



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**Seventh periodic report submitted by Germany  
under article 40 of the Covenant pursuant to the  
optional reporting procedure, due in 2019\***

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\* The present document is being issued without formal editing.

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## Introduction

1. The Federal Republic of Germany would like to apologise once again for the delayed submission to the Human Rights Committee of its responses to the list of issues prior to reporting (LOIPR).
2. The following responses to the list of issues were compiled by the German Federal Government. Unless otherwise indicated, they reflect the situation as applicable on 31 December 2019.
3. A number of statistical summaries/overviews have been attached to this document in order to improve readability.

### A. General information on the national human rights situation, including new measures and developments relating to the implementation of the Covenant

#### Reply to paragraph 1 of the list of issues prior to reporting (CCPR/C/DEU/QPR/7)

4. Most of the issues referred to in the Committee's previous concluding observations are addressed in the LOIPR. These issues are covered in the answers below.
5. Regarding paragraph 12 of the Committee's previous concluding observations in the context of extraditions and diplomatic assurances, the Federal Government hereby refers to the reply to paragraph 30 in the list of issues transmitted by the Committee against Torture (CAT/C/DEU/QPR/6), submitted by Germany in lieu of the sixth periodic report (CAT/C/DEU/6).
6. The implementation of the Committee's Views under the Optional Protocol with regard to individual complaints directed against Germany is coordinated by the Federal Ministry of Justice and Consumer Protection (BMJV). Depending on the individual case in question, other federal or *Länder* authorities will be called upon to take actions where necessary in order to implement the Committee's Views on a case-by-case basis.

#### Reply to paragraph 2 of the list of issues

7. With the Act of 12 June 2015 serving to Implement Recommendations by the Committee of Inquiry of the German Bundestag into the National Socialist Underground (Gesetz zur Umsetzung von Empfehlungen des NSU-Untersuchungsausschusses des Deutschen Bundestages), racist, xenophobic or other aims and motives evidencing contempt for humanity are explicitly included in the catalogue of sentencing principles enshrined in section 46 (2), second sentence, of the Criminal Code (Strafgesetzbuch, StGB). The element "other aims and motives evidencing contempt for humanity" also covers further recognised principles of non-discrimination.
8. In October 2016, the Act to Improve the Combating of Human Trafficking and to Amend the Federal Central Criminal Register and Book Eight of the Social Code (Gesetz zur Verbesserung der Bekämpfung des Menschenhandels und zur Änderung des Bundeszentralregistergesetzes sowie des Achten Buches des Sozialgesetzbuches) entered into force. This Act fundamentally redesigned and expanded the criminal law provisions for combating human trafficking. At the same time, it served to implement Directive 2011/36/EU and the Council of Europe Convention on Action against Trafficking in Human Beings. The offence of human trafficking (section 232 of the Criminal Code) now not only encompasses human trafficking for the purpose of exploiting a person in the form of prostitution, employment or slavery, but also human trafficking for the purpose of committing criminal offences, begging and organ trafficking. Moreover, the definition of aggravating elements has been extended, in particular for cases where the victims are under 18 years of age. As regards the exploitation of victims following human trafficking, new offences of forced prostitution (section 232a of the Criminal Code) and forced labour (section 232b) have been introduced. Notably, section 232a (6) of the Criminal Code regulates the criminal liability of "clients" of sexual services, making it an offence to

exploit a victim's predicament for the performance of sexual acts. In addition to the revision of the exploitation of labour offence (section 233 of the Criminal Code), the offence of exploitation involving deprivation of liberty (section 233a) has been newly introduced to improve criminal-law protection against exploitation in cases of such exceptional severity.

9. The Act of 20 July 2017 Introducing the Right of Marriage for Same-Sex Couples (Eheöffnungsgesetz; Federal Law Gazette I p. 2787), which entered into force on 1 October 2017, now allows same-sex couples to enter into marriage. The First Ordinance to Amend the Ordinance on the Implementation of the Act on Civil Status (Erste Verordnung zur Änderung der Personenstandsverordnung) contains provisions for the execution of the Civil Status Act (Personenstandsgesetz), and ensures that the Act Introducing the Right of Marriage for Same-Sex Couples is implemented in the civil status registers.

10. The Act of 18 December 2018 to Amend the Information Entered into the Register of Births (Gesetz zur Änderung der in das Geburtenregister einzutragenden Angaben; Federal Law Gazette I p. 2635) provides for an additional option for registering sex in the case of individuals with variations in sex development. This serves to implement the decision of the Federal Constitutional Court of 10 October 2017 (1 BvR 2019/16). In addition to the categories of female and male, as well as the option of certifying a birth while omitting the person's sex, the new provisions allow individuals with a difference of sex development to be entered into the register under the category diverse (German: divers). The entry may be amended at a later date. Additionally, individuals who have their entries amended may now enter a further declaration amending their first name to match their certified sex.

11. On July 22nd 2017, the Act on the Criminal Rehabilitation of People Sentenced after 8 May 1945 for Consensual Homosexual Acts (Gesetz zur strafrechtlichen Rehabilitierung der nach dem 8. Mai 1945 wegen einvernehmlicher homosexueller Handlungen verurteilten Personen) entered into force. With this Act, all convictions were annulled by law which had been handed down between 1945 and 1994 for consensual homosexual acts between persons over 16 years of age in application of the long-since repealed provisions of sections 175, 175a of the Criminal Code of the Federal Republic of Germany and section 151 of the Criminal Code of the German Democratic Republic. The core aim of the rehabilitation Act was to remove the legal stigma suffered by the affected persons on account of their conviction. In addition, those affected can receive compensation. In addition, on 13 March 2019 the Ordinance on Payment of Compensation from the Federal Budget to those Affected by the Criminal Law Ban on Consensual Homosexual Acts entered into force. This Ordinance means that even more individuals are now entitled to compensation. In total, more than 715,500 euros had been disbursed by December 2019. The Federal Government funds a hotline providing advice to potential applicants.

12. Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), 12 October 2017

13. The Act to Regulate the Prostitution Trade and to Protect Persons Working in Prostitution (Prostituiertenschutzgesetz) of 21 October 2016 entered into force on 1 July 2017. This Act includes protection against forced prostitution.

14. Act to Establish and Operate a National Violence against Women Telephone Hotline (Hilfetelefongesetz), 7 March 2012 (Federal Law Gazette I p. 448)

15. On 1 October 2017, the Act on the Introduction of a Family Court Approval Requirement for Measures Involving Deprivation of Liberty with regard to Children (Gesetz zur Einführung eines familiengerichtlichen Genehmigungsvorbehaltes für freiheitsentziehende Maßnahmen bei Kindern) entered into force. The aim of this Act is to improve the protection of children in child and juvenile psychiatric clinics, as well as in child and juvenile welfare facilities and facilities for the disabled.

16. The core provisions of the Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren, Federal Law Gazette I p. 2146) entered into force on 17 December 2019. The rules on audiovisual recording of examinations of accused

persons in the German Code of Criminal Procedure (Strafprozessordnung) and the cross-reference in section 70c of the Juvenile Courts Act (Jugendgerichtsgesetz) entered into force on 1 January 2020. The Act makes explicit statutory clarifications and specifically introduces new provisions into the Juvenile Courts Act to improve the legal status of juveniles and ensure that their special need for protection is taken into account in juvenile criminal proceedings.

17. The Act on the Equal Participation of Women and Men in Leadership Positions in the Private and the Public Sectors (Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst) was promulgated on 24 April 2015 (Federal Law Gazette I p. 642). The Act is built around three pillars: The first pillar is a gender quota for women of 30 percent on the supervisory boards of enterprises listed on the stock exchange and subject to full worker co-determination. The second pillar is an obligation for enterprises listed on the stock exchange or subject to worker co-determination to set targets for the percentage of female staff members on supervisory boards, management boards and in top-level management positions. The third pillar concerns the Federal Act on Appointment to Bodies (Gesetz über die Mitwirkung des Bundes an der Besetzung von Gremien) and the Federal Act on Equality between Women and Men in the Federal Administration and in Federal Enterprises and Courts (Gesetz für die Gleichstellung von Frauen und Männern in der Bundesverwaltung und in den Unternehmen und Gerichten des Bundes). A revised version of the latter aims at increasing the percentage of women in top executive positions in the public service and at improving the compatibility of family obligations, duties as a care provider and professional activities. Statistics concerning the implementation of this Act are recorded annually and published in the form of a gender equality index. As of 2016, a gender quota of at least 30 percent is required when filling vacancies in supervisory bodies in which the Federal Government has at least three seats, and in so-called “essential bodies” in which the membership of at least one member is to be determined by the Federal Government. As of 2018 the goal is to raise this proportion to 50 percent.

18. The Federal Act on Gender Equality of 24 April 2015 differs in many respects from the previous Act. In future, equality plans must include concrete targets, and each target must be accompanied by specific personnel, social and organisational measures.

19. To further the principle of equal pay for equal and equivalent work, the Act to Promote Transparency in Wage Structures (Entgelttransparenzgesetz) entered into force on 6 July 2017. Complementing the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz), this legislation specifically prohibits gender pay discrimination and introduces instruments for the better implementation of the equal pay for equal and equivalent work principle.

20. The Act on the Legal Status and Tasks of the German Institute for Human Rights (Gesetz über die Rechtsstellung und Aufgaben des Deutschen Instituts für Menschenrechte) of 16 July 2015 (Federal Law Gazette I, p. 1194) sets out the legal status, tasks and financing of the German Institute for Human Rights in line with the Paris Principles.

21. The following contains a list of recent case examples in which higher domestic courts have referred explicitly to the ICCPR:

- Federal Constitutional Court concerning the Act on the Uniformity of Collective Labour Agreements (*Tarifeinheitgesetz*), judgment of 11 July 2017, file nos.: 1 BvR 1571/15, 1 BvR 1588/15, 1 BvR 2883/15, 1 BvR 1043/16, 1 BvR 1477/16, §206.
- Federal Constitutional Court, order of 29 January 2019, file no.: 2 BvC 62/14, §61, 67 et seqq.
- Federal Administrative Court, CJEU referral of 19 August 2014, file no.: 1 C 1/14, §16 et seqq.
- Baden-Württemberg Higher Administrative Court, judgment of 29 August 2017, file no.: 10 S 30/16, §44, 46.

- Higher Administrative Court for the *Land* of North Rhine-Westphalia, judgment of 19 March 2019, file no.: A 1361/15, §216, 407 et seqq.

## **B. Specific information on the implementation of articles 1–27 of the Covenant, including with regard to the previous recommendations of the Committee**

### **Constitutional and legal framework within which the Covenant is implemented (art. 2)**

#### **Reply to paragraph 3 of the list of issues**

22. The Federal Government has always considered the reservation restricting the Committee's competence with regard to Article 26 of the Covenant, which was made in ratifying the Option Protocol to the Covenant, to be necessary. The reservation restricts the Committee's competence to cases where a complaint is made of unequal treatment regarding the rights guaranteed in the Covenant.

23. The Federal Government has taken note of the Committee's views concerning communication 3232/2018 with regard to the reservation on article 5 (2) (a) of the Optional Protocol and will consider possible consequences.

#### **Reply to paragraph 4 of the list of issues**

24. Implementation of the measures provided for in the National Action Plan on Business and Human Rights (NAP) for the period from 2016 to 2020 is continuous. An interministerial committee ensures that these measures are coherent. The NAP formulates the expectation that all business enterprises domiciled in Germany will integrate human rights due diligence processes into their value chain. Human rights due diligence is based on the UN Guiding Principles on Business and Human Rights. The human rights referenced in the UN Guiding Principles include those enshrined in the Covenant, which is also explicitly mentioned in the NAP as an obligatory human rights standard forming part of the core of human rights due diligence.

25. The Federal Government is currently surveying a representative sample of enterprises based in Germany with more than 500 employees to verify whether at least 50% of these enterprises have integrated the elements of human rights due diligence into their business processes and are fulfilling their human rights responsibilities. The results of this survey will be published in a further interim report in early 2020. The outcome of the NAP monitoring will provide an essential foundation for the Federal Government's decision on follow-up measures, which may include statutory provisions. This was provided for both in the NAP and in the coalition agreement.

26. The EU's CSR Directive has already been transposed into German law. The implementing legislation entered into force on 19 April 2017 (Act to Strengthen Non-financial Reporting by Companies in their Management and Group Management Reports; *Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten*).

27. The Federal Government does not share the above-mentioned concerns about insufficient access to justice in cases of human rights violations falling within the sphere of responsibility of business enterprises. German enterprises accused of having been involved in human rights violations abroad can be sued in Germany before a German court even if the damage suffered by the aggrieved person (i.e. the victim of a human rights violation falling within the sphere of responsibility of the business enterprise) occurred abroad. International civil procedural law provides access to the courts. The fact that plaintiffs not resident in Germany can receive legal aid under the same conditions as plaintiffs residing in Germany additionally facilitates access to justice. The BMJV has compiled a multilingual information brochure on these questions to inform affected individuals about ways to access German courts and the procedural mechanisms available to facilitate court

proceedings (e.g. the “model action for a declaratory judgment” introduced to improve the enforcement of consumer law; collective remedies). Whether or not a plaintiff is entitled to compensation depends on the substantive law applicable in the individual case. If the damage occurred abroad, this is usually the substantive law of the foreign country. All of this is explained in the information brochure. In addition to court proceedings, victims have the option of filing complaints with the National Contact Point for the OECD Guidelines for Multinational Enterprises.

