FUNDAMENTAL RIGHTS SERIES

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN GERMANY IN 2003

January 2004

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[*] submitted to the Network by Dr Wolfgang Heyde.

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lituanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. Slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. Tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par Olivier De Schutter, assisté par Valérie Verbruggen.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice and Home Affairs), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), Rick Lawson (The Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Dean Spielmann (Luxembourg), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by Olivier De Schutter, with the assistance of Valérie Verbruggen.
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PRELIMINARY REMARKS

The report concerning the development of the fundamental rights in Germany covers evolutions in the period between 1 December 2002 and 1 December 2003. Therefore the issues reported normally have their ground in the period of scrutiny, e.g. new court decisions, new legislation etc. To hold the report legible priorities were set up in some fields. One might miss one or the other issue or development. He should be referred to the next report 2004.

Before going into detail I would like to point out some general aspects that are important for the assessment of the prohibition of fundamental rights in general:

1. The Federal Parliament [Bundestag] established a special Committee on Human Rights and Humanitarian Aid at the beginning of the 14th legislative term and again at the beginning of the 15th legislative term in the autumn of 2002. The Committee sees human rights policy as a cross-sectional task and is therefore involved in human rights aspects in a wide range of foreign policy, foreign economic policy as well as, which is important, development policy and domestic policy including issues of asylum and aliens law. It constantly receives information from the Federal Government on the human rights situation in different countries, on centres of crisis for humanitarian aid and on the Federal Government's policy in these fields. In a dialogue with the Federal Government, the Committee participates in the further development of national, European and international instruments for the protection of human rights and in the legal and political scrutiny of human rights infringements.

2. The independent German Institute for Human Rights (Deutsches Institut für Menschenrechte, Zimmerstraße 26/27, 10969 Berlin; www.institut-fuer-menschenrechte.de) which was founded in 2001 on recommendation of the Federal Parliament meanwhile has taken up its work. The Institute is an institution which receives basic financing from the state but determines its work projects independently of any state influence. On the basis of research the Institute is to work out practice-related contributions to the examination, assessment and resolution of concrete human rights problems and themes. This includes documentation, information, research and political guidance, human rights education in Germany, international co-operation and the promotion of dialogue and co-operation at home.

It has already published important documentations. Also it has been helpful in preparing this report.

3. A "Kernbericht Bundesrepublik Deutschland für die Staatenberichte zu den Menschenrechtsübereinkommen der Vereinten Nationen" [Core Document forming part of the reports of states parties – Germany] which was updated in 2002 contains compressed information about country and population, economy, political structure and a general statutory framework within which human rights are protected. It is published on the Internet (in German and English) at www.auswaertiges-amt.de and www.bmj.bund.de.

4. Three institutions are of great importance for the protection and realization of the fundamental rights.

a) By means of Article 45 b Basic Law, a special control body has been created for the federal armed forces: the Defence Commissioner of the Bundestag. He is appointed by the Bundestag to safeguard the fundamental rights of soldiers and to assist the Bundestag in exercising parliamentary control. The Act on the Defence Commissioner [*Gesetz über den Wehrbeauftragten*] contains more precise provisions on appointment, legal position and tasks. He acts on instruction of the Bundestag or the Defence Committee for the examination of certain events. Furthermore, he is obliged to act within his duty-bound discretion on becoming aware of circumstances pointing to a violation of the fundamental

rights of soldiers or of the principles of internal management. He must inform the Bundestag of his determinations by means of individual reports or in an annual report.

b) The task of the Federal Data Protection Commissioner is to monitor adherence by federal public agencies, by the Deutsche Telecom AG and the Deutsche Post AG to the provisions of the Federal Data Protection Act [*Bundesdatenschutzgesetz*] and other provisions concerning data protection. The Federal Data Protection Act is intended to protect the individual from detriment to rights of privacy caused by the use of personal data. The Data Protection Commissioner submits a report to the Bundestag every two years. The Commissioner is independent in the exercise of his office. Observance of data protection provisions by the authorities of the *Länder* is controlled by the *Länder* commissioners.
c) The Federal Government Commissioner for Immigration, Refugees and Integration supports the Federal Government in its efforts in respect of policy on foreigners and makes proposals for the further development of the policy of integration, including in the European framework. The commissioner is a contact for creating the conditions to enable Germans and foreigners to live together without tension. In particular, he should suggest and support initiatives for integration in the *Länder* and in local communities, as well as in groups within society, in order to further the mutual understanding of Germans and foreigners.

5. The Federal Republic of Germany is a federal state consisting of 16 *Länder* [States].
The emphasis in the field of legislative power lies within the Federation. Some of the subjects where legislation originates in the *Länder* are: culture (schools, wide sections of higher education, radio and television), communal self-administration and the police. Further and important: Regarding the implementation of statutes, in principle the emphasis is on the *Länder*.

A comprehensive consideration of the executive's practice within the 16 *Länder* would blast the scope of this report. Therefore it can only be presented in examples.

6. The Federal Government in July 2003 presented the 21st Report of the Government of the Federal Republic of Germany for the period of 1 Jan to 31 Dec 2002 according to the regulations of Article 21 of the European Social Charter regarding central points: right to work (Article 1), right to associate (Article 5), right to collectively negotiate (Article 6), right to social security (Article 12), right to care (Article 13), right of the family to social, legal and economic protection (Article 16).

7. Some Abbreviations

BGBl.	Bundesgesetzblatt – Federal Gazette
BVerfGE	Entscheidungen des Bundesverfassungsgerichts – decisions of the Federal Constitutional Court (volume, page)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts – decisions of the Federal Administrative Court (volume, Page)
JZ	Juristenzeitung
NJW	Neue Juristische Wochenschrift – New Juridicial Weekly
VGH	Verwaltungsgerichtshof – Higher Administrative Court

CHAPTER I : DIGNITY

Article 1. Human dignity

National legislation, regulation and case law

Article 1 Charter corresponds to Article 1 German Basic Law [*Grundgesetz (the Constitution)*]. It has a high importance as a fundamental legal value decision. As such it has an impact on the other rights contained in the charter. The dignity of the human person is part of the substance of the rights laid down in this Charter[1].

As a single right, as an independent test standard, it is only of small significance[2], for human dignity is concretely visible in many special rights of the charter. It is – with different intensity – essential to these rights and develops them. This regards, above all, to the further rights in the first chapter, for instance human life (Article 2), questions in regard to bio-medicine as an aspect of freedom from bodily harm (Article 3), ban on torture (Article 4). Issues that, by German Law, come under Article 1 Basic Law (at least as well) will not be treated with Article 1 Charter but will come e.g. under Article 3 (human dignity and bio-medicine) and Article 4 (threat of torture in the Daschner case).

Case Law:

(1) It can be reported about the Benetton-advertisement II-decision of the Federal Constitutional Court. The decision dealt with an advertisement of the Benetton Company.
This advert shows part of a human backside where the words „H.I.V. POSITIVE“ are stamped on. On the lower right side of the picture it says „UNITED COLOURS OF BENETTON“. The civil courts including the Federal Court of Justice [*Bundesgerichtshof*] prohibited this advert to be printed in a magazine. In December 2000 the Fed. Const. Ct.[3] declared the decision of the Federal Court of Justice as not compliant with constitutional law because of the infringement of the freedom of press. However the Fed. Ct. of Justice again confirmed its prohibition of printing the advert. The Fed. Const. Ct.[4] anew declared the Fed. Ct. of Justice decision as not compliant with constitutional law. Prohibiting the printing of the advert limited the magazine's freedom of press. This limitation was not constitutionally justified. The Court stressed that though the human dignity strictly limits the freedom of expression in the law on competition as well, this limit was not infringed by the advert. The Court expresses that the high importance of the human dignity demands this criteria to be dealt with sensitively. It is an absolute constitutional right and cannot be balanced with any other fundamental right. Furthermore the fundamental rights were altogether the principle of human dignity put in concrete terms. Therefore the reasons for the assumption that considering another constitutional right infringes the inviolable human dignity had to be given carefully. Attacks on human dignity could consist of humiliation, stigmatisation, persecution, outlawing and other patterns of behaviour. This could not be found in this case. The advert that takes suffering as its theme in a commercial context could be felt about as strange or thought of as improper. This would not justify the grave accusation of infringing the human dignity.

(2) The violation of the human dignity was denied in a completely different case as well. This case was the exhibition "*Körperwelten. Die Faszination des Echten*" in Munich that contained

[1] Updated Explanations relating to the text of the Charter of Fundamental Rights. Cover note from Praesidium of the Convention, CONV 828/03, p.4.
[2] See as well Borowsky, Article 1 n° 33, in: J Meyer (ed.), Kommentar zur Charta der Grundrechte der Europäischen Union, Baden-Baden, 2003.
[3] Judgment of 12 Dec 2000, BVerfGE 102, 347.
[4] BVerfG, decision 11 March 2003 – 1 BvR 426/02 –, NJW 2003, 1303.

more than 200 human displays (whole mummified bodies, individual organs and transparent slices of the human body). This exhibition had been on tour through several german towns, it had had huge numbers of visitors but as well it provoked many discussions about the moral-ethical justification of such an exhibition. The Higher Administrative Court [*Verwaltungs-gerichtshof*] Munich[5] had to examine among others if even just the presentation of the human displays in a thematic structure that is oriented towards the medical functions of the human body infringes areas of protection that come under the Bavarian FuneralAct[6] [*Bayerisches Bestattungsgesetz*]. The Court weighed the freedom of science (Article 5 § 2 Basic Law) against the human dignity (Article 1 § 1 Basic Law).

The invention, development and use of plastination as a method of anatomical preparation were research as a part of the freedom of science. The safeguarding of the human dignity could limit the freedom of science. Referring to decisions of the Fed. Const. Ct.[7] and literature, the Higher Administrative Ct. held: The human dignity had an effect after the death as well and it included the concrete corpse as the mortal remains of a dead person; it was not allowed to be treated as any matter. Every contact with a dead body had to be measured on the general entitlement to respect of the dead person which was his/her right via the human dignity and which was under protection after death as well. Disparaged and humiliating procedures were prohibited. The Court deals in detail with the individual exhibits and their claimed scientific purpose that is mainly confirmed. Some tastelessness and questionable patterns of the organizer's behaviour as well as that of individuals acting in the surroundings of the exhibition do not justify prohibiting the exhibition as such.

Article 2. Right to life

National legislation, regulation and case law

Air Safety:

The Federal Government has forwarded a bill on an Air Safety Act [*Luftsicherheitsgesetz*] to the Federal Council at the beginning of November 2003.[8] This was caused by the terrorist attacks in the USA on 11 Sept 2001 but as well by the hijacking of a motor glider on 5 Jan 2003 in Frankfurt/Main. At the same time, the European Air Safety Regulation is taken into account. [9] Article 13 of the coming Act on Air Safety intends that under certain strict preconditions the armed forces may be called in to support the state police in the airspace in order to prevent a particular severe accident. Article 14 § 3 contents a last resort clause (ultima-ratio-clause): The direct effect by force of arms <i.e. shooting down a plane and therefore killing the passengers> will only be permitted if one can assume according to the circumstances that an airplane is to be put into action against human life and if shooting down the plane is the only means to avert a present danger.

