of the ECHR could result in a violation of the constitution.

The evaluations made in judgments of the ECHR must be therefore complemented by the rights of the parties who have not been involved in the international proceedings.

The Federal Constitutional Court has also emphasized that its scope of judicial review of judgments of ordinary courts, especially in the field of multipole legal relations in private law, is to be exercised in a cautious manner. According to this "self-restraint" the Federal Constitutional Court would only intervene in situations where, in the interpretation and application of domestic law and the Convention by ordinary courts, errors become apparent which result from a fundamentally erroneous view of the significance of fundamental or human rights.

In Austria the Convention and its subsequent Protocols enjoy the rank of constitutional law. Every individual can therefore bring a complaint before the Constitutional Court alleging the violation of rights guaranteed by the Convention. This instrument is all the more significant for Austrian constitutional law because to a certain extent it represents a surrogate for a still not yet existing modern catalogue of fundamental rights. The Austrian legislature has repeatedly been forced to amend domestic law – especially in the field of criminal law in order to achieve conformity of domestic law with the Convention. The jurisprudence of the ECHR has therefore deployed considerable influence upon the case law of the Austrian Constitutional Court.