28. The Federal Government is aware of its responsibilities in the field of arms export control. It thus pursues a restrictive and responsible arms export policy. The Federal Government decides on the granting of licences for arms exports on a case-by-case basis and in light of the respective situation following a process of careful consideration, taking into account foreign and security policy considerations. These decisions are based on the legal requirements set out in the War Weapons Control Act (*Gesetz über die Kontrolle von Kriegswaffen*), the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*) and the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*), as well as the Political Principles Adopted by the Federal Government for the Export of War Weapons and Other Military Equipment (in the version of 26 June 2019), the Council of the European Union’s Common Position of 8 December 2008 defining common rules governing control of exports of military technology and equipment (in the version of 16 September 2019) and the Arms Trade Treaty.

29. Respect for human rights in the recipient country plays a prominent role in the decision-making process. As a matter of principle, licences are not granted where there is sufficient suspicion that the military equipment to be delivered would be misused for the purposes of internal repression or other ongoing and systematic human rights violations.

## **Non-discrimination and prohibition of advocacy of national, racial or religious hatred (arts. 2, 3, 20 and 26)**

### **Reply to paragraph 5 of the list of issues**

30. Discrimination by public entities is already prohibited by Article 3 of the Basic Law (*Grundgesetz*) and therefore has constitutional status. The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) primarily covers discrimination by private entities or individuals. As far as possible, the provisions of the Act are also applicable to civil service employees (section 24 of the General Equal Treatment Act). In its section 1, the General Equal Treatment Act explicitly protects all persons from discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual identity. The explanatory memorandum to accompany the Act explicitly states that the criterion of ethnic origin is to be understood in a broad sense, having regard to the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD). Thus, a situation will also constitute an indirect discrimination on the grounds of ethnic origin in cases where a distinction is made ostensibly on grounds of nationality or language, but is based in reality on ethnic origin.

31. The General Equal Treatment Act also provides for protection of persons who are subject to unequal treatment on several grounds. If, in a particular case, unequal treatment based on one of these grounds is justified, this does not automatically mean that unequal treatment based on another ground is also justified (section 4 of the General Equal Treatment Act). Moreover, the fact that there were several grounds for unequal treatment can affect the amount of a potential compensation claim.

32. There is no risk that the exception provided for in section 19 (3) of the General Equal Treatment Act could be drawn upon to justify unequal treatment on arbitrary grounds in the case of rental of housing. This provision serves the sole purpose of achieving socially stable residential structures and balanced patterns of settlement, as well as balanced economic, social and cultural conditions.

33. Care is taken at the initial planning stage and when funding is granted to ensure that social housing is spatially distributed throughout an urban area in order to avoid segregation.

Socially stable residential structures also play a part in allocating inhabitants to subsidised housing.

34. Problematic social structures within individual neighbourhoods can also be avoided or remedied if care is taken when allocating housing that, at least to a certain degree, there is mix of population groups. Section 19 (3) of the General Equal Treatment Act provides the necessary leeway for this. However, it does not allow discriminatory practices in the procurement or leasing of residential property; rather – subject to strict conditions – this provision is aimed exclusively at preventing the formation of ghettos and the creation of living environments that could have negative effects on current or future residents.

35. The general deadline of two months provided for in sections 15 (4) and 21 (5) of the General Equal Treatment Act has not been amended.

#### **Reply to paragraph 6 of the list of issues**

36. Victims of discrimination have affordable and effective access to justice. Most importantly, they can bring claims based on the General Equal Treatment Act before the civil, labour or administrative courts, depending on the specific case constellation. Under civil procedural law, litigants can receive legal aid if, according to their personal and economic circumstances, they cannot afford the costs of litigation.

37. Germany does not provide for the possibility of *actio popularis*. It is possible, however, to intervene as a third party in certain proceedings (for example in proceedings before the Constitutional Court, section 27a of the Federal Constitutional Court Act [*Bundesverfassungsgerichtsgesetz*], and in proceedings before administrative courts, section 65 of the Code of Administrative Court Procedure [*Verwaltungsgerichtsordnung*]) and submit amicus curiae briefs. For example, the German Institute for Human Rights has used its broad mandate to submit amicus curiae briefs in anti-discrimination cases.

38. In addition, the Act on Equal Treatment for Persons with Disabilities (*Behindertengleichstellungsgesetz*) allows recognised organisations to bring certain actions related to discrimination of disabled persons before the administrative and social courts. There are also specific actions that can be initiated by recognised organisations in the field of consumer protection.

39. The Federal Anti-Discrimination Agency has powers to support persons who consider themselves victims of discrimination. Notably, it can strive to bring about an amicable settlement between the parties. It does not have the authority to initiate court proceedings.

40. However, anti-discrimination organisations are authorised, under the terms of their statutes, to provide legal advice to disadvantaged persons in court-proceedings. Legal representation may be provided only by attorneys-at-law.

#### **Reply to paragraph 7 of the list of issues**

41. With respect to hate speech on the internet, Germany pursues a two-pronged strategy: Rapid removal of hate speech and criminal prosecution of the perpetrators.

42. The new Act to Improve Enforcement of the law in Social Networks (*Netzwerkdurchsetzungsgesetz*, NetzDG) which entered into force in October 2017, aims to ensure the rapid removal of hate speech. The law targets hate crime, criminally punishable fake news (“information disorder”) and other unlawful content on social networks. It obliges the operators of large social media platforms to establish an efficient complaints management system that makes it easy for users to report unlawful content. If such content is reported, operators are required to take it down or block it within seven days or, in the case of manifestly unlawful content, within 24 hours. Operators must also publish reports about their handling of complaints. Non-compliance with these obligations can result in fines of up to 50 million euros. Such fines are imposed not for failure to remove individual posts, but rather in cases of systematic failure to comply with the above-mentioned requirements.

43. Germany has established a nationwide *Day of Action to Combat Hate Postings* with the aim of enhancing law enforcement in this area. For the past three years, this has entailed coordinated house searches and police questioning throughout Germany. This day serves as a reminder that the Internet is not a legal vacuum, and uses a prevention-based approach to raise awareness among the population. Furthermore, in the Land of North Rhine-Westphalia, the working group entitled *Don't Just Delete, Prosecute – Enforcing the Law on the Internet* was established in early 2017 to promote coordinated action on the part of law enforcement authorities, media companies and the media supervisory authority against criminally relevant hate speech on the web.

44. In addition, since 2015, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) has supported the activities of “jugendschutz.net”, a joint competence centre for the protection of minors on the internet at the federal and *Länder* levels. Jugendschutz.net, although not a public authority, has a legal mandate laid down in the Interstate Treaty for the Protection of Minors from Harmful Media (*Jugendmedienschutz-Staatsvertrag*). It offers a hotline for reporting harmful content on the internet. It assesses the reported cases, evaluates the apparent origin of the material, and tries to establish who is responsible for the content.

45. The Federal Agency for Civic Education (BpB) has long since been aware that hate speech and hostile agitation of any kind on the internet will cause major problems for societies in the 21st century. The BpB fulfils its role as an advocate for democracy by raising awareness and putting the spotlight on hate speech, speaking out against online hatred and encouraging all citizens to actively contribute to a democratic counter-narrative. The BpB has embarked upon various educational activities and initiatives aimed at building skills, such as its compilation of online teaching materials for inclusion in the regular school curriculum or in special classes. The BpB has put together detailed background information, and has developed guidelines and handouts suggesting possible counter-strategies and explaining the legal instruments available to counter hate speech.

46. On 14 June 2017 the Federal Government adopted a new National Action Plan Against Racism. The chapter on racism and hatred on the internet describes a number of initiatives in this field that have been launched or are supported by the Federal Government or the *Länder*. In addition to the initiatives referred to in the Action Plan, the BMFSFJ has provided support since 2017 to numerous projects for preventing and combating online hate speech and for strengthening democracy and civic engagement on the internet as part of its federal *Living Democracy!* programme (“Demokratie Leben!”).

47. The National Action Plan Against Racism can be found at: [http://www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2018/nap-en.pdf?\\_blob=publicationFile&v=4](http://www.bmi.bund.de/SharedDocs/downloads/EN/publikationen/2018/nap-en.pdf?_blob=publicationFile&v=4).

48. With its federal *Living Democracy!* programme (2015-2019) the BMFSFJ promotes civil participation and democratic attitudes at local, regional and national levels. In May 2018 it was decided to extend the federal *Living Democracy!* programme for a second period (2020-2024) with a total budget of 115.5 million euros. The federal programme targets children and young people, their parents, family members and other caregivers, as well as voluntary, part-time and full-time youth support workers, “multipliers” and representatives of state and civil society organisations. The basic aims of the federal programme are to promote democracy, celebrate and embrace diversity, and prevent extremism. In addition to approx. 300 “Partnerships for democracy” at the local level, 16 regional democracy centres in the *Länder* and nearly 150 pilot projects, the *Living Democracy!* programme provides funding to 40 organisations to create competence centres and networks for combating phenomena including discrimination, anti-Semitism and right-wing extremism. Their function is to pool expertise in their respective areas and act as a nexus and point of contact, building networks and bringing together a variety of different actors and civil society organisations.



## Reply to paragraph 8 of the list of issues

### *Application of criminal provisions in investigation proceedings (police statistics)*

49. Hate crime is recorded as a separate statistical category via the Criminal Police Reporting Service for Politically Motivated Crime (*Kriminalpolizeilicher Meldedienst Politisch motivierte Kriminalität*), which was introduced in 2001. Recording hate crime as “politically motivated crime” does not result in any restrictions in terms of the criminal offences recorded; rather, this heading captures all criminal offences perpetrated with racist motives. Within this heading, offences are assigned to different subcategories in order to provide a nuanced view of the motives recorded. These subcategories are as follows: *Anti-Semitic, disability, xenophobic, social status, racism, religion, sexual orientation*. Additionally, since 1 January 2017, anti-Muslim, anti-Christian and anti-ziganistic offences have been recorded as separate subcategories. The offences concerned are reported by local police via the *Land* criminal police offices to the Federal Criminal Police Office, where the data are recorded centrally.

50. The overview entitled “hate crime” (see annex to question 8a) traces the development of case numbers between 2001 and 2018.

51. The number of criminal offences with far-right anti-Semitic motives reached a peak in 2014 with 1,799 recorded cases. In 2017, the number of criminal offences recorded was 1,504. The overwhelming majority of anti-Semitic offences continue to fall into the category of politically motivated right-wing crime. The number of criminal offences motivated by xenophobia, on the other hand, continuously increased between 2012 and 2016, from 2,922 to 8,983 respectively. In 2017, the number of criminal offences motivated by xenophobia dropped for the first time after years of growth. In 2018, the number of xenophobic criminal offences increased again but, with 7,701 offences recorded, still remained below the levels reported for 2016. The number of criminal offences motivated by racism reached a peak in 2018, with 1,725 offences recorded in that year. In 2018, the overall number of politically motivated criminal offences constituting hate crime increased again. The Federal Government has an obligation to fight all forms of extremism, racism and hate crime, and will continue to do this, applying all means at its disposal and further intensifying the measures it takes.

### *Further extension of hate crime recording in judicial statistics*

52. The justice administrations of Germany’s *Länder* have been recording the number of proceedings that are due to right-wing extremist or xenophobic offences since 1992. The Federal Office of Justice (*Bundesamt für Justiz – BfJ*) collects this data at a centralised level and compiles a nationwide set of statistics. This statistical recording system was fundamentally reformed with effect as of 2013 to produce improved, more easily comparable data sets for the whole of Germany. The results for the period as of 2013 are available on the website of the BfJ (see annex to question 8c).<sup>1</sup> These statistics capture criminal proceedings for offences perpetrated with xenophobic or right-wing extremist motives. Criminal offences with anti-Semitic motives and criminal offences perpetrated via the internet are listed separately. Figures for 2018 are not yet available.

53. There are no plans to amend section 130 of the Criminal Code (incitement to hatred). This provision already provides a framework, fleshed out by the German courts, that guarantees sufficient protection for population groups and their individual members. It serves to protect the public interest in peaceful coexistence throughout the nation. In this connection, “liability to disturb public order” requires no more than an abstract risk of a breach of the public peace. No actual breach of the peace or specific risk of such breach is required. The elements of the offence as they currently stand are considered sufficient.

<sup>1</sup> [https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Justizstatistik/Straftaten/Strafrechtspflege\\_node.html](https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Justizstatistik/Straftaten/Strafrechtspflege_node.html).

**Reply to paragraph 9 of the list of issues**

54. Police measures based exclusively or overwhelmingly on a person's outward appearance or ethnic origin (*racial profiling* in accordance with the definition applied by CERD and the European Fundamental Rights Agency) do not feature among the methods used in police practice in Germany. Racial profiling violates applicable German law, in particular the principle of equal treatment enshrined in Article 3 para. 3, first sentence, of the Basic Law). Neither the Act on the Federal Police (*Bundespolizeigesetz*) nor the relevant regulations and ordinances applicable within the Federal Police permit unequal treatment of persons based on factors such as race, origin or religion. The same is true of the corresponding regulations applicable to the *Land* police authorities.

55. In order to ensure that each and every police officer exercises his/her powers in a non-discriminatory manner, police training at the federal and *Land* levels focus in particular on issues of racism and discrimination. The aim is to ensure that (trainee) police officers are equipped with the necessary awareness for their interactions with people of diverse backgrounds. This serves to prevent the emergence of prejudice and discriminatory attitudes (conscious or subconscious). Since 2014, racial profiling has featured either directly or indirectly on the curriculum at all relevant stages of training. Existing approaches, e.g. seminars held internally at the Federal Ministry of the Interior and the Federal Police on the ICERD definition of racism and on racial profiling, continue to be pursued and further developed. Since 2016, the Federal Police has been working on successively updating and improving basic and further training, related materials and applicable ordinances and regulations pertaining to discrimination, racism and racial profiling.