Euthanasia:

The issue of euthanasia – more particularly voluntary active euthanasia, or the possibility of voluntarily inflicting death on a person who, under certain circumstances, has manifested such

[5] VGH München, Decision 21 Febr 2003 – 4 CS03.462 – , NJW 2003, 1618.
[6] According to Article 5 sentence 1 Bavarian Fun. Act the dignity of the dead person has to be safeguarded.
[7] For instance BVerfGE 30,173 <194>
[8] Article 1 of „Entwurf eines Gesetzes zur Neuregelung von Luftsicherheitsaufgaben" [Draft of an Act for new Regulation of Air Safety Tasks], Bundesrats-Drucksache. 827/03 of 7 Nov 2003.
[9] EU-Regulation n° 2320/2002 of the European Parliament and Council as of 16 Dec 2002 for fixing joint regulations regarding the safety in civil aviation (OJ L 355 p. 1).

a whish – was very much the topic of debate in 2002 in other Member States[10]. The Pretty vs. United Kingdom judgment of 29 April 2002[11] was the first in which the European Court of Human Rights pronounced on the question of knowing whether the penal prohibition of assisted suicide constitutes an interference with rights granted by the European Convention on Human Rights. During the period of scrutiny, there have been two relevant decisions in Germany.

(1) Especially the judgement of the Federal Court of Justice[12] launched a lively public discussion.[13] It dealt with the necessity of calling in the Guardianship Court where the stopping of life-supporting measures is concerned. The Court decided: The patient's will has priority above all. If the patient has made clear for the case of having an illness with irreversibly mortal course that no life-supporting measures should be taken into action, then the doctors treating this patient have to respect his/her will. This, the patient's decision, is an expression of his/her right of self-determination and of his/her human dignity. If the doctors offer a life-supporting or life-prolonging treatment then the patient's guardian on principle can only deny those with approval of the Guardianship Court. Insofar – but only insofar – the Guardianship Court has the competency to decide about life-supporting or life-prolonging measures to be taken into action.

(2) The second decision here presented was made by the Higher Regional Court [*Oberlandesgericht*] in Munich[14]. It relates to the nursing staff's competence areas in a nursing home. Referring to its staff's decision on a matter of conscience based on Articles 1, 2 and 4 Basic Law[15], the nursery home had refused to support euthanasia that the patient's guardian had wished for by presentation of a doctor's order. The Court confirmed the legality of the refusal. It examined as well if the patient (his state was related to a suicide attempt) was in a state of dying and it pointed out: Death is not to be expected in the soon future as seen from a medical point of view. It would be non-compliant with the concept of protecting the guarded person's life under Article 1 § 1 Basic Law if the will of a patient to die who is no more able to a decision of his will can just be decided upon by the persons effected.

Article 3. Right to the integrity of the person

National legislation, regulation and case law

Article 3 § 1 sets out the principle of the right to the physical and mental integrity of the individual. In § 2 it sets forth the resulting consequences in the area of medicine and biology. It lays down four principles in this respect and with that it takes up with the Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine (Convention on Human rights and Biomedicine) of 4 April 1997 of the Council of Europe[16]. This Convention is complemented by an Additional Protocol of 12

[10] See E.U. Network of Independent Experts in Fundamental Rights (CFR-CDF), Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002, volume 1, p. 31-36.
[11] NJW 2002, 2851.
[12] Judgement of 17 March 2003 – XII ZB 2/03 –, NJW 2003, 1588. To this very extensively reasoned decision see the comment of *E. Deutsch*, NJW 2003, 1567, as well as the discussion of *N. Stackmann* NJW 2003, 1568. See as well *A. Spickhoff*, the development of the law concerning medical doctors 2002/2003, NJW 2003, 1701/1709.
[13] For instance see *Volker Gerhardt*, Letzte Hilfe, Frankfurter Allgemeine Zeitung of 19 Sept 2003, p. 8, and *Franz Kamphaus*, Die Kunst des Sterbens, Frankfurter Allgemeine Zeitung of 30 Sept 2003, p. 8.
[14] Oberlandesgericht, Judgement of 13 Febr 2003, NJW 2003, 1743. Critical comment: *W. Uhlenbruck*, Bedenkliche Aushöhlung der Patientenrechte durch die Gerichte, NJW, 2003, 1710.
[15] Respect of Human Dignity (Art. 1 (1)), Right to Life (Art. 2 (2)), Freedom of Conscience (Art. 4 (1)).
[16] S.T.E., nº 164.

Jan 1998 on the prohibition of cloning human beings[17], followed by an Additional Protocol of 24 Jan 2002 on transplantation of organs and tissues of human beings[18].

Convention on Human Rights and Biomedicine:

Germany did not sign the convention so far because a domestic opinion was not yet formed. The discussion regards especially Article 17 § 2 (protection of persons not able to consent to research) and Article 18 (protection of embryos). Although Germany took a fundamental part in creating both protocols they cannot be signed and ratified by Germany because it did not sign the convention itself. The status of the domestic debate regarding research on humans who are not able to give their approval as well as the political need for action are shown in the final report of the Enquete-Commission "Law and ethics of modern medicine".[19] In the Commission's opinion especially the following group of themes should be dealt with and transferred to a legal regulation if necessary: Designing an exchange of information within the bounds of informed consent; defining the terms "not able to consent" and "able to consent"; the concept of risk-benefit-appraisal and the borders of using it; framework regulations for ethical commissions; permissability of altruistic medical research on humans who are not able to give their approval; permissability of altruistic clinical trials of medicines by clarifying the law relating to the manufacture and distribution of medicines.

By order of the Federal Minister of Justice, *Prof. Koenig* (Centre for European Integration Research, Bonn) has prepared an expert opinion on the German legal situation and the necessary modifications regarding to the convention[20]. The process of forming an opinion in the Government and in the Enquete-Commission has not yet finished. (See also reasons for concern.)

Therapeutic Cloning:

According to the Guidelines for the preparation of the national reports 2003 the state of the debate on therapeutic cloning (legislation in force, initiatives etc) shall be described.

Not only is the reproductive but as well the so-called "therapeutic cloning"[21] forbidden in the Federal Republic of Germany by the Embryo Protection Act [*Embryonenschutzgesetz*] of 12 Dec 1990[22]. This act which is a pure penal act assumes a comprehensive worthiness of protection in regard to the embryo in vitro. The punishability and therefore the prohibition of cloning embryos results from Article 6 § 1.[23] This was not changed by the Stem Cell Act [*Stammzellgesetz*] of 28 June 2002[24]. This legal status by way of the Embryos protection Act

[17] S.T.E n° 168. This protocol became effective on 1 March 2001.
[18] S.T.E n° 186.
[19] BT-Drucks. 14/9020 of 14 May 2002, p. 192-196 (part E 1.2).
[20] See website of the Ministry of Justice www.bmj.bund.de.
[21] Creation of human clones by ways of transferring the cell nucleus of a human body cell into a human egg cell whose cell nucleus was removed beforehand.
[22] Gesetz zum Schutz von Embryonen, BGBl. I 1990, 2726. As federal law, the act could only be based upon the federal competence "penal law" in 1990 (Article 74 N° 1 Basic Law). Only 1994 the concurrent legislation competence was transferred to the federation for „human artificial insemination, analysis and modification of genetic information, as well as the regulation of organ and tissue transplantation" (Article 74 n° 26).
[23] Section 6 (Cloning) § 1 reads as follows: "Anyone who artificially causes a human embryo to develop with the same genetic information as another embryo, foetus, human being or deceased person shall be punished with imprisonment of up to five years or a fine." – Section 8 § 1 for the purpose of the Embryo Protection Act defines an embryo as "a fertilised human egg capable of developing from the time of fusion of the nuclei, and further each totipotent cell removed from an embryo that is capable of dividing and developing into an individual human being if the necessary conditions prevail."
[24] BGBl. I 2002, 2277. The Stem Cell Act completes the penal-wise sanctioned prohibition norms of the Embryo Protection Act by a general prohibition of import and use of embryonic stem cells and their approval by way of an exception.

is general opinion, seen as well by the Federal Government[25] and the Enquete-Commission "Law and ethics of modern medicine"[26]. But there are as well doubts if the prohibition includes the facts of "therapeutic" cloning with the required clarity. The Commission therefore sees a strong legal need for clarification[27], as well in regard to the requirement of clarity and definiteness of Article 103 § 3 Basic Law[28]. The Federal Government had already sent a reminder for a legal clarification in 1998[29]. But up to now there have not been any legislative initiatives because there are different opinions in society and politics regarding the ethical and constitutional[30] justification of the "therapeutic" cloning. The Federal Minister of Justice *Brigitte Zypries* has explained in a speech of 29 Oct 2003: "There is no initiative by the Federal Government to change the Embryo Protection Act. Although there are no clear-cut borderlines in some areas and although the tremendously fast development of genetic engineering raises new questions, the Act can still be handled in its present wording. But we have to closely observe the developments in science."[31] – In this context, the Minister expressed herself sceptically on the authorization of therapeutic cloning.

Implementation of the Bio-Patent-Directive of 6 July 1998[32]:

The Federal Government introduced a draft for an Act for Implementing the Directive on the legal protection of biotechnical inventions [*Gesetz zur Umsetzung der Richtlinie über den rechtlichen Schutz biotechnologischer Erfindungen*].[33] The new law is to clarify the ethical borders of the ability to grant patents among others. It shall be prohibited to grant patents on human embryos, on procedures to clone human beings or to change the human germ line as well as the use of human embryos for industrial or commercial purposes for instance. This directive should have been implemented by 30 July 2000 originally.

