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HUMAN RIGHTS COMMITTEE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES  
UNDER ARTICLE 40 OF THE COVENANT**

**Fourth periodic report**

**AUSTRIA\* \*\***

[21 July 2006]

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\* This document contains the fourth periodic report of Austria, due in 2002. For the third report, due in 1993, see CCPR/C/83/Add.3. For the second periodic report submitted by the Government of Austria, see CCPR/C/51/Add.2; for its consideration by the Committee, see CCPR/C/SR.1098 to SR.1100 and *Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/47/40)*, paras. 80-124. For the first report of the State party, see CCPR/C/51/Add.2.

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## **Introduction**

1. The present report submitted pursuant to article 40 of the International Covenant on Civil and Political Rights (CCPR) should be seen as a supplement to earlier reports. The situation described in detail in earlier reports is thus updated by the explanations provided in the present report.

### **Article 1. The right of self-determination of peoples**

2. There is no need for any amendments or additional comments. The authors refer especially to the comments on this provision contained in the second periodic report of Austria.

### **Article 2. Recognition under domestic law and ban on discrimination**

3. The 1988 Amendment to the Federal Constitution, Federal Law Gazette No. 685, which entered into force on 1 January 1991, supplemented articles 129a and 129b (see annex A to the third periodic report) and broadened the system of legal protection by introducing independent administrative senates in the federal provinces (hereinafter “Independent Administrative Senates”).

4. According to article 129a of the Federal Constitution Act, the Independent Administrative Senates have the following competences:

(a) To rule in proceedings on administrative offences, except federal fiscal penal matters (a separate independent agency, i.e. the Independent Financial Senate, was set up for federal fiscal offences);

(b) To rule on complaints by persons who maintain that their rights were violated, on account of the exercise of a direct power of command and by coercive power (such as acts of arrest, confiscation or the like) used by administrative authorities;

(c) To rule on other matters assigned to them by way of federal or regional laws governing individual administrative areas. This is to make it possible to call upon the Independent Administrative Senates for a decision on civil law claims, in keeping with article 14 (1) of CCPR. It should be mentioned in this connection that the 2001 Reform of the Administrative System Act (Federal Law Gazette I No. 65/2002) bestowed upon the Independent Administrative Senates a great many matters in which they have second-instance competences;

(d) To rule on complaints regarding violations of the obligation to take decisions, especially in matters assigned to them under federal or regional legislation.

5. According to article 139 and following of the Federal Constitution Act, Independent Administrative Senates are authorized to challenge an ordinance of a federal or regional authority or a federal or regional law before the Constitutional Court for unlawfulness and/or non-compliance with the Constitution, if the Senate has to apply the ordinance and/or law in question in proceedings. This is to guarantee that the Independent Administrative Senates may lodge a request for review of the question by the Constitutional Court in all those cases in which they feel that a general standard that is being applied in the course of proceedings is in

contradiction with fundamental rights. In 2003, for example, the Independent Administrative Senate of the Federal Province of Upper Austria submitted seven applications for a legislative review and one application to review an ordinance.

6. The number of cases which are brought before the Independent Administrative Senates varies according to federal province (e.g. Vorarlberg in the year 2004: 1,264 cases; in Upper Austria in the year 2003: 2,237 cases; Salzburg in the year 2003: 2,225 cases; Styria in the year 2003: 2,732 cases; on average, about two thirds of the cases - with the trend being on the increase - relate to proceedings for administrative offences). The situation is similar concerning the number of decisions taken (e.g. Vorarlberg in the year 2004: 1,139 decisions; Upper Austria in the year 2003: 2,032 decisions; Salzburg in the year 2003: 2,202 decisions; Styria in the year 2003: 2,709 decisions).

7. A decision by an Independent Administrative Senate may be challenged before the Administrative Court, as well as before the Constitutional Court (Vorarlberg recorded 80 complaints to the Administrative Court and 23 complaints to the Constitutional Court; in Upper Austria there were 64 complaints to the Administrative Court and 76 complaints to the Constitutional Court in 2003; in Styria there were 62 complaints to the Administrative Court and 2 complaints to the Constitutional Court in 2003).

8. For further information on article 2, the authors would also like to refer to the detailed explanations on the Equal Treatment Act (ad art. 26).

#### **Regarding Concern No. 7 - Lack of intention of adopting appropriate measures for taking into account the Committee's views**

9. It should be stated as a first comment that, as a matter of principle, the "concerns" of the Human Rights Committee do not have any legally binding effect according to established international academic opinion (see Nowak: "CCPR-Kommentar, 1989", margin note 33 and following regarding article 5 FP; Kälin (ed.): "Die Schweiz und die UNO-Menschenrechtspakte", 1997, 19; Joseph/Schultz/Castan: "The International Covenant on Civil and Political Rights", 2nd edition, 2004, 24).

10. As these "concerns" may not claim to be legally binding, they ultimately do not result in the revocation of a highest-instance domestic decision or, more or less automatically, to a reopening of the domestic case.

11. Austria has always published the concerns of the Committee regarding communications directed against Austria, in which a violation of CCPR was established, and reported to the Committee about any possible measures taken to implement the legal opinion expressed in these views.

12. According to the United Nations database linked to CCPR, a total of 13 communications directed against Austria were regarded as being inadmissible and/or the alleged violations of the Convention proved to be inapplicable. In another five cases, the Human Rights Committee stated that Austria had violated guarantees of CCPR, which can also be found in academic legal literature. At present, Austria is reporting on two concerns to the Committee in the light of the respective concerns: in the case of Karakurt, the associated issues under European Union law

needed to be clarified first, which was done in the fall of 2004. With the entering into force of the amendments of the Trade Union Act and the Industrial Relations Act on 1 January 2006 the entitlement to stand for election to work-councils is no longer limited to Austrian nationals or members of the European Economic Area, but applies to all employees irrespective of their nationality.

13. In the case of Sholam Weiss, the law on extradition and judicial assistance was amended, especially in the light of the concerns expressed by the Human Rights Committee (Federal Law Gazette I No. 15/2004). The Federal Ministry of Justice is monitoring the conduct of authorities and courts in the United States of America towards the complainant and will report on it to the Committee. Two further concerns related to the Pauger case, in which a detailed opinion was submitted, on why the Austrian legislator did not see any ground for adopting further legislative changes. The concerns of the Human Rights Committee in connection with the most recent of the five cases directed against Austria, in which violations of CCPR were identified, namely *Perterer v. Austria*, were published in English and German. Subsequently, the complainant reported the offence to the Public Prosecutor's Office in Salzburg and filed a lawsuit against the Republic of Austria and the Federal Province of Salzburg with the Regional Court Salzburg, on which a decision is still pending.

### **Article 3. Equal treatment of men and women**

#### **Women pursuing gainful activities**

14. In this connection, the authors would like to refer to the website of the Federal Ministry for the Economy and Labour regarding background information. There, Austria's economic reports of recent years are available, as well as English translations of the implementing reports of Austria on the "National Action Plan (NAP) for Employment"; up-to-date labour-market data may also be accessed. Up-to-date information can also be taken from the latest progress report on the NAP for Employment, which is available in German and English at <http://www.bmwa.gv.at/BMWA/Themen/Wirtschaftspolitik/Beschäftigung/Aktionsplan/default/htm>. It is attached to the present comments in the English version (annex 10).

#### **Education**

15. For a number of years now, the Federal Ministry for Education, Science and Culture has been making efforts to give increased attention to the subject of "Equal Treatment of Men and Women". Starting out from the one-sided educational patterns pursued by girls and boys, measures are being taken at various levels in order to establish some equilibrium in this connection and to make existing educational options attractive to both sexes. The efforts to promote a "Conscientious Co-Education" (*Bewusste Koedukation*) at school also fit into this context (projects, further-training seminars, activities), in order to raise awareness among teachers about the gender-specific socialization processes, as well as for the everyday behaviour of girls and boys in public.

16. The action plans of the Federal Ministry for Education, Science and Culture, which have been applied since 1997, must be seen as a comprehensive approach to putting into practice the equal treatment of the sexes, with the participation of the entire government department. (The action plans were set up on the basis of the catalogue of measures by the action platform. They

were issued after the Fourth World Conference on Women, held in Beijing in 1995.) The current action plan (2003-2006) "Gender Mainstreaming and Gender-Awareness in Education" (*Gender Mainstreaming und geschlechtssensible Bildung*) serves the goal of creating the prerequisites in education and human awareness for further breaking down the traditional role patterns. As a result, the efforts undertaken by the Federal Ministry for Education, Science and Culture focus on ongoing information and awareness-raising activities, as well as on supporting associations and (school) projects which offer target-oriented advice and assistance in the field of "occupational guidance for girls/young women" (*Berufsorientierung von Mädchen/jungen Frauen*).

17. The enclosed statistics 4.01 to 4.28 (annex 9) are meant to provide an overview of the position of girls in the educational system. They indicate that the educational level of girls has gone up steadily in recent years. Accordingly, a clearly higher number of girls are graduating from upper-level general secondary schools. However, the statistics of occupational-training schools still indicate that there are distinct gender-specific differences, i.e. girls mainly choose vocational schools focusing on business, economic and social skills. The education department has made efforts for many years, by way of different measures, to enhance the significance attaching to the choice of occupation by women/girls, as well as to expand the range of occupations for girls and to counteract the traditional training choices. The unemployment and education statistics show that unemployment among women is lower when women have a higher educational level. As a result, they have better opportunities for a job and an adequate income.

18. The project "FIT - Women in Technology" (*FIT - Frauen in der Technik*), sponsored with funding from the European Social Fund, is intended to raise the percentage of women in technical studies by giving female secondary-school pupils an opportunity to have a first look at courses at six Austrian universities. The ESF project "Ready" (in five federal provinces for girls between 13 and 15 years of age - a cooperation project between schools and counselling services for girls) aims at expanding the occupational perspectives of girls, as well as at increasing the opportunities for girls in the labour market. The project "MUT - Girls and Technology" (*MUT - Mädchen und Technik*) serves the goal of raising the percentage of women in non-traditional, mainly technical occupations. These measures are carried out in cooperation with counselling services, schools and other public institutions.

### **Women and the penitentiary system**

19. On average, about 400 women are detained in Austria's prison (of which 120 are pretrial detainees),<sup>1</sup> which corresponds to 5.6 per cent of the total prison population. The trend is rising, both with regard to the absolute number of female inmates and the share in percentages in the total population. In 1992, for example, an average of 340 women were detained, which corresponded to about 4.8 per cent of all inmates. The share of foreigners among female detainees fluctuates between about 25 and 27 per cent and corresponds more or less to the share of foreigners in the total population in Austria's prisons.

20. On average, about 20 young female persons are detained.<sup>2</sup> Of these, about 3 per cent have one child with them when kept in detention. It should be mentioned that under certain circumstances female prison inmates may keep their children who were born before or while serving a sentence. The prison pays for their maintenance. A prerequisite - if a woman is to

keep her child with her - is that she is entitled to care for and educate the child - which does not necessarily have to be the case - and that one need not worry about the child suffering any disadvantage when staying in prison. However, there is a time limit to this right of female prison inmates, namely the second birthday of the child. It is possible, though, to extend this period by one year, if the prison term ends during that year.

21. Female detainees comprise pretrial detainees, women serving a sentence and women sentenced to special measures (mentally abnormal offenders without criminal responsibility, mentally abnormal offenders with criminal responsibility and offenders requiring treatment for an addiction). The measures imposed on mentally abnormal female offenders with criminal responsibility are carried out at the correctional institution for women, those imposed upon female offenders requiring treatment for an addiction in a penal institution especially set up for this purpose, and those imposed upon mentally abnormal female offenders without criminal responsibility in psychiatric hospitals.

22. In addition to institutions for the enforcement of special measures, other correctional institutions are the prisons and one correctional institution for women. The prisons attached to courts are intended for pretrial detention and the enforcement of sentences carrying a maximum prison term of 18 months. Both male and female inmates, separated according to gender, are detained in the prisons attached to courts, except for instances, in which for reasons of expediency no separate women's unit was set up, given the small number of women. For a number of prison terms, the enforcement of sentences may be somewhat relaxed (prison leave, attending vocational training and further training activities outside the prison, working outside the prison without observation), if there is no danger of abuse.

23. The Schwarzaau prison is the only correctional institution for women in Austria. On 1 February 2004, a total of 152 women were detained at that prison. There were four inmates in the unit for young persons. The Schwarzaau prison has a capacity to accommodate 160 women. It is subdivided into units for the standard enforcement of prison terms, special units for enforcing special measures under articles 21 (2) and 22 of the Austrian Criminal Law Code, enforcement of sentences against first-time offenders, enforcement of sentences against young persons, or mothers with children, and in groups of inmates, units for detainees prior to release and for women allowed to leave the prison temporarily. Furthermore, 40 men may be accommodated in the "agriculture" section. In 2002, the costs per prison day amounted to EUR 72.

