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A Judgement Is Important – Enforcement Even More So!

A Comparison of Regional Human Rights Courts

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International human rights protection has gained in importance over the last sixty years. The primary indicator of this development is the submission of states to the judgements of international human rights courts. However, the mere existence of these courts does not guarantee success. People can assert their rights only when judgements are properly and completely carried out. The following article illuminates the various mechanisms for implementing and enforcing judgements of the three existing international human rights courts.

A consideration of developments over the last hundred years alone shows that a great deal has been accomplished in the area of human rights. With the horrors at the atrocities of two world wars in mind, human rights have gained international significance. The European Court of Human Rights (ECtHR), the first regional court of its kind, was founded in 1959, to defend and enforce the European Convention on Human Rights (ECHR), which was created by the Council of Europe (CoE), in 1950. It was only twenty years later, in 1979, that the Inter-American Court of Human Rights (IACHR) was founded, with the goal of supporting the American Convention on Human Rights (ACHR) of 1969. A further twenty-seven years passed before the African Court on Human and Peoples' Rights (AfCHPR) began its work, in 2006, to implement the African Charter on Human and Peoples' Rights, the so-called Banjul Charter of 1981. Initiatives to implement an Asian equivalent have so far failed. All these regional courts pursue the goal of the cross-border establishment of fundamental human rights by concentrating competences and standardising principles and norms. If human rights are not sufficiently protected in their own country, people from Europe, Latin America, and Africa can, as a last resort, appeal to the human rights court in their region.

A glance at the history of these courts' origins reveal their very different levels of development. A comparison of pending cases and judgements also highlights these differences. The ECtHR has by far the greatest workload. Each year, 17,000 cases reach the court.

For human rights court judgements, as for national judgements, peace under the law can be achieved only if judgement enforcement is monitored and ensured. To this end, the courts have developed very different mechanisms. An investigation of how the courts navigate this complex field is informative.

European Court of Human Rights

The ECtHR, headquartered in Strasbourg, issued its first verdict in 1961. The forty-seven member states have agreed to comply with final ECtHR judgements in which they are involved. If the ECtHR establishes that the ECHR has been violated, it can determine specific compensation. The member state in question is then required to remedy the consequences and make reparation. The state must also ensure that comparable violations of the Convention are not repeated in future. The specific manner in which this is done, however, is within the purview of the state in question. The state thus has a degree of choice with regard to the manner in which the judgement is carried out. The Committee of Ministers is responsible for monitoring. The Committee is made up of one representative of each member state of the CoE. The monitoring of the implementation of ECtHR judgements is on the agenda of the Committee of Ministers four times a year. Effectiveness and political pressure can be increased primarily when the judgements recur on the agenda and are discussed.[1] The overriding principle of the monitoring procedure is constant dialogue and exchange of information, which also follows from the nature of the

Table 1: Number of Cases and Judgements on Human Right Courts 2018

	ECtHR	IACHR	AfCHPR
Pending cases	27,000	32	~140
Judgements	2,738	28	18
Enforcement proceedings	6,151	208	19
Proceeding enforcements completed	2,705*	2	1

* This includes cases that were submitted directly to the Council of Europe's Committee of Ministers. The number of expanded enforcement proceedings is slightly higher than that of standardised enforcement proceedings (1,464 to 1,241).

Sources: Committee of Ministers 2018: Annual Report 2018, pp. 52, 167; ECHR 2018: Annual Report 2018, p. 63; IACHR 2018: Annual Report 2018, pp. 46, 62, 63, 65, 66, 90 – 92; AfCHPR 2018: Annual Report 2018, pp. 5 – 55.

judgements. The primary task of the enforcement procedure is to support the member state in question in identifying both, the causes of the violations and possible measures for correcting them. Coercion in the sense of true enforcement cannot be exercised. Member states are called upon to submit an action plan within six months of the judgement and, once the plan has been fully implemented, to submit an action report. After the six-month deadline has expired, reminders are generally sent to the responsible parties. If there is no reaction to these reminders, the Committee of Ministers can consider referring the matter back to the ECtHR once again with the question of whether the parties have fulfilled their obligations in carrying out the judgement. After such a hearing, the court can interpret its judgement anew, and require additional measures. Only when the Committee of Ministers is convinced that the judgement has been fully implemented will the monitoring procedure be concluded with a final resolution, which requires a two-thirds majority.