Practice of national authorities

Protection of the embryo in vitro by constitutional right:

The lecture delivered by the Federal Minister of Justice on 29 Oct 2003 caused great publicity because of another very fundamental item. She concerned herself with the question if and to what extend the embryo *in vitro* benefits from the protection by fundamental rights. In this context, she warned against a too wide interpretation of Article 1 Basic Law[34]. Regarding this issue, philosophical, religious or ideological, scientific and legal aspects are very closely interwoven with each other. For this reason, it is very controversial in society as well as in the theory of constitutional law[35]. The wording and the history of origins of the Basic Law would

[25] Answer to an interpellation [*Große Anfrage*] of the FDP (parliamentary party) as of 1 June 2001, Bundestags-Drucksache 14/6229, p. 3.
[26] Zweiter Zwischenbericht, Teilbericht Stammzellforschung, BT-Drucks. 14/7526, of 21 Nov 2001, p. 23/24 and 48-50.
[27] AaO (Fn. 24) p. 24/25 and 48.
[28] Article 103 (2) Basic Law: „An act may be punished only if it was defined by a law as a criminal offence before the act was committed."
[29] Bericht zur Frage eines gesetzgeberischen Handlungsbedarfes beim Embryonenschutzgesetz aufgrund der beim Klonen von Tieren angewandten Techniken und der sich abzeichnenden weiteren Entwicklung (Klonbericht), Bundestags-Drucksache 13/11263, section D, of 26 Aug 1998.
[30] See for instance *H.-G. Dederer*, Menschenwürde des Embryo in vitro? Der Kristallisationspunkt der Bioethik-Debatte am Beispiel des therapeutischen Klonens. Archiv des öffentlichen Rechts, Bd. 127 (2002), p. 1 ff.
[31] Vom Zeugen zum Erzeugen? Verfassungsrechtliche und rechtspolitische Fragen der Bioethik. – Lecture in the Humboldt-Forum of the Humboldt-Universität at Berlin on 29 Oct 2003, section III. To be found on www.bmj.bund.de.
[32] Directive 98/44/EG of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ L 213 of 30 July 1998.
[33] Bundestags-Drucksache 15/1709.
[34] Article 1 (1) Basic Law reads: „Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."
[35] An overview on the different positions can be found with *H.-G. Dederer*, Verfassungskonkretisierung im Verfassungsneuland: das Stammzellgesetz, Juristenzeitung 2003, 986 <988>.

not give an unambiguous answer here. Therefore it was just and equitable to give the answer as well regarding the consequences of different alternatives of interpretation. There had to be room to move for the legislator in executing his task to protect the human life. Agreeing with the Fed. Const. Ct.[36] it was the right way to let the constitutional protection of life (Article 2 § 2 Basic Law[37]) begin with the time of fusion of the nuclei, that is with the creation of the embryo. At this point of time human life was starting, and the protection of the embryo by constitutional rights was open for restrictions. But the embryo in this early phase was not entitled to human dignity with absolute protection. This was because the embryo in vitro did not have an essential precondition to develop into a human being, "as" a human being. This was only possible after implantation.

This point of view differs from the position held so far by the Parliament and the Federal Government as well as juridical literature in essential parts. Therefore it has found great publicity and caused various reactions[38].

In any case, the Minister newly provoked the discussion about possibilities and restrictions of research with embryonic stem cells[39]. She pointed to the legal positions in some other EU member states as well which differ a lot from the very restricted German point of view.

Patients' Charter:

A new charter „Patients' Rights in Germany" was early in 2003 published as a pamphlet by the Federal Ministry of Justice and the Federal Ministry of Health and Social Security.[40] It was worked out by a team that was implemented by the two ministers. However the charter is not a government's paper but a documentation of all those that take part in the public health service. It puts together the patients' rights based upon valid law. There have been similar initiatives earlier on in the United Kingdom, Ireland, Portugal and Austria. The charter appeals to all persons who take part in the public health service to respect the patients' rights, to support patients by enforcing their rights and to work towards taking the patients' rights into account in the everyday practice. It deals in detail with the patient-doctor-relationship and the case of damage. Regarding the patient-doctor-relationship issues are among others the quality of a medical treatment, the importance of the patient's consent, the self-determination at the end of life, explanation to and information of the patient as well as protection of personality and confidentiality of the patient's data.

Reasons for concern

It is very unsatisfactory that the signature and ratification of the Convention on Human Rights and Biomedicine is still open in the Federal Republic of Germany. The Enquete-Commission of Inquiry "Law and ethics of modern medicine" thought it is very urgent that the German "Bundestag" deals intensively with the field of research on human beings who are not able to

[36] See BVerfGE 39, 1 <41>.
[37] Article 2 (2) sent. 1 reads: „Every person shall have the right to life and physical integrity."
[38] See for instance Frankfurter Allgemeine Zeitung of 29 Oct p. 1 and 2 and of 30 Oct p. 1 and 2.
[39] Word-to-word the speech reads (part III at the end): "Weil die Gewinnung von Stammzellen immer die Vernichtung von Embryonen voraussetzt, also den Umgang mit menschlichem Leben betrifft, bedarf jede Entscheidung in diesem Bereich einer besonders sorgfältigen Abwägung der betroffenen Rechte. Es geht um einen „möglichst schonenden Ausgleich" der widerstreitenden Rechte, wie das Bundesverfassungsgericht es hervorgehoben hat. Das Recht der Forscher auf Freiheit ihrer Forschung darf nicht ausgehebelt werden. Aber es darf auch nicht das berechtigte gesellschaftliche Interesse daran vernachlässigt werden, dass wir die wissenschaftlichen Grundlagen etwa für die Transplantationsmedizin oder die Krebsbekämpfung verbessern. Auch hierzu ist die Politik verpflichtet. – Eine Lockerung des Stammzellgesetzes sei von Verfassungs wegen jedenfalls nicht untersagt."
[40] See also *H.-G. Bollweg/K. Brahms*, „Patientenrechte in Deutschland" – Neue Patientencharta, NJW 2003, 1505 ff.

give their approval[41]. This should happen soon for that the political preconditions for signing the convention can be created. In my opinion there is no violation of the fundamental right of human dignity.

The agreement is a framework convention that shall create guidelines for a new legislation especially in those states that have none or only insufficient legal restrictions in the area of biomedicine so far. Germany should bear part of the convention and should not stand apart because of the convention's too low standard from the German point of view.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

International case law and concluding observation of international organs

The "Report to the German Government on the visit to Germany carried out by the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 15 December 2000" was published on 12 March 2003 (CPT/Inf.(2003) 20) together with the comment of the Federal Government from 14 June 2002. (CPT/Inf (2003) 21). This was the third periodic report of a CPT delegation in Germany.The report dealt among others with complaints of excessive police ill-treatment of people of foreign nationals while removed in airports. It includes recommendations, annotations and requests of information. The German Government in its comment has expressed its special opinion.

Practice of national authorities

Threat of torture by Frankfurt deputy police chief Daschner:

At the end of September 2002 an 11 years old boy had been kidnapped in Frankfurt. Ransom being paid the suspect Magnus Gäfgen was arrested, but the kidnapped child not found. Gäfgen gave misleading information of the boy's whereabouts. In this situation the police vice president on 1 October 2002 ordered the threat of ill-treatment of the suspect in order to force Gäfgen to reveal the child's whereabouts. He made an annotation that the arrested should be interrogated by threat of harm and pain (no violation) while being observed by a physician. As a result of this threat Gäfgen admitted to have killed the child and gave information about the place where to find the body.

This line of action of the police vice president became public in February 2003. It caused in Germany – and especially in the media – an animated debate about the admission of governmental torture as last resort (ultima ratio) in order to save human life. The chairman of the German Judges Association and the Minister of Interior of "Brandenburg", among others, supported the admission of torture in special cases. There has also been discussed the work-out of legal bases for such exceptions of the prohibition of torture (Weighing: the protection of human lives ranging higher than prohibition of torture).

The Federal Minister of Interior, constitutional judges and Members of Parliament,[42] however, turned on any undermining of prohibition of torture. The chairman of the German Judges Association withdrew his remark. In the Bundestag-Committee on Human Rights and Humanitarian Aid the Parliamentary Secretary of State of the Ministry of Justice, Alfred Hartenbach, on 12 March 2003 emphasized the prohibition of torture and inhuman treatment as being absolutely valid. He cleared up the most important anchoring of prohibition of torture in the international law as well as the unequivocal constitutional legal status (Article 1

[41] See footnote 19.
[42] See the comment of *P. Follmar, W. Heinz, B. Schulz*," The topical discussion of torture in Gemany. A contribution of the German Institut for Human rights " (Policy Paper n° 1, Berlin, May 2003).

(1), Article2 (2) sentence 1, Article 104 (1) sentence 2 Basic Law) in Germany. Additionally he referred to section 136a Criminal Procedure Act[43] and to the Hesse Act of public security and order; its section 12 regulates expressively that section 136a Criminal Procedure Act is valid for a person's preventive interrogation. The German Institute of Human Rights produced a publication[44] on short notice specifying the absolute prohibition of torture as being anchored in international and German law and as being related to basic decisions of human rights. Establishing exceptional legal facts could not be justified in any way.

Magnus Gäfgen was condemned on 28 July 2003 because of confession of murder during the main trial[45]. Up to now there has been no decision by the public prosecutor's office concerning the initiated preliminary investigations against the police.

Report of Amnesty International

An actual report of Amnesty International highlights about ongoing allegations of a pattern of police ill-treatment of, and excessive use of force against detainees in Germany as well as against foreign nationals subjected to a removal order from Germany. According to Amnesty International most complainants reported that they had been subjected to kicks and punches or were knelt on by police officers who painfully twisted their arms behind their backs or twisted and tugged their handcuffed hands. Some victims of alleged police ill-treatment had suffered serious injury, sometimes necessitating periods of hospitalization. One man dies in hospital as a result of being repeatedly kicked and beaten by police officers in police custody. The report also highlights several instances, during which unarmed individuals were controversially shot dead. There would be concern that police officers discharged their firearms in circumstances in which there was either no imminent threat of death or serious injury, or it was questionable whether such a threat existed and whether less extreme measures could have sufficed.

In Amnesty International's opinion, although the number of allegations of ill-treatment and excessive use of force appears to have diminished in recent years, the seriousness of certain reports combined with the severity of injuries sustained by complaints would indicate that the German authorities must redouble their efforts in this area and undertake all possible steps to prevent and penalize such occurrences. The report summarizes a 77-page document. It concludes with recommendations to address the apparent shortcomings and to bring perpetrators to justice. These include:

- A central government agency should maintain and publish regular, uniform and comprehensive statistics on complaints about serious misconduct by officers of the individual Länder and federal police authorities. These figures should include i.e. the steps taken in response to each complaint and the outcome of any criminal and disciplinary investigations, statistics on allegations of racist abuse and statistics on national origin of complainants.
- Amnesty International believes that there is a need for an independent body to compile comprehensive statistics and, when necessary, to investigate.
- Germany should immediately sign and ratify the Optional Protocol to the Convention against Torture.

Reasons for concern

Regarding the signing of the Optional Protocol the problem lies in the federal structure of the Federal Republic. The Protocol affects competences of the states (*Länder)*. Germany may not

[43] According to section136a Code of Criminal Procedurein the preliminary inquiry the accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment,induced fatigue etc. This shall apply irrespective of the accused's consent.
[44] Footnote 42.
[45] Report in Frankfurter Allgemeine Zeitung of 29 July 2003.

sign before every 16 *Länder* agree. The Federal Government is under discussion with the *Länder* at present.

Amnesty International's report worries and has to be taken serious. Some of these described individual cases have also been part of reports in German media. The criminal investigations are handled in the responsibility of the respective prosecutors. In its comment concerning the CPT-report the Federal Government gave a detailed account of suitable actions (point 21) which have been taken on the reported cases of ill-treatment. It also pointed out existing installations of the Federal Border Police [*BGS*] and in some *Länder* in order to detect infringements of law and misbehaviour and expressed its opinion concerning an installation of a central authority. The installation of independent authorities through the entire republic, beyond the reach of the federal police, may only be issued by the *Länder* themselves due to their authorised competence of police control.