24. At the Schwarzaau prison female inmates are employed to work in the business operation, in the artistic undertakings and in the sewing workshop, in two kitchens, the laundry station, as well as in gardening and park maintenance jobs. At present, there is "full employment". Some of the inmates are sent away from the prison temporarily to attend courses at the training centre of the Institute for the Promotion of Occupational Qualifications in Wiener Neustadt or receive training at the prison to obtain qualifications in the catering business or as cooks. Counselling groups, first-aid courses, pottery, sports activities, as well as singing or do-it-yourself groups are offered as leisure-time activities. In the course of the training activities and in various leisure-time groups (partly artistic projects), female inmates of the Schwarzaau prison are already being looked after on a co-educational basis, together with the male inmates of the farming estate at Schwarzaau and/or occasionally together with young inmates of the Gerasdorf prison for young offenders.

25. Young inmates are also being taught school material. Adults have the possibility of obtaining the lower-level secondary school diploma. In addition, various language courses can be attended on a self-study basis. The Schwarzau prison also participates in the European Union project "Tele-Learning". It is planned to become part of an ongoing WHO health project. If there is no danger of abuse, the female inmates, who serve prison sentences, may also leave the prison temporarily for the purpose of obtaining their basic or further training, or to work outside the prison (the so-called "Freigang").

26. In 10 other prisons (Wiener Neustadt, Salzburg, Linz, Vienna-Favoriten, Feldkirch, Innsbruck, Klagenfurt, Leoben, Ried, Vienna-Josefstadt) there are units for women with a total capacity for 322 prison inmates. The Graz-Jakomini and the Wels prisons are currently being refurbished. Once the construction work has been finished, the two prisons will have additional capacity for 48 women (the total capacity will be for 510 women, including Schwarzau). In some of these prisons (Graz-Jakomini, Vienna-Josefstadt, Schwarzau, Innsbruck, Wels and Krems), there are facilities to accommodate mothers with their children, which makes it possible for female inmates to take along their children until they have reached the age of 3. A total of 24 such places are available.

#### **Equal Treatment Act**

27. Please refer to the comments under article 26 with regard to the Austrian Equal Treatment Act, Federal Law Gazette I No. 66/2004, which has been in force since 4 July 2004.

#### **Article 4. Public emergency**

28. Austria's constitutional regime does not admit of any suspension of the fundamental rights. This article is therefore not applicable.

29. Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights), which also contains an authorization to derogate from individual provisions of the Convention, cannot be applied either, in accordance with the prevailing doctrine, on account of the principle of permissible deviations from agreement, as contained in article 53 of the Convention.

#### **Article 6. Right to life**

30. There appears to be no need to offer further comments to amend earlier reports, in the light of general comment 14 regarding this provision.

#### **Article 7. Ban on torture**

#### **Regarding Concern No. 8 - Confessions extracted by means of torture**

31. It is stated, by way of introduction, that the European Convention on Human Rights has constitutional ranking, and that compliance with the absolute ban on torture, as laid down in its article 3 thereof, is therefore guaranteed by constitutional law.

32. In addition, reference is made here to the federal law adopted by the National Council of 26 February 2004, amending the 1975 Code of Criminal Procedure. It is due to enter into force on 1 January 2008.



33. This reform - which is a new codification of the pretrial procedure in criminal law cases - contains an express provision (art. 166, item 1, of the Reform of the Criminal Procedure Act), inter alia, according to which the statements given by accused persons, by witnesses or co-accused persons may not be used to the detriment of an accused person, as this would otherwise result in a ground for nullity of the decision if they were obtained under torture (as defined in article 7 of the International Covenant on Civil and Political Rights, article 3 of the European Convention on Human Rights, or article 1 (1) and (15) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

34. The fact that the currently applicable Code of Criminal Procedure does not contain an express provision which obliges the courts to review a confession that was obtained by torture can be explained as follows: Austrian Criminal Law is characterized by the principle of searching for the substantive truth. After all, a confession does not release a court from its obligation to establish the facts to the extent possible (art. 206 of the Austrian Code of Criminal Procedure). Every confession and its revocation must therefore be examined carefully. Like all other evidence, a confession is subject to a judge's evaluation of evidence (art. 258 of the Austrian Code of Criminal Procedure). If a defendant maintains, or if there are other objective leads (such as traces of injuries) that a confession was obtained by torture, the court must take the initiative in taking the necessary evidence, in order to avoid that its ruling is defective, on account of statements by the accused that were used in violation of article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Upon appeal, this would lead to the revocation of the court decision for using an inadmissible piece of evidence.

35. Furthermore, the court is obliged to report the case to the office of public prosecution (art. 84 (1) of the Code of Criminal Procedure), which must launch the necessary investigations, because allegations of torture or ill-treatment give rise to suspecting an offence that is punishable ex officio (especially according to article 312 of the Code of Criminal Procedure: "torturing or neglecting a detainee" and article 83 and following, in connection with article 313 of the Code of Criminal Procedure: "Physical injuries due to exploiting an official position"). As a matter of principle, charges of maltreatment against public law-enforcement agents (police, gendarmerie) and prison employees must not be investigated by units of the law-enforcement services or the prisons, but - upon submission by the office of public prosecution - by pretrial investigations by the court or a court preliminary investigation, as is stipulated in general service instructions (decrees) of the Federal Ministry of the Interior and the Federal Ministry of Justice. The responsible office of public prosecution must be informed of maltreatment charges within 24 hours. This procedure ensures an immediate and impartial examination of the charges.

#### **Regarding Concern No. 16 - Measures implemented to counter all forms of violence against women**

36. In 1997 the so-called "law on protection against violence" (*Gewaltschutzgesetz*) was adopted, which facilitates cooperation by networking between the law-enforcement agents, newly established intervention centres and the courts. The Federal Law on the Protection against Violence in the Family, Federal Law Gazette No. 759/1996, entered into force on 1 May 1997. At the same time, the Austrian General Civil Law Code, the Security Police Act and the

Execution Regulations were amended. This possibility was further improved by the amendment of the Security Police Act in 1999 and of the Execution Regulations in 2003 (Federal Law Gazette I No. 31/2003).

37. The law on protection against violence offers the possibility of imposing sanctions and taking preventive measures outside the criminal law in cases of domestic violence. An essential core element of this package for the protection against any type of violence (physical, mental, sexual) in the family and domestic sphere, of which women are the principal victims, is therefore the power vested in agents of the public security services to issue preventive orders sending persons away (*Wegweisung*) from specific premises, or prohibiting them from entering these (*Betretungsverbot*) without conducting proceedings and without judicial permission (art. 38a of the Security Police Act).

38. The agents of the public security services are authorized to send away a person from an apartment or its immediate vicinity if a danger to another person's life, health or freedom arises from that person's presence. In addition, that person can be prohibited from returning to the apartment and/or its environment for a period of 10 days. Non-compliance with this prohibition carries a fine of 360 euros (art. 84 (1), item 2, of the Security Police Act). This is to allow victims of domestic violence to remain in their familiar surroundings without exposure to fear.

39. In the course of exercising security police powers, the victims of violence are informed about possible further steps (assistance from institutions for the protection of victims, intervention centres or the possibility to file a motion for a temporary injunction). Under certain circumstances, a person at risk may obtain a temporary injunction from the court against a close relative, ordering that person to leave the apartment and its immediate surroundings, as well as prohibiting that person to return to these premises for a longer period of time. Under certain circumstances the court may also prohibit the person from staying at a certain, defined place outside the apartment, and/or to instruct the relative to avoid meeting and getting into contact with the applicant (art. 382b Execution Regulations).

40. As a social measure accompanying the law on the protection against violence, a so-called "intervention centre" has been set up in every federal province (art. 25 (3) of the Security Police Act). These facilities are responsible for getting into contact with persons at risk in order to be able to offer them individualized accompanying advice. The psychosocial and legal advice activities of the intervention centres begin immediately after the police have sent away the attacker. They will take the initiative and contact the victim, after sending the person away, and offer comprehensive support, with the preparation of a safety plan with the victim of violence taking first priority. The intervention centres are organized as associations which are financed jointly by the Federal Ministry of the Interior and the Federal Ministry for Health and Women.

41. In 1997 an Advisory Board on Prevention was set up in order to ensure cooperation among the institutions involved in implementing the law on the protection against violence, as well as to monitor compliance with this law and to further develop the basic idea underlying this legislation. From the very beginning, the Advisory Board on Prevention has been a joint controlling instrument. The intervention centres are obliged to report to the Advisory Board on Prevention in the course of their annual activity reports on the work of the institutions involved and to submit proposals for improvement.

42. Experience to date with the measures to protect against violence has been very positive. Since the introduction of the law for the protection against violence in 1997, it has become generally known on an increasing level - in connection with the accompanying measures offered by the intervention centres - which has led to a rise in the number of prohibitions for entry of premises. However, this should not be interpreted to mean that violence in the family has grown in Austria, but rather as a success of this milestone in fighting violence within the family, which is no longer seen as a taboo. The Austrian law has therefore also become a model for similar solutions in other European countries.

43. In 2004 the Law to Amend the Criminal Law Code, Federal Law Gazette I No. 15/2004, led to a comprehensive reform of sexual criminal law. The goal of the reform was, inter alia, to transpose into Austrian criminal law the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention on Transnational Organized Crime as well as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

44. The sexual offences are currently covered under “punishable acts against sexual integrity and self-determination” in the Austrian Criminal Law Code. This includes, inter alia, punishable acts committed abroad, which are punished irrespective of the laws at the place of the offence (art. 64), rape (art. 201), sexual assault (art. 202), sexual abuse of a defenceless or mentally impaired person (art. 205), grave sexual abuse of minors (art. 206), sexual abuse of minors (art. 207), pornographic presentation of minors (art. 207a), endangering the morals of persons below the age of 16 (art. 208), incest (art. 211), abuse of a relation of authority (art. 212), pandering (art. 213), paid negotiation of sexual contacts with minors (art. 214), directing persons towards prostitution (art. 215), promoting prostitution and pornographic presentations of minors (art. 215a), procuring (art. 216), as well as sexual harassment and sexual acts in public (art. 218). In case of violations against articles 201, 202, 205, 206, 207, 207b, 212 and 213 of the Austrian Criminal Law Code, the time needed for the victim to come of age (age 18) is not taken into account when calculating lapse of time. The 2001 law amending the criminal law code already raised the punishment for rape (art. 201 of the Austrian Criminal Law Code) and for grave sexual abuse of children (art. 206 of the Austrian Criminal Law Code).

45. The former distinction between so-called “aggravated” rape, involving the use of major force and/or the menace of a serious danger to body and life, on the one hand, and rape, involving the use of (other) force, deprivation or liberty and/or the menace of a danger to body and life, on the other, was abolished. Merging the former paragraphs 1 and 2 of article 201 of the Austrian Criminal Law Code (“rape”) into one new paragraph 1 led de facto to a possibly stricter punishment in case of rape in the range of the former paragraph 2. Furthermore, by eliminating the distinction, the impression was avoided that there could be a case of “less serious” rape.

46. In the field of sexual assault (art. 202 of the Austrian Criminal Law Code), the possible punishment was raised, as undue pressure applied to perform or suffer a sexual act is a violation of the especially important interests of the injured person (according to paragraph 1 this currently carries a maximum prison term of five years).

47. The earlier privileged position of rape and sexual assault in marriage or cohabitation was eliminated. The background to this privileged position was the consideration that one must also bear in mind that it need not always be in the interest of the victim if offences of sexual violence in the private sphere of the family are prosecuted. In recent years, the awareness for the personality of the individual human being and his/her right to sexual self-determination has clearly grown, so that less weight is given to the fact that rape was committed within a family setting and that it is therefore no longer appropriate to have a generally more lenient prosecution of acts of sexual aggression committed in a partnership. Deleting and not replacing article 203 of the Austrian Criminal Law Code serves to make it absolutely clear that sexual integrity and self-determination must also be protected in marriage or cohabitation.

48. Furthermore, a new penal provision was enacted covering the hiring, offering or negotiating with minors for prostitution or participation in pornographic presentations (art. 215a of the Austrian Criminal Law Code), and article 218 of the Austrian Criminal Law Code (previously “obscene acts in public”) was transformed into a penal provision covering “sexual harassment” of individual persons, with the prosecution taking place only upon application of the harassed person. According to article 218 of the Austrian Criminal Law Code, a person who engages in a sexual act with the intention of molesting another person is liable to punishment, unless the act carries a stricter punishment in keeping with another penal provision. The act carries a maximum prison term of six months or a maximum fine of 360 daily rates.