Despite the large number of concluded cases, various problems impede the enforcement of ECtHR judgements. Various interests among the delegates to the Committee of Ministers create practical difficulties within the working groups in specifying suitable measures. High delegate turnover makes the bases of discussion uneven, and the results are often unpredictable. Moreover, the European legal system, with its abstract approach, is open to interpretation, which often leaves the actual meaning of the judgements unclear. For this reason, the 14th Additional Protocol to the ECHR, which took effect in 2010, introduced a new competence to the court. At the request of the Committee of Ministers, the court is now authorised to interpret its own judgements. This is extremely unusual in the context of national procedural rules, since a court can generally not reconsider a case after its judgement has become final. Further fundamental difficulties arise from openly formulated standards, ongoing guideline revisions, practical application, and the complexity of the prevailing situation. Its large workload prompted the ECtHR, in 2004, to formulate its conclusions in much more precise terms, so-called pilot judgements, thereby greatly reducing the states' discretion in carrying out the judgements.[2] Here, the court identifies a large number of structurally similar cases dealing with analogous problems, and selects one or more pilot cases, which are then dealt with on behalf of them all. The solutions thus prepared serve as orientation for situations presenting similar circumstances, thereby also functioning as a preventive measure. The affected states are expected to orient their future behaviour accordingly. This reduces the court's workload by dealing with potential cases ahead of time and ensuring that they need not reach the court; it also allows the court to focus on other pilot cases, accelerating proceedings and achieving peace under the law more quickly.

Inter-American Court of Human Rights

Currently, 20 states have submitted to decisions by the IACHR, located in San Jose, Costa Rica. Unlike the ECtHR, the elected judges work part-time, receiving compensation for their expenses. The courts reviews violations of the ACHR and other human rights conventions insofar as they are compatible with the inter-American legal system. Unlike the European system, the IACHR does not allow individuals to contact it directly. Individual petitions can only be submitted to the Organisation of American States[3] commission, which can then refer them to the IACHR or handle the case itself. Only the commission and the member states are authorised to contact the IACHR directly.

In contrast to the European system, there is no independent monitoring organ; the IACHR monitors the implementation of its judgements itself. It has been dogged by repeated complaints of insufficient implementation. However, given the vast range of items it can mandate in its judgements, the figures for concluded cases by themselves say little about implementation. An IACHR judgement that is sixty per cent implemented can be much more far-reaching than a fully implemented proceeding in the European system. It makes more sense to measure non-implementation on quality rather than quantity.

Unlike the ECtHR, the IACHR is authorised to order a wide range of reparation measures itself, including material and non-material compensation and rehabilitation. It is common for a judgement to encompass several orders. This necessarily affects judgement implementation negatively because a single judgement can set the entire state apparatus in motion. Responsibility for the implementation of judgements lies first and foremost with the sentenced state itself. Within a certain period of time, the sentenced state will submit a report to the court about its case-related activities aimed at implementing the judgement. If the report indicates implementation deficits, the court may issue further requirements for the state and organise hearings at its seat or in the state concerned. Since the instrument for hearing states within their territorial borders was put in place in 2009, its use has increased. In 2018, the court conducted six such external personal hearings. At these personal, non-public sessions, the delegates of the state in question discuss progress in implementation efforts with the judges, who in turn explain their decisions and provide assistance on how the state can implement the orders issued. A division of the court, created in 2015 for monitoring judgement implementation, accompanies each case individually until it has been fully implemented; it also assists in procedures involving other comparable cases affecting the same state. The division ultimately decides when a judgement has been completely implemented. The public is regularly informed of events. Monitoring is based on detailed check-ups through ongoing dialogue. From the court's standpoint, this increases control over the process, enabling it to react more quickly and effectively to difficulties, and to advance proceedings.

African Court on Human and Peoples' Rights

The most recently founded regional human rights court is based in Arusha, Tanzania. Compared to the other human rights courts, it is still at the beginning of its development, even after thirteen years. Of the fifty-five states in the African Union, thirty have signed the binding founding protocol. Only eight states have ratified the supplementary declaration concerning access by individuals and NGOs, which is important in the interest of rule of law. The court's lack of acceptance is also reflected in the implementation of the judgements it has thus far issued. Of the twenty-eight total judgements it issued by the end of 2018, only a single country, Burkina Faso, has so far fully implemented the court's orders. Seven states have partially completed judgement implementation.