Investigations by the state prosecutors in some cases taking a very long time are unsatisfying. In fact building a central governmental authority initiates problems of distribution of federal competencies. Yet, the federation and the *Länder* together should look out for a solution that brings to account the justified wish of Amnesty International in the interest of people who are or may become victims of misconduct of police officers. The solution probably could consist of a common authority of the *Länder*.

Article 5. Prohibition of slavery and forced labor

No significant issues to be reported.

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

National legislation, regulation and case law

Article 2 § 2 sentence 1 Basic Law[46] corresponds to Article 6 of the Charter. It was a criterion in a decision of the Federal Constitutional Court[47] concerning the period of detention for investigation. According to section 121 § 1 Criminal Procedure Act a detention for investigation in principle is determined on 6 months. Extensions may only follow because of important reasons and on strict premises. As to the case to be decided by the Federal Constitutional Court the defendant had been arrested for more than a year. The Higher Regional Court [*Oberlandesgericht*] on 3 April 2003 had ordered after all to continue the detention of investigation.

The Fed. Const. Court reminded on the fact that in the fundamental right of a person's freedom also the precept of acceleration is established. Article 2 § 2 sentence 2 Basic Law has a high appreciating importance. Even the Great Criminal Court being overcharged with matters of detention for not only a short time period was not an important reason which justifies further imprisonment, if it is based on jurisdictional activities that could not be accomplished within specified time, although all measures and possibilities of judicial organisation have been exhausted. This is said to belong to the responsibilities of the constituted community.

[46] Article 2 (2) sentence 2 Basic Law reads: "Freedom of the person shall be inviolable."
[47] Federal Constituional Court (Chamber) 6 May 2003-2 BvR 530/03- NJW 2003. 2895.

Practice of national authorities

Concerning extradition detention see Article 19 in this document.

Article 7. Respect for private and family life

International case law and concluding observation of international organs

Article 7 of the Charter corresponds to Article 8 ECHR. Therefore it covers a wide range of issues. By this it covers besides the right to personality as well issues which come under Article 6 § 2 Basic Law[48].

Only short may be mentioned three decisions of the European Court of Human Rights regarding the right of access of a father to his child. In these cases the Court did not find out violation of article 8 EHCR. In the case *Hoppe*[49] the German courts had granted the parental authority over the applicant's daughter to the divorced mother and had given him only a restricted right of access to the daughter. The Court appreciated the procedure and the reasoning of the German courts. The national authorities would have acted within the margin of appreciation afforded to them in such matters. – The two other cases[50] regarded regulations that were modified in the meantime.

In the case *Kück*[51] however the Court stated a violation of Article 8 ECHR. The judgment concerned a transsexual person. The health insurance company had refused the reimbursement of expenses for a gender re-assignment operation and hormone treatment. The courts had rejected the applicant's claims. The Court of Appeal [*Kammergericht*] Berlin held that the question of necessity of the operation could not be clearly affirmed. In any event, the applicant would have herself deliberately caused the disease. The Federal Constitutional Court refused to admit the applicant's constitutional complaint. – The European Court of Human Rights referred to its former decisions[52] on problems of transsexual persons. Though no previous case would have establish as such any right to self-determination as being contained in Article 8, the notion of personal identity would be an important principle underlying the interpretation of its guarantees. In the light of the recent developments, the burden placed on a person to prove the medical necessity of treatment, including irreversible surgery, in the field of one of the most intimate private-life matters, would appear disproportionate.

National legislation, regulation and case law

Right to respect for private life:

Once again, the Fed. Const. Court had to deal with strained relations between the freedom of the press and the common right to respect for private life. The matter was the daughter of Caroline, princess of Hanover. On occasion of the child's birth a magazine published an astro-prognosis (horoscope of birthday) of the character and future development of the child. The child, represented by her mother, claimed action for injunction. The civil court permitted the

[48] Article 6 (2) sentence 1 reads: "The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them."
[49] *Hoppe v. Germany* (judgm.), n° 28422/95, 3 Dec 2002.
[50] E. Ct. H. R., *Sahin v. Germany* (judgm.) n° 30943/96, 8 July 2003; *Sommerfeld v. Germany* (judgm.) n° 31871/96, 8 July 2003. Both cases regarded the same legal question.
[51] E. Ct. H. R., *van Kück v. Germany* (jugdm.) n° 35968/97), 12 June 2003.
[52] See i. g. I. v. United Kingdom n° 25680/94, 11 July 2002; *Christine Goodwin v. United Kingdom* n° 28957/95, 11 July 2002.

claim. The Fed. Const. Court[53] refused to admit the constitutional complaint made by the newspaper: a child has an own right of developing its personality without embarrassment. This development of personality might be delicately embarrassed by making a report relative to the child in the media. Circulating the horoscope may lead to expecting the child to act in a special way. There have been published private matters which do not serve as a public formation of opinion being important for democracy.

The decision of the Federal Court of Justice [*Bundesgerichtshof*] was a matter of the admissibility of applying evidence in a civil suit. The parties laid claim to loan redemption. They had had a telephone conversation about it. The witness watched by monitoring this telephone conversation being important for the statement of claim. The defendant was sentenced by the Higher Regional Court [*OLG*] to payment based on evidence. The Federal Court of Justice[54] declared the utilisation of the evidence to be inadmissible. The utilisation is a violation of the defendant's right to personality: The Federal Court of Justice refers to the judgement, appreciated long ago, the common right to personality defending also the right to the spoken word. It contains also the warrant to determine whether the communication content shall be available only to the partner or to further persons. The protection does not depend on the character (contents) of the spoken words. – Yet the Federal Court of Justice admits that this right may be handled with reservation according to the constitutional order, the functional efficiency of the administration of justice being part of it. Only special circumstances (i.e. situation of self-defence or similar) permit to accept infringing on the right to personality in favour of the evidence.

Powers of investigation and surveillance:

In October 2003 the Federal Government presented a draft of a new Telecommunication Act[55] [*Telekommunikationsgesetz*]. It shall replace the Telecommunication Act, in force since 1996, and transform five competent EU directives[56], which came into force in the middle of 2002. The project contents sections concerning privacy of telecommunication (Articles 86-88), the protection of data (Articles 89-105), and the public security (Articles 106-113). The section of public security regulates extensively among others the technical transformation of measures of interception for security authorities, admissible interference with privacy of telecommunication and the performance of inquiries of the security authorities.

In the Federal Republic of Germany, a federal state, police law is mainly law of the *Länder*. In each of the 16 *Länder* exists a police law regulating the tasks (function) and competencies of the police authorities. In all *Länder*[57] there is an own constitutional court which measures acts of Land authorities against the relevant Land constitution. The Constitutional Court of the Free State Saxony[58] [*Verfassungsgerichtshof*] had to deal with novel competence regulating legal police in Saxon police law.[59] Three aspects of this decision may be mentioned. One of them regards the regulating of the incomprehensible investigation [*Schleierfahndung*] – control of identity for no reason and suspect. It says police may stop, identify and examine any person even out of border area for the purpose of prevented fight against frontier-crossing criminality. The court of state regards this to be in compliance with the constitution. Yet it asks for a previous document (protection of fundamental rights by procedure!) when

[53] Decision (chamber)29 July 2003 – BvR 1964/00 –, NJW 2003,3262.
[54] Judgement 18 Febr. 2003 – XI ZR 165/02 –, NJW 2003, 1727.
[55] Bundesrats-Drucksache 755/03 of 17 Oct 2003.
[56] Directives 2002/21/EG, 2002/20/EG, 2002/19/EG, 2002/22/EG, 2002/58/EG.
[57] With the exception of SchlH. In this matter the Federal Constitutional Court percepts duties due to the regional constitutional court. See Article 99 Basic Law.
[58] Police Act [*Polizeigesetz*] of the Free State Saxony in the version of the publication of 13 Aug 1999 (Saxonian GVBl. p. 466).
[59] Judgement 10 July 2003 – 43-11/00 –, Neue Justiz 2003, 473 (only headnote), reported by *M. Kutscha*, Saxonian Police Law according to Fundamental Rights, Neue Justiz 2003, 623-626.

controlling identity beyond borders (band of 30 km). The second aspect regards the later (additional) information of the affected while undercover agent engaged. Because of the fundamental right to informational self-determination it may not be cancelled for reasons of risk of (no) further application of the undercover agent; otherwise the course of law might in fact be blocked to the affected. The State Court did not object, at least, to the (obvious) monitoring by video in public places although it is a considerable manipulation of the right to informational self-determination which is to be protected. Being confined to "dangerous places" or centres of crime it is considered relatively.

An employee's secret monitoring with optic-electronic devices has been matter of a decision by the Federal Labour Court [*Bundesarbeitsgericht*][60] The employee was suspected of an offence. The court regarded the monitoring and its use as admissible for the termination reason, as less decisive measures detecting the suspicion had been exhausted.[61]

In this context another two constitutional complaints can be referred to: the modification of Article 13 Basic Law[62] in 1998 (said to be unconstitutional) and several directions of the law improving the struggle against organised crime, also modified in 1998. The new arrangements permit the monitoring of homes, so called "Großer Lauschangriff" (great attack of listening). The Federal Constitutional Court has held a public hearing, a decision will follow in 2004.

Right to respect for family life:

Three decisions of the Federal Constitutional Court regarded questions of family life and parental authority according to Article 6 (2) Basic Law.[63] The first *Senat* decided that section 1626a Civil Code at present is mostly in compliance with the constitution and consistent with the right for parents as stated in Article 6 (2) Basic Law.[64] As for this direction the mother on

[60] Judgement 27 March 2003 – 2 AZR 51/02 –, NJW 2003, 3436.

[61] The case happened in 2000. Since 2001 the Federal Data Protection Act in section 6b rules the monitoring of the public accessible areas with optic-electronic devices.

[62] Article 13 Basic Law [Inviolability of the home], amended by Law of 26 March 1998, reads:
(1) The home is inviolable.
(2) Searches may be authorized only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed.
(3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorization shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.
(4) To avert acute dangers to public safety, especially dangers to life or to the public, technical means of surveillance of the home may be employed only pursuant to judicial order. When time is of the essence, such measures may also be ordered by other authorities designated by a law; a judicial decision shall subsequently be obtained without delay.
(5) If technical means are contemplated solely for the protection of persons officially deployed in a home, the measure may be ordered by an authority designated by a law. The information thereby obtained may be otherwise used only for purposes of criminal prosecution or to avert danger and only if the legality of the measure has been previously determined by a judge; when time is of the essence, a judicial decision shall subsequently be obtained without delay.
(6) The Federal Government shall report to the Bundestag annually as to the employment of technical means pursuant to paragraph (3) and, within the jurisdiction of the Federation, pursuant to paragraph (4) and, insofar as judicial approval is required, pursuant to paragraph (5) of this Article. A panel elected by the Bundestag shall exercise parliamentary control on the basis of this report. A comparable parliamentary control shall be afforded by the Länder.
(7) Interferences and restrictions shall otherwise only be permissible to avert a danger to the public or to the life of an individual, or, pursuant to a law, to confront an acute danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of an epidemic, or to protect young persons at risk.