### **Obligation to report to the police**

49. The security authorities are obliged to file a report for every punishable offence which comes to their attention. Other authorities or service units (e.g. the youth welfare office, teachers) are not required to file a police report if the report were to affect a personal relationship of trust, which is necessary for the exercise of official duties. However, protection of the person concerned must always be the primary consideration. Whenever a person learns of a punishable offence, he/she has the right to report it to the police, but does not have a general obligation to do so. The report should best be made to the nearest police station.

50. The 1998 Physicians Act governs the reporting obligations of medical doctors. As a matter of principle, a distinction is made regarding victims, namely between minor and adult persons, and in the case of minor victims a distinction is made regarding the offenders, namely close relatives and other offenders. If a doctor suspects that a minor patient was abused, tormented, neglected or sexually abused, he/she must report this to the police. There is one exception, namely if the suspected offender is a close relative, the doctor may refrain from reporting the case to the police for as long as the child’s well-being so requires and there is cooperation with the youth welfare official and, possibly, involvement of a child protection facility at a hospital. However, doctors must file a report without delay to the youth welfare official. In the case of adults, there is only an obligation to report if one suspects that a punishable act caused a serious physical injury or the death of a person. If adults are unable to safeguard their own interests, doctors are obliged to report this to the authorities. This obligation goes beyond the arrangements applying to other adults (that a punishable act is suspected, with the result of a serious physical injury or death), although one may suspect that the person concerned was maltreated, tortured, neglected or sexually abused.

### **Reporting to the police and penal prosecution**

51. A number of legislative measures have been taken in order to reduce the stress on the persons concerned when they are interrogated by the police and the court or during the proceedings.
52. Girls and women who are victims of sexual assault or maltreatment have the right to be interrogated by a female police officer. Furthermore, a person of their confidence (e.g. a girlfriend, an advisor) may be present during the police interview. By the same token, the victim has the right to the presence of a person of their confidence before the pretrial judge, as well as during the trial.
53. The victims of sexual offences have the right to “being interrogated with consideration”. Persons who are summoned as witnesses in criminal proceedings do have the obligation, in principle, to appear in court and make a true statement (art. 150 of the Austrian Code of Criminal Procedure). However, the law contains a number of exemptions. The victims of sexual offences, for example, are entitled to refrain from giving evidence, i.e. they are released from their obligation to give evidence, if there was an adversarial interrogation during the pretrial proceedings in the presence of the parties (arts. 152 (1), item 2a, 162a and 274 of the Austrian Code of Criminal Procedure). This restriction, which serves to safeguard the rights of the accused, does not completely spare the victims an examination by the judge, but does make it possible for them not having to give evidence in the presence of the accused. This interrogation with video support is carried out by the judge, with the public prosecutor, the accused and his/her legal counsel participating. The statements are broadcast to the courtroom by means of video equipment so that the victim is spared an immediate confrontation with the accused. In the case of victims below the age of 14, it is a must to conduct the interrogation with consideration; older victims must apply for it.
54. According to article 250 (1) of the Austrian Code of Criminal Procedure, the presiding judge is authorized to have the accused removed from the courtroom, by way of exception, during the examination of a witness or a co-perpetrator, so that the witness is not adversely affected when giving evidence. Once the accused is returned to the courtroom, the presiding judge must inform the accused of all occurrences in his/her absence, as soon as the judge heard him/her on the matter dealt with in his absence. In particular, he/she must be informed of the statements that were given in the meantime.
55. According to article 228 (1) of the Austrian Code of Criminal Procedure, a trial is public, otherwise it is deemed null and void. However, the Code of Criminal Procedure contains a number of exceptions from this principle: in certain cases, for example prior to discussing circumstances from “the personal sphere of life or the sphere of secrecy” of witnesses, as well as prior to examining anonymous witnesses according to article 166a of the Austrian Code of Criminal Procedure, the court must ask the audience to leave the room (art. 229 of the Code of Criminal Procedure). In any event, audio and video recordings during the trial are prohibited (art. 288 (4) of the Code of Criminal Procedure). The presiding judge may reject questions as being inappropriate (art. 249 of the Austrian Code of Criminal Procedure).

56. Article 166a of the Code of Criminal Procedure serves to protect the security of witnesses, especially in the field of organized crime. Whenever there is a risk that witnesses would expose themselves or third parties to a serious danger to body, life, physical integrity or freedom by disclosing person-related data or by answering questions that lead to conclusions about these data, the investigating judge is obliged to grant witnesses the right not to answer such questions (“anonymous witnesses”). A decision in this connection is at the discretion of the investigating judge.

57. If, for example, the defendant or a third person threatens a witness, in the event that he/she testifies against them, the name and address of the witness need not be indicated in the court file, or a different address may be given, or if the address already appears in the court file, a reference may be made to it. The witness also has the possibility of writing down the address, so that the public has no knowledge of it.

### **Support services during proceedings**

58. Support services during proceedings are defined as legal and psychosocial assistance for victims of violence. They are already provided as early as when the incident is reported to the police and continue until the criminal proceedings are finally ended with legal force, in order to avoid another traumatization of the victim of violence. It may also be necessary to provide this assistance to relatives.

59. There is no law in Austria on support services during proceedings. However, institutions for the protection of victims offer this assistance in the framework of their financial and human resources. An inter-ministerial working group on “Support services during proceedings” was set up in 2001 within the Federal Ministry for Social Security, Generations and Consumer Protection. The working group is developing a plan for setting up a structured and nationwide support service system.

60. In a decision, unanimously adopted by the National Council on 26 February 2004, on “Improving the Protection of Victims” (*Verbesserung des Opfererschutzes*) (43/E of the annexes, XXII. GP) the Federal Minister of Justice was asked to look into the possibilities for integrating - already now - some of the improvements into the rights of victims, which the law reforming criminal proceedings will provide, before the law enters into force, by building them into the Code of Criminal Procedure that is in force until the end of 2007, in order to be able to implement some of these benefits already at an earlier point in time, as well as to introduce a government bill to this effect in the National Council.

61. In the course of implementing this decision, a federal law was adopted in the fall of 2005, which established that victims of violence and sexual offences are entitled to psychosocial and legal support services during proceedings. It also contains further improvements in the legal position of the victim in the presently valid Code of Criminal Procedure. It was announced in Federal Law Gazette I No. 119/2005 and entered into force on 1 January 2006.

62. The instrument of support services during proceedings, which the Federal Ministry of Justice is promoting already now, is thus put on a legal basis in the Code of Criminal Procedure. On this basis, institutions offering support services during proceedings are to be set up and ensured throughout Austria.

63. Moreover, several other improvements in the rights of victims that were introduced by the law on a reform of penal proceedings were also built into the Code of Criminal Procedure that is in force until the end of 2007. For example, the information and communication obligations of the criminal prosecution offices were expanded vis-à-vis persons whose rights were infringed by a punishable act. The courts and the public prosecution offices are required to always show respect and dignity when dealing with such persons. Persons, who may have been exposed to violence or dangerous threats through a punishable act or who may have been affected in their sexual integrity, as well as the close relatives of a person whose death may have been caused by a punishable act, or other relatives who witnessed a deed, need to be informed of the right to support services during proceedings, of the requirements in this connection and of the institutions for the protection of victims that offer such services during proceedings. The persons who are entitled to obtain support services during proceedings, usually persons suffering especially from severe emotional injuries and requiring more protection, must be informed ex officio of the release from detention of the accused before a first-instance court ruling is issued. Injured persons speaking other languages are to be granted the same translation assistance as the accused would receive.

### **Emergency hotlines**

64. In addition to the aforementioned intervention centres against domestic violence and the Centre of Intervention against Trafficking in Women, the following counselling and support services are available, inter alia, for women affected by violence.

65. The helpline against male violence was set up at the end of 1998 as a nationwide contact point for first advice and crisis counselling in cases of (male) violence. It is fully funded by the Federal Ministry for Health and Women.

66. A team of female experts provides advice throughout the country, free of charge and around the clock. The advice is given anonymously; if necessary callers are sent to regional counselling and support institutions for further assistance. Here, too, the constantly growing numbers prove the importance of these institutions. In addition, there are six emergency telephone lines for women in Austria, which offer advice and assistance to raped women and girls.

### **Women's shelters and temporary accommodation for women**

67. At present, a total of 29 women's shelters and apartments are available for women in Austria which offer women and children in situations of violence in the family temporary accommodation.

### **Women counselling centres**

68. One essential basic idea regarding the protection of women is not only to offer a possible shelter in emergency situations but, in addition, to provide women affected by violence with comprehensive support. At present, there are 33 women counselling centres in Austria that are sponsored by the State (mainly by the Federal Ministry for Health and Women) and that offer

comprehensive counselling services (inter alia, legal matters, assistance in divorce issues, psychological care, advice on occupational matters, etc.), as well as 5 emergency telephone lines that, inter alia, are also first contact points for women threatened by violence and that offer support and assistance. Moreover, a number of institutions receive State support and work on projects to prevent violence, provide information and offer therapeutic support, as well as help in clearing up cases, also when child abuse is suspected.

69. The brochure “Women are right/Women have rights” (*Frauen haben Recht(e)*) provides information about legal possibilities in cases of domestic violence, as well as about assistance and advice options in this field (e.g. women’s shelters, emergency telephone lines, women’s service points, intervention centres) and is distributed free of charge by the Federal Ministry for Health and Women. In addition, information brochures on the topic “Protecting against Violence - For Children and Women” (*Gewaltschutz für Kinder und Frauen*) are available at all police stations. As part of the institution “Criminal Police Advice Services” (*Kriminalpolizeilicher Beratungsdienst*), various projects are supported, especially school projects for the prevention of violence.

70. For the protection of victims to be effective, the quality of the assistance and the interventions also needs to be ensured. In the period 1996-1997 a broad-based training series was therefore carried out for members of the relevant groups of occupations. Since 1998, female staff at women’s centres have also been given basic and further training upon government order (there is no separate job profile for women counsellors, with a specific training course). In addition, the State ordered the organization of interdisciplinary seminars until the end of 2003, which serve the goal of promoting mutual understanding and cooperation between groups of different occupations. In the meantime, excellent results have been achieved with interdisciplinary cooperation and networking in all federal provinces of Austria; there seems to be no need therefore for organizing further interdisciplinary seminars.

71. Since 1998 two-day seminars are also being held on the subject of violence against women as part of the basic training of police officers.

72. Foreign women who cannot reasonably be expected to continue living with their husbands because they threaten the women and their minor children physically or mentally may be issued work permits in excess of the maximum number of federal work permits for foreigners (Ordinance on Exceeding the Maximum Number of Federal Work Permits).

73. All that is needed in this connection is to report to the police on these grounds, to obtain a temporary injunction by the court pursuant to the law on the protection against violence, or a court decision on moving into a separate accommodation, a divorce, if the exercise of violence by the husband was the reason for the divorce, or if the woman went to see a doctor, went to a hospital, an intervention centre, a women’s shelter, the youth welfare office, and/or the youth social welfare centre or a centre for the protection of children and if these institutions have reported or confirmed that there are grounds to suspect the exercise of violence. Austrian marriage law expressly stipulates that applying physical violence or serious mental pain is a serious marital offence.



### **Female genital mutilation**

74. The 2001 law amending the criminal law expressly stipulates in article 90 of the Austrian Criminal Law Code that no permission may be granted - for whatever reason - to a mutilation of (female) genitals and therefore stipulates that this constitutes a physical injury that is punishable in keeping with articles 83 to 87 of the Austrian Criminal Law Code. Pursuant to article 90 (1) of the Austrian Criminal Law Code, permission given by the injured or exposed person rules out the unlawfulness of the suffered physical injury or threat to physical safety, unless the injury or exposure as such is in violation of public morals. Paragraph 3, which was added by the 2001 amendment to the criminal law clarifies that one cannot agree to a mutilation of or other injury to the genitals that will cause a sustained impairment of the sexual sensations. As a result, a possible consent given to the injurious practices summed up under the concept of “(female) genital mutilation” is always unlawful and thus always punishable.

75. Although there is hardly any reason to assume that genital mutilation is practised in Austria, it does happen that families living in Austria and coming from countries where such mutilations are performed will take their daughters to their country of origin in order to have such a serious injury to the genitals performed there.

76. Article 90 (3) of the Austrian Criminal Law Code is intended to combat female genital mutilation, in line with worldwide efforts to counter such practices (inter alia with a view to implementing Recommendation No. 22 of the Committee on the Elimination of Discrimination against Women (CEDAW/C/2000/II/Add.1 - Concluding Observations/Comments) on the occasion of the review of Austria’s country reports).

### **Sex tourism**

77. The 2004 law amending the criminal law expanded the possibilities for punishing sex tourism abroad. While the abuse of minors up to the age of 14 as prostitutes was previously punishable by law, resorting to the services of prostitutes who have not yet reached the age of 18 has now become punishable.