56. Initial and further training at the Federal Police regularly focuses on and continually revisits the topic of the application of section 22 (1a) of the Act on the Federal Police. Section 22 (1a) of the Federal Police Act allows police officers to question, review the identity documents of and inspect objects in the possession of any person at a railway station, on a train or at the airport, where situational intelligence or border-police experience suggest a case of unlawful immigration. The Federal Government believes that this provision is compatible with the Basic Law and with international and European law, since situational intelligence and border-police experience are permissible criteria which – when accompanied by sufficient training and awareness on the part of the police officers concerned – allow for non-discriminatory selection. For this reason, the Federal Police places special emphasis on training and awareness-raising in this area as described above.

57. Where, in isolated cases, complaints are raised of discriminatory conduct by the police, Germany's legal framework provides for immediate and effective procedures to clarify the circumstances. Whoever feels that they have suffered discrimination in being stopped by the police can turn to the German administrative courts, which then examine the case concerned. The official complaints management procedures in place at the Federal Police include various internal and external options for lodging a complaint to review potential wrongdoing on the part of police officers in an independent procedure conducted by supervisory authorities.

58. Persons concerned may submit their problems orally, in writing or by telephone to any Federal Police station. Furthermore, all Federal Police authorities can be contacted via the internet. To ensure an independent, impartial and comprehensive investigation into the matter, every incoming complaint is dealt with and a thorough review is conducted.

59. It has been emphasised in the previous decisions of the German courts (e.g. judgment of Koblenz Higher Administrative Court of 21 April 2016 and North Rhine-Westphalia Higher Administrative Court of 7 August 2018) that police controls pursuant to section 22 (1a) of the Act on the Federal Police must be based on reliable indications of a certain group of outwardly recognisable perpetrators, and that in this respect a higher burden of proof is incumbent upon the authorities. With this, a reasonable suspicion standard already applies. The Federal Government does not see any need for further legislative measures. The Federal Police accounted for the above-mentioned decisions of the German courts in updating its internal instructions and further-training materials in 2016.

60. Furthermore, in 2016 the Federal Police introduced an independent internal complaints mechanism.

## **Counter-terrorism and security measures (arts. 9, 12, 14 and 17)**

### **Reply to paragraph 10 of the list of issues**

61. In the opinion of the *Länder*, recent amendments to the police acts in Bavaria, North Rhine-Westphalia, Baden-Württemberg, Mecklenburg-Western Pomerania, Hamburg, Brandenburg, Lower Saxony, Saxony, and Saxony-Anhalt do not undermine any of Germany's human rights obligations under international law (e.g. access to legal advice and remedy).

62. Police law in Schleswig-Holstein has undergone a "vulnerability assessment". The outcomes of this assessment are currently being scrutinised by policy makers. A conclusive decision on the scope of the amendments is still pending.

63. Reforms to the Act on the Tasks and Powers Conferred upon the Bavarian State Police (Bavarian Police Powers Act; *Bayerisches Polizeiaufgabengesetz*) extended police powers of intervention with the aim of adjusting these to developments in technology and enabling Bavarian police to respond effectively to new types of threat, including those of a terrorist nature. The powers laid down in the Bavarian Police Powers Act are general and are available to the police in responding to the different types of threat they are tasked with averting under the same legislation. The Bavarian Police Powers Act does not grant any special powers solely for averting threats of a terrorist nature. Certain powers under the Bavarian Police Powers Act are subject to a judicial decision; this protects the rights of the individuals affected by police measures. In addition, all affected persons have recourse to legal remedies against police measures. Under certain circumstances, persons held in police custody are granted legal counsel by a court. Furthermore, anybody affected by a police measure is free to avail themselves of the assistance of legal counsel. Information, documentation and reporting duties equally ensure that police conduct remains subject to effective scrutiny.

64. The Federal Criminal Police Act (*Bundeskriminalamtgesetz*), which entered into force at the federal level on 25 May 2018, implements both European requirements in the area of data protection and the judgment of the Federal Constitutional Court of 20 April 2016 (BVerfGE 141, 220), which clarified requirements for the execution of undercover investigation measures. In fulfilling its task of averting the threat of international terrorism as described in section 5 of the Federal Criminal Police Act, the Federal Criminal Police Office can exercise the powers set forth in sections 38 et seqq. of the same Act, depending on the severity of the measure concerned, only if certain factual elements are fulfilled and other conditions (e.g. a general requirement that the measure must have been ordered by a court) have been met. This is complemented by statutory information, documentation and reporting duties. The Federal Criminal Police Act upholds the principles of legal certainty (principle of specificity) and proportionality. The affected persons have access to effective remedies including the possibility of judicial review.

65. Precautionary arrest (*Sicherungshaft*) under section 62 (2) of the Residence Act (*Aufenthaltsgesetz*) was most recently reformed with the Second Act for the Better Enforcement of the Obligation to Leave Germany (*Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht*), which entered into force on 21 August 2019.

66. The requirements for precautionary arrest were revised and broadened. The Act defined circumstances which now automatically lead to a rebuttable presumption of a risk of flight.

67. The necessity and proportionality of such measures is governed by law. Section 62 (1) of the Residence Act reads as follows: "Custody awaiting deportation shall not be permissible if the purpose of the custody can be achieved by other, less severe means which are also sufficient. The detention shall be limited to the shortest possible duration. Minors and families with minors may be taken into custody awaiting deportation only in

exceptional cases and only for as long as is reasonable taking into account the well-being of the child.”

68. In order to protect individuals against arbitrariness and abuse, custody may be ordered solely by a judge, who examines whether the statutory requirements are met in doing so.

## **Violence against women, including sexual and domestic violence (arts. 2, 3, 6, 7 and 26)**

### **Reply to paragraph 11 of the list of issues**

#### *Female Genital Mutilation*

69. In September 2013, lawmakers included female genital mutilation (FGM) in the Criminal Code as an offence in its own right (section 226a of the Criminal Code), subjecting it to punishment under criminal law with a maximum penalty of 15 years’ imprisonment. Before, such offences were already subject to a penalty of up to ten years’ imprisonment as dangerous bodily harm (section 224 of the Criminal Code) or, depending on the circumstances of the individual case, as grievous bodily harm (section 226 of the Criminal Code).

70. In 2016, the Federal Government financed an empirical study on FGM in Germany, and in the same year for the first time presented figures on women and girls affected by or at risk of FGM.

71. From October 2017 to December 2018, the Federal Government funded a project aimed at providing information on FGM in refugee accommodation centres.

72. Based on a decision adopted by the Minister-Presidents of the *Länder* in October 2019, a uniform “Statement opposing female genital mutilation” containing information about FGM and the legal consequences in Germany will be drafted and made available to public authorities throughout the Federal Republic. The statement can be carried by (the parents of) those at risk of FGM and shown to others in their home countries as a form of protection against pressure to undergo circumcision/circumcise their daughters.

#### *Stalking*

73. With the Act on Improving Protection against Stalking (*Gesetz zur Verbesserung des Schutzes gegen Nachstellungen*), which entered into force in March 2017, Germany has improved the protection afforded to affected persons (in practice, mostly women). Thanks to the amendment of section 238 of the Criminal Code, it is no longer necessary to demonstrate that an act of stalking has seriously restricted the affected person’s lifestyle (which was a high standard of proof to meet). Now, it is sufficient if one of the acts listed is committed in a manner that is capable of causing such a serious restriction.

74. Where a partner enters into a commitment to behave in a certain manner in a settlement confirmed by a court, any violation of this settlement is now subject to criminal prosecution pursuant to section 4 of the Act on Protection against Violence (*Gewaltschutzgesetz*). In this way, a legal provision has been created that parallels the safeguards afforded by criminal-law where courts have issued protection orders in cases of violence. In addition, a new provision ensures that the competent police authority and other public authorities receive mandatory notification of any court-confirmed settlement.

#### *Data collection*

75. In order to improve the collection of data and shed light on unreported offences, a study was carried out to identify the potential for a monitoring scheme in the field of violence against women. The monitoring scheme will supply well-founded, systematic data and insights in order to provide a sound basis for the federal and *Länder* policies and the policies of support systems in the field of violence against women in the long term. One element of the monitoring process is to analyse crime statistics in the field of violence

within relationships. An evaluation of these statistics has been produced annually since 2016. The most recent evaluation was published by the BMFSFJ on 25 November 2019.

#### *Domestic violence*

76. On 11 May 2011, the Council of Europe opened for signature a Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) establishing comprehensive and specific measures to prevent and combat violence against women and domestic violence, and to protect victims. Germany signed the Convention on that very day and ratified it on 12 October 2017. The Convention entered into force for Germany on 1 February 2018.

77. With the Convention's entry into force, it has become the task of all levels of government – the Federation, the *Länder* and the municipalities – to secure the enduring implementation of this instrument.

78. In the future, the Federation intends to provide even more support to the *Länder* as the latter fulfil their task of ensuring that a network of support services is in place to protect individuals against violence.

79. In the 19th parliamentary term, the Federal Government launched a programme of action to support and further develop the system of support services for women affected by violence. A key element of this programme of action is the federal funding programme *Facing up to Violence against Women Together*.

80. This consists of an investment programme to support facility-building projects and of an innovation programme. Within the bounds of its funding remit, the Federation will use this funding programme to test concepts for closing known gaps in the network of support services. This includes improving access to care and support services for women whom these services have so far been unable to reach in sufficient numbers (e.g. women from ethnic minorities, women with several children or older sons, women with physical impairments and women with psychological or addiction problems) and developing innovative best-practice support models for persons affected by violence.

81. The Federal Government published a report in 2012 on women's shelters, specialist counselling and advisory services, and other support schemes available to women affected by violence and their children. This report identified more than 350 women's shelters and more than 40 safe houses with over 6,000 beds, which afford protection and advice each year to around 15,000 to 17,000 women plus their children – i.e. somewhere between 30,000 and 34,000 people in total. Add to that the more than 750 specialist counselling and advisory services available across the Federal Republic, where women affected by violence can obtain qualified advice and support. In addition to the large number of women's counselling centres and distress helplines, providing professional support in the field of violence against women in general or specialising in support and counselling for victims of sexual violence, these services also comprise around 130 intervention services for domestic violence and around 40 specialist counselling and advisory services for victims of trafficking in women and other specific forms of violence. These include, for example, specialist advice centres and cooperation centres for victims of forced marriages or stalking.

82. From 2020 to 2023, the Federation plans to invest a total of 120 million euros to build, extend and refit women's shelters and counselling centres throughout Germany. On 21 October 2019, details regarding the implementation of this investment programme were presented and discussed at the meeting of the Round Table against violence against women established by the Federal Government, the *Länder* and the municipalities.

83. In March 2013, the BMFSFJ launched a nationwide distress helpline for violence against women. By calling 08000 116 016, women who have suffered violence can speak to specialised women counsellors, around the clock, in German and in 17 other languages, barrier-free, anonymously, and free of charge. Those who call the hotline are provided with advice, support, information, and the details of local counselling and advisory services. Additionally, the website [www.hilfetelefon.de](http://www.hilfetelefon.de) provides access to information and advice. By the end of 2018, the distress helpline for violence against women had already been contacted on some 185,000 occasions.

84. Additionally, the BMFSFJ and the BMJV have published a free brochure entitled “Greater protection in Cases of Domestic Violence”, which is regularly updated and is available in German, English, Turkish, Arabic and Persian.

85. Moreover, the BMFSFJ takes full advantage of the Federation’s albeit limited remit to support the system of women’s services by providing funding to national cooperation projects and networks (*Frauenhauskoordinierung e.V.*, and *Bundesverband für Frauenberatungsstellen und Frauennotrufe, Bundesweiter Koordinierungskreis gegen Frauenhandel und Gewalt an Frauen im Migrationsprozess e.V.*). Promoting networks of counselling and advisory centres and support services for women affected by violence is an important part of the comprehensive strategy pursued by the Federal Government to combat and prevent violence against women.

#### *Trafficking in human beings*

86. The Act to ratify the Council of Europe Convention on Action against Trafficking in Human Beings of 12 October 2012 transposed that Convention into national law. The Convention entered into force for Germany on 1 April 2013. The Council of Europe Convention is the first binding document to explicitly place human trafficking in a human-rights context by creating a legal making victims’ rights the focus of law. As the German legal situation is already in line with the Convention, the ratifying legislation does not make any amendments to German law.

87. In light of the highly complex issues that domestic violence and trafficking in women/human trafficking entail, and the fact that these affect a range of policy areas, target groups, and levels of action, the Federal Government has set up federal/*Länder* working groups on domestic violence and human trafficking under the auspices of the BMFSFJ. The tasks of the working groups include: a continual exchange of information about the many and diverse activities pursued in the sixteen *Länder* and in national and international committees; analysis of the specific problems encountered in combating domestic violence and trafficking in women; elaboration of recommendations and, where applicable, of joint action against domestic violence and trafficking in women. With regard to combating human trafficking, a joint forum of all Federal Government/*Länder* working groups operating in this field met for the first time in spring 2019 to facilitate a comprehensive exchange.

#### *Protection of women refugees*

88. In 2016, the BMFSFJ launched an initiative, together with the United Nations child welfare organisation UNICEF and further partners, for the protection of women and children in refugee accommodation. This federal initiative entailed drawing up and publishing *Minimum Standards for the Protection of Refugees and Migrants in Refugee Accommodation Centres*. The standards focus in particular on women, children and other vulnerable groups of individuals, such as persons with disabilities, refugees and migrants with trauma-related disorders, and lesbian, gay, bisexual, transgender and intersex refugees.