[63] Article 6 sections 1 and 2 read: (1) Marriage and family shall enjoy the special protection of the state. (2) The care and upbringing of children is the natural right and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

[64] Federal Constitutional Court, judgement 29 Jan 2003 – 1 BvL 20/99 and 1 BvR 933/01.

principle has the parental authority of her illegitimate children. Only if both mother and father express intentionally to assume parental authority together, or if they marry each other, it will be due to them together.
Article 6 (2) Basic Law has also been a measure of examination to the proceeding 2 BvR 716/01.[65] Criminal proceedings against young people on principle are not held in public. As for section 51 § 2 law of juvenile court relatives and persons authorised for education and legal representatives may be excluded , if there are "doubts against their presence". To parents having the right to education this means a severe manipulation of it. In the opinion of the Federal Constitutional Court parents therefore may only be excluded if there exist important points of view concerning juvenile criminal law. Section 51 § 2 with its wording "doubts against their presence" was too wide and not clear (enough). Manipulations of the fundamental warranted right to parents need a legal basis by a sufficiently provided law. Section 51 § 2 therefore is void.[66]

At last of importance is the judgement of the Fed. Const. Court[67] concerning the right of a biological father. The Federal Constitutional Court confirmed it in two respects: (1) As to section 1600 Civil Code only the legal (legitimate) father (i.e. the husband), the mother or the child can contest the paternity, but not the so called biological father. The Federal Constitutional Court regards this as a violation of Article 6 II 1 Basic Law. Under certain conditions also the biological father must be able to contest another man's paternity, for instance if the man who first acknowledged the paternity no longer shares life with the mother. (2) Section 1685 Civil Code regulates the right to personal access with a child. But the corporeal/biological father does not belong to the persons named (i.e. grandparents, husband or former husband). He even then has no right to personal access if there exists a social relation to one another, him having been responsible for the child at least for a short time. According to the Fed. Const. Court this violates Article 6 § 1 Basic Law (protection of family). If in cases of this sort bonds are continuing the biological father must have the right to personal access, if it serves to the well-being of the child.

Practice of national authorities

1. Monitoring of Telecommunications

(1) The extensive legal possibilities of monitoring of telecommunications and the relevant practice of the prosecution offices and security services time and again are criticised[68]. People are concerned that by that mode the State is able to get an excess of information about its citizens. In May the Federal Ministry of Justice presented an advisory opinion of the Max-Planck-Institute for foreign and international criminal law in Freeburg, the Ministry had ordered, “Legal reality and the efficiency of monitoring of telecommunications in accordance with sections 100a and 100b of the German Code of Criminal Procedure (StPO) and of other covert investigative measures”[69]. The analysis results that monitoring of telecommunications is indispensable for the prosecution authorities. Otherwise prosecution would be impossible in special areas of criminality. That happens for the organised criminality as well as for the fight against international terrorism. The efficiency can be proved with the proportional shares of

[65] Judgement of 16 Jan 2003 – 2 BvR 716/01 –, NJW 2003, 2004.
[66] Regarding the right of persons competent of education to being partners in the proceeding of measures of young people's deprivation of liberty see Constitutional Court Brandenburg, Decision, 19 Dec 2002 – VfgBbg 104/02 –, NJW 2003, 2009.
[67] Decision, 9 April 2003 – 1BvR 1493/96 and 1 BvR 1724/01 –, NJW 2003, 2151.
[68] See e.g. parliamentary motion by the FDP-Fraction „*Rechtsstaatlichkeit der Telefonüberwachung sichern“* [Interception of telecommunications to be secured conform with the rule of law], Bundestagsdrucksache 15/1583 of 24 Sept 2003.
[69] Report by *Hans-Jörg Albrecht, Claudia Dorsch and Christian Krüpe.* For a Summery see the website of the Ministry: www.bmj.bund.de. – Furthermore see the answer of the Federal Government on an interpellation by the FDP-Fraction regarding monitoring of telecommunications in Germany, Bundestags-Drucksache 15/725 of 28 March 2003.

indictments. It is twice as much, in the cases of monitoring of telecommunication, as in the other average. In fact, the numbers of monitoring went up distinctly but this can be referred to the heavy increase of mobile telephones in the population.
The investigation has weaknesses in two areas: First, judicial orders in many cases have only been reasoned very generally. Second, the duty to later notify the persons affected about the monitoring is met only rarely.

(2) Pursuant to the Act regarding Article 10 [*Artikel 10-Gesetz*] the secret services are entitled, under special conditions, to monitoring of post and telecommunications. These competences are controlled by the Parliamentary Control Commission [*Parlamentarisches Kontrollgremium*] and by the Act 10-Commission [*G 10 Kommission*]. A report of the Parliamentary Control Commission of 24 March 2003 for the period of 1 Jan 2002 to 30 June 2002[70] informs about the control function and about the frequency of relevant measures. They differ according to the different measures and cannot be described in this connection.

2. Acoustical surveillance of homes

According to Article 13 § 3 Basic Law under special conditions it is allowed to use technical means for the surveillance of a home[71]. Section 100c Criminal Procedure Act specifics this for the area of criminal prosecution. The Federal Government every year has to report on the use. The 2002 report[72] shows: In 11 *Länder* (of 16) altogether 28 procedures (cases) took place regarding 31 homes. The concerned was informed later in 19 of these cases. The Federal Public Prosecutor General carried out two cases; in one of these he later informed the concerned person.

3. Rights of the security authorities to inquiries

The Act for the fight against Terrorism [*Terrorismusbekämpfungsgesetz*], in force since 1 Jan 2002, has assigned new competences to the security authorities, in particular rights to inquiry at banks, postal and telecommunication services, and so called IMSI-Catcher. For controlling reasons these competences of the functions of the Parliamentary Control Commission have been extended. It has to deliver a report every year. The 2002 report[73] informs on the control functions of the Parliamentary Control Commission and the Act 10-Commission and on the provisions of admissibility of the new measures. It describes 30 measures in whole which mainly happened in the first half year. The Commission points out its impression that the security services are aware of their responsibility and perform their functions conscientious.

Article 8. Protection of personal data

Practice of national authorities

Activity Report of the Federal Commissioner for Data Protection:

The Federal Commissioner for Data Protection is an independent authority in the sense of Article 8 § 3 Charter. He is elected upon the proposal of the Federal Government, by the German *Bundestag* for a term of five years; he is eligible for re-election for one additional term. The Federal Commissioner for Data Protection is autonomous and not bound by any instructions. His function and duties are specified in the Federal Data Protection Act[74] [*Bundesdatenschutzgesetz*]. He gives advice to the *Bundestag* and the Federal Government by

[70] Bundestags-Drucksache 15/718.
[71] See footnote 62.
[72] Bundestagsdrucksache 15/1504 of 28 Aug 2003, Anlage 1.
[73] Bundestags-Drucksache 15/981 of 5 May 2003.
[74] Act of 1990 in the new version of the publication of 14 Jan 2003, BGBl. I 2003 p. 66.

drafting activity reports and expert opinions, and advises in the course of legislative procedures. He monitors compliance with legal provisions on data protection within the federal administration and telecommunications and postal service organizations. Every two years the Federal Commissioner shall, pursuant to section 26 § 1 Federal Data Protection Act, submit an activity report to the Federal Parliament.

In May 2003 he submitted the Activity Report 2001/2002 (19th Activity Report) to the Parliament.[75] The real report covers 170 pages complemented with 29 supplements. It contains a description of the main developments concerning data protection in the public sector and in the private sector, all telecommunication services and postal services, but also in some areas of the private sector. In 22 cases he had lodged formal complaints (supplement 3). In principle he points out while on the one hand there was much reached for the strengthening of the fundamental right to informational self-determination, on the other hand the protection of data has not yet rated as high by all ones as it should have.[76] – The Report goes much in detail on many important issues. The competences and the practice of the security authorities take a broad room with partly critical remarks, questions and recommendations. The Federal Commissioner criticises the increasing of telecommunication monitoring[77]. He warns on the dangers that might follow out of the sum of the new possibilities to interfere. Regarding the fight against terrorism, however, he states: In the result again it was shown that an effective fighting against terror and criminality is not in unbridgeable contrast with data protection as expression of the right to free development of the personality and to informational self-determination, but can indeed be connected in a weighed balance of interests.

Reasons for concern

The commissioner's report is a very good example for the thorough and responsible work in this function.

Article 9. Right to marry and right to found a family

No significant issues to be reported.

Article 10. Freedom of thought, conscience and religion

National legislation, regulation and case law

In the period of scrutiny under the aspect of freedom of religion the main topic was the head scarf dispute (n° 1). Interesting is as well a decision of a lower court regarding a prayer in a municipal kindergarden (n° 2). There is a further relevant court decision only to be mentioned. It regarded the contract of employment of clergymen as a matter of the autonomy of religious societies.[78]

[75] Bundestags-Drucksache 15/888.
[76] E.g. regarding the Act on the Protection of Personal Data Used in Teleservices [*Gesetz über den Datenschutz bei Telediensten (TDDSG)*] the report points out the relevance of the application of the TDDSG in the practical use. More and more providers of the internet would implement the rules of this act. But he criticizes that in the result an overall improvement of the data protection with teleservices could not be noticed.
[77] Regarding this matter see above with Article 7 (*Practice of national authorities*).
[78] Bundesgerichtshof, judgment 28 March 2003 – V ZR 261/02 (Köln) –, NJW 2003, 2097. See also Bundesverwaltungsgericht, judgment 30 Oct 2002 – 2 C 23/01(Koblenz) –, NJW 2003, 212.

1. Head scarf

1.1 It did not happen often that a decision of the Federal Constitutional Court[79] and its consequences took so much public reaction[80] as the head scarf controversy. The case: The *Land* Baden-Württemberg had refused to take into the public school a Muslim lady teacher *Fereshta Ludin* who insisted on wearing a head scarf for religious reasons also during teaching. The Federal Administrative Court[81] agreed with the *Land* in accordance to the two previous instances. The public educational mission should be protected with the necessary religious neutrality. She lodged a constitutional complaint. The Fed. Const. Ct. in a surprising decision held that Ms Ludin could not be barred from her profession under existing legislation. There would not be a sufficient clear legal basis in the *Land* law of Baden-Württemberg to prohibit teachers wearing a head scarf in school. However, the judges said the individual *Länder* could enact such laws in their responsibility as legislators in educational matters. The Court described the reasons which could justify a prohibition and those which recommend admitting head scarves in school. But it did not point out a clear position in the matter. The judgment, it was a majority decision 5:3, and three judges delivered an extensive dissenting opinion, therefore was criticised. It did not bring any legal certainty.

The *Länder* Baden-Württemberg, Bavaria, Berlin, Brandenburg, Hesse, Lower Saxony and Saarland said they would put forward legislation banning head scarves in state schools. In any way it will become a difficult and problematic issue for it is an open question if the head scarf is a real religious symbol or an expression of a political attitude which is in contrast to the value ideas of the German Constitution, according to the fundamental rights tradition in western countries.