### **Payments pursuant to the Crime Victims Act**

78. The victims of crimes or their surviving dependants are entitled, under certain conditions, to receive benefits under the Crime Victims Act. The federal law published in Federal Law Gazette I No. 48/2005 considerably improved the range of benefits and the legal protection afforded to victims of crime, and extended the group of entitled persons. The amendment essentially entered into force on 1 July 2005.

79. In addition to Austrian and European Economic Area citizens, all those who meet the requirements defined in the law and who were staying legally in Austria at the time of the act that is the origin of the claim are now also entitled to benefits. The entitled persons must have suffered a physical injury or damage to their health as a result of an unlawful act that carries a prison term of more than six months, or must have suffered such damage without any personal involvement, unless there is a claim under the law on official liability (art. II, para. 1 (1), of the Crime Victims Act).

80. According to article 2 of the aforementioned law, the benefits include compensation for loss of income or subsistence, remedial care, orthopaedic support, medical, occupational and social rehabilitation, as well as grants to care costs or for blindness and compensation of funeral costs. In addition, the entitlement of crime victims and their surviving dependants to psychotherapy was considerably expanded, in addition to granting income-related additional payments. In the field of remedial care and rehabilitation, contributions to costs directly related to the incident and prescription fees are now also refunded. If evidence of an urgent need is furnished, advance payments may also be granted.

### **Advisory Board for Human Rights**

81. Upon repeated recommendations by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Advisory Board for Human Rights was set up within the Federal Ministry of the Interior in July 1999. The Advisory Board consists of 11 members and as many alternate members who are not bound by any instructions when complying with their duties; in other words, they are independent. All members and alternate members are appointed by the Federal Minister of the Interior for a term of office of three years.

82. The President of the Constitutional Court has the right of nomination regarding the position of the chairperson and the deputy chairperson, who must be selected from among the members of the Constitutional or the Administrative Court or from among those persons who are entitled to teach constitutional law at one of Austria's universities. The following persons also have the right of nomination for one member and one alternate member each:

- (a) The Federal Chancellor;
- (b) The Federal Minister of Justice;
- (c) Five private, non-profit organizations that are committed to the protection of human rights.

83. Three members and their alternate members are appointed by the Federal Minister of the Interior without any prior nomination.

84. The Advisory Board has the task of reviewing - from the perspective of compliance with human rights - the activities of the security authorities, of authorities that are otherwise subordinate to the Federal Minister of the Interior, as well as of the agencies authorized to apply immediate powers of command as well as coercive powers as administrative authorities. In addition, the Advisory Board is involved in devising activities on the substance of the issue. On the basis of this work, it submits proposals for improvement to the Federal Minister of the Interior. The activities of the Advisory Board are not limited in substance to reviewing the situation of detained persons from the angle of a humane treatment (art. 3 of the European Convention on Human Rights), but all aspects of human rights may be covered, according to the priorities established by the Advisory Board, in the context of all activities undertaken by the security and enforcement bodies. Moreover, the Advisory Board also deals with the substance of the issue and its concepts, in order to be able to submit proposals for improvement to the Federal

Minister of the Interior. These proposals deal with aspects of respecting certain rights, as well as organizational overall conditions in the work of the security and law-enforcement bodies, from the viewpoint of human rights. The terms of reference of the Advisory Board are therefore not geared to checking on individual cases but to activities regarding the structural and institutional level. This orientation clearly distinguishes the Advisory Board from criminal justice agencies or disciplinary bodies.

85. The main focus of the work of the Advisory Board is on pinpointing possible structural deficiencies as well as on obtaining a certain preventive effect by making appropriate suggestions for the improvement of human rights, in connection with the tasks performed by the security and law-enforcement officials. The primary task of the Advisory Board is therefore to analyse the structural conditions for the work of the police from the viewpoint of human rights. This means, in particular, that abuses and violations of human rights are not regarded as isolated individual incidents, but as cases that are caused by the system.

86. The Advisory Board meets approximately every six weeks. Whenever necessary, a minimum of three members may call for an extraordinary meeting. The reports submitted by the commissions are considered and analysed in the meetings. Depending on the factual situation, recommendations with proposals for possible improvements are addressed to the Federal Minister of the Interior, or the Advisory Board identifies the matter as a priority for its work. Working groups, which the Advisory Board appoints and which also involve external experts, in addition to the members of the Advisory Board and of its commissions, deal with the issues at hand and bring the matter to the attention of the Federal Minister of the Interior, in the form of reports.

87. The Advisory Board pursues its monitoring and reviewing activities without prejudice to the activities of the criminal enforcement agencies, of the administrative supervisory bodies or of the Independent Administrative Senates.

88. The Advisory Board has set up commissions of experts, which are organized on a regional basis, in order to ensure nationwide coverage when evaluating the activities of the security and law-enforcement bodies. The commissions review, in an accompanying fashion, the detention of persons at service units of the security and law-enforcement bodies, as well as large-scale police activities with regard to the observance of human rights in their performance. According to article 15 c (1) of the Security Police Act the Advisory Board has to set up commissions, based on regional considerations, in such numbers that compliance with all tasks is ensured. As a result, three commissions were set up for the district covered by the Higher Regional Court for Vienna, and one commission each for the other districts covered by Higher Regional Courts. Article I of the Guidelines for the Structure, Working Methods and Visits of the Commissions defines the local competences of the three commissions set up for the district covered by the Higher Regional Court for Vienna. The six commissions began operating in July 2000.

89. The six commissions consist of a minimum of five and a maximum of eight members. The Advisory Board appoints a person recognized for his/her merits in the field of human rights as the head of each commission. The other members of the commissions are appointed by the Advisory Board upon proposal by the head of the commissions. Care must be taken with regard

to the composition of the commissions so that the expertise required to perform the tasks is adequately represented, and that there is a balanced representation of the two sexes. Experts who belong to security and law-enforcement bodies cannot become members of the commissions.

90. The visits undertaken by the commissions follow a routine pattern and cover the entire respective territory, on the one hand, and are scheduled on the basis of circumstances brought to their attention, on the other. The visits need not be announced in advance. The commission as a whole or a delegation of the commission may undertake the visits. A delegation consists of a minimum of two members of a commission. Every delegation must represent the legal and administrative expertise, as well as the medical and psychological expertise.

91. The security and law-enforcement bodies are obliged to support the Advisory Board and its commissions in its activities. The head of a visited service unit must allow access to the documents and provide information. In this connection, officials of the security and law-enforcement bodies are not required to observe official secrecy. The commission must be allowed access to all premises. Moreover, if the commission wishes to contact specific detained persons it must be allowed to do so without any third parties being present.

92. The commissions must report to the Advisory Board after each visit. The reports must, in particular, comprise the established facts and the measures and recommendations, which the commission deems necessary.

93. The Federal Minister of the Interior must make available sufficient funding to the Advisory Board so that it can fulfil its obligations. A business unit was set up at the Federal Ministry of the Interior to support the Advisory Board in its activities. The business unit acts as a general contact point and coordinates and implements the tasks entrusted to the members of the Advisory Board, who work on an honorary basis. It also acts as a link to the commissions. In addition to the administrative work involved in preparing and processing the meetings of the Advisory Board, organizing, assisting and cooperating in the substantive matters covered during the meetings of the working groups are the other main tasks undertaken by the business unit. Furthermore, the individual reports of the commissions are compiled in a database, analysed and prepared for deliberation by the Advisory Board.

94. So far, the Advisory Board for Human Rights has prepared the following 18 reports:

- Report on so-called “problematic cases of deportations” (1999);
- Report on problems regarding “minors in pre-deportation detention” (2000);
- Report on human rights issues in connection with the detention of women by staff of the security and law-enforcement bodies (2001);
- Report on the information provided to detained persons (2002);
- Report on the medical services provided to detained persons (2002);
- Position of the Advisory Board for Human Rights on the Guidelines of the Federal Minister of the Interior regarding federal services provided to asylum-seekers (2003);

- Report of the Advisory Board for Human Rights regarding the study entitled “Language Used by the Security and Law Enforcement Bodies” (2004);
- Report on the language used by the Austrian security and law-enforcement bodies (2004);
- Report of the Advisory Board for Human Rights regarding “The Use of Police Coercive Force - Minimizing the Risks in Problematic Situations” (2004);
- Report of the Advisory Board for Human Rights regarding “Reactions to Alleged Human Rights Violations” (2004);
- Report of the Advisory Board for Human Rights regarding “Human Rights Defence Counsels” (2005);
- Conditions in the detention centres of security bodies (2005);
- Report of the Advisory Board for Human Rights regarding “Human Rights in the Basic and Further Training of Security and Law Enforcement Officials” (2005);
- Report on the Board’s activities in 1999 and 2000;
- Report on the Board’s activities in 2001;
- Report on the Board’s activities in 2002;
- Report on the Board’s activities in 2003;
- Report on the Board’s activities in 2004.

95. The Security Police Act ensures that the recommendations made by the Advisory Board for Human Rights to the Federal Minister of the Interior in any given year are included in the Federal Government’s Annual Report on Security to the National Council.

96. In addition, the Advisory Board submitted recommendations to the Federal Minister of the Interior on a number of subjects, including discriminating use of language by the security and law-enforcement bodies, large-scale police operations, hunger strikes by persons detained prior to deportation, border surveillance posts, pre-deportation detainees in prisons, and the joint detention of married couples.

97. The German version of the reports and the recommendations of the Advisory Board for Human Rights can be downloaded from its homepage ([www.menschenrechtsbeirat.at](http://www.menschenrechtsbeirat.at)).

### **Extradition**

98. In accordance with article 19 of the Extradition and Judicial Assistance Act, Federal Law Gazette No. 529/1979, as last amended by Federal Law Gazette I No. 164/2004, a person must not be extradited if there is reason to suspect that the criminal proceedings in the requesting State

will not or did not comply with the principles laid down in articles 3 and 6 of the European Convention on Human Rights which has constitutional ranking in Austria. Furthermore, nobody may be extradited who may be exposed to a punishment in the requesting State that would be enforced in a manner not consistent with article 3 of the Convention, or who would be exposed to prosecution in the requesting State on account of his/her origin, race, religion, affiliation with a certain ethnic or social group, nationality or political views, or who would have to expect serious prejudice for one of these reasons. These measures are intended to ensure compliance with the principles of a State governed by the rule of law in this area. Below is the English version of the text of article 19 of the Extradition and Judicial Assistance Act:

“**Article 19.** Extradition is prohibited if there is cause to suspect that:

1. The criminal proceedings in the requesting State will not comply or have not complied with the principles of articles 3 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Federal Law Gazette 210/1958);

2. The penalties or preventive measures imposed or expected in the requesting country would be enforced in a manner not consistent with the provisions of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Federal Law Gazette 210/1958); or

3. The person to be extradited would be subject to prosecution in the requesting country because of his/her origin, race, religion, membership in a specific ethnic or social group, nationality, or political views, or may expect other serious prejudice for any of these reasons (extradition asylum).”

99. Similar provisions are also contained, for example, in article 3 (2) of the European Convention on Extradition of 13 December 1957, in article 5 of the European Convention on the Suppression of Terrorism of 27 January 1977 and in article 15 of the International Convention on the Suppression of the Financing of Terrorism of 10 January 2000, all of which were ratified by Austria.

100. It should be added that extradition is inadmissible for the prosecution of an offence that carries the death penalty according to the law of the requesting State unless it is ensured that the death penalty will not be imposed. No extradition at all is possible for the execution of the death penalty. The same applies to penalties that are contrary to article 3 of the European Convention on Human Rights (art. 20 of the aforementioned law).

101. With its decision (VfSlg. 16772/2002, Federal Law Gazette I No. 6/2003) of 12 December 2002, the Constitutional Court repealed - on grounds of unconstitutionality - the second sentence of article 33 (5) of the Extradition and Judicial Assistance Act, Federal Law Gazette No. 529/1979, which read: “No legal remedy is admissible against the decision for which reasons must be given.” The Constitutional Court explained the revocation, inter alia, by arguing that the principle of the rule of law, as contained in federal constitutional law, requires that the instruments for legal protection, which are indispensable prerequisites, “show a certain minimum amount of factual efficiency for the person seeking legal protection”. In addition, a

person (allegedly) injured in his/her rights under the Convention must be granted the possibility of filing an effective complaint to a national body, in accordance with article 13 of the Convention.

102. On account of this decision, the law amending criminal law, adopted in 2004, Federal Law Gazette I No. 15/2004, now provides for a two-instance extradition procedure. Since the aforementioned amendment was adopted, extradition proceedings are now concentrated with the investigating judge who - possibly after conducting a hearing - has to decide on the admissibility of an extradition, unless the person concerned agrees to being extradited. This decision by the investigating judge can now be appealed to the second-instance court, which appeal can be lodged by the person to be extradited and by the public prosecutor. The second-instance court reaches a final decision on the admissibility of the extradition.

