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Roundtable: Effective national co-ordination: a key factor in reinforcing the domestic capacity for rapid execution of judgments of the European Court of Human Rights

Length of judicial proceedings – a never-ending story with a happy ending

Dear colleagues, Ladies and Gentlemen,

Thank you very much for the invitation to this Roundtable. I am honoured and flattered that I have been invited, although I retired in 2020 and that I have been asked to share my experiences in implementing judgments from the European Court of Human Rights.

The Execution Department suggested that I report on the German cases concerning excessive length of court proceedings.

At the time we felt that this was a big problem. Today, of course, it is difficult to talk about these cases without thinking that they represent a very small problem compared with the dreadful situation we are seeing now in Ukraine, a member state of the Council of Europe. I hope that we can come back to the smaller issues with a better feeling in future.

And I will now try to answer the question which was put to me. The answer is about a story of political blockade, coupled with a legal policy debate that was unprepared for the case law of the Court.

A. Introduction of the remedy against court proceedings of excessive length

1. As you all know, the judgment in the case of Kudla versus Poland in October 2000 was the starting point. It stated for the first time that the European Convention on Human Rights obligated the

States Parties to make available a legal remedy against excessively long court proceedings. In Germany, this was accomplished in December 2011 – meaning that it took eleven years. It was truly a Never-Ending Story in those days. I can't even remember how often I met for lunch in Strasbourg with representatives of the Executive Department during those eleven years. Anyway, I would like to underline: Despite the issue it was certainly a pleasure to meet Mme. Mayer and her colleagues.

2. Of course, the German Agents informed the responsible office of the Ministry of Justice of the Kudla judgment, and the first draft of a new bill was ready in 2005.
3. In 2006, the Court issued its judgment in Sürmeli versus Germany, which now expressly obliged Germany to introduce a legal remedy against excessively long court proceedings. However, there was no sufficient response. This led to the pilot judgment of Rumpf versus Germany in 2010.
4. Why was the draft bill of 2005 never passed?
5. Legal policy topics are managed in parliament by the legal policy spokespersons of the governing parties. Both relevant spokespersons at the time had been judges before their election to parliament. Among the judiciary, however, many considered the case law of the Court on this issue to be discrediting and degrading. The feeling was: We work hard and we lead the cases with a strong sense of responsibility. Cases of excessive length are isolated cases. How can the Court in Strasbourg expect us to take up yet another legal remedy into our work programme for these isolated cases? And this was the attitude taken by the two relevant legal policy spokespersons as well.
6. One of the two described the draft bill publicly – in parliament - as, loosely translated, "a monstrosity of ministerial imagination." Not much worse than that can be said about a draft bill. They said that the European Court of Human Rights had completely misunderstood the situation in Germany anyway, and that the best

thing to do would be to do nothing at all. The draft bill was blocked politically before it even reached the parliament.

7. The government tried several times to break through this blockade. For example, a Symposium was organised in 2007, to which the government – together with the two spokespersons - invited numerous experts. These included Renate Jaeger, the German judge in Strasbourg at the time, and members of the judiciary and the bar. The positive aspect was that the attitude of the persons concerned in the judiciary had changed by that point – 7 years after Kudla, 5 years after the first draft bill was written, and 1 year after Sürmeli. The experts had now reached a general consensus that action must be taken, but they fought over what form the legal remedy should take. However, the legal policy spokespersons could not be convinced, so that the blockade was maintained. One of them even left the event that was actually supposed to convince him after a short time.
8. But: Subsequent to the Symposium, a new draft bill was submitted which addressed the expert debate and which contained a new model of a remedy.
9. However, the decisive step did not come until the next federal elections in September 2009. Neither of the two legal policy spokespersons were re-elected – but I am afraid that the reason was not the blockage of that draft bill.
10. But the Court apparently did not want to take any risks, and in November 2009 declared an already-pending proceeding to be a pilot proceeding against Germany – Rumpf versus Germany. In its judgment of September 2010, the Court used some strong language and issued Germany a deadline of one year once the judgment was final to adopt the necessary legal remedy.
11. This time Government and Parliament cooperated: The new law was promulgated exactly on the last day of the deadline, and the legal remedy against court proceedings of excessive length was introduced. A Happy Ending after eleven years.