89. Until the end of 2018, in order to test the *Minimum Standards* in practice, the BMFSFJ funded a total of 100 positions for the coordination of protection against violence in refugee accommodation centres. Additionally, support is provided for developing and establishing decentralised advice and support structures within Germany’s welfare organisations to protect people against violence in refugee accommodation centres, and for developing a monitoring tool to assist accommodation providers.

90. Another focus is on awareness-raising and information campaigns to inform women and girls in refugee accommodation centres about their rights and about the counselling, advice and protection they can obtain in Germany. A significant contribution is made in this regard by the national distress helpline for violence against women, and the coordination units against violence against women and human trafficking that operate throughout Germany.

91. The Second Act to Improve the Enforcement of the Obligation to Leave Germany (*Zweites Gesetz zur besseren Durchsetzung der Ausreisepflicht*), which entered into force on 21 August 2019, introduced federal legislation to protect vulnerable persons in refugee

accommodation centres. Pursuant to section 44 (2a) of the Asylum Act (*Asylgesetz*), the *Länder* “should, with regard to the accommodation of persons requesting asylum pursuant to subsection 1, take appropriate measures to ensure the protection of women and vulnerable persons”. As outlined in the explanatory memorandum to the legislation, vulnerable persons under this provision particularly include, in addition to women, “minors, persons with disabilities, elderly persons, pregnant women, lesbian, gay, bisexual, transgender and intersex persons, single parents with minor children, victims of human trafficking, persons suffering from serious illnesses, persons with mental disorders and persons who have suffered torture, rape, or other serious forms of emotional, physical or sexual violence, such as for instance victims of gender violence, female genital mutilation or forced marriage, or victims of sexual, gender-based, racially or religiously motivated violence”.

## **Voluntary termination of pregnancy (arts. 3, 6, 7, 17 and 26)**

### **Reply to paragraph 12 of the list of issues**

92. Even though abortion fundamentally constitutes a punishable offence under the Criminal Code (section 218), the legislature has introduced a range of possibilities for pregnant women in specific cases to have legal and safe access to pregnancy termination. Section 218a of the Criminal Code provides that pregnancy termination within the first twelve weeks of pregnancy is not punishable if the pregnant woman decides to have the termination of her own free will, if she demonstrates that she obtained counselling at least three days prior to the procedure and if the termination is performed by a physician. In addition, termination of pregnancy with the pregnant woman’s consent is not unlawful and thus not punishable if the pregnancy was caused by an act of sexual abuse or by rape and if no more than 12 weeks have since elapsed. The same applies, irrespective of the duration of pregnancy, if the termination is necessary to avert a danger to the life or a danger of grave impairment to the health of the pregnant woman. In view of the specific situation of pregnant women, section 218a of the Criminal Code provides for an exemption from punishment (solely) for pregnant women in cases of an abortion between weeks 12 and 22 of pregnancy if the woman has obtained counselling prior to the procedure and if the termination was performed by a physician. Lastly, extraordinary circumstances such as severe personal or social distress are taken into consideration. Where such circumstances are found to apply, the court may refrain from imposing a penalty on a pregnant woman who undergoes a termination without medication indication at any time during her pregnancy.

93. The Act to Improve Access to Information on Abortions (*Gesetz zur Verbesserung der Information über einen Schwangerschaftsabbruch*), which entered into force on 29 March 2019, amended section 219a of the Criminal Code (“Advertising abortion”). This provision now clarifies that doctors, hospitals and facilities are allowed to refer publicly to the fact that they perform legal abortions. This allows women to ascertain from a doctor’s website, for example, whether the latter’s medical practice offers pregnancy terminations. Moreover, doctors, hospitals and facilities are allowed to refer to information about terminating a pregnancy provided by the competent federal or *Land* authority, a counselling service in accordance with the Act on Pregnancies in Conflict Situations (*Schwangerschaftskonfliktgesetz*) or a medical association.

94. The Act on Pregnancies in Conflict Situations was also amended. Pursuant to section 13 (3) of the Act on Pregnancies in Conflict Situations, the German Medical Association (*Bundesärztekammer*) now maintains a list of doctors’ surgeries, hospitals and facilities which have stated that they carry out pregnancy terminations under the conditions set out in section 218a (1) to (3) of the Criminal Code. This list is updated monthly and published online. Pursuant to section 13a of the Act on Pregnancies in Conflict Situations, the Federal Centre for Health Education (*Bundeszentrale für gesundheitliche Aufklärung*) also publishes the German Medical Association’s list, alongside further information on abortions. Furthermore, the nationwide central crisis hotline “*Pregnant women in distress*”, set up on the basis of the Act on Pregnancies in Conflict Situations, provides information from the list. At the end of July 2019, the German Medical Association fulfilled its legal

obligation to publish this list for the first time. Meanwhile, the list contains 302 addresses of doctors, hospitals and facilities from all of Germany's *Länder*. More are currently undergoing verification. The next update will take place in February 2020.

95. Hormonal contraceptives must be prescribed by a doctor. Statutory health insurance providers reimburse the costs of these contraceptives for women under the age of 22 (section 24a of Book V of the Social Code). In this context it should be noted that recipients of state support such as unemployment benefit are also entitled to the benefits provided under the German statutory health insurance system. In addition, based on the results of a model project on counselling, information and cost coverage for contraceptives (*Beratung, Information und Kostenübernahme bei Verhütungsmitteln*), funded by the BMFSFJ, the competent federal authorities are examining whether the costs of prescription contraceptives could potentially be covered for women with limited funds.

96. In cases of street harassment, police forces and public order authorities have primary responsibility for ensuring that women seeking abortion counselling have unimpeded access to counselling centres for pregnant women in conflict situations. Police law and the law relating to public order generally fall within the remit of the *Länder* (Articles 30 and 70 paragraph 1 of the Basic Law). The Federation, by contrast, is responsible for criminal law and civil law. Victims can take civil action against such acts of street harassment by filing an injunction or can file a criminal action for insult (*Beleidigung*) or malicious gossip (*üble Nachrede*). However, in arriving at an assessment, the courts must also weigh up the right to freedom of expression in the individual case.

97. Cases involving protection against street harassment of pregnant women and doctors have recently been the subject of a number of complaints by an anti-abortion activist to the European Court of Human Rights (ECHR). After the Court ruled against Germany in an initial case in 2015 (*Annen v. Germany*, 3690/10), in a number of recently issued judgments it has approved the approach of German civil courts to complaints brought before them by doctors and a scientist in response to forceful campaigning by activist Klaus Günter Annen, which included *inter alia* "pavement counselling" of potential patients outside the doctors' medical practices (ECHR, judgments of 20 September 2018, *Annen v. Germany* (nos. 2 to 5), Application nos. 3682/10, 3687/10, 9765/10 and 70693/11 and ECHR, judgment of 18 October 2018, *Annen v. Germany* (no. 6), Application no. 3779/11).

98. The ECHR has pointed out in its judgments that the actions of pro-life activists are protected to a large degree by the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights. At the same time, it has made it clear that there is a limit in cases where doctors who perform abortions in accordance with domestic law are publicly discredited as criminals and where patients seeking medical assistance are harassed, e.g. in the form of "pavement counselling" (see *Annen ./. Germany* (no. 4), 9765/10, § 26).

99. This case law is to be welcomed because it ensures greater legal certainty in future cases – both for doctors performing abortions and for the domestic courts. It is thus to be expected that in future cases, the competent domestic authorities and courts will be able to find adequate solutions based on currently existing domestic law.

### **Children with variations of sex characteristics (intersex) (arts. 7, 9, 17, 24 and 26)**

#### **Reply to paragraph 13 of the list of issues**

100. Following the concluding observations of the Committee, the Federal Government mandated a report by the German Ethics Council (an independent council of experts) on the situation of intersex persons in Germany. In its report in 2012 the Council recommended that surgical and other medical measures concerning infants and children should be permitted only if these are strictly necessary in light of the best interest of the child. The Federal Government has initiated legislative procedures to address the question of surgical and other medical treatment of intersex children. The parties forming the current government have agreed to introduce legislation providing that such procedures shall be



permitted only in cases of immediate concern and in order to prevent life-threatening situations.

101. In preparation for the drafting process, the BMJV held an interdisciplinary symposium in October 2018 with the participation of experts from various fields (medicine, law, psychology, gender studies), as well as affected individuals and their representatives, and interest groups. The symposium showed that all participants largely agreed that a ban should be introduced. However, the question of which precise form this ban should take encountered a great deal of discussion.

102. The draft bill is currently under consideration by the relevant ministries. A cabinet decision is expected within the first few months of 2020.

103. A 2016 study supported by the BMFSFJ on the *current relevance of cosmetic operations of children with “ambiguous” genitalia* contained an analysis of the first ever complete survey in Germany of the frequency of genitoplasty in children diagnosed with so-called “disorders of sexual development”. The study retrospectively evaluated case-related data from hospital statistics on feminisation and masculinisation surgeries performed on genitals in German hospitals between 2005 and 2014. Based on the agreement of the current governing coalition, under which sex reassignment surgery in children should be permitted only in imperative cases and to avert an immediate threat to a child’s life, the University of Bochum examined in 2018 how the frequency of feminisation and masculinisation surgeries on children’s genitals had developed over recent years. The notable overall result of the analysis is that the number of children under the age of 10 with congenital variations in physical sex characteristics who underwent inpatient feminisation or masculinisation surgery in a German hospital remained relatively stable between 2005 and 2016 when considered in relation to the number of diagnoses. There is no indication that there was a decrease in the number of feminising or masculinising genital surgeries on children unable to consent. This result is consistent with that of the first study (2016) covering the period between 2005 and 2014.

104. In addition, since spring 2019, the BMFSFJ has been engaged in targeted nationwide public awareness raising and educational work through its online “Rainbow Web Portal” to spread the information that a variation in physical sex development in itself does not usually require medical treatment and that account must be taken of the child’s right to develop their own gender identity.

105. Moreover, preparations are currently ongoing to create a dialogue forum to expand counselling and support services for intersex people and their relatives, and to improve and secure the quality of such services. The dialogue forum is planned to be launched in late March/early April 2020.

106. The Federal Association of Intersex People (*Bundesverband Intersexuelle Menschen e. V.*) was commissioned by the BMFSFJ to create a curriculum for qualified counselling of intersex people and their families. Taking the form of guidelines, this curriculum will be used as a basis for improving the quality of the counselling and support available to intersex people.

**Right to life, prohibition of torture and other cruel, inhuman or degrading treatment or punishment, liberty and security of person, and treatment of persons deprived of their liberty (arts. 6, 7, 9, 10 and 24)**

**Reply to paragraph 14 of the list of issues prior to reporting**

107. In its discussions with the United States, the Federal Government regularly expresses its requirement that US armed forces in Germany act in accordance with their obligations under the NATO Status of Forces Agreement, in particular under Article II of that Agreement, and that they respect the law applicable in Germany, which includes international law. The US side regularly confirms that it considers itself obliged to meet this requirement.

**Reply to paragraph 15 of the list of issues**

108. In Hamburg, criminal investigations against police employees are conducted in a centralised investigation office (Department for Internal Investigations, “Dezernat Interne Ermittlungen, DIE”), which is affiliated with the Interior Ministry. The DIE has a total of 168 pending investigation proceedings in connection with the G20 summit in Hamburg (status: 21 January 2020); these are based on criminal allegations against a total of 221 police officers. Of these, 146 proceedings against a total of 189 police officers dealt with the allegation of unlawful use of force. Eighty-three of the total of 168 investigation proceedings were initiated *ex officio* (i.e., by the police, the DIE or the public prosecutor’s office) following a comprehensive evaluation of the available video material. An additional 36 proceedings were initiated based upon information provided by third parties. Only 49 of all investigation proceedings were based upon criminal complaints by aggrieved persons.

109. Following conclusion of the criminal investigation by the DIE, the public prosecutor’s office is tasked with the legal assessment and decision as to how the proceedings should be concluded. According to information provided by Hamburg Public Prosecutor’s Office, 103 cases were terminated pursuant to section 170 (2) of the Code of Criminal Procedure (*Strafprozessordnung*) because of insufficient suspicion (current as of 14 October 2019). The accused could not be ascertained in 54 of the terminated proceedings. In eleven of those cases, this was because the police officers could not be identified. Additionally, the investigations were made more difficult by the fact that, in the proceedings due to bodily injury in public office, the identity of 60 aggrieved persons was unknown. The remaining investigations are ongoing.

110. As a reaction to the problem of the lack of ability to identify accused police officers, Hamburg has meanwhile introduced an identification requirement for police officers (initially limited to 2 years). In October 2019, the Hamburg City Parliament resolved the Act to Amend to Hamburg Civil Servant Law (introduction of section 111a HmbBG). In addition, in November 2019 the Hamburg Senate resolved an executive order specifying the rules of the Act. That executive order includes an obligation to wear identification for the Hamburg riot police in large-scale operations under unified command due to rallies, other public events or gatherings.

*Reply to paragraph 15 (a)*

111. The figures with regard to complaints against the police for the years 2011 to 2018 can be found in the attached annex.

*Reply to paragraph 15 (b)*

112. Where there is a suspicion of a criminal offence, criminal investigations are, as a general principle, conducted by the public prosecutor’s office. Safeguards are in place in almost all *Länder* to ensure that the specific investigations which are necessary in a particular case are transferred to another police station than that against whose staff the allegations have been made.

113. Further, Bavaria, Bremen Hamburg and Schleswig-Holstein each have a central investigating body which is either affiliated with the *Land* Ministry of the Interior or the *Land* Criminal Police Office, and which conducts investigations into complaints filed against police officers.