103. It should also be mentioned at this juncture that article 57, paragraph 1, of the 1997 Aliens Act, which prohibits deportation, rejection at the border and refusal of entry into Austria, now expressly refers to articles 2 and 3 of the Convention, as well as to Protocol No. 6 to the Convention abolishing the death penalty (Federal Law Gazette No. 138/1985, as amended by Federal Law Gazette III No. 30/1998). It now reads as follows:

“**Article 57.** (1) Aliens must not be refused entry, rejected at the border or deported to a State if this were to violate article 2 of the Convention on the Protection of Human Rights and Fundamental Freedoms or Protocol No. 6 to this Convention abolishing the death penalty.”

104. Prior to removing a person by force from Austria it must therefore be examined ex officio in every case whether this measure would violate any of the provisions referred to above (see Concern No. 10 (i) and (ii)).

105. It should be pointed out that this provision was reworded - however, without a change of substance - by the 2005 Aliens Police Act, Federal Law Gazette I No. 100. The new provision, which enters into force on 1 January 2006, reads as follows:

“**Article 50.** (1) It is inadmissible to refuse an alien entry into the country, or to prevent an alien from entering the country, to reject an alien at the border or to deport an alien to another State if this were to violate articles 2 or 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (the Convention), Federal Law Gazette No. 210/1958, or Protocols No. 6 or 13 to the Convention on the Protection of Human Rights and Fundamental Freedoms on abolishing the death penalty, or if that would be linked for that person, as a civilian, to a serious prejudice to his/her life and his/her integrity, due to arbitrary force, in the course of an international or domestic conflict.”

### **Therapeutic treatment of minors and handicapped persons**

106. On account of the law of 2001 amending the Child Custody Act, Federal Law Gazette I No. 135/2000, which entered into force on 1 July 2001, changes have occurred regarding minors and handicapped persons in connection with their therapeutic treatment. Article 146c of the Austrian General Civil Law Code now stipulates that the understanding and discerning child is

the only person that can give his/her consent to medical treatments. In case of doubt, it is assumed that minors above the age of 14 are able to understand and to discern. In the absence of the necessary understanding and discernment, the consent of the person who is responsible for the care and education of the child is required.

107. The term “medical treatment” according to article 146c of the Austrian General Civil Law Code is a far-reaching concept and does not only comprise therapeutic treatments in the narrower sense of the word, but also diagnostic, prophylactic and pain-relieving measures, as well as such forms that do not follow recognized methods of medical science, as is the case with alternative or complementary medicine. When assessing the understanding or discernment of a minor, his/her age, maturity, health status, personality, as well as other factors are decisive, but also the seriousness of the intervention, the risks and possible consequences associated with its performance or non-performance need to be taken into consideration on the basis of the state-of-the-art medicine. The decisive factor is whether the child - in connection with a specific medical treatment - can grasp the consequences of his/her decision and is capable of adjusting his/her conduct according to this insight. The physician in charge or the member of another health occupation concerned will therefore have to assess the understanding and discernment after considering all circumstances in the individual case. However, in case of doubt the rule applies that persons who have reached the age of 14 are understanding and discerning persons.

108. However, if, as a rule, the treatment entails a serious or sustained impairment of the personality or physical integrity of the minor child, article 146c (2) of the Austrian General Civil Law Code defines the obligation of the members of a health occupation to obtain - in addition to the consent of the child concerned - the agreement of the person who is responsible before the law for the care and education of the child. As a rule, this will be the parent of a legitimate child or the mother of an illegitimate child.

109. According to article 146c (3) of the Austrian General Civil Law Code, the consent of the understanding and discerning child and the agreement of the person responsible for the care and education of the child are not required if the treatment is of such urgency that the delay caused by obtaining the consent or the agreement could jeopardize the life of the child or would result in a serious damage to the child's health.

110. The law of 2001 amending the Child Custody Act also contains new provisions on medical measures that result in the lasting disability to reproduce (sterilization) of a handicapped person. According to article 282 (3) of the Austrian Civil Law Code, which entered into force on 1 July 2001, a custodian cannot agree to such a measure unless a serious danger to the life or a serious damage to the health of the handicapped person is otherwise the result, on account of lasting physical suffering. In any event, the consent requires court approval.

## **Article 8. Prohibition of slavery**

### **Criminal law**

111. The facts constituting an offence pursuant to article 217 of the Austrian Criminal Law Code have been expanded, as a result of which everyone who induces or recruits a person to engage in prostitution in a country other than that of that person's own nationality or regular domicile is liable to punishment for cross-border dealings in prostitution, since the entry into



force of the law of 2004 amending the Criminal Law Code. It is of no importance whether or not the person previously engaged in prostitution. Cross-border dealings in prostitution carry a maximum prison term of 10 years.

112. The clause on “trafficking in human beings” (art. 104a of the Austrian Criminal Law Code) was inserted as a supplement to cross-border dealings in prostitution. Apart from crossing any border, any commercial activity for the purpose of sexual exploitation, the removal of organs, or exploitation of the working capacity is also penalized. The provisions affording protection therefore also apply to all persons (nationals and foreigners alike) domiciled in Austria.

113. Article 104 (1) of the Austrian Criminal Law Code sets forth several different measures, which must be carried out in relation to someone with the intent of exploiting others in a certain manner. While the details regarding the circumstances leading to an offence are of lesser importance in connection with the protection of minors, the draft legislation lists certain “improper” means, which are described in detail, that are used in connection with adults (see article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons and article 1 of the Council Framework Decision on Combating Trafficking in Human Beings, OJ L 203 of 1 August 2002, page 1). The use of force or duress against the persons concerned of whatever age is meant as a qualification and should carry a prison term of six months to five years, which correlates with the sentence carried by serious compulsion, as defined by article 106 (1), item 3. Other qualifications are intended to take account of article 3 (2) of the Framework Decision on Combating Trafficking in Human Beings.

114. The acts constituting an offence include recruiting, accommodating, taking in, transporting, passing on or offering a person (when seen in isolation these are often neutral acts) and are of relevance under criminal law if they are performed with the intent of having the victim exploited in a certain manner by the offender or a third party. This kind of exploitation may relate to three aspects, i.e. sexual exploitation, exploitation by the unlawful removal of organs, as well as exploitation of the working capacity. As a matter of principle, though, it is always the conduct before the commission of the actual exploitation that must be given due care when including it in the existing pattern of punishment so that contradictions in evaluation in relation to other provisions are avoided.

115. “Exploitation”, as defined by this provision, exists if there is a far-reaching and sustained suppression of the vital interests of the victim. It is only when a subsequent exploitation of the victim formed part of the offender’s intention to act that one can actually speak of an offence. “Sexual exploitation” is said to take place whenever a person is compelled to provide sexual services or be available for sexual activities that do not agree with that person’s vital interests, i.e. if a prostitute is deprived of the “lion’s share” (that exceeds the vital needs of everyday life) of the remuneration paid by her customers or if certain conditions are prescribed for engaging in prostitution that jeopardize specific vital interests (see article 216 (2) of the Austrian Criminal Law Code). In connection with minors, that limit, namely when one can speak of a violation of their vital interests, must be drawn earlier, inasmuch as their undisturbed sexual and moral development must also be taken into consideration (see also the protective provisions contained in articles 206, 207, 207a (1), 207b, 208, 212, 213, 214 and 215a of the Austrian Criminal Law Code).

116. The facts of a sustained exploitation (also directed against the vital interests of the victim) of the human body by the removal of organs would certainly apply if an organ is removed from a living person for use by a third person, an act which would not be justified in accordance with article 90 in view of the serious nature of the physical injuries to the donor associated with the removal of the organ or the risks involved - possibly also to be expected at a later stage in life. According to Austrian law this would have to be qualified as physical injury, in keeping with article 83 and following, if it were performed in accordance with the intention of the person trafficking in human beings. According to the offender's design, either a legally effective consent by the victim to the intended removal of the organ would have to be absent - such as when the victim is not even informed of the intended surgery - or the victim's consent is to be obtained by the application of force, duress or trickery. Alternatively, the absent justification - independent of a possibly given consent - would also derive from the fact that the intended injury would be contrary to public morals. The removal of body cells that can be reproduced, which as such is regarded as causing no problems, could be regarded as exploitation, even if the victim has given his/her consent, if the removal is made in such volumes or with such frequency that it may result in sustainable damage to the health of the victim. The removal of an organ for therapeutic purposes - such as the removal of a donor organ or the removal of an organ for medical indications, when affected, for example, by a tumour - would lack the element of exploitation of the body of the person concerned. As a result, such a case could not be included among the problematic organ removals, as defined in the provision on trafficking in persons. The concept of an "organ", as defined by this provision, must be understood in the medical meaning offered by article 62a of the Hospital and Sanatoria Act and therefore also covers parts of organs and human tissue.

117. Exploitation of the working capacity is understood to mean practices which - although not to be regarded as slavery or similar to slavery, but nevertheless constituting a reckless utilization of the victim - are directed against the victim's vital interests. This is the case whenever the victim of the act is given no or only insufficient remuneration for his/her work or service over a longer period of time, or if the working hours permitted or reasonably expected in keeping with the legislation are excessively extended, or if the victim is induced to perform the expected work under unreasonable circumstances. If the collective wages are not excessively disregarded, albeit for a longer time, or if the working hours are exceeded, albeit not excessively, such cases will therefore not be qualified in that sense; but a considerable and sustained disregard of statutory and/or collectively agreed minimum standards will be qualified as such. As in other provisions, the punishment is not only intended for the selfish action of the offender who (himself/herself) intends to exploit the person concerned but it also constitutes trafficking in persons if the victim is to be passed on to a third person for the purpose of exploitation.

### **Laws concerning aliens**

118. Further provisions that are relevant to article 8 can be found in the 2005 Aliens Police Act. The judicial penal sanctions contained in this Act in connection with the smuggling of persons, being accessory to an unauthorized stay in the country and exploitation of aliens take account of the Council Framework Decision on Combating Trafficking in Human Beings.

## Smuggling of aliens

119. Article 114 reads as follows:

- “(1) Persons who knowingly support the unlawful entry or transit of an alien into or through a member State of the European Union or a country neighbouring Austria shall be punished by the court to a maximum prison term of one year;
- “(2) Persons who support the unlawful entry or transit of an alien into or through a member State of the European Union or a country neighbouring Austria with the intent of enriching himself/herself or a third party unlawfully by obtaining a remuneration for the service shall be punished by the court to a maximum prison term of two years;
- “(3) Persons who were convicted of smuggling aliens, as defined in paragraph 2, within the last five years shall be punished to a maximum prison term of three years. Convictions shall also include those by a foreign court in proceedings complying with the principles of article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms;
- “(4) Persons who commit the act, as defined in paragraph 2, on a commercial basis (art. 70 of the Austrian Criminal Law Code) or in a manner and fashion as a result of which the alien is put into a painful situation for an extended period of time, especially during transportation, shall be punished by the court to a prison term between six months and five years;
- “(5) Persons who commit the act, as defined in paragraph 2, as a member of a criminal organization or in a manner and fashion that jeopardize the life of the alien, to whom the punishable act relates, shall be punished by the court to a prison term of 1 to 10 years;
- “(6) Aliens whose unlawful entry or transit is supported by the act shall not be punished as accomplices (art. 12 of the Austrian Criminal Law Code). Their rejection at the border or deportation may be stayed if and as long as this is required in order to examine them on the facts;
- “(7) The bodies of the public security service shall be authorized in the case of imminent danger to secure, for the time being, objects that the offender carries with him/her, or transport means or containers used to commit the offence in order to secure the confiscation of the enrichment (art. 20 of the Austrian Criminal Law Code), its forfeiture (art. 20b of the Austrian Criminal Law Code) or seizure (art. 26 of the Austrian Criminal Law Code). The load carried by means of transport may be released to the registered vehicle owner or to his/her authorized representative. The court shall be informed without delay of the measures taken;
- “(8) Proceedings for the offences defined in paragraph 1 shall be the responsibility of first-instance courts.”

### **Aiding in the unauthorized stay of persons**

120. Article 115 reads as follows:

- “(1) Persons who assist an alien in staying without authorization on the territory of a member State of the European Union, with the intent of preventing measures being taken or enforced that end the stay, shall be punished by the court to a prison term of up to six months or a fine of up to 360 daily wages;
- “(2) Persons who assist an alien in staying without authorization on the territory of a member State of the European Union, with the intent of unlawfully enriching himself/herself or a third party by a remuneration that is not merely a petty amount, shall be sentenced by the court to a prison term of up to one year or a fine of 360 daily wages;
- “(3) Persons who commit the offence on a commercial basis shall be sentenced to a maximum prison term of three years;
- “(4) The alien who benefited, or was to benefit, from the assistance provided according to paragraphs 1 and 2 shall not be punished as an accomplice;
- “(5) The proceedings concerning the offences defined in paragraphs 1 and 2 shall be the responsibility of first-instance courts.”