B. Activity of Agents as coordinators

12. What role can agents play as coordinators in a process like that one? In my view, the role is important, but not spectacular, and it is not visible to the public. The Agents represent within the government the obligation from Article 46 of the Convention to implement the judgments of the Court.
13. In Germany, first of all, they forward a judgment to the office which must implement it.
14. They then function as contact persons and consultants for that office. In this case, we also supported the organisation of the Symposium.
15. The Agents take part in meetings etc. and take a position on proposals which serve to implement the judgment. They judge whether this would fulfil the conditions imposed by the judgment.
16. What was special in introducing a legal remedy for length of proceedings cases was that the judgments of Kudla and Sürmeli came up against an unprepared political and expert public. Before then, the problem of long court proceedings had been debated only in other contexts, but not with the goal of introducing a new legal remedy.
17. Therefore, the decisive factor was that the assessment of the project changed with time – from complete incomprehension and rejection to better consciousness of the problem and the insight that a solution needed to be found, also as far as a new remedy was concerned.
18. One thing that played a role is that at the beginning of the debate, we were in a phase in which many assumed that the Convention would be relevant for Germany only in a few isolated cases, because otherwise everything was well regulated by domestic German law. This idea - or dream - was not ended until 2004 with the judgment of Hannover versus Germany, when the Court for the first time declared that a senate judgment of the Federal

Constitutional Court violated the Convention. This initially caused somewhat of a shock.

19. The judgments of the European Court of Human Rights also shook up the judiciary with respect to excessively long court proceedings. During the discussion on the implementation of the Sürmeli judgment, the responsible section of the Court apparently decided that, in addition to the landmark judgments, it would serve on the German government as many length of proceedings cases as possible. Never before had we had such a large number of proceedings to deal with – the number of convictions, friendly settlements and unilateral declarations climbed to new highs. That was very tedious, but also very helpful because the problem could not be brushed aside.

20. At the time, I was quite often invited by the judiciary to give lectures – as the messenger of the enemy, so to speak. I still remember very well my first lecture to judges in Berlin: I stood at the podium in an imposing traditional courtroom, completely filled with stern-looking judges, who stayed silently seated at the end of my presentation and did not ask a single question. But eventually, the lectures became more pleasant and the judges were more talkative.

21. During that time, we also made other, more general efforts to familiarize the authorities, judges and lawyers with the European Court of Human Rights. For example, we held annual meetings with the 16 constituent states. I am very grateful to Judge Renate Jaeger, who was the German judge in Strasbourg at the time, for participating in these talks, and also to Judge Angelika Nussberger and Judge Anja Seibert-Fohr, who continued the tradition. With those events, we were able to support a climate of inclusion and understanding, which significantly facilitated our work.

22. We also introduced an advanced training event on the Court and to international human rights standards for the judiciary, which is repeated regularly. Also, at that time my predecessor, Jens Meyer-Ladewig, began to have important judgments from the ECHR

translated into German for law journals, and also the Justice Ministry provided financial support for another translation project.

23. Finally, since that time the Agents have published annual reports on the judgments of the Human Rights court in German.

24. All in all, the process to introduce a legal remedy for overlong proceedings confirmed an experience that we also observed in other cases of human rights criticism of Germany. If this criticism – whether by a Court judgment or a statement by another human rights mechanism – relates to a point which is already the subject of political debate within Germany, it will become part of that debate. The structures needed to discuss the issue and develop measures are already in place, and as a rule a solution can be found. However, this is much more difficult when the problem is not yet sufficiently identified in the relevant area and a political debate first needs to be started. In such a situation, criticism relating to human rights often results in initial resistance. That was the case here, and in my opinion, that is what led to the very protracted process.

My conclusion: Political support is indispensable.

But a coordinator is important. We need an office which takes up the implementation of judgments and activates, informs and supports all necessary offices. Also, the coordinator must judge whether the measures taken comply with the requirements of the Convention. Furthermore, independently of specific cases, it makes sense to contribute towards the dissemination of knowledge and understanding of the Convention and of the Court.

So, like the previous speakers, I can only encourage you to starting talking to everyone at the earliest date possible. And don't give up, even if it is the beginning of an excessively long proceeding!

Thank you very much.