1.2 Labour law

In a totally different and less surprising case the Federal Labour Court[82] had decided in favour of the religious freedom. The issue concerned a Muslim woman who worked as shop assistant in a department store in a small town. One day she told her employer that her religious ideas had changed and that the Islam forbade her to show in public without a head scarf. As a result she got dismissed. The Federal Labour Court declared the dismissal to be illegal. It had to be weighed between the entrepreneurial freedom of activity of the department store (fear of negative customer reactions) and the protection of the religious conviction of the shop assistant. The department store could at least have waited if its fears would have proven to come true. – The Fed. Const. Ct. did not accept the employer's complaint of unconstitutionality. The weighing made by the Federal Labour Court between the fundamental right to freedom of activity and the religious interests of the assistant was not to be objected.

2. Prayer in a municipal kindergarten

Years ago the Fed. Const. Ct. had to deal with the question if a prayer in a state entity would violate the necessary religious neutrality of the state.[83] A similar case came before the Higher Administrative Court [*Verwaltungsgerichtshof*] Kassel.[84] The applicant visited a kindergarten which is a municipal entity. Normally in this kindergarten a prayer is said before the common

[79] Judgment, 24 Sept 2003 – 2 BvR 1436/02 –, NJW 2003, 3111; JZ 2003, 1164. See commentaries i.e. by *Ipsen*, NVwZ (Neue Zeitschrift für Verwaltungsrecht) 2003, 1210; *U. Sacksofsky*, NJW 2003, 3297; *K.-H. Kästner*, JZ 2003, 1178.
[80] The media for months published letters to the editor.
[81] Judgement, 4 Jul 2002 – 2 C 21.01 –, Deutsches Verwaltungsblatt 2002, 1645.
[82] Judgement from 10 Oct 2002 – 2 AZR 472/01 –.
[83] BVerfGE 52, 223 „Schulgebet". See also BVerfGE 93, 1 <24> "Kruzifix", and Bundesverwaltungsgericht, 21 April 1998, BVerwGE 109, 40.
[84] VGH, decision 30 June 2003 – 10 TG 553/03 – NJW 2003, 2846.

meal. He objected to this practice. However, the Court held that this practice does not violate the necessary religious neutrality by the state. The applicant, of course, would be free to attend or not.

Practice of national authorities

1. Islamic religious teaching

In German schools religious teaching normally is regular portion of the curriculum. It is held in cooperation with the Christian Churches. The possibilities of Islamic religious teaching are discussed for some years now. The Catholic and Protestant churches support this as an expression of the freedom of religion. Problems arise, however, out of Article 7 Basic Law. Article 7 § 3 rules: "Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. Without prejudice for state's right of supervision, religious instruction *shall be given in accordance with the tenets of the religious community concerned."* There is no Islamic institution which is able to represent the main Islamic branches in Germany and to fix such tenets. Some *Länder* have tried a solution. North-Rhine-Westphalia e.g. practices a school experiment of "Islamic instruction" [*Islamische Unterweisung*] since 1999. Very new is a four years school experiment in Lower Saxony. In the school year 2003/2004 the *Land* has started with a real Islamic religious teaching [*Religionsunterricht*] for Muslim children in 8 elementary schools[85], in responsibility of the state in German language. It is practiced as a regular curriculum. The difficulties with the requests of Article 7 § 3 sent.2 Basic Law are surmounted by a round table in which the relevant Muslim organisations and associations in Lower Saxony are represented.

2. The case *Homann*

In October 2003 a speech became public that was held by the Member of Parliament *Martin Homann* in his electoral district. The CDU/CSU fraction decided to exclude him from the fraction because of the anti-Semitic tendency in this speech.

Article 11. Freedom of expression and of information

National legislation, regulation and case law

1. Ensuring of the pluralism of the media

In the Federal Republic of Germany the basis for the media organisation is the freedom of expression and information in respect to press and broadcast as it is guaranteed in Article 5 § 1 Basic Law. The Fed. Const. Court made concrete the resulting requirements in numerous principle judgements, in particular in the so called "Broadcast judgements" ["*Rundfunk-urteile*"]. The law of media is a *Land* law. In all the *Länder* there are broadcasting companies, some of them serving various *Länder*. Acts concerning printed media [*Landespressegesetze*] contain norms which concrete the guarantee of freedom of Article 5 Basic Law. These are effective as well in broadcasting Acts [*Landesrundfunkgesetze*] and state treaties regarding broadcasting. *Land* Media Acts [*Landesmediengesetze*] regulate the legal grounds of private broadcasting. All legal ruling shall warrant diversities of opinion being represented in the media. The only federal media law is the Deutsche Welle Act, Deutsche Welle being the German broadcast for foreign countries.

[85] Described by *Rolf Bade/Edeltraud Windolph*, „Islamischer Religionsunterricht" – ein niedersächsischer Schulversuch, Amtsblatt des Kultusministeriums für Schule und Schulverwaltung, Heft 12/2003, p. 389 f.

The Act against restricted trade practices [*GWB, Kartellgesetz*], a federal law, contains special regulations controlling fusions of press organisations (Articles 23 and 24).

During the period under scrutiny a modification of the law was discussed because of the planned fusion concerning two newspapers in Berlin ("Berliner Zeitung" and "Tagesspiegel").

2. Cases

2.1 Criminal law

According to section 100g Criminal Procedure Act (formerly section 12 Fernmeldeanlagen-gesetz) the Public Prosecutor is allowed to inquire about connection data with the telecommunications services. In the case of a searched for terrorist the Fed. Const. Court[86] stated respective judicial orders as admissible. The judicial order regarded connection data of journalists employed with the Second German Television Company [*Zweites Deutsches Fernsehen, ZDF*]. Along with the decision goes a detailed argument. Though it was a heavy interference with the secrecy of telecommunications and with the freedom of the press and freedom of reporting by means of broadcasts, the clearing up and the prosecution of serious crimes served a public interest. As well the principle of proportionality was met.

2.2 Civil law

Regarding the importance of the right to freedom of opinion the decision of the Fed. Const. Court[87] dealt with in Article 1 – the Benetton advertisement – has to be mentioned in the context of Article 11. Continuing its former jurisdiction the Court stresses the right to freedom of opinion being unrenounceable for the free democratic state order. Restrictions have to be justified by sufficiently weighty consequences to public welfare or rights worth the protection or interests of third persons. This was especially maintained in critical statements of opinion concerning social and political questions. The violation of a sufficiently important concern protected by this norm has to be proved in the case of restricting on the basis of section 1 Unfair Competition Act[88]. Concerns of this kind are not violated here. In this context the court made detailed manifestations to determinate the sense of expressed opinion, on the base of which the constitutional estimation may follow.

The Federal Court of Justice has been occupied with an interesting formulation of a question concerning the limits of freedom of expressed opinion.

The commissioner for sect matters of a catholic arch diocese several times in public had expressed himself critically about a therapist's activities. The latter claimed material and immaterial damages from the church because of injury of his right of personality and business. The regional court and higher regional court refused the claim. The Federal Court of Justice, however, decided that a commissioner for sect matters of a church, this being a corporation under public law, had an increased duty of care. This he violated. The judgement of the lower instance was abolished.

[86] Judgement 12 March 2003, – 1 BvR 330/96 u.a. –, NJW 2003, 1787.
[87] Decision 11 March 2003 – 1BvR 426/02 –, NJW 2003, 1303.
[88] Act on Unfair Competition section 1 contains a general clause saying acts of competition being contrary to public policy are prohibited.

Article 12. Freedom of assembly and of association

National legislation, regulation and case law

Prohibition of political parties:

According to German constitutional law political parties have a constitutional status and a public function. They shall "participate in the formation of the political will of the people", Article 20 § 1 sent.1 Basic Law. Section 1 § 1 sent. 1 Act on Political Parties [*Parteiengesetz*] reads: "The parties are a constitutionally necessary part of the free democratic basic order." Therefore they can only be prohibited by the Federal Constitutional Court pursuant to Article 21 § 2 Basic Law in connection with Sections 43-47 Federal Constitutional Court Act. Article 21 § 2 Basis Law reads: "Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality." The application for a decision on whether a party is unconstitutional may be made by the *Bundestag*, the *Bundesrat* or the Federal Government. If the application proves to be founded, the Fed. Const. Ct. declares the party as unconstitutional and accompanied this with the dissolution of the party. – As long as such a decision is not delivered the party has the full rights as other political parties, e.g. in public financing.

In 2001 the Federal Government, the *Bundesrat* and the *Bundestag* had made an application against the right-wing Nationaldemokratische Partei Deutschlands [National Democratic Party of Germany] to be unconstitutional. On 8 Oct 2002 the Second *Senat* of the Fed. Const. Ct. had carried out a hearing. Now, by decision of 18 March 2003,[89] the Court has decided to terminate proceedings. In the *Senat* there had to be a majority of 6 judges for continuing the proceedings. But 3 of 7 judges held a lack of proceedings because offices for the protection of the constitution had smuggled several paid informants into leading party ranks.

Practice of national authorities

Prohibition of assemblies:

The Assembly Act (sections 5 and 15) regulates the conditions for prohibiting an assembly. The competent authority is the local community in the *Länder*. Such prohibitions time and again are expressed. Numbers could not be determined.

Article 13. Freedom of the arts and sciences

No significant issues to be reported.

Article 14. Right to education

Practice of national authorities

In 2003 the discussion on improvements of the school and education systems, among others triggered by the OECD-PISA study, continued.

Regarding the vocational training the Federal Ministry for Education and Research has presented the Vocational Training Report 2003 of which the Federal Government took note

[89] Fed. Const. Ct, decision 18 March 2003 – 2 BvB 1/01 u.a. –, NJW, 2003, 1577.

and consented on 30 April 2003. The extensive report deals with new challenges for the dual vocational training, the training situation in 2002 and selected activities for modernisation of the vocational training and further training among others.

Article 15. Freedom to choose an occupation and right to engage in work

National legislation, regulation and case law

The difficult economical situation and the huge numbers of unemployed persons lead to a number of reform proposals and draft acts. It has been a matter of difficult deliberations in the government coalition as well as it has been contentious between the government and the opposition which of the solutions make sense and really help to solve the matter. All the proposals and points at issue cannot be presented within this report. As well it has not been in sight at the of Nov 2003 if and in what way there would be an agreement respective compromise in the mediation committee regarding this matter.

This applies as well to the considerations and measures concerning the reformation of the public social security system.

Article 16. Freedom to conduct a business

National legislation, regulation and case law

First the Act regarding the support of small entrepreneurs and the improvement of financing small enterprises [*Gesetz zur Förderung von Kleinunternehmern und zur Verbesserung der Unternehmensfinanzierung*][90] should be mentioned. It contains several improvements for the entrepreneurs themselves as well as releases them of bureaucratic regulations.

Regarding the employer-employee-relationship the Federal Court of Labour[91] had to decide about a termination due to a partial shut-down of business because of a business re-organisation. The Court stressed that there is no boundless freedom regarding business matters. The termination is to be seen as a misuse of the director's right to terminate the employer-employee-relationship in this context.