One reason for this deficit is the fact that the role of "enforcer" is not clearly defined. Article 29 Para. 2 of the court's founding protocol charges the African Union Commission with the monitoring of judgement implementation, noting it should request assistance from the court if

necessary. Structurally, this is intended to be similar to the European system. However, no rules have yet been fixed in law as to what means the Commission may use to monitor the procedure. The Commission has so far done little. The court, on the other hand, has realised that it is in a much better position than the Commission, due to its natural information advantage. It has, therefore, increasingly taken the initiative.[4] Like the IACHR, the AfCHPR starts by requiring reports about the status of implementation in affected states. It can also request neutral assessments from non-state institutions. If they reveal problems with implementation, hearings can be held in which the affected states participate, following the IACHR model. In the interest of enhancing understanding, the court continuously comments on and interprets its decisions. Given that the court's decision-making practice is still in its early stages, these measures are of particular importance; the ECtHR and the IACHR can draw on decades of case law. Until the judgements have been fully implemented, states are required to submit status reports at regular intervals; such reports are, however, rarely received on time. Progress is recorded in publicly accessible activity reports, which are intended generate public pressure. In practice, the AfCHPR is oriented on the inter-American system, although the existing legal framework does not in fact provide for such an orientation.

Given the increasing number of cases, the court proposed in its last activity report that an independent monitoring division be created within the African Union, along the lines of the European system. The Commission has yet to respond to this proposal. However, the AfCHPR cannot solely rely on new political and legislative ideas. It must – as indeed it is already doing within the scope of its current capabilities – establish a dialogue with the states and promote acceptance and implementation of it judgements.

Outlook

Since the Second World War, formulation of human and fundamental rights has spread around the world like wildfire. Legal practitioners, politicians, and members of civil society all agreed that this was a necessary step to protect against inhuman practices. After this phase of increased importance of human rights protection, the political climate changed, however. Human rights protection is seen in many states around the world as an impediment to political and economic interests. Even states that have previously supported international human rights protection are beginning to withdraw that support. Some states have begun styling themselves "defenders of human rights" to the outside world and recognising court judgements on paper. The far less publicly visible implementation of those judgements, on the other hand, is pursued in a half-hearted manner or ignored completely. These states thus torpedo the functionality of regional human rights systems as a whole. Unfortunately, this development follows a trend that can be observed in all multinational organisations.

The regional human rights courts have challenged the deficiency in implementing their judgements. In addition to establishing written rules and implementing them, political will in the affected states is critical to the courts' success. Since political will cannot be coerced, the courts must ensure that they select the right measures and instruments. The legal systems are pursuing various approaches. These differences can be explained both historically and on the basis of the varying levels of acceptance. It will be virtually impossible to ascertain which approach is the most effective. The figures confirm the effectiveness of various methods. Above all other considerations looms the problem of fostering trust in a system of human rights. Without sufficient acceptance of the human rights courts' decisions, even the most effective approaches to managing judgement implementation will be toothless tigers.

A comparison of regional human rights court judgement implementation work shows several parallels. The individual consideration of a case is fundamental, as is the regular evaluation of progress achieved. In this manner, the courts force personal exchanges with the sentenced states. This results in many points of contact that

facilitate the development of trust and acceptance. The work is impeded by great time pressures and the reduction of financial resources. As a result, the courts often fail to meet their own demands, which not only impedes development of acceptance, but will even be counterproductive in the long run.

In addition to dialogue with member states, intensified exchanges among the regional human rights courts is extremely important. The effectiveness of procedures in a regional context must be considered, but there is no need to keep on reinventing the wheel. Sharing best practices and experience with new tools – be it Latin America's in-country hearings or Europe's pilot judgments – can accelerate refinement of the human rights protection systems. Declarations of intent to increase collaboration, such as the Kampala Declaration, signed by the three regional human rights courts in October 2019, are therefore welcome and represent a first step in the right direction.[5] Only through "multi-level protection" for basic and human rights, agreed between the international courts, will the growing challenges for the protection of human rights worldwide be successfully met.

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1 Grabenwarter, Christoph / Pabel, Katharina 2016: European Convention on Human Rights, 6th edition, § 16, marginal note 18.
2 Ibid., marginal note 7.
3 An organisation of 35 independent North and South American states, headquartered in Washington D.C.
4 Murray, Rachel 2019: Implementation of the Judgments of the African Court on Human and Peoples' Rights, The ACtHPR Monitor, 6 Aug 2019, in: https://bit.ly/2QZLwli [14 Nov 2019].
5 AGMR 2019: Kampala Declaration, 5 Nov 2019, https://bit.ly/30lCVwH [14 Jan 2020].