### **Exploitation of aliens**

121. Article 116 reads as follows:

- “(1) Persons who exploit an alien with the intent of obtaining a regular income for themselves or third persons by taking advantage of the special dependence of an alien who stays on the federal territory unlawfully, does not have a work permit or is otherwise in a special relationship of dependence, shall be punished by the court with a maximum prison term of three years;
- “(2) Persons who cause distress to an alien on account of the act, or who exploit a larger number of aliens, shall be punished to a prison term of six months to five years;
- “(3) If the act leads to the death of an alien, the offender shall be sentenced to a maximum prison term of 10 years.”

122. Persons affected by trafficking in women are granted a residence permit ex officio on humanitarian grounds, irrespective of their readiness to cooperate with the authorities. The practice in this connection goes beyond the procedure governed by Council Directive 2004/81/EC of 29 April 2004 on residence permit issued to third-country nationals who are victims of trafficking in human beings or who were given assistance to immigrate illegally and who cooperate with the competent authorities. It is especially through cooperation with the intervention centre for persons affected by trafficking in women, which has been in operation in

Vienna since 1998, and the first-instance alien-police authorities that victims of trafficking in human beings are granted residence permits in keeping with the current legal basis (art. 10 (4) of the 1997 Aliens Act) and that individual solutions are sought.

123. As a further consequence, all women concerned may also be granted settlement permits to become established on a permanent basis in Austria, provided that all prerequisites are met. As of 1 January 2006, victims of trafficking in human beings may also be granted residence permits on humanitarian grounds according to article 72 (2) of the Austrian Settlement and Residence Act or humanitarian visa according to article 22 of the Aliens Police Act.

124. The aforementioned intervention centre for persons affected by trafficking in women is supported by the Federal Ministry for Health and Women and the Federal Ministry of the Interior. It assists female migrants who were coerced to engage in prostitution or who were induced to come to Austria through marriage trafficking or trafficking in household workers. The actual work is based on a cooperation agreement between the Federal Ministry of the Interior and LEFÖ, an association. The objective of the agreement is to combat human rights violations from which female migrants suffer, on account of their weak social and legal status, to support the women concerned in analysing their situation, and to take the right decisions for them, as well as to create the conditions, in the form of immediate medium- or long-term support to the persons concerned, so that they can return to their home countries. The association offers psychosocial, health and legal advice, as well as advice on labour-market policies, and provides services and leisure-time facilities, together with educational measures and courses, as well as workshops on various subjects. (The annual report for 2004 is enclosed as annex 3; reference is made, in particular, to the statistics contained in the report.)

#### **Article 9. Personal freedoms**

##### **Regarding Concern No. 9 - Lawyer's presence at the preliminary stage of judicial criminal investigation; no audio recording of interrogations**

125. The impression that under Austrian law an arrested person does not have the right to obtain the assistance of a legal counsel immediately upon his/her detention does not apply for the reasons given in the following paragraphs.

126. According to article 178 of the Austrian Code of Criminal Procedure, every detained person must be informed upon detention, or immediately afterwards, of the offence with which he/she is charged, and of the reason for being detained. He/she must also be informed that he/she has the right to contact a relative or a person of his/her confidence and a legal counsel, and that he/she has the right not to give evidence. As a rule, persons are arrested by agents of the security authorities, so it is their obligation to give detainees this first information.

127. In its decision of 17 September 2002, file number GZ 2000/01/0325-6, the Administrative Court stated that a suspect (accused) has the right to communication and access to a legal counsel in the event that he/she is interrogated by agents of the public security services, and that he/she must be informed of this right, in keeping with article 8 (1) of the Guideline Regulations. In a Joint Decree of the Federal Minister of the Interior and the Federal Minister of Justice on contacting and calling in a legal counsel when a suspect is to be

interrogated by agents of the public security services working for the criminal justice system, file number JABl. No. 13/2003, it is stated, by way of a comment, that a suspect must be allowed to contact and consult with a legal counsel, immediately upon his/her request. If the person to be interrogated states that he/she will not give any evidence, unless a legal counsel is present, then the authorities may have to wait with the interrogation, to the extent that the purpose of the interrogation and the investigative measures deriving therefrom permit that a legal counsel is present during the interrogation.

128. Article 179 (1) of the Austrian Code of Criminal Procedure states that the investigating judges must examine the accused person arrested immediately, at the latest, though, 48 hours after his/her commitment to the court, and that he/she must be informed at the beginning of the interrogation, inter alia, of his/her right to consult with a legal counsel, before giving evidence. According to article 45 (3) of the Austrian Code of Criminal Procedure the accused person arrested may, as a rule, consult with his/her legal counsel without a court person being present. Monitoring the conversation can only be done by the investigating judge if the accused has been arrested because of a risk of collusion and if it feared, on account of special, serious circumstances, that consultation with the legal counsel will otherwise prejudice the evidence. In practice, though, it hardly ever happens that conversations are monitored.

129. To sum up, the current legal situation may be described as follows: every arrested person has the right not to give evidence, as well as to contact a legal counsel before being interrogated, and to ask for access to a legal counsel. If an arrested person therefore wishes to speak to his/her legal counsel, before giving any information on the matter at hand, then he/she must be assisted in obtaining the conversation with his/her legal counsel. It will depend on the circumstances of the individual case whether this is already possible before the arrested person is committed to prison - that is to say during his/her temporary custody by the security authorities - or only after his/her committal. It must be borne in mind, though, that it is sometimes more in the interest of the arrested person to be brought, as quickly as possible, before a judge who will examine the suspicious situation without prejudice than to be remanded in police custody.

130. The 2004 Criminal Procedures Reform Act stipulates the following extensions of the rights of accused persons: according to article 59 (1) of the aforementioned law, an accused person who is arrested has the possibility to contact a legal counsel, to give the legal counsel power of attorney and to consult with the legal counsel before being interrogated. It is only in special cases that this contact, which takes place before the accused is committed to prison, is restricted to issuing the power of attorney and providing the general legal information. The contacts with the legal counsel after committal to prison may only be monitored if the accused is also detained for risk of collusion or conspiracy, and if it is feared, on account of special, serious circumstances, that the contact with the legal counsel might prejudice the evidence (art. 59 (2) of the Criminal Procedures Reform Act). Before the interrogation commences, the accused must be informed, inter alia, that he/she has the right to consult first with a legal counsel, in which case the interrogation may have to be postponed, if necessary, for a reasonable period of time (art. 164 (1) of the Criminal Procedures Reform Act). In addition, the accused has the right to call in a person of his/her confidence when he/she is being interrogated. Such a person may, however, not take part in the interrogation (art. 164 (2) of the Criminal Procedures Reform Act). This person of confidence may also be a legal counsel.

131. With regard to the recommended production of audio recordings of all interrogations of arrested and accused persons, it must be stated that the currently applicable Code of Criminal Procedure does not require the production of an audio recording when the accused is interrogated in court, but that a written record is produced by a minute keeper, who is an independent records clerk. According to article 6 (3), item 3, of the Guidelines Ordinance, a written record must be produced of the (police) interrogation which must also indicate the names (service numbers) of all persons present, the times of the interrogations and the breaks, as well as the room (office) in which the interrogation was conducted. If the person concerned agrees, the evidence may be recorded not in the form of a written record but by audio or video recording, which may also be produced in addition to the written record.

132. According to article 97 of the Criminal Procedures Reform Act it will be possible, after expressly informing the accused, to produce an audio or video recording of the interrogation if the record is a complete record of the interrogation. Such a record must especially be produced if the accused is not permitted to call in a person of his/her confidence, because - due to specific facts - it must be assumed that their presence might affect the investigations (art. 164 (1) of the Criminal Procedures Reform Act).

#### **Regarding Concern No. 10 (ii) - Treatment of persons awaiting expulsion**

133. One speaks of pre-deportation detention when an alien is arrested and detained on the basis of a decision on deportation. According to article 61 (1) of the Aliens Act, aliens may be arrested and committed to a pre-deportation detention centre if this is necessary in order to secure the procedure for issuing a residence ban or a deportation until it can be enforced, or in order to secure the deportation, rejection at border or transit transportation. When staying legally on federal territory, aliens may only be taken into a pre-deportation detention centre if there is reason to assume, on account of certain facts, that they would evade the procedure. The authorities are required by law to take steps that will keep the pre-deportation detention period as short as possible. Pre-deportation detention must be ordered by way of a decree, which may be appealed to the Independent Administrative Senate (arts. 61 (4) and 72 (1) of the Aliens Act). According to article 73 (2), item 2, of the Aliens Act, the Independent Administrative Senate must take its decision within one week, unless the detention of the alien would have ended earlier. These decisions by the Independent Administrative Senate may then be appealed to the Constitutional Court, as well as to the Administrative Court. The legal situation, as it is described here, will remain more or less unchanged once the Aliens Police Act enters into force on 1 January 2006. The relevant provisions in force can then be found in article 76 and following of the Aliens Police Act.

134. The provisions in article 72 and following of the 1997 Aliens Act were linked to the intentions of the legislator, namely to take account of the requirements in article 5 (4) of the European Convention on Human Rights, as well as of article 6 of 1997 Personal Freedoms Act, according to which everybody is entitled to a court decision, as soon as possible, on the legality of his/her arrest and detention. The case law of the Independent Administrative Senates is proof of the fact that this goal has been achieved (see, to list but a few examples of many decisions, file number GZ 013/02/03018 by the Burgenland Independent Administrative Senate of 17 June 2003; file number VwSen-400557/3/Sr/Ri of the Upper Austrian Independent Administrative Senate of 30 December 1999 - in both cases the Independent Administrative

Senate stated that the grounds for a pre-deportation detention did *not* prevail. A similar situation can be found in the decision on inadmissibility by the European Court of Human Rights of 22 May 2001, *Okonkwo v. Austria*, Application 35117/97). The case law of the Constitutional Court is also proof of this: for example, in its decision of 12 October 1994, file number B 2153/93, the Constitutional Court ruled that the complainant's right to personal freedom under article 6 (1) of the 1997 Personal Freedoms Act, which is guaranteed by constitutional law, was violated because the Independent Administrative Senate exceeded the one-week delay for taking a decision (see also file number VfSlg. 13.893/1994). The instrument of complaining against pre-deportation detention was also recognized by the case law of the Convention bodies as being an effective remedy, as defined by article 35 of the European Convention on Human Rights (see decisions of the European Court of Human Rights of 18 January 2000, *Yavuz v. Austria*, Application 32800/96; and of 15 May 1996, *Birinci v. Austria*, Application 25736/94).

135. Every year, the Federal Minister of the Interior signs private-law contracts with a number of relief organizations which are to ensure humanitarian, social and legal assistance to detainees during pre-deportation periods, in order to take better account of the special needs for legal protection of pre-deportation detainees that are due to communication difficulties. By way of instructions the Federal Minister of the Interior creates the overall legal conditions for the necessary requirements leading to the effective implementation of these agreements.

136. The main goals of this form of assistance are:

- To conduct assistance and information talks;
- To provide pre-deportation detainees with any commodities needed in acute situations until the prison management can provide the necessary supplies;
- To accompany pre-deportation detainees to medical examinations, if they so wish;
- To inform pre-deportation detainees of the legal circumstances, especially about the proceedings pending against them;
- To prepare detainees for deportation or release;
- To follow up on the situation of detainees for about one week after their release from pre-deportation detention centres in Austria;
- To assist pre-deportation detainees in the contact interview with the public security services officer accompanying the deportation.

137. When pre-deportation detention is enforced, detainees are informed about the possibility of being supported by an assistant for pre-deportation detainees immediately and in a language which they understand. Although detainees may waive the support of an assistant, for the time being, these assistants are nevertheless informed. Assistants must be granted access to the detainees concerned in order to give them the possibility of being provided with detailed information about the assistance and to clear up possible misunderstandings.



138. Pre-deportation detainees are kept at police detention centres. At present, there are 15 such centres in Austria. The officers in contact with the detainees receive special training on a regular basis. Care is taken that both friends and relatives, but also the staff of organizations providing assistance to pre-deportation detainees, have access to the detained persons.

139. As a rule, cells for six persons are being used for the enforcement of pre-deportation detention. Single cells will only be used if the detainee has caused injuries to himself/herself (safe custody), is on a hunger strike or specifically requests this. It may also be the result of an imposed disciplinary measure or an order by the official physician in case of a contagious disease.

140. Men and women in pre-deportation detention centres are kept separate. There are so-called mother-and-child cells. Here, a woman in pre-deportation detention may take along her child (up to the age of two and a half years) on a voluntary basis. Of course, no pre-deportation detention is imposed upon the child, and the woman has to set her wish in writing. As a matter of principle, pregnant women are regarded as being fit for detention. They are given medical attention. Only female staff are employed in prison units for women. Young persons are accommodated in separate cells.