Article 17. Right to property

International case law and concluding observation of international organs

A decision made by the European Court of Human Rights concerned the former singular admittance of a lawyer only at one Higher Regional Court [*OLG*]. The Fed. Const. Court[92] declared this regulation (section 25 Federal Lawyer's Regulation [*BRAO*]) as unconstitutional. The European Court[93] held that the judgement of the Fed. Const. Court did not violate the ECHR.

[90] Act of 31 July 2003, BGBl. I 2003 p. 1515.
[91] Judgement 26 Sept 2002 – 2 AZR 636/01 –, NJW 2003, 2116.
[92] Judgement 13 Sept 2000, BVerfGE 103, 1.
[93] Decision 6 Febr 2003, n° 71630/01 – *Wendenburg v. Germany* –, NJW 2003, 2221.

National legislation, regulation and case law

The Act regulating the copyright in the information society [*Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft*][94] mainly implemented the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001. It deeply modified the Copyright Act and takes into account the changed conditions regarding the use of copyright works following the new developments of digitalisation and the internet.

Article 18. Right to asylum

International case law and concluding observation of international organs

No significant issues to be reported.

National legislation, regulation and case law

1. There is no relevant new legislation. The Federal Parliament [*Deutscher Bundestag*] has adopted an Immigration Act [*Zuwanderungsgesetz*][95] at 9 May 2003. However, when it failed to pass the Federal Council [*Bundesrat*], the Federal Government referred it to the Mediation Committee [*Vermittlungsausschuss*] which is currently trying to negotiate a compromise text but has not yet concluded its considerations. The Immigration Act as adopted by Parliament includes a new Residence Act [*Aufenthaltsgesetz*] to replace the Foreigners' Act of 1990. It shall bring about a comprehensive new regulation of residence, gainful employment and integration of foreigners, which would lead to several improvements with regard to their status. The law also includes new regulations in the field of refugee law and an improvement of the legal status of persons benefiting from subsidiary forms of protection. Article 3 Immigration Act contains modifications of the Asylum Procedure Act to shorten the asylum procedure.

1.1. Section 60 § 1 Residence Act which incorporates the refoulement prohibition of Article 33 § 1 1951 Geneva Convention into the Act, clarifies that victims of non-state or gender-specific persecution are to be considered Convention refugees. If adopted, this would be an important improvement for the protection of refugees, which UNHCR has repeatedly demanded. UNHCR has therefore in principle welcomed the draft regulation but has also asked for further amendments.[96]

Up until now, the competent authorities and courts apply a restrictive interpretation of the term "refugee"[97]. Only refugees fleeing from state or quasi state persecution are recognised.[98] One recent example of the German jurisprudence is a decision of the Higher Administrative Court of North Rhine Westphalia on an Iraqi asylum application[99]. In the view of the court, there was and would be no political persecution in the sense of section 51 § 1 Foreigners' Act

[94] Act of 10 Sept 2003, BGBl. I 2003 p. 1774.
[95] Act for Steering and Limitation of Immigration and for the ruling of the Residence and of the Integration of Citizens of the Union and Foreigners (Immigration Act), Bundesrats-Drucksache 343/03. It corresponds with the promulgated Immigration Act of 20 June 2002 (BGBl. I 2002 p. 1946) which the Federal Constitutional Court declared the act null and void for formal reasons Judgement 18 Dec 2002 – 2 BvF 1/02 –, NJW 2003, 339.
[96] UNHCR-Comments of February 2003 on the Draft of the Federal Government for an Immigration Law.
[97] See e.g. Federal Administrative Court [*Bundesverwaltungsgericht*], decision 18 Jan 1994 – 9 C 48.92, BVerwGE 95, 42; Fed. Adm. Court, decision 15 April 1997 – 9 C 15.96; Fed. Adm. Court, decision 2 Sept 1997 – 9 C 40.96.
[98] Authoritative is section 51 § 1 Foreigners' Act: "An alien may not be expelled to a State in which his life or freedom is threatened by reason of his race, religion, nationality, membership of a particular social group or his political opinion." - It does not speak about state persecution.
[99] Judgment 14 Aug 2003 – 20 A 430/02 A –.

in Iraq at the time and for the next future because of the lack of any state authority. The imperative essence of any "political persecution", a state power, did not exist.

UNHCR has pointed out that according to an interpretation of the term "refugee" in line with international law, the perpetrator of the persecution is not decisive but the possibility of the state to protect. This interpretation is accepted by the vast majority of the Convention's State parties.[100] An interpretation of the Convention aimed at the protection of human rights (see Article 1A and the refoulement prohibition of Article 33 of the 51 Convention) requires the inclusion of non-state persecution in the term "refugee". A similar position has been developed by the European Court of Human Rights for Article 3 ECHR.[101]
The application of the term "refugee" is not only relevant for the admissibility of removal but also for the status the applicant will obtain.

The Federal Government has pointed out in an answer to a question by Parliament on that topic[102]: Persons who are persecuted by non-state agents for any of the reasons enumerated in the 51 Convention (race, religion, political opinion etc.) must be granted refugee status, if they cannot obtain protection in the country of origin. In this regard, it makes no difference whether the persecution is attributable to the state or not. In both cases, the persecution endangers the individual's body, life or freedom for the grounds laid down in the 51 Convention. The same need of protection warrants the same status of protection. – This corresponds to the prevailing state practice, in particular to the practice of all the other EU Member states.

1.2. Some of the modifications of the Asylum Procedure Act by Article 3 of the draft immigration law are not conform to the 51 Convention. UNHCR[103] has criticised the new section 28 § 2 Asylum Procedure Act according to which subjective post-flight reasons are generally not taken into consideration. Contrary, the 51 Convention makes no difference between pre-flight and post-flight reasons.

Another point of criticism are the sanctions which are to be applied if an alien does not contact the recognition authorities immediately. Pursuant sections 20 (1) and (2), 22 (3) and 23 (2) Asylum Procedure Act, the application is then considered a secondary application. Consequently, pre-flight reasons could remain fully excluded. This would be contrary to the refoulement prohibition of Article 33 Geneva Convention. UNHCR has recommended to eliminate these passages of the act. – The organisation acknowledges that asylum procedure in the whole should be streamlined. However, any streamlining must be done in conformity with the 51 Convention. UNHCR suggested for example to ensure that asylum seekers receive qualified councelling during the early stages of the procedure.

2. The protection of personal data communicated by the asylum seeker is regulated by the Aliens Central Register Act [*Gesetz über das Ausländerzentralregister*] of 1994, since then modified several times. It determines which personal data has to be sent to the central register by which public authorities. It further regulates the transfer of data from the register to the various public bodies, in particular security offices, and the transfer to private bodies. The Act also contains rules on correction, erasure and blocking of data. The Aliens Central Register Act is supplemented by the Regulation on the Use of Aliens Data Files by the Aliens Authorities and the Diplomatic Missions [*Verordnung über die Führung von Ausländerdateien durch die Ausländerbehörden und die Auslandsvertretungen*] of 1990. The Regulation on Data Transferring to the Aliens Authorities [*Verordnung über Datenübermitt-*

[100] UNHCR-Statement of June 2003 for the Hearing „European Harmonisation of the Asylum Policy" by the Committee on Home Affairs of the Federal Parliament at 2 July 2003, p. 11 and follows.
[101] See Jens Meyer-Ladewig, Konvention zum Schutze der Menschenrechte und Grundfreiheiten, Handkommentar 2003, article 3, n° 23-26.
[102] Bundestags-Drucksache 15/1452 of 25 July 2003, p. 5.
[103] Footnote 2.

lungen an die Ausländerbehörden] of 1990 obliges different authorities to transfer specific data to the alien's authorities.

Practice of national authorities

See before. No further significant issues to be reported.

Reasons for concern

It still is an open question whether the improvements of the immigration law described above will be adopted. Otherwise, an interpretation of the term "refugee" in line with the 51 Convention can only be introduced through the EU qualification directive. It is hoped that the Federal Government will withdraw the reservations to the directive it currently upholds.[104] The same holds true for the improvements of the draft immigration law with regard to the legal status of recognised refugees and persons with complementary protection.

Article 19. Protection in the event of removal, expulsion or extradition

International case law and concluding observation of international organs

According to section 45 Aliens Law an alien may be expelled if his residence endangers public security and order or other considerable interests of Germany. In the case *Yilmaz* the European Court of Human Rights has declared an "unlimited" expulsion unlawful because of a violation of Article 8 ECHR. Yilmaz was a Turkish national born in Germany. In 1992 he received an unlimited residence permit. In the time relevant for the decision, he lived together with a German woman. In 1999, a son was born. After he was repeatedly convicted in 1995 and 1996 partly for heavy crimes the competent authorities ordered his expulsion pursuant to sections 47, 48 Aliens Act. The administrative courts confirmed this decision. The Federal Constitutional Court refused to admit the applicant's constitutional complaint for the lack of chances of success. However, the ECHR decided against Germany. The Court considered the fact that the expulsion was ordered without limitations a disproportionate interference in violation of Article 8 ECHR because of its effects on the applicant's family life and the personal circumstances of the case.

National legislation, regulation and case law

1. According to the established jurisdiction of the Federal Constitutional Court[105], the courts have to examine in extradition procedures whether the extradition is in conformity with indispensable constitutional principles of the German legal system. This includes the principle of proportionality (for instance no unbearable hard, inadequate or inhuman, humiliating punishment). In the reporting period, the Federal Constitutional Court had to deal with two different extradition cases. In one of these cases, the Higher Regional Court [*Oberlandesgericht*] Munich had declared an extradition request to India based on criminal conspiracy and fraud admissible. The Federal Constitutional Court[106] refused to admit the constitutional complaint. A danger of a treatment contrary to human rights could only be presumed if there was a "reasonable probability" in the concrete case to become the victim of torture or other cruel, inhuman or humiliating treatment in the requesting state which was not the case here. Although according to the reports of Amnesty International and the Foreign Office, torture was often used for interrogation and extortion by the police, there was no

[104] Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM (2001) 51 final, 12 September 2001.
[105] BVerfGE 63,332, 337 f.; 75, 1, 19.
[106] Decision of 24 Jun 2003 – 2 BvR 685/03 –.

continuous practice of systematic human rights violations in India. Otherwise, Germany would not have been allowed to conclude an extradition agreement with India. – The decision was passed by 6:2 votes. Two judges opposed to the majority in a dissenting opinion with important arguments.

In the second case, the USA had requested the extradition of a Yemen national. He was accused to have supported terrorist organisations, in particular Al Qaeda and Hamas. The accused claimed to have been kidnapped from Yemen to Germany contrary to international law. The Federal Constitutional Court[107] rejected the constitutional complaint. The court did not believe in the kidnapping and did not find a violation of the right to fair trial. The requesting state should have to been presumed to observe the rule of law and human rights principles. Furthermore, the USA had agreed not use the presidential decree of 13 Nov 2003 (application of special law of procedure) to the applicant.