114. Central complaints offices of the police have been established in the interior ministries of Lower Saxony, Saxony, Saxony-Anhalt and Schleswig-Holstein.

115. Citizens in Rhineland-Palatinate are able to turn to the Police Commissioner (*Beauftragter für die Landespolizei*) to file complaints against the personal misconduct of individual police officers or against police measures. The Police Commissioner is the point of contact for both citizens’ complaints and suggestions made regarding the *Land* police.

116. In Schleswig-Holstein, the office of Police Commissioner (similar to Rhineland-Palatinate) was introduced as of 1 October 2016.

117. Anyone in Mecklenburg-Western Pomerania is entitled to turn to the “Ombudsperson of Mecklenburg-Western Pomerania” at the *Land* Parliament of Mecklenburg-Western Pomerania in the event of alleged misconduct. The Ombudsperson is independent in the exercise of the office and subject only to the law.

118. The *Land* of Baden-Württemberg has had an Ombudsperson since 2016, who is independent in the exercise of the office and not subject to any instructions but rather only to the law. The Ombudsperson has specific responsibility for the police. He or she is a contact point for police officers, and simultaneously a central contact person and a mediating representative of the interests of citizens if they report possible personal misconduct of individual officers or claim that a police measure was unlawful.

119. In Bremen, every citizen has the opportunity to contact the Department of Internal Investigations if a certain factual situation attains criminal-law relevance (e.g., bodily injury). Where this results in a complaint being filed against the police, the matter is immediately passed on to the Department of Internal Investigations, which is subordinate to the Senate Administration for the Interior, for further investigation.

120. In Thuringia, the Ministry of Interior and Community established an Ombudsperson’s Office (*Vertrauensstelle*) at the Thuringian police as of 1 December 2017.

*Reply to paragraph 15 (c)*

121. At the *Land* level, to date there is an identification requirement for police officers in Berlin, Brandenburg, Bremen, Hamburg, Hesse, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saxony-Anhalt, Schleswig-Holstein and Thuringia (to some extent limited to units under unified command). While there is currently no identification obligation in place in the other *Länder*, to some extent considerations are being entertained to introduce this duty. Some *Länder* have taken the decision to introduce an identification tag to be worn on a voluntary basis.

122. There are no plans to have federal police officers wear name badges or identification numbers. In actual practice, no case has become known thus far in which it was impossible to identify officers of the Federal Police and thus impossible to investigate allegations.

123. By judgment dated 7 May 2019 (LVG 4/18), the Land Constitutional Court of Saxony-Anhalt declared that the rules obligating the police officers to wear name and identification number badges were constitutional.

124. By judgment of 26 September 2019, the Federal Administrative Court upheld as lawful the statutory rule of the *Land* of Brandenburg mandating identification for police officers. The Court held that the obligation to wear a name badge or identification number did indeed interfere with the right of informational self-determination of the officers. However, the Court concluded that this interference was constitutional (file no. BVerw 2 C 32.18 and BVerwG 2 C 33.18).

National Agency for the Prevention of Torture

125. Because its tasks cover both the national and regional levels, the National Agency was established on the basis of an administrative agreement between the Federation and the *Länder*. Since 2015, the funding of the National Agency has consisted of 180,000 € from the budget of the BMJV (national office) and 360,000 € from the budgets of Germany’s *Länder*. In the administrative agreement regarding cooperation between the national office and the *Länder* commission, the funding was specified as to amount, so that any change would require an amendment of the administrative agreement.

126. In November 2019, the Conference of Justice Ministers of the *Länder* decided to increase funding for the National Agency by a total of 100,000 € per year as of 2020.

**Reply to paragraph 16 of the list of issues***Police custody*

127. Those *Länder* that still maintain the option of mechanical restraint (*Fixierung*) in police custody are continuously encouraged to draw on the experiences of those *Länder* that have abandoned the practice. Mechanical restraint in prisons has become a rare occurrence. The CPT has commented on the practice encountered in its 2015 visit as follows:

128. “The CPT welcomes the fact that, since the 2010 visit, the use of mechanical restraint (*Fixierung*) in the context of police custody has been abandoned by the police authorities of several *Länder*, including Baden-Württemberg, Berlin, Saarland and Thuringia. The Committee calls upon the police authorities of Lower Saxony, North-Rhine Westphalia, Saxony-Anhalt and all other *Länder* concerned to put an end to this practice without any further delay.”

129. “The CPT is pleased to note that the downward trend observed during the 2013 visit regarding the use of mechanical restraint (*Fixierung*) in prisons has continued. As a matter of fact, in most of the prisons visited, hardly any prisoner had been subjected to *Fixierung* in recent years. The CPT encourages the relevant authorities of all *Länder* to abandon the resort to *Fixierung* in prisons.”

130. With its Act to Strengthen the Rights of Persons Held in Police Custody (*Gesetz zur Stärkung der Rechte von im Polizeigewahrsam festgehaltenen Personen*; GV.NRW p. 995), which entered into force on 31 December 2019, North-Rhine Westphalia implemented the requirements established by the Federal Constitutional Court in the latter’s decision of 24 July 2018 concerning particularly intrusive forms of physical restraint (2 BvR 309/15; 2 BvR 502/16) to cover persons held in police custody. With this Act, the use of this type of mechanical restraint is thus permissible only where new, much stricter legal requirements are met.

*Care*

131. Regarding the inspection of care facilities and outpatient care services, please refer to question 17.

132. Measures involving deprivation of liberty are the subject of growing attention, and this is also evidenced by the publication of research-based guidelines developed in close collaboration between field experts and practitioners to support caregivers in avoiding measures that restrict a resident’s liberty ([www.leitlinie-fem.de](http://www.leitlinie-fem.de)). These guidelines, updated in 2015, were drawn up together with a group of experts from various fields. Residents’ representatives, representatives of care facilities, care-home supervisory authorities, and the Medical Service of the German Health Insurance Funds were involved in the project. The project was funded by the Federal Ministry for Education and Research.

133. Two projects – Werdenfelser Weg and ReduFix – are actively offering training seminars on how best to avoid measures involving deprivation of liberty. The Werdenfelser Weg project has had a considerable impact. Having started as a regional project in Bavaria, it is now active throughout Germany and provides guidance to those dealing with this issue in practice. The ReduFix project has successfully trained a number of instructors (“multipliers”) who offer in-house training at relevant institutions. On its website, the project offers handbooks and guidance materials, as well as a list of contacts for those interested in training courses. The materials and training seminars on offer are designed to raise awareness not only of what the law says, but of the need to avoid measures involving deprivation of liberty in general.

134. The German Judicial Academy also continues to offer seminars on the topic.

*Criminal prosecution*

135. Where impermissible instances of mechanical restraint occur, the competent investigating authorities are obliged to initiate investigations in accordance with the principle of mandatory prosecution. Especially in cases of victims who were subject to a special duty of care, the obligation to ensure effective criminal prosecution may be

particularly pronounced. For instance, in a decision of 15 January 2020 the Federal Constitutional Court granted a constitutional complaint challenging the discontinuation of criminal proceedings in a case of coercive physical restraint, and remitted the case back to the lower court for further clarification.

### Reply to paragraph 17 of the list of issues

#### *Reply to paragraph 17 (a)*

136. All care services must respect human dignity and have in place a system of quality management. Compliance with these requirements and multiple other quality-related criteria is monitored in annual inspections of all nursing homes and community-based care services, which are carried out by the Medical Service of the German Health Insurance Funds and the Inspection Service of the Association of Private Health Insurance Funds (*Prüfdienst des Verbandes der privaten Krankenversicherung e. V.*). The results of these inspections are published and may result in corrective measures or sanctions.

137. As part of the annual quality control inspections conducted at inpatient care facilities under section 114 et seq. of Book XI of the Social Code (SGB XI), data are collected with regard to the patients included in the sample, *inter alia* on the use of measures involving restrictions of their liberty. One of the issues examined is whether the use of such measures is subject to consent or authorisation, and whether the necessity of such consent or authorisation is regularly verified. Every three years, the Medical Advisory Service of the National Association of Statutory Health Insurance Funds (MDS) compiles a report based on the conclusions of these quality control audits. The 5th MDS quality report, presented in February 2018 and based on the 2016 inspection results, shows a decrease in the use of measures involving restriction of liberty at residential care facilities.

138. On 1 October 2019, work began on implementing a new system of quality measurement, control and reporting at full-time institutional long-term care facilities, using specific indicators to measure the quality of results. The new system includes regular (twice a year) assessments for all nursing-home residents on *use of straps* and *use of bed rail installations*. These assessments will permit an even better response to the use of coercive measures in future. No additional measures are envisaged in this regard at present.

139. In addition to the regular annual inspections described above, ad hoc inspections can be carried out following an incident, tip-off or complaint. If long-term care patients or their family members find substantial shortcomings in the care provided, or if they do not approve of the choice of community-based or inpatient care provider, they may turn to the relevant long-term care insurance fund or to the competent supervisory authority.

140. In addition, regular inspections are carried out under nursing-home supervisory law, in accordance with the respective statutory provisions of the *Länder*.

#### *Reply to paragraph 17 (b)*

141. Staff at Brandenburg Forensic Psychiatric Clinic regularly take part in obligatory training courses on the issue of measures involving restrictions of patient liberty. De-escalation training is held once a year. Participation in these courses is strictly monitored so as to ensure that all members of staff undergo the relevant training. In the event of an emergency, doctors are called in to instruct staff on the type and scope of safeguards to be applied, and remain on sight throughout. Once the emergency situation is over, a debriefing takes place with the patient to assess the situation, and the clinic notifies each incident without delay to the public prosecution office/execution of sentence division at the competent court.

142. The competent *Land* ministry has received no submissions or information whatsoever regarding the allegation that, in one particular case, staff at Brandenburg Forensic Psychiatric Clinic used force on multiple occasions against a patient. Furthermore, no such allegation was confirmed in the subsequent meetings that took place as required under supervisory law.

143. If inter-patient violence occurs at the clinic, a meeting is convened with the patients concerned and the chief medical officer. The patients are informed about possible steps which might be taken, including legal action. Where necessary, the patients are kept in separate parts of the clinic.

144. However, it must be borne in mind that patients will still need to be granted their essential freedoms. The clinic is a therapeutic facility. Permanent monitoring therefore cannot be endorsed.

*Reply to paragraph 17 (c)*

145. Pursuant to the mental health acts of the *Länder* (“PsychKG’s”), a person can be committed to a clinic against his or her will if there is an acute and considerable risk of self-harm or harm to others as a result of a mental disorder/illness. In cases of committal, most *Länder* do not provide for the application of any disciplinary sanctions.

146. The Federal Constitutional Court has made it clear that medical treatment without a person’s agreement in the context of a committal is permissible, but only as a measure of last resort and if the person concerned, due to his or her illness, is incapable of appreciating that he or she requires treatment or of acting in accordance with such appreciation. In light of the Federal Constitutional Court’s case law, the *Länder* have either already revised their mental health acts or are in the process of doing so. The rights and needs of the affected persons are at the forefront of considerations in this area. Coercion is to be avoided as far as possible and is permitted only in accordance with the strict requirements defined by the Federal Constitutional Court. New structures are to be put in place to avoid coercion and to further developing support services. Meanwhile, the *Länder* have also drafted proposals for the procedures to be followed by all psychiatric clinics falling within their respective supervisory remits.

147. In their respective acts, the *Länder* have also legislated for the introduction of new structures to improve prevention and aftercare support services for children, juveniles and adults, and ensure that these services are better interlinked. Improved prevention and aftercare can reduce the number of involuntary hospital stays/forced committals. Furthermore, it has been possible to reduce the number of measures involving deprivation of liberty by appointing guardians ad litem with expertise on alternative measures.<sup>2</sup> Compliance with patients’ rights is monitored by various agencies within the health-care system and by independent consumer and patients’ organisations.

148. The Federal Government is funding a research project entitled *Avoiding coercive measures in the psychiatric care system* with the aim of making the use of compulsory measures in Germany more transparent and gaining insights on how to avoid coercion by utilising alternative, voluntary treatment options.<sup>3</sup> The idea is to formulate recommendations for action aimed at reducing the use of coercive measures and to develop a monitoring system for recording data on the use of coercion and on the measures taken to avoid such use.

*Reply to paragraph 17 (d)*

149. Both sterilisation and abortion are forbidden without the consent of the person concerned. A person is capable of giving consent if, after having been provided with the relevant information by a physician, he or she is able to comprehend the meaning and implications of the decision at issue and to form his or her will accordingly. Only where the

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<sup>2</sup> Measures include widespread employment of “psychiatric care coordinators” (*Psychiatriekoordinator*), building networks of community-based psychiatric care services, employing voluntary patient advocates and having a regularly updated Psychiatric Care Strategy both at the local and *Länder* level.

<sup>3</sup> Project period: 2016 to 2020. The subproject entitled *Recording and reducing coercive measures in the psychiatric care system* aims to record and provide a thorough analysis of coercive measures in this area. The second project entitled *Avoiding coercion in the psychiatric care system* aims to identify which measures could be taken – especially those of a structural nature – to help avoid or reduce coercion.

person concerned is not capable of giving consent, may his or her guardian consent on his or her behalf. Where sterilisation is concerned, however, a particularly strict standard applies. This is governed by section 1905 of the Civil Code. It should be stressed that, pursuant to section 1905 (1) no. 1 of the Civil Code, a guardian may not consent to the sterilisation of a person under his or her guardianship if the sterilisation is inconsistent with that person's (natural) will, regardless of whether he or she is capable of giving consent or not. Thus, forced sterilisation is prohibited in Germany. For the purposes of supported decision-making, the guardian's duties include providing persons under their guardianship who are not capable of giving consent with information and advice and establishing their actual will. If the person under guardianship then objects to the sterilisation, the procedure cannot be carried out, regardless of the manner and form in which this objection was raised. A special guardian must always be appointed for the decision on consent to a sterilisation (section 1899 (2) of the Civil Code). Moreover, the guardian's consent must be approved by the guardianship court (section 1905 (2) of the Civil Code). Thus, section 1905 of the Civil Code also serves to protect persons under guardianship from having sterilisations performed on them without having been provided with sufficient information and advice and without their actual will having been established.