141. So-called open units for women are currently being tested. Here, detainees are allowed more freedom of movement (throughout the day, the doors of the cells are kept open). This is a special building section that is also provided with an appropriate common room. All detainees are given the opportunity to go for a walk or play basketball in the courtyard.

### **Pretrial detention**

142. Formal and substantive requirements (art. 180 (1) of the Austrian Code of Criminal Procedure) must be met in order to be able to impose pretrial detention. On the one hand, the court may impose pretrial detention only if the public prosecutor so moves, and only in those cases in which the court has launched a preliminary investigation against the accused or charges are brought against him/her. In addition, before taking the decision to impose pretrial detention, the court must hear the accused on the matter, as well as on the requirements for the detention. On the other hand, the accused must be seriously suspected of a specific act, and there must be reasons that require his detention in order to avert certain risks for the proceedings or the general public (reasons for detention: danger of absconding, danger of collusion, danger of committing or perpetrating the act - article 180 (2) of the Austrian Code of Criminal Procedure). Detention must not be imposed or maintained if it is disproportionate to the significance of the matter or the punishment to be expected (principle of proportionality). When assessing proportionality, the dimension of the punishment to be expected, taking into account a possible release on probation (at the earliest after having served two thirds of the imposed punishment) must be taken into account. Lastly, the purpose of the detention is not or may not be achieved by other specific, more lenient means (e.g. paying bail) or another type of detention (e.g. punitive detention or pre-extradition detention - article 180 (4) and (5) of the Austrian Code of Criminal Procedure). If the case relates to an offence that carries a minimum prison term of 10 years, pretrial detention must be imposed, unless there are certain facts that rule out the application of all aforementioned reasons for detention (so-called mandatory pretrial detention - article 180 (7) of the Austrian Code of Criminal Procedure).

143. Pretrial detention must be lifted if the public prosecutor so moves (art. 193 (4) of the Austrian Code of Criminal Procedure), if there are no compelling reasons for a further detention, if the period of the detention would be disproportionately long (art. 193 (2) of the Austrian Code of Criminal Procedure), or if the statutory maximum period would be exceeded (art. 194 of the Austrian Code of Criminal Procedure). For example, pretrial detention that is imposed solely on account of the danger of collusion must never exceed two months (art. 194 (1) of the Austrian Code of Criminal Procedure). Moreover, the accused must be released in any event if he/she has been kept in pretrial detention for six months, in case of indictable offences carrying a sentence of one year, or for two years in case of indictable offences carrying a prison term of more than five years, without the trial having started (art. 194 (2) of the Austrian Code of Criminal Procedure). Also in the case of indictable offences (i.e. punishable acts committed with intent that carry a prison term of more than three years) a detention period of more than six months requires a special justification regarding the scope and difficulty of the investigation (art. 194 (3) of the Austrian Code of Criminal Procedure). Lastly, pretrial detention must also be lifted if the preliminary investigations are discontinued, or if the accused is acquitted by a first-instance court decision (already before the judgement becomes final and enforceable), unless the public prosecutor submits a complaint for nullity or an appeal immediately after the judgement is pronounced and there is danger of absconding (art. 396 of the Austrian Code of Criminal Procedure).

144. The accused may submit a complaint to the Higher Regional Court against a decision to impose or to continue pretrial detention (arts. 179 (5) and 182 (4) of the Austrian Code of Criminal Procedure).

145. Austria's confinement law stipulates a rigid system of arrest periods in order to limit the term of the arrest. Before these deadlines, a hearing must be held concerning the detention in order to decide whether the accused should be detained or released from detention. Decisions that impose or continue pretrial detention therefore only have a maximum effect for the term of the detention period; the expiry date must be indicated in the decision. The decision to impose pretrial detention is effective only for a period of 14 days as of the arrest of the accused, the period of detention - when a pretrial detention is continued for the first time - is one month, as well as another two months for every further continuation of the pretrial detention, always as of the date of the decision (art. 181 (2) of the Austrian Code of Criminal Procedure). If two hearings have already been held on the detention, the accused may waive further such hearings. It is only in this case that the decision on the release from or the continuation of the pretrial detention will be communicated in writing without any oral hearing being held before the decision (art. 181 (5) of the Austrian Code of Criminal Procedure).

146. In addition, all persons involved in criminal proceedings are obliged to make every effort to keep the pretrial detention period as short as possible (art. 193 (3) of the Austrian Code of Criminal Procedure). Altogether, the strict requirements for detention (urgent suspicion of an offence; principle of proportionality), in connection with the described procedural provisions (deadlines for detention periods and maximum duration of pretrial detention) ensure that pretrial detention is imposed only as a measure of last recourse (principle of *ultima ratio*) and that hearings on detention are conducted with special expediency, according to the obligations under article 5 (3) of the European Convention on Human Rights.

147. On 1 September 2005, a total of 1,970 persons were kept in pretrial detention in Austria. The average duration of a pretrial detention is 68 days. This also includes cases in which the accused is expecting a decision on a legal remedy lodged against a first-instance court decision regarding the pretrial detention.

#### **Article 10. The right of detainees to a humane treatment**

148. The Penal Enforcement Act does not summarize the rights or duties of arrested persons in a special section. However, it can be gathered from the wording of the various sections in the law that individual rights are granted. The Penal Enforcement Act either refers expressly to rights (e.g. art. 64 of the Penal Enforcement Act: “For the exercise of the rights indicated in arts. 62 and 63 ...”) or entitlements (e.g. arts. 39 or 87 (1) of the Penal Enforcement Act: “... prisoners are entitled ...”), but also that prisoners are allowed to do certain things (e.g. art. 92 of the Penal Enforcement Act: “... may use money”; or art. 93 of the Penal Enforcement Act: “... may receive visitors”). However, when referring to individual rights, the Penal Enforcement Act mainly uses the wording “... prisoners *are ... to be allowed*” (arts. 99a and 147 of the Penal Enforcement Act), “... *are to be supplied with*” (art. 38 of the Penal Enforcement Act), “... *are to be accommodated*” (art. 50 of the Penal Enforcement Act) or “*have to receive*” (art. 51 of the Penal Enforcement Act). The decisive point is whether the provisions of the law only obligate and/or bind the enforcing agency or also grant a right to the prisoner that requires compliance. This must be established in the course of interpreting a specific provision. According to the case law of the Administrative Court, individual rights can also be derived from provisions that impose certain obligations upon authorities, also and particularly in the interest of the persons concerned. In case of doubt (after interpreting a provision), it must be assumed that the rules of law also grant individual rights. The individual rights are either unconditional (e.g. only to be the subject of restrictions in accordance with the laws - art. 22 of the Penal Enforcement Act; to receive a minimum of one visit per week ... for a minimum of 30 minutes - art. 93 of the Penal Enforcement Act; to be given the opportunity to take a hot shower or a bath at least twice a week - art. 42 of the Penal Enforcement Act), but largely conditional (e.g. prisoners are entitled to decorate their cells ..., to the extent that this does not impair security and order ... - art. 40 of the Penal Enforcement Act; exclusion of abuse and/or provision for subsistence when out on leave according to art. 147 of the Penal Enforcement Act).

149. A list of the most important rights is given below by way of illustration:

- (Subsequent) respite in enforcing the sentence due to a health-related inability to serve the prison term (arts. 5 and 133 of the Penal Enforcement Act) or for other reasons (art. 6 of the Penal Enforcement Act), as well as when commencing a treatment to cure an addiction (art. 30 of the Drugs Act);
- To keep souvenirs, photographs of close friends, the wedding band, a wrist watch or a pocket watch (art. 132 of the Penal Enforcement Act);
- To wear one’s own underwear (art. 39 of the Penal Enforcement Act);
- To receive visitors (art. 93 of the Penal Enforcement Act);
- The right to serve the term in the prison prescribed by law (art. 9 of the Penal Enforcement Act);

- To write and to receive letters (art. 87 of the Penal Enforcement Act);
- To dispose of the prisoner's personal money (art. 54 of the Penal Enforcement Act);
- To make telephone calls (art. 96a of the Penal Enforcement Act);
- To listen to the radio and to share in receiving TV programmes (art. 58 of the Penal Enforcement Act);
- To receive parcels (art. 91 of the Penal Enforcement Act);
- To obtain one's own books, newspapers and magazines (art. 60 of the Penal Enforcement Act);
- To obtain foodstuffs (art. 34 of the Penal Enforcement Act);
- To attend religious services and receive pastoral assistance (art. 85 of the Penal Enforcement Act);
- To be paid an accident pension (art. 79 of the Penal Enforcement Act);
- To be allowed to obtain dentures, to receive dental treatment (art. 73 of the Penal Enforcement Act);
- To call in another physician in addition to the prison's physician against payment of fees (art. 70 of the Penal Enforcement Act);
- To contact the supervisory bodies of the enforcement agents (art. 122 of the Penal Enforcement Act);
- To paint, draw, sculpture during leisure time (art. 63 of the Penal Enforcement Act);
- To decorate the cell (art. 40 of the Penal Enforcement Act);
- To be remunerated for work, as well as to receive extraordinary remuneration for work (arts. 51 and 53 of the Penal Enforcement Act);
- To save up a money reserve (art. 54 of the Penal Enforcement Act);
- To care for and educate children (for female prison inmates - up to the age of 3) (art. 73 of the Penal Enforcement Act);
- To be married (in prison) (art. 100 of the Penal Enforcement Act);
- To be addressed in the polite form ("Sie" and "Mister"/"Mrs.") (art. 22 of the Penal Enforcement Act);
- To be allowed one set of clothes and to wear one's own clothes (art. 98 of the Penal Enforcement Act);

- To be kept separate and to be given more educational attendance when serving a first sentence (art. 127 of the Penal Enforcement Act);
- To be accommodated in groups during the day and individually at night (art. 124 of the Penal Enforcement Act);
- To submit applications and to file complaints (arts. 119 to 121 of the Penal Enforcement Act);
- To be heard as a party in administrative fines' proceedings (art. 116 of the Penal Enforcement Act);
- To be heard in proceedings on a release on probation (art. 152a of the Penal Enforcement Act);
- To be granted various relaxed detention measures during penal enforcement (e.g. temporary leave - article 126 of the Penal Enforcement Act);
- To be granted leave (arts. 99a, 126 (2), item 4, and 147 of the Penal Enforcement Act);
- To have the prison term suspended/preventive measure (arts. 99 and 166 of the Penal Enforcement Act);
- To be granted assistance in preparing for the release (art. 144 of the Penal Enforcement Act);
- To receive assistance on release from prison (necessary clothing, provisions for travelling, financial aid, travel costs) (arts. 150 and 156 of the Penal Enforcement Act).

150. In its decision of 21 June 2005 the Administrative Court stated that one cannot derive a legal title from article 93 of the Penal Enforcement Act to the provision of facilities suited for sexual contacts. However, the prison director has ample scope for discretion, provided that the organizational possibilities of the prison so permit, to make available suitable premises for sexual contacts, or when deciding whether and who of the prisoners are to be permitted to have such contacts with visitors.

151. In addition to these "standard rights", a prisoner may also be granted other concessions on his/her requests if he/she demonstrates that he/she cooperates in reaching the objective of the prison term. If these prerequisites apply, there is then a right to these concessions. The following concessions, for example, may be granted by the prison director: to wear one's own upper garments, to use one's own sports utensils and sports clothing, to use one's own TV or radio sets, as well as other technical devices, to play music on one's own musical instruments. The prison director may grant other concessions only if the Federal Ministry of Justice approved of them in advance (e.g. the use of one's own money to buy any necessary item).

152. In addition, inmates also have the right to submit their own requests orally or in writing. For the latter, form sheets are available in the prisons. The house rules of the prisons, which are

standardized to a large extent, list the times and responsible persons for submitting such requests during “office hours” or “petition visits”. It is also possible for prisoners to present their requests as early as when being admitted to prison. These requests may address many different personal needs, the granting of individual rights (e.g. relaxed measures and concessions), the removal of (alleged) deficiencies during penal enforcement or only the possibility of a talk.

153. In urgent cases, the requests may be presented to the nearest prison official who will then take the necessary steps. This type of communication, which is personal and direct, has proved to be effective and is suited to preventing complications during penal enforcement. In order to ensure expeditious handling, all requests, petitions or applications submitted to the prison official must be handled and answered without any undue delay. A separate requirement is the legal obligation to reach a decision within six months, at the latest, after receipt of such requests and complaints (obligation to take a decision according to article 73 of the General Administrative Procedures Act); otherwise the matter may be referred for a decision upon an application for transfer to the superior enforcement agency (in case of court prisons to the president of the regional court as the higher enforcing authority, and in case of correctional institutions to the Federal Ministry of Justice).