2. The case of Metin Kaplan[108], who was the leader of the radical Islamite association „Kalifatstaat" prohibited by the Federal Minister of Interior on 12 Dec 2001[109], received wide public attention. Mr. Kaplan's right to asylum and refugee status was revoked after he had been convicted to four years imprisonment for requesting publicly the committal of criminal offences. The Administrative Court[110] [*Verwaltungsgericht*] Cologne has confirmed this revocation. But in a parallel decision[111] it has declared his removal unlawful on the basis of section 53 § 4 Aliens Act[112] in connection with Article 3 ECHR. The Court held that there was a high probability that Kaplan's trial in Turkey would not be in accordance with the rule of law and violate basic standards of Article 6 ECHR. There was the danger that testimonies given under torture would be used contrary to the Convention against Torture to which Turkey is a state party. – The Federal Minister of Interior has criticized the judgment publicly. A decision of the court of appeal has not yet been passed.

Practice of national authorities

According to German law the asylum and extradition procedure are considered separate procedures. According to section 4 Asylum Procedure Act [*Asylverfahrensgesetz*] refugee recognitions are not binding for the extradition procedure. The extradition authorities which are different from the authorities handling asylum applications have to examine independently whether extradition has to be refused because of "political persecution" (Section 6 § 2 of the Act on the international mutual legal assistance in Criminal Matters [*Gesetz über die internationale Rechtshilfe in Strafsachen*]).[113]

UNHCR has been approached in several extradition procedures against refugees recognised by other EU countries where the extradition authorities and courts failed to take the special nature of refugee cases sufficiently into considerations. One example is a recent decision of the Higher Regional Court [*Oberlandesgericht*] Dresden.[114] Consequently, recognised refugees may have to spend months in extradition detention before they are finally released.

[107] Decision (chamber) 5 Nov 2003 – 2 BvR 1506/03 – .
[108] In Germany known as "Kalif von Köln" [Caliph of Cologne].
[109] The Fed. Const. Ct, decision 2 Oct 2003 – 1 BvR 536/03 –, refused to accept a constitutional complaint against the decision of the Federal Administrative Court which had confirmed the prohibition.
[110] Judgment 27 Aug 2003 (3 K 629/02.A).
[111] Judgment 27 Aug 2003 (3 K 8110/02.A).
[112] Persuant to section section 53 § 4 *Ausländergesetz* an alien may not be removed in so far as the application of the European Convention on Human Rights shows that the removal is unlawful.
[113] Section 6 § 2 reads: The extradition is not admissible if serious reasons exist for the assumption that the prosecuted person in case of his extradition because of his race, his religion, his nationality, his membership of a particular social group or political opinion would be persecuted or punished or that his situation for one of these reasons would be complicated.
[114] Decision of 11 Sept 2002 – OLG Ausl 21/02 –. The Higher Regional Court refused to accept the Dutch refugee recognition and declared an extradition request to the country of origin admissible.

CHAPTER III : EQUALITY

Article 20. Equality before the law

National legislation, regulation and case law

An interesting decision made by the Fed. Const. Court concerned the costs of interpretation for a foreign-language defendant being imprisoned on remand. He was made to pay the costs of interpretation regarding the mail control. The Fed. Const. Court[115] declared this as an inadmissible discrimination. A foreign-language defendant being imprisoned on remand as well must be granted the right to keep contact to the outside world without any costs. There must not be an unequal treatment of German and foreign defendants.

Article 21. Non-discrimination

National legislation, regulation and case law

To date, the Council Directives 2000/43/EC, 2000/78/EC and 2002/73/EC are not realized in Germany. Respective Draft Acts of the Federal Government are being prepared.

Article 22. Cultural, religious and linguistic diversity

No significant issues to be reported.

Article 23. Equality between man and women

International case law and concluding observation of international organs

The European Court of Justice[116] decided that the German compulsory military service which applies to men only is not inadmissible with community law.

Practice of national authorities

In March 2003, the Federal Government presented a report[117] on the implementation of Gender Mainstreaming in science and research. The report contains information about the tendency trend towards more equalization in education and research. Though regarding the number of women with high educational exams this trend does not continue in regard to the management positions in science, research and economics as well as in technically oriented vocational trainings and university studies. Then there are presented a number of measures and projects which have been introduced by the Federal Ministry of Education and Research.

Regarding the situation of women the so called shadow reports [*Schattenberichte zum 5. CEDAW-Bericht*] of 8 June 2003, published by agisra e.V., KOK e.V. and TERRE DES FEMMES e.V., individually take stand with numerous critical hints and proposals.

[115] Decision 7 Oct 2003 – 2 BvR 2118/01 –.
[116] ECJ Judgement 11 March 2003 – C-186/01 –, *Alexander Dory*, NJW 2003, 1379.
[117] Bundestags-Drucksache 15/720 of 20 March 2003.

Article 24. The rights of the child

National legislation, regulation and case law

Within Article 7 (Right to respect for family life) the judgement of the Fed. Const. Court regarding the parental care was mentioned. The Court held that the legislator should implement a transition regulation until 31 Dec 2003. This was realized by the "Gesetz zur Umsetzung familienrechtlicher Entscheidungen des Bundesverfassungsgerichts".[118]

Article 25. The rights of the elderly

International case law and concluding observation of international organs

The CPT Report mentioned above within Article 4 deals as well with the situation in two German homes that had been visited by the CPT delegation. The delegation has been positively impressed by the conditions provided in these homes (Section E n° 178-180).

Article 26. Integration of persons with disabilities

Practice of national authorities

The Federal Government published a report[119] about the employment situation of severely handicapped persons in the relevant time period. According to this, the legally implemented measures for fighting against unemployment of severely handicapped persons were successful. Nonetheless the report names as well areas of concern in which the Federal Government notices further need for action.
In April 2003 the government[120] took stand to an interpellation regarding the integration of disabled persons.

CHAPTER IV : SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

No significant issues to be reported.

Article 28. Right of collective bargaining and action

No significant issues to be reported.

Article 29. Right of access to placement services

National legislation, regulation and case law

Regarding the reform projects be referred to the comment within Article 15.

[118] Act of 13 Dec 2003, BGBl. I 2003 p. 2547.
[119] Bericht der Bundesregierung nach § 160 des Neunten Buches Sozialgesetzbuch (SGB IX) über die Beschäftigungssituation schwer behinderter Menschen.
[120] Bundestags-Drucksache 15/793 of 7 April 2003.

Article 30. Protection in the event of unjustified dismissal

National legislation, regulation and case law

Regarding unjustified dismissal be referred to the decision of the Federal Labour Court mentioned within Article 15.

Article 31. Fair and just working conditions

International case law and concluding observation of international organs

On 9 Sept 2003 the European Court of Justice[121] announced the known judgement concerning the medical standby duty that has to be regarded as working hours. It contains an interpretation of Directive 93/104/EG.

Practice of national authorities

The Federal Government has presented a report regarding the status of safety and health at the work place and the occurring of accidents and illnesses related to the respective job in the Federal Republic of Germany in 2001. It gives an overview on how the work demands and work conditions have changed during the last years.

Article 32. Prohibition of child labour and protection of young people at work

No significant issues to be reported.

Article 33. Family and professional life

No significant issues to be reported.

Article 34. Social security and social assistance

National legislation, regulation and case law

Regarding social security and social assistance be referred to the comment within Article 15.
On 1 Jan 2003 the Act concerning the Basic Security[122] came into force.
A decision by the Fed. Const. Court[123] concerned the social nursing and care insurance. According to this decision there is no violation of the principle of equality in establishing the need for care by certain legally determined measures. The established need for care is necessary for the social nursing and care insurance to contribute.
The Federal Finance Court[124] referred to the constitutional stipulation (Article 1 § 1 in connection with Article 20 § 1 Basic Law) regarding the financial minimum for existence.

[121] Judgement 9 Sept 2003 – C-151/02 – *Landeshauptstadt Kiel/Norbert Jaeger*.
[122] Gesetz über eine bedarfsorientierte Grundsicherung im Alter und bei Erwerbsminderung [Act about a need-oriented basic security in old age and in case of reduced earning capacity] of 26 June 2001, BGBl. I 2001, p. 1310, 1335 modified by the Act of 27 April 2002, BGBl. I 2002, p.1462.
[123] Decision (Chamber) 22 May 2003 – 1 BvR 452/99 u.a. –.
[124] Decision 6 March 2003 – XI B 7/02 –, NJW 2003, 1830.

Article 35. Health care

National legislation, regulation and case law

The health reform has is one of the major themes in politics. An extensive measure is the Act for modernising the legal health insurance system [*Gesetz zur Modernisierung der gesetzlichen Krankenversicherung (GKV-Modernisierungsgesetz)*][125]. It contains a fundamental reform of the legal health insurance system.

Article 36. Access to services of general economic interest

No significant issues to be reported.

Article 37. Environmental protection

Practice of national authorities

Consequences of the latest judgements of the European Court of Justice regarding the waste disposal on the German waste law have been represented by the Federal Government in an answer[126] to an interpellation.

Article 38. Consumer protection

Practice of national authorities

The Federal Government presented an action plan regarding the consumer protection. It contains aims and principles of consumer policy and describes them for different areas.

CHAPTER V : CITIZEN'S RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

No significant issues to be reported.

Article 40. Right to vote and to stand as a candidate at municipal elections

No significant issues to be reported.

Article 41. Right to good administration

No significant issues to be reported.

[125] Act of 14 Nov 2003, BGBl. I 2003 p. 2190.
[126] Bundestags-Drucksache 15/728 of 28 March 2003.

Article 42. Right of access to documents

No significant issues to be reported.

Article 43. Ombudsman

No significant issues to be reported.

Article 44. Right to petition

No significant issues to be reported.

Article 45. Freedom of movement and of residence

No significant issues to be reported.

Article 46. Diplomatic and consular protection

No significant issues to be reported.

CHAPTER VI : JUSTICE

Article 47. Right to an effective remedy and to a fair trial

International case law and concluding observation of international organs

Three decisions made by the European Court of Human Rights have sentenced the Federal Republic of Germany because the time of proceedings took too long.[127]

National legislation, regulation and case law

The Fed. Const. Court itself in two cases reprimanded the duration of criminal proceedings which took far too long.
See as well the decision of 7 Oct 2003 regarding interpretation costs mentioned within Article 20.

Article 48. Presumption of innocence and right of defence

No significant issues to be reported.

Article 49. Principles of legality and proportionality of criminal offences and penalties

No significant issues to be reported.

[127] ECHR 6 Febr 2003, n° 45835/99, *Hesse-Anger v. Germany* (Fed. Const. Court)
ECHR 27 Febr 2003, n° 39547/98, *Niederböster v. Germany* (Fed. Const. Court)
ECHR 20 Febr 2003, n° 44324/98, *Kind v. Germany* (Civil Courts)

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

International case law and concluding observation of international organs

The European Court of Justice[128] deals with the rule not to be tried or punished twice in its judgement of 11 Febr 2003.

[128] Judgement 11 Febr 2003 – C-187/01 and C-385/01, *Gözütok and Brügge*, JZ 2003, 303.