150. It is only in rare exceptional cases that all of the requirements stipulated in section 1905 (1) nos. 1 to 5 of the Civil Code are fulfilled (i.e. no inconsistency with the natural will of the person under guardianship, permanent lack of capacity to give consent, concrete assumption that (without the sterilisation) there would be a pregnancy, danger for the life or health of the pregnant woman, availability of other reasonable means). This is also confirmed by statistics which show that sterilisations play an increasingly minor role in the practice of guardianship courts. While in 2008, sterilisation was still authorised in 91 cases and rejected in 22 cases nationwide, in 2014 it was authorised in only 36 cases and rejected in 21 cases. In this context, it should be noted that authorisation does not necessarily mean that the measure was then actually carried out. In 2015, the figures continued to decrease significantly (26 authorisations and 13 rejections). Due to an adjustment of the statistical procedure, more recent reliable figures are currently not available, although indications suggest that the figures will continue to decrease significantly.

151. Nonetheless, another review of section 1905 of the Civil Code is certainly due in light of the requirements of the UNCRPD. First of all, this will require having a sufficient factual basis to identify the situations in which sterilisation of persons under guardianship is authorised or rejected in judicial practice on the basis of section 1905 of the Civil Code. The BMJV therefore plans to launch a research project on sterilisation of persons under legal guardianship. The call for proposals is currently being prepared. The aim of the project is to establish a body of empirical legal research in order to determine whether section 1905 of the Civil Code should be maintained, modified or abandoned altogether and replaced by a general ban on the sterilisation of persons under guardianship.

152. Since the introduction of the Act on Consent to Coercive Medical Treatment Under Guardianship Law (*Gesetz zur Regelung der betreuungsrechtlichen Einwilligung in eine ärztliche Zwangsmaßnahme*),<sup>4</sup> the legislature has amended the law governing committal under guardianship law<sup>5</sup> by breaking the link between consent to coercive medical treatment and committal involving deprivation of liberty.<sup>6</sup>

153. While retaining strict substantive and procedural permissibility requirements, the newly created section 1906a of the Civil Code now provides under subsection (1) no. 7 that coercive medical treatment is always subject to the precondition that the person concerned stays as an inpatient at a hospital providing the necessary medical treatment, including any

<sup>4</sup> The Act entered into force on 18 February 2013.

<sup>5</sup> This matter falls under federal legislative competence.

<sup>6</sup> Act to Amend the Substantive Permissibility Requirements for Coercive Medical Treatment and to Strengthen the Right of Self-determination of Persons under Guardianship (*Gesetz zur Änderung der materiellen Zulässigkeitsvoraussetzungen von ärztlichen Zwangsmaßnahmen und zur Stärkung des Selbstbestimmungsrechts von Betreuten*), which entered into force on 22 July 2017. This Act stipulates that an evaluation of the practical impact of the amendments is to be carried out three years after its entry into force.

necessary after-care of the person under guardianship. In accordance with the *ultima ratio* rule, coercive medical treatment as an outpatient continues to be prohibited. In addition, the Act introduced further provisions serving to strengthen the right to self-determination in matters concerning medical treatment for persons under guardianship.<sup>7</sup>

154. Moreover, where appropriate, the guardian should inform the person under guardianship of the possibility of drawing up an advance medical directive (*Patientenverfügung*), and, if the person concerned so wishes, assist him or her in doing so. While further encouraging the widespread use of advance medical directives, this is also designed to help avoid coercive medical treatment.

#### **Reply to paragraph 18 of the list of issues**

155. The Act to Strengthen the Procedural Rights of Accused Persons in Criminal Proceedings and to Amend the Law on Courts with Lay Judges (*Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Strafverfahren und zur Änderung des Schöffengerichts*) obliges law enforcement agencies to provide general information to accused parties who wish to consult a defence attorney prior to being examined, in order to make it easier for them to do this. At the same time, agencies must provide details of existing emergency attorneys' services.

156. The Federal Government does not believe it necessary to amend the relevant legal provisions because an arrested accused person is already permitted by law to notify a relative or trusted person immediately following his/her arrest.

157. Pursuant to section 114 b (2), first sentence, no. 6 of the Code of Criminal Procedure, anyone who has been arrested must be informed that they may notify a close relative or trusted person, provided that this does not place the purpose of the investigation at considerable risk (amendment of 27 August 2017 per the Second Act to Strengthen the Procedural Rights of Accused Persons in Criminal Proceedings and to Amend the Law on Courts with Lay Judges [*Zweites Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Strafverfahren und zur Änderung des Schöffengerichts*]).

158. This right of notification itself is governed in section 114 c (1) of the Code of Criminal Procedure. The wording of this provision clearly expresses that the right of a person who has been arrested to notify a close relative or trusted person is the rule, and that it may be refused or postponed only in exceptional cases where there is cause for concern that it would considerably jeopardise the investigations.

159. The Federal Government believes that this standard is sufficiently specific, both in terms of the protections it affords to the person taken into custody and in terms of ensuring that the police can properly perform their duties. The only conceivable alternative would be to introduce individual provisions governing specific case constellations, which, in light of the variety of situations that can arise in practice, would be at risk of being incomplete.

160. Where applied, the exception permitted under section 114b (2) no. 6 and section 114c (1) of the Code of Criminal Procedure must be as brief and limited as possible. This is the consequence of the provision made in section 114c (1) of the Code of Criminal Procedure, according to which the accused party is to be given the opportunity to notify a close relative or trusted person of his/her arrest *without delay* ("unverzögerlich"). According to the universally valid definition given to this phrase in section 121 (1) of the Civil Code (*Bürgerliches Gesetzbuch*), *without delay* ("unverzögerlich") is to be read as meaning without *culpable* delay. This corresponds to the standard applied by the European Court of Human Rights, which derives, from the right to respect for private and family life, an obligation for governments to ensure that the family members of an arrested person are notified "promptly" ("rapidement"). It bears noting in this context that section 114c (2) of the Code of Criminal Procedure creates a further temporal limitation: According to this provision, a court that has ordered the execution of remand detention must also make an order for one of the accused's

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<sup>7</sup> The permissibility of consent to coercive medical treatment is now subject to the additional express requirement that such treatment must not be in conflict with the will of the person under guardianship, which is to be respected pursuant to section 1901a of the Civil Code.



relatives, or a person trusted by him/her, to be notified of the detention without delay (without *culpable* delay). This obligation is not subject to any exceptions or limitations, even if the purpose of the investigation were to be jeopardised, thus distinguishing it from the right of accused parties to notify others of their arrest pursuant to section 114c (1) of the German Code of Criminal Procedure. The decision on whether to execute remand detention is taken when the arrested accused is brought before the competent judge, which must always happen following arrest – at the latest on the next day (section 115 (1), (2), section 128 (1) of the Code of Criminal Procedure). In the event that it orders execution of remand detention, the court before which the accused party is brought for a personal hearing no later than the day following his/her arrest (section 128 (1) of the Code of Criminal Procedure) must order that one of the accused's relatives, or a person trusted by him/her, is notified without delay (section 114c (2) of the Code of Criminal Procedure). This serves to ensure the protection afforded under Article 104 para. 4 of the Basic Law, according to which a relative or a person enjoying the trust of the person in custody must be notified without delay of any judicial decision imposing or continuing deprivation of liberty. The law does not provide for any exceptions from this judicial duty of notification.

161. This duty exists irrespective of the accused person's own right to notify a close relative or trusted person under sections 114c (1) and 114b (2) no. 6 of the Code of Criminal Procedure.

162. As a consequence, the very latest point in time at which a relative or a person trusted by the accused party is notified *ex officio* that the accused is being held in custody is the day following the arrest.

163. Finally, the court's decisions regarding notification of a relative/trusted person can be challenged by the accused (*Beschwerde*; section 304 of the Code of Criminal Procedure).

164. Also, foreign accused persons are to be advised that they may demand notification of the consular representation of their native country and have messages communicated to it (section 114b (2), fourth sentence of the Code of Criminal Procedure).

165. The involvement of a defence attorney is also ensured by law.

166. Pursuant to section 136 (1), second sentence, read in conjunction with section 163a (4), second sentence, of the Code of Criminal Procedure, accused parties must be informed prior to their first police examination that, by statute, they are free to reply to the accusation or to remain silent (section 114b (2) no. 2 of the Code of Criminal Procedure). Section 163a (4), third sentence, read in conjunction with section 168c (1) and (5) of the Code of Criminal Procedure stipulates that defence counsel is entitled to be present during the first and any following examination by the police. The same applies to examinations by the court or public prosecution office (section 168c (1) and (5) and section 163a (3), second sentence, read in conjunction with section 168c (1) and (5) of the Code of Criminal Procedure).

167. According to section 114b (2) no. 4 of the Code of Criminal Procedure, accused parties are also to be advised that they may consult a defence counsel of their choice at any time, including before their examination. If accused persons wish to consult a defence attorney, police officers are obligated to provide them with information (including the phone number of emergency attorneys' services) in order to make it easier for them to do so (section 163a (4), second sentence, read in conjunction with section 136 (1), third and fourth sentence of the Code of Criminal Procedure).

168. Moreover, pursuant to section 114b (2) no. 4a of the Code of Criminal Procedure in its current version (see the Act to Reform the Law governing Mandatory Legal Representation [*Gesetz zur Neuregelung des Rechts der notwendigen Verteidigung*], in force as of 13 December 2019), accused parties must be advised of their right to request the assignment of a court-appointment defence counsel (*Pflichtverteidiger*) in cases of mandatory legal representation (i.e. especially in cases involving considerable charges – see below). The decision on a request for assignment of a court-appointed defence counsel pursuant to section 141 (1) of the Code of Criminal Procedure (new version) must also be taken without delay and, most importantly, before the examination of the accused.

169. These explicit instructions make it clear to accused parties that they are not obliged to undergo a police examination without having a lawyer present, which mitigates any psychological pressure.

170. In German law, the assignment of a court-appointed defence counsel also guarantees the right of accused parties to have access to defence that is pre-financed by the state. The criteria for such assignment are listed in section 140 of the Code of Criminal Procedure. In particular, these include the severity of the offence at issue (section 140 (1) nos 1 and 2 of the Code of Criminal Procedure), the expected legal consequence (section 140 (1) nos 1, 2, 3 and 7 and (2) of the Code of Criminal Procedure), the complexity of the case (section 140 (2) of the Code of Criminal Procedure) and the personal circumstances of the accused, especially their ability to defend themselves (section 140 (1) nos 4, 5 and 9 and (2) of the Code of Criminal Procedure). These criteria are thus in line with those developed by the ECHR for interpreting the term “the interests of justice” in Article 6 para. 3 (c) of the European Convention on Human Rights. Assistance by court-appointed counsel is pre-financed by the state and provided to an accused under the conditions set out in section 140 of the Code of Criminal Procedure regardless of whether the accused is in economic need. German criminal procedure law thus goes beyond the requirements of Article 6 para. 3 (c) of the European Convention on Human Rights.

171. In addition to being entitled to court-appointed counsel, accused parties who are unable to pay for a lawyer themselves can also benefit from free legal advice. Under the Act on Legal Advice and Representation of Citizens on a Low Income (*Gesetz über Rechtsberatung und Vertretung für Bürger mit geringem Einkommen*), accused parties who are not entitled to court-appointed counsel under section 140 of the Code of Criminal Procedure but who have no financial means of paying for counsel themselves are entitled to free legal advice from a lawyer.

#### **Reply to paragraph 19 of the list of issues**

172. Pursuant to section 137 (1) of the Code of Criminal Procedure – which is also applicable in juvenile criminal proceedings pursuant to section 2 (2) of the Juvenile Courts Act – accused parties may avail themselves of the assistance of defence counsel at any stage of the proceedings. Pursuant to section 163a (4), second sentence, and section 136 (1), second sentence, of the Code of Criminal Procedure, read in conjunction with section 2 (2) of the Juvenile Courts Act, juveniles must be advised prior to commencement of their (first) police examination that the law allows them to involve a defence counsel of their choice at any stage, even before the examination begins. Furthermore, the German provisions on mandatory defence provide for a right to assistance by legal counsel at state expense in cases involving considerable.

173. Two acts entered into force in December to implement Directive (EU) 2016/1919 on legal aid and Directive (EU) 2016/800 (mentioned in the question): Firstly, the Act to Reform the Law governing Mandatory Legal Representation (*Gesetz zur Neuregelung des Rechts der notwendigen Verteidigung*), which mainly extends the provisions governing the right to mandatory defence counsel in the part of the Code of Criminal Procedure governing general criminal procedural law (which is also applicable to juvenile accused persons pursuant to section 2 (2) of the Juvenile Courts Act); secondly, the Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren*). The latter introduces section 68a of the Juvenile Courts Act which expressly provides that in cases of mandatory defence (pursuant to section 68 of the Juvenile Courts Act and section 140 of the Code of Criminal Procedure, i.e. especially in cases involving detention or provisional placement, in cases where the accusations concern serious criminal offences, in cases where juvenile custody is to be expected and in cases where accused parties are insufficiently able to defend themselves), defence counsel must, as a rule, be appointed *ex officio* before an examination of the juvenile can commence (including before the first police examination). The newly introduced section 70c (4) of the Juvenile Courts Act additionally provides that in these cases, examinations must, as a rule, be postponed in order to enable the presence of defence counsel if the latter is not present. These new provisions ensure that in cases of

mandatory defence, accused juveniles are assisted by defence counsel at all stages of the proceedings up until the final and binding judgment is passed.