154. As a matter of principle, decisions on requests by prison inmates are to be taken without a formal (investigative) procedure (art. 37 and following of the General Administrative Procedures Act) and without issuing a decree. As a rule, the decisions only need to be communicated orally (art. 22 (3) of the Penal Enforcement Act). If necessary, the essence of the order or decision can be recorded in the personal file, for example in the form of a memo (see art. 18 of the General Administrative Procedures Act). Recently, the possibilities offered by electronic communications are also being used on an increasing scale and electronic documentations are produced, which helps to reduce the time required for taking a decision. It is only in exceptional cases, namely in connection with administrative penalties (art. 116 of the Penal Enforcement Act - for details see below) and in complaints procedures (arts. 120 and 121 of the Penal Enforcement Act) that an investigative procedure must be carried out and that a decree must be issued, which must be in writing if so requested.

155. The decision, primarily free of form, does not curtail the rights of prisoners. After all, these are often short-term decisions in the course of the day, and it is also up to every prisoner to obtain a formal, appealable decision and its formal review by the competent agency (Enforcement Chamber at the Higher Regional Court) by filing a complaint pursuant to article 121 of the Penal Enforcement Act.

156. Prisoners may file complaints regarding any decision or order affecting their rights, as well as regarding any conduct of the prison staff concerning their rights. The Penal Enforcement Act lists two types of complaints: complaints regarding prisoners’ rights and those regarding the supervision of the staff.

157. Prisoners may file complaints against any decision or order relating to their rights, as well as any conduct of the prison staff affecting their rights (complaints regarding prisoners’ rights). The complaint must be filed within the period set for legal remedies (art. 120 (2) of the Penal Enforcement Act). In general, complaints do not have a suspensive effect. However, such effect may be granted. Joint complaints by several prisoners are admissible. Independent Enforcement

Chambers decide on complaints regarding prisoners' rights by means of decrees (art. 11a and following of the Penal Enforcement Act - as a rule this body comprises two judges and an enforcement officer). These chambers are set up with the Higher Regional Courts and their decisions may be appealed to the Administrative Court (art. 121 (5) of the Penal Enforcement Act, for incorrect application of the law or a procedural error) or to the Constitutional Court (art. 114 of the Federal Constitution Act, for alleged violation of rights guaranteed by constitutional law or application of an unconstitutional law or an unconstitutional ordinance). The Federal Minister of Justice may file a so-called official complaint against decisions of the Enforcement Chambers to the Administrative Court for unlawfulness (art. 121 (5) of the Penal Enforcement Act). If a prisoner thinks that one of his/her rights recognized by the European Convention on Human Rights has been violated, he/she may seize the European Court of Human Rights in Strasbourg after having exhausted domestic legal remedies (Enforcement Chamber, Administrative Court and/or Constitutional Court).

158. Complaints regarding the supervision of staff are based on the right to supervision of the enforcement bodies. The prison director is primarily responsible for exercising supervision over the enforcement of sentences. Whenever the prison director does not stop deplorable conditions, these must be eliminated by the supervisory authorities (the presidents of first-instance criminal courts acting as supervisory enforcement bodies for prisons attached to and/or the Federal Ministry of Justice as supreme enforcement body for prisons and correctional institutions). No decree needs to be issued in connection with these complaints which, as a rule, do not deal with individual rights (art. 122 of the Penal Enforcement Act). Nor do they lead to any formal proceedings. In contrast to complaints regarding prisoners' rights, which trigger an obligation to take a decision (art. 73 of the General Administrative Procedures Act), there is no title to a right and thus no title to a decree, in connection with exercising the right to supervision, as was described above. However, (in most cases) the authority has the "internal" obligation, which third parties cannot enforce, to take action. It is common enforcement practice to provide the intervening party with a short, written notice about the outcome of the exercise of the right to supervision. With regard to the type of medical treatment, one may only refer to the right of supervision according to article 122 of the Penal Enforcement Act.

159. In addition to individual rights, prisoners are also required to observe obligations of conduct. Their compliance is meant to ensure security and order in the course of living together in a prison. Examples of the most important of these obligations include the following:

- To obey orders (art. 26 of the Penal Enforcement Act);
- To observe decency (art. 26 of the Penal Enforcement Act);
- Not to jeopardize security and order (art. 26 of the Penal Enforcement Act);
- To participate in their own re-socialization (art. 26 of the Penal Enforcement Act);
- To remain in assigned rooms/places (art. 26 of the Penal Enforcement Act);
- To refrain from inflicting damage on oneself and from applying tattoos (art. 27 of the Penal Enforcement Act);
- Not to engage in any business or gambling (art. 30 of the Penal Enforcement Act);

- To contribute to the costs of the enforcement of sentences (art. 32 of the Penal Enforcement Act);
- To refund special expenses and compensate damage to prison property (art. 32a of the Penal Enforcement Act);
- To report diseases and vermin infestation (art. 36 of the Penal Enforcement Act);
- To report serious danger to the physical safety of persons and/or to major parts of the prison property (art. 36 of the Penal Enforcement Act);
- To observe body hygiene (art. 42 of the Penal Enforcement Act);
- To perform work (art. 44 of the Penal Enforcement Act).

160. The Penal Enforcement Act penalizes violations of explicit obligations of conduct, as well as other negative conduct (art. 107 of the Penal Enforcement Act) in order to create awareness about their special significance to the proper enforcement of sentences. If there is a violation of a specific obligation to conduct, this is considered as constituting the facts of a regulatory offence.

161. Only the following are considered regulatory offences (art. 107 of the Penal Enforcement Act - complete list):

1. Absconding;
2. Engaging in illicit intercourse/contacts with other persons;
3. Inflicting damage upon oneself or to apply tattoos (have tattoos applied);
4. Provoking or approve of acts punishable by court or disciplinary measures or major violations of decency;
5. Keeping objects illicitly;
6. Violating reporting duties;
7. Refusing to work in spite of warning notices;
8. Not report for serving a sentence after a suspension or prison leave;
9. Behaving in an improper manner;
10. Acting in violation of the general obligations of prisoners;
11. Damaging or considerably soiling prison property or items (art. 107 (2) of the Penal Enforcement Act);
12. Committing specific acts punishable by courts, which fall under the competence of local courts (art. 107 (3) of the Penal Enforcement Act).



162. Any attempt at, provocation to, or assistance in committing a regulatory offence is also punishable. With the exception of the misconduct listed in item 11 (for which gross negligence is sufficient), regulatory offences can only be committed intentionally (in case of item 3 intention is actually partly required). If the behaviour gives rise to suspecting an act punishable by the courts, it must be reported to the public prosecutor (art. 118 (2) of the Penal Enforcement Act).

163. One or several of the following measures may be contemplated as administrative penalties, which may only be imposed upon administrative proceedings, conducted by the prison director (art. 109 of the Penal Enforcement Act):

1. A formally pronounced, firm reprimand;
2. To restrict or withdraw benefits (art. 24 of the Penal Enforcement Act);
3. To restrict or withdraw rights concerning a prisoner's personal money, watching television, correspondence, receiving visitors or making telephone calls (admissible only for abuse of these rights);
4. Fines: maximum €145, to be deducted in instalments from the prisoner's personal money;
5. House arrest: may only be imposed when aggravating circumstances prevail (simple or serious house arrest are possible);
6. Keeping a prisoner in a special room for solitary confinement, in the course of which the rights according to article 109, item 3, of the Penal Enforcement Act and benefits are not permitted (in case of simple house arrest some of these may be maintained), separation from the other prisoners during outdoor exercise, working admissible only in the confinement room (in case of serious house arrest work may be withdrawn completely and the lights in the confinement room may be turned on only for restricted hours).

164. With the exception of reprimands and fines, all administrative penalties may be imposed on probation (period of probation: one to six months, ending upon release, at the latest). However, a penalty need not always be imposed in the event of a regulatory offence. If the fault is of a minor nature, if the regulatory offence does not lead to any or only to minor consequences, and if a punishment is not required in order to ensure the proper conduct of the prisoner in the future, then a warning notice will be given (art. 108 (2) of the Penal Enforcement Act). Otherwise, the prison director may initiate administrative proceedings and impose an administrative penalty by way of decree (arts. 22 (3) and 116 of the Penal Enforcement Act).

165. In line with the procedural laws to be applied, the accused must be confronted with the charges and incriminating and exonerating evidence must be recorded. The result of the evidence-taking must be brought to the attention of the prisoner for commenting (hearing the parties). In the decision in the administrative proceedings, which must also be handed to the prisoner in writing, upon his/her request (arts. 22 (3) and 121 (4) of the Penal Enforcement Act), the established facts must be described that constitute the regulatory offence, and the imposed

administrative penalty must be indicated. The reasons given in the decision must explain what evidence underlies the facts that were established. The aggravating and the mitigating circumstances applied in assessing the punishment must be listed. When proclaiming the decision with the punishment, instructions on legal remedies must be given, and the competent body for legal remedies must be mentioned.

166. A complaint against the decision with the punishment may be lodged to the Enforcement Chamber (art. 11a and following, and art. 121 of the Penal Enforcement Act), which will take a decision by way of decree. Both the prisoner and the Federal Minister of Justice may lodge a complaint (an official complaint) with the Administrative Court against the decision of the Enforcement Chamber. It is also possible to lodge a complaint against the decision of the Enforcement Chamber to the Constitutional Court (art. 144 of the Federal Constitution Act).

167. About 3,300 persons work at the prisons. Of these, about 2,900 are prison guards, 160 administrative staff and 240 members of care services (mainly prison doctors, social workers, psychologists, psychiatrists, therapeutics and nurses, as well as pastoral services). The tasks of prison guards do not only include keeping watch, but also taking care of the inmates in the workshops, on the farms and in the prison cell wards. It is primarily the presidents of the Higher Regional Courts of Vienna, Graz, Linz and Innsbruck who are responsible for staff measures regarding the prisons in their districts. These staff measures also include ongoing training in basic and further training facilities belonging to the judicial services, but also provided by external training providers.

### **Probation service**

168. By way of a general agreement with the Federal Ministry of Justice, the nationwide provision of probation services, assistance to prisoners upon release, non-penal settlement of cases (“diversion”), arrangements for community services and housing assistance was transferred to an association called NEUSTART, which is a private organization. In 2004, a total of 33,000 clients received services from the 1,463 full-time and voluntary staff members of NEUSTART.

169. Persons who, after their arrest, are instructed by their judges or by a public prosecutor, as part of the non-penal settlement of cases (“diversion”), to receive probation services are given the assistance of a probation officer. Without such instructions, persons may turn to this service for persons released from prison on a voluntary basis before or after being actually set free and are given advice, or are being accompanied by trained social workers. In 2004, for example, 5,736 persons were assisted by this service upon their release from prison. A total of 8,452 resorted to the probation services. The social workers become fixed reference persons and provide support, until this function can be taken over by a new social fabric.

170. The first problem is always accommodation, because persons released from prison do not find accommodation when they are without work and have only meagre financial means. It is only with secure accommodation that one can look for a job on the labour market in order to be able to slowly and gradually stand on firm ground again in a normal life with a new job and a secure income. NEUSTART therefore tries to improve the housing situation and provides active help in finding an affordable and adequate accommodation. In 2004, a total of 295 persons were

accommodated in housing and crisis centres of the association. NEUSTART also helps, together with the labour market service, in finding suitable jobs, and it helps with recruitment. In addition, a great many further-training and retraining courses are being offered in order to create a broader basis for reintegration into the labour market.

### **Article 11. Imprisonment pending the payment of a debt**

171. No further comments are necessary.

### **Article 12. Freedom of movement**

#### **Asylum**

172. In 2003, a total of 2,084 persons were granted asylum. In 2004, though, 5,208 applications for asylum were recorded that ended with a positive result and absolute decisions.

173. In 2003, the 1997 Asylum Act was the subject of a thorough reform, the first result of which was to introduce an admission procedure at the beginning of the asylum procedure. In addition, other elements of the amendment related, *inter alia*, to reforms aimed at simplifying and accelerating procedures in connection with families and at accelerating the asylum procedure - for example by linking expulsion proceedings dealing with completely negative decisions and by arranging for a stronger involvement of the public-security service units.

174. Already before the amendment went into force, the 1997 Asylum Act in the version of the 2003 Amendment of the Asylum Act was contested by the regional governments of the federal provinces of Vienna and Upper Austria before the Constitutional Court as being unconstitutional. Furthermore, after the amendment became effective, the Independent Federal Asylum Senate submitted a number of applications for the revocation of certain parts of the amended asylum law. In its decision of 15 October 2004, the Constitutional Court partly took account of these applications. As of the fall of 2004, work was therefore begun in the Federal Ministry of the Interior, with the cooperation of the other government departments concerned, the federal provinces, UNHCR and the non-governmental organizations to draw up a draft for a new codification of the asylum law, to become effective on 1 January 2006.

175. Like the previous arrangements, the new