174. The right of the accused to have a defence counsel of their choice or an appointed defence counsel present during examinations directly derives from section 163a (4), third sentence, read in conjunction with section 168c (1) of the Code of Criminal Procedure (where police examinations are concerned), from section 163a (3), second sentence, read in conjunction with section 168c (1) of the Code of Criminal Procedure (where examinations by the public prosecution office are concerned) and from section 168c (1) of the Code of Criminal Procedure (where court examinations are concerned). The right to have defence counsel present during police examinations was introduced by the Second Act to Strengthen the Procedural Rights of Accused Persons in Criminal Proceedings and to Amend the Law on Courts with Lay Judges of 27 August 2017.

#### **Reply to paragraph 20 of the list of issues**

175. Disciplinary detention in German prisons (*Arrest*) is a disciplinary measure for particularly grave infractions during detention which is enforced by separating the inmate from other prisoners. In those *Länder* which provide by law for the possibility of ordering disciplinary detention – this is the most serious sanction possible. It is only imposed very rarely and for the most serious misconduct; furthermore, it is subject to very strict preconditions. This is especially true for juvenile prisoners.

176. Solitary confinement (*Einzelhaft*) is to be differentiated from disciplinary detention. Solitary confinement is not a disciplinary measure and is subject to different statutory requirements.

177. The statutory rules of the *Länder* on disciplinary detention vary for different types of detention. In some *Länder*, it is permissible to order disciplinary detention as a disciplinary measure for up to four weeks for adults, and up to two weeks for juvenile prisoners. In some *Länder*, the permitted periods are shorter (see annex).

178. The law of several *Länder* specifically states that for juvenile prisoners, disciplinary detention must be underpinned by educational considerations. As a general rule, disciplinary measures against juvenile prisoners may be ordered only if amicable conflict resolution or educational measures prove to be insufficient.

#### **Reply to paragraph 21 of the list of issues**

179. The German legislature has transposed the 4 May 2011 decision of the Federal Constitutional Court (BVerfG) by instituting a comprehensive statutory reform of the law governing preventive detention, both at the federal and *Länder* levels. The new rules entered into force on 1 June 2013.

180. The Act on the Federal Law Implementation of the Distance Requirement in the Law of Preventive Detention (*Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebotes im Recht der Sicherungsverwahrung*) was adopted at the federal level; this ensures compliance with the requirements imposed by both the BVerfG and the ECHR.

181. With this act, the federal legislature implemented the guidelines developed by the BVerfG with regard to the so-called “distance requirement” (section 66c Criminal Code). With their respective prison acts, the *Länder* have implemented these guidelines in concrete terms and have adapted the conditions under which preventive detainees are accommodated accordingly.

182. The goal of the reform is to distinguish more clearly than before between the enforcement of a term of imprisonment and the enforcement of preventive detention, thereby reflecting the exclusively preventive character of preventive detention and its therapeutic approach.

183. In particular, the new rules contain provisions on the therapy that must be offered to preventive detainees, as well as the design of their accommodation and their preparation for release. As called for by the BVerfG, the overall approach is clearly oriented toward attaining freedom and receiving therapy.

184. With regard to the cases in which preventive detention was *ordered subsequently* (i.e. only *after* the prison sentence had been served) or was *subsequently extended* (i.e. beyond the originally permitted 10 years), the following applies:

- Consistent with the requirements imposed by the BVerfG, a rule was created for such cases (Article 316f of the Introductory Act to the Criminal Code [*Einführungsgesetz zum Strafgesetzbuch*]) which guarantees that *subsequent ordering* or *subsequent extension* of preventive detention is possible only if the prerequisites of Article 5 (1), letter e of the European Convention on Human Rights have been fulfilled; this requires that the preventive detainee suffers from a “true mental disorder” (which is to be treated therapeutically in “reformed” preventive detention) and that his conduct provides concrete cause to assume a high risk of extremely serious violent or sexual offences.
- Essentially, this new rule is relevant only for *subsequent extensions* of preventive detention, because in 2010 the legislature abolished the *subsequent ordering* of preventive detention following a prison sentence for offences committed after 1 January 2011.
- All cases in which preventive detention was *ordered subsequently* or *subsequently extended* were reviewed by the courts pursuant to the principles set forth in the judgment of the BVerfG of 4 May 2011 (and which the legislature subsequently put into statutory form with an effective date of 1 June 2013).
- In fact, we have determined that preventive detention *ordered subsequently* or *subsequently extended* following a prison sentence is essentially becoming obsolete due to the continual decline in the number of persons held in preventive detention on that basis; by November 2017, no more than around 40 individuals were being held as preventive detainees on the basis of a *subsequent order* or *subsequent extension*. According to the law currently in place, the *subsequent ordering* or *subsequent extension* of preventive detention following a prison sentence is no longer possible.

185. The new law is also consistent with the rules imposed by the BVerfG in that it has shortened the maximum interval for the regular judicial review of ongoing preventive detention to one year (after which the court must re-examine whether preventive detention shall continue). Where a person has been in preventive detention for more than 10 years, this interval is further shortened to nine months (section 67e (2) of the Criminal Code).

186. Since 2016, the Chambers of the ECHR determined as early as 2016 that the new legal rules which took effect on 1 June 2013 and the practical implementation measures taken by the *Länder* have brought the situation into compliance with the European Convention on Human Rights (*Bergmann v. Federal Republic of Germany* (no. 23279/14) of 7 January 2016; also *Ilmseher v. Federal Republic of Germany* (10211/12 and 27505/14) of 2 February 2017).

187. By decision of 4 December 2018, the Grand Chamber upheld that assessment and deemed the legal situation in Germany to be in compliance with the Convention.

188. For a statistical overview of the development of preventive detention in Germany since 2010 see annex to question 21.

#### **Reply to paragraph 22 of the list of issues**

189. The Federal Government cannot confirm these numbers. The Federal Criminal Police Office’s missing persons file (*Vermisstendatei*) only counts the number of reports, which means that the figures given do not necessarily correlate with the actual number of missing persons. Reference is made in this respect to the Federal Government’s report on the situation of unaccompanied foreign minors in Germany dated 20 September 2018, Bundestag Printed Paper (*BT-Drucksache*) 19/4517, p. 31 et seq.

190. The Second Act to Improve the Registration and Sharing of Data for Purposes of Residence and Asylum Law (2. *Datenaustauschverbesserungsgesetz*) introduced new rules allowing information on whether an alert has been issued for a person to be taken into care to be included in the Central Register of Foreign Nationals (*Ausländerzentralregister*). The

foreigners authority and other authorities with access to this information are therefore automatically made aware of cases where an alert has been issued (entry into force: 1 May 2020). In particular, this serves to protect missing foreign minors and adults, since the competent authority (police department, youth welfare office etc.) can be informed when such a person is found.

191. If the parents of a newborn child cannot provide a valid identification document, the registration authorities will issue a “certified register copy” having the same legal value as a birth certificate (section 35 of the Ordinance on implementation of the Civil Status Act [*Personenstandsverordnung*]).

## **Treatment of aliens, including refugees and asylum seekers (arts. 7, 9, 10, 13 and 17)**

### **Reply to paragraph 23 of the list of issues**

192. Following the enormous and unforeseeable increase in the number of asylum seekers between 2015 and 2017, and the shortcomings that became manifest due to the associated strains on the system, efforts began in autumn 2017 to institute structural change at the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*, BAMF). These changes aim to secure and enhance the quality of the Office’s work. This is also reflected in the “Migration Master Plan” of the Federal Ministry of the Interior, Building and Community (BMI) of 4 July 2018 which formulates the following goals:

- Process optimisation and quality assurance in relation to asylum decisions
  - By autumn 2017, “centralised” and “decentralised” quality assurance measures had been introduced in the form of a quality assurance concept for asylum.
  - This concept states, for example, that all branch offices of the BAMF (i.e. decentralised quality control) must randomly select and review 10% each of the individual steps they take in asylum proceedings (application acceptance, hearing and finalisation). Moreover, all asylum decisions must be reviewed before being served (see *Establishment of the multiple-review principle* below).
- Establishment of the multiple-review principle
  - Under the multiple review principle, asylum decisions at all branches of the Office are now not only reviewed in terms of plausibility (as was the case previously), but must also be reviewed comprehensively in terms of their formal and substantive integrity.
- Nationwide controls of asylum decisions
  - As part of “centralised” quality assurance, spot checks are carried out on a monthly basis at the headquarters of the BAMF: 1,055 served decisions and 106 final reports are randomly selected and reviewed to identify frequently recurring and/or structural deficiencies at an early state. Any deficiencies are then communicated within the organisation. If erroneous decisions are found, the responsible division is informed and a revocation or withdrawal of the decision is ordered.
- Nationwide recognition rate controls
  - Twice a year, the recognition rates for different countries of origin at the various branches of the Office are compared and wherever significant deviations from the national average are found, closer examinations are carried out. Significant deviation means any deviation of more than 10 % above or below the national average. This is to ensure that, despite the decentralised processing of asylum applications, the decision-making practice is as uniform as possible.

- Introduction of staff rotation
  - To prevent collusion between case workers and reviewers, a rotation system was developed and has been implemented nationally since October 2019.
- Comprehensive training and uniform guidelines for all stages of asylum proceedings
  - A qualification campaign largely completed in the summer of 2018 and the reintroduction of a 12-week training programme for newly employed case workers have provided a framework for comprehensive training. Nearly all case-working staff now have a uniform level of knowledge and any existing knowledge gaps have been filled. With the help of guidelines for the individual stages of asylum proceedings, which take the form of uniform checklists, staff can perform their tasks in a uniform manner and work to a high standard of quality.
  - Moreover, the BMI views quality assurance at the BAMF an ongoing task that regularly requires new approaches and will require adjustment where new insights are gained. In this context, “centralised” and “decentralised” quality assurance at the BAMF has been continuously expanded since 2017.

### **Reply to paragraph 24 of the list of issues**

193. Any allegations of ill-treatment are investigated in accordance with the “principle of legality” (principle of mandatory prosecution). Where such allegations have proved to be well founded, those responsible have been prosecuted. In one particular case concerning the events of 2014 at a refugee centre in Burbach, public prosecutor’s have brought charges against 38 persons before Siegen Regional Court; at the beginning of 2020 eleven persons, including the head of the centre, who was hired by a private organisation, had been convicted. Several trials in this case are ongoing.

194. Under the current legal situation, foreigners whose deportation has been suspended (i.e. “tolerated migrants”) are obliged by law to take up their habitual residence in a specific locality (residence restriction) if their subsistence is not secured (section 61 (1d) of the Residence Act). With this, the legislature aims to achieve a fair distribution of social welfare expenditure among the *Länder*. The system ensures that welfare benefits are paid only in the locality where the recipient is required to reside. It should be noted that section 61 (1d), third sentence, of the Residence Act allows the residence restriction to be amended *ex officio* or at the foreigner’s request, if this is required for example in order to maintain the family unit or on other humanitarian grounds. This allows for an adequate response in individual cases to the problems described in the question.

195. The BAMF individually examines and assesses each and every asylum application. Every decision is made based on the details of the specific case. The Federal Government does not agree that foreign victims of human trafficking are often afforded temporary residence only if they cooperate with the police.

196. As a signatory state of the Geneva Refugee Convention, the Federal Republic of Germany takes the Convention’s regulations and principles – including the principle of non-refoulement set out in Article 33 – into account in all its legislative initiatives.

### **Right to privacy (art. 17)**

#### **Reply to paragraph 25 of the list of issues**

197. A key instrument in effectively fulfilling the statutory mandate of the Federal Intelligence Service (BND) is the strategic surveillance of telecommunications between non-German citizens abroad from within domestic territory (so called Foreign-Foreign Signals Intelligence Gathering). This enables the BND to gather up-to-date authentic information without delay, and thus to obtain particularly important insights from international data flows. In terms of substance, this concerns strategically important intelligence, i.e. international and overarching issues relevant to German foreign policy such as international terrorism, proliferation of weapons of mass destruction and delivery

systems, international organised crime, and the development of the political situation in specific countries.

198. The legal framework for Foreign-Foreign Signals Intelligence Gathering is precisely governed by special regulations (section 6 et seqq. of the Federal Intelligence Service Act, *Gesetz über den Bundesnachrichtendienst*).

199. The statutory requirements regarding Foreign-Foreign Signals Intelligence Gathering have been implemented within the BND through various organisational measures. For example, quality assurance as a central service within the Technical Intelligence Division (*Technische Aufklärung*) ensures that any use of search terms is purely mission- and incident-related. Uniform standards for data quality and plausibility have been defined and implemented with the establishment of the quality assurance service. Before any search terms are used, it is ensured that their use is legally permissible, plausible and reasonable.

200. Foreign-Foreign Signal Intelligence Gathering is monitored by the newly established Independent Board (*Unabhängiges Gremium*). The latter is composed of two Federal Court of Justice judges and one Federal Public Prosecutor at the Federal Court of Justice, as well as three substitute members. Its duties include examining the permissibility and necessity of orders issued under section 6 (1) of the Federal Intelligence Service Act. In addition, citizens of the European Union as well as EU institutions and public entities of EU Member States enjoy special protection from intelligence-gathering measures. The Independent Board also monitors compliance of the provisions in place in this respect. Moreover, it examines whether the statutory requirements are complied with in cases where specific information obtained through Foreign-Foreign Signal Gathering is passed on to foreign intelligence services.

201. As a higher federal authority, the BND is part of the remit of the Federal Chancellery, which is responsible for the administrative and substantive supervision of the BND. This includes monitoring the lawfulness of the means employed as well as their expediency.

202. Since 1 July 2017, telecommunications service providers have been under obligation to store their users' traffic data, created whenever they use telephone and internet services, for a limited period of ten weeks, and to retain location data for four weeks (so-called data retention). Specific categories of data are exempted from the retention obligation, e.g. visited websites and e-mails. Anonymous telephone services such as telephone helplines are also exempted from retention. In addition to the short retention period and the restriction of data categories to be retained, the statutory regulations contain strict limitations regarding access to the retained data. During the retention period, the data remain at the telecommunications companies. Retrieving such data for the purposes of criminal prosecution, for example, is permissible only if there is a suspicion of a specific criminal offence listed in a catalogue (section 100g (2) of the Code of Criminal Procedure). This may be ordered only by a court and is generally carried out overtly, i.e. with the knowledge of the person concerned.

203. The constitutionality of these regulations and their conformity with EU law has been and remains the subject matter of various court cases:

204. Three constitutional complaints against data retention regulations are pending before the Federal Constitutional Court. At the moment, it is impossible to predict with any certainty when a decision will be issued in these cases.

205. In its judgment of 21 December 2016 in a preliminary ruling procedure concerning Swedish and British regulations, the European Court of Justice (ECJ) held that national legislation which covers, in a generalised manner, all subscribers and registered users and all means of electronic communication as well as all traffic data – and provides for no differentiation, limitation or exception according to the objective pursued – is not permissible because it exceeds the limits of what is strictly necessary and is therefore disproportionate.

206. On 22 June 2017, the North-Rhine/Westphalia Higher Administrative Court in Münster, referring to this ECJ judgment, held at national level in a proceeding for provisional court relief that a telecommunications service provider which had brought an

action regarding Germany's regulations on this subject was not obliged to retain data until the main proceedings on the merits of whether these regulations were compliant with EU law had been concluded. Subsequently, the Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (*Bundesnetzagentur*), as the competent supervisory authority, announced that it would waive enforcement of the retention obligation vis-à-vis all companies subject to it.

207. The main proceedings are currently pending before the Federal Administrative Court (BVerwG). On 25 September 2019, the BVerwG decided to suspend the proceedings and to refer the question of compatibility with European law of the German data retention regulations to the ECJ for clarification. The BVerwG based this decision on the consideration that, in contrast to the Swedish and British regulations at issue in the ECJ judgment of 21 December 2016 (C-203/15), the retention obligation under the German regulations covered only a limited range of means of communication and provided for limited retention periods, and that therefore, the compatibility of these regulations with European Union law had to be decided anew. A decision by the ECJ is still pending.

208. The statutory data retention obligations are still in force. However, the Federal Network Agency refrains from issuing any orders or taking any other measures to enforce the data retention obligation vis-à-vis all companies subject to it until the main proceedings before the BVerwG have been concluded.

## **Freedom of religion (art. 2, 18, 26)**

### **Reply to paragraph 26 of the list of issues**

209. The Federal Constitutional Court has indicated in its judgment of 27 January 2015 (BVerfGE 138, 296) that *Länder* statutes which prohibit the wearing of religiously motivated dress by teachers must give reasonable consideration to the freedom of faith of the teachers and pupils concerned, as well as the right of parents to educate their children and the state's duty of ideological and religious neutrality. Giving consideration to the requirement of tolerance as an expression of human dignity (Article 1 of the Basic Law), a balance must be struck between the freedom of religion and the state's duty to provide education in a religiously neutral and conflict-sensitive setting.

210. Such a ban may be lawful, however, if substantial conflicts lead to concrete disturbances of the peace at the school or a breach of the state's neutrality.

211. Any *Länder* statutes concerning the ban on religious clothing for civil servants must meet the criteria set out by the Federal Constitutional Court which, in turn, are fully in line with Art. 18 para 3 of the Covenant as described above.

## **Freedom of expression (art. 19)**

### **Reply to paragraph 27 of the list of issues**

212. It was announced in the explanatory memorandum for the Network Enforcement Act (NetzDG - Bundestag printed paper 18/12356, p. 18) that the Federal Government would carry out an evaluation no later than three years following the entry into force of the Act. This evaluation is currently being prepared.

213. Social networks which have at least two million registered users in Germany are obliged to publish six-monthly transparency reports about user complaints and the social network's content removal practice. According to the transparency reports for the first and second half of 2018 as well as the first half of 2019, the removal rate of the above-mentioned social networks amounts on average to about one quarter of the content reported under the NetzDG (with some variations between providers). There are no indications that networks are resorting to a policy of excessive content removal ("overblocking").

214. Only illegal content that violates specific provisions of the German Criminal Code must be removed. This includes public incitement to crime; forming criminal or terrorist organisations; incitement to hatred; dissemination of depictions of violence; defamation of



religious and ideological associations; distribution of child pornography; insult; intentional defamation; and threatening the commission of a felony.

215. In a thriving democracy, freedom of expression also provides protection for statements that are tasteless and repulsive. However, freedom of expression ends at the point where criminal law begins. Criminally punishable hate speech should have as little place on social networks as it does on our streets. Where people are intimidated by criminal hate speech, leading them to step back from public discourse, this is a danger for democracy.

216. The illegal content covered by the NetzDG is based on the provisions of the German Criminal Code. The criminal offences in question have been the subject of extensive jurisprudence, with the many previous decisions of the courts comprehensively documented in legal literature. For this reason, there is no need for new guidelines regarding the interpretation of these criminal offences. Moreover, the NetzDG allows social networks to refer content for review to a *recognised self-regulation institution*, whose analysts must be independent and possess the necessary expertise.

217. It is important to underline that the NetzDG does not put the social networks concerned at risk of having to pay a monetary fine if, within the context of their complaints management system, they make the wrong decision in an individual case. Monetary fines are imposed only where breaches of obligations occur that are due to systemic defects in the handling of unlawful content. Moreover, the unlawfulness of the content concerned must also have been confirmed by way of a judicial decision (“preliminary ruling procedure”). Aside from this, users still have the option to request a judicial review of content removals or blockings.

218. So far, a fine in the amount of two million euros was imposed on Facebook but has yet to become final and binding. The underlying accusation concerned Facebook’s compliance with the reporting requirements under the NetzDG in the first half of 2018.

#### **Reply to paragraph 28 of the list of issues**

219. There are currently no plans to decriminalise defamation. However, given the increasing number of defamation cases committed online and on social media, there is an ongoing discussion as to whether defamation committed in public or via written publications should carry a higher penalty.

220. Section 202d of the Criminal Code, which entered into force on 18 December 2015, criminalises the acts of procuring data for oneself or another person, supplying data to another person, and disseminating or otherwise providing access to data where these data are not generally accessible and have been obtained by another person by way of an unlawful act. In terms of the subjective elements of the offence, the provision requires – in addition to intent – that the act is committed for the purpose of personal enrichment or the enrichment of a third party or in order to harm another person.

221. The applicable penalty is imprisonment for a term not exceeding three years or a fine. The penalty may not be more severe than the applicable penalty for the predicate offence.

222. “Data leaks” are generally not covered by section 202d of the Criminal Code. According to the wording of the provision, the handling of stolen data can be committed only if the perpetrator of the predicate offence obtained the data by way of an unlawful act. If, on the other hand, the data were already available to the perpetrator of the predicate offence, the handling of stolen data is ruled out. Thus, criminal liability under section 202d of the Criminal Code is not incurred if a person was entrusted with data and this person then passes (“leaks”) these data to a third party. If that person was obliged to keep the data confidential (e.g. in his or her capacity as a public official), he or she, by passing that data on, might incur criminal liability for violating other provisions (in particular, confidentiality obligations). However, he or she does not *obtain* any data through such offence. This means that a third party who accepts the “leaked” data from him or her is likewise unable to incur criminal liability for handling stolen data.

223. Furthermore, according to the explicit wording of the provision, the offence does not apply to activities which exclusively serve the purpose of performing lawful official or professional duties, such as but not limited to the activities of officials or their agents aimed at supplying data for the sole purpose of use in taxation proceedings, criminal proceedings or regulatory offence proceedings. It also excludes the professional activities of persons who are or have been professionally involved in the preparation, production or dissemination of printed materials, radio broadcasts, or film documentaries, or in information and communication services serving the purpose of providing information or forming public opinion, which involve the receipt, analysis or publication of data.

224. Activities of the media fall under the latter exemption and are therefore explicitly not covered by the offence governed in this provision.

225. Likewise, the offence does not cover data which are generally accessible, e.g. by way of an electronic internet search.

226. Thus, the offence is not aimed at imposing any disproportionate restrictions on the right of access to information of legitimate public value.

227. In accordance with the division of responsibilities under the federal system, the *Länder* are responsible for prosecuting offences under section 202d of the Criminal Code. In January 2018, the BMJV carried out a survey among the *Land* justice administrations enquiring about the number of investigations conducted against journalists under section 202d of the Criminal Code since the provision entered into force. The information provided by the *Land* justice administrations has shown that fewer than ten investigations were conducted against journalists under section 202d of the Criminal Code since the provision entered into force. Of those, none offered sufficient grounds for preferring public charges against a journalist. Neither were any seizures carried out relating to the offence under section 202d of the Criminal Code.

## **Freedom of association (art. 22)**

### **Reply to paragraph 29 of the list of issues**

228. In the view of the Federal Government, the ban on strike action for civil servants in Germany is in accordance with Article 22 of the Covenant as well as with the largely parallel Article 11 of the European Convention on Human Rights.

229. The right to strike is only one of several key components of the freedom of association. Where, as is the case in Germany, other comparable means of participation and representation in the regulation of working conditions are provided, a ban on industrial action may be regarded as proportionate. The Federal Constitutional Court, in its judgment of 12 June 2018 ([https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/06/rs20180612\\_2bvr173812en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/06/rs20180612_2bvr173812en.html), in English, margin no. 163 et seq.), has dealt extensively with the case law of the ECHR on this matter and found that the ban on strike action for civil servants is compatible with the European Convention, and, by implication, with the Covenant. The Federal Government agrees with the conclusions of the Federal Constitutional Court. However, individual applications regarding this issue are pending before the ECHR and a decision is to be expected in due course.

## **Right to participate in public life (arts. 25 and 26)**

### **Reply to paragraph 30 of the list of issues**

230. In Germany, the constitutional principle of universal suffrage holds that all German citizens, thus including persons with disabilities, have the right to vote and stand as a candidate at elections to the Bundestag, to the Landtag and at municipal elections (Article 38 (1), 1st sentence, and Article 28 (1), 2nd sentence of the Basic Law). The principle of universal suffrage also applies to European elections (section 1 (1), 2nd sentence of the European Elections Act (*Europawahlgesetz*)).

231. In Germany, persons with disabilities and persons with diminished criminal responsibility are not excluded from the right to vote. In the past, persons placed under permanent (rather than only temporary) legal guardianship regarding all their affairs (persons under full guardianship) as well as criminal offenders placed in a psychiatric hospital due to (complete) lack of criminal responsibility were excluded from elections to the Bundestag and from European elections. In its judgment of 29 January 2019 (file no. 2 BvC 62/14), the Federal Constitutional Court declared the exclusion from voting rights of persons placed in a psychiatric hospital due to lack of criminal responsibility to be incompatible with the Basic Law and thus void. It held that the exclusion from voting rights of persons placed under permanent full guardianship was incompatible with the Basic Law, and declared that the pertinent provision, to the extent that it was found to be unconstitutional, could no longer be applied by courts and administrative authorities.

232. The Act to Amend the Federal Elections Act and other Legislation (*Gesetz zur Änderung des Bundeswahlgesetzes und anderer Gesetze*, Federal Law Gazette I p. 834), which entered into force on 1 July 2019, abolished the previously existing exclusions from voting rights of persons placed under permanent full guardianship and of criminal offenders placed in a psychiatric hospital due to lack of criminal responsibility. Simultaneously, it defined the limits of permissible assistance in exercising the right to vote and amended Section 107a of the Criminal Code to make it clear that anybody rendering permissible assistance who casts a vote which is contrary to the choice of the voter they are assisting, or without the voter they are assisting having expressed their choice, will have committed a criminal offence.

233. Prior to the entry into force of the reform, a judgment of the Federal Constitutional Court (file no. 2 BvQ 22/19), which was already in effect at the time of the European Elections on 26 May 2019, stipulated that the above-mentioned exclusions from voting rights must no longer be applied in relation to applications for voter registration (§§ 17, 17a of the European Electoral Regulations) or in relation to objections and complaints against the accuracy and completeness of the electoral roll.

234. The provisions of the *Länder* on elections to the Landtag and on municipal elections contained similar exclusions from voting rights. Not least due to the above-mentioned judgment, the *Länder* have meanwhile either abolished these exclusions from voting rights or are planning to do so in good time before their next elections.

235. Federal election law contains numerous provisions on facilitating the participation of persons with disabilities in elections, including barrier-free access to polling stations, assistance and information, special provisions for visually impaired voters and other relevant groups.

236. Similar measures, also stipulated by laws or statutory instruments, are in place for *Landtag* and municipal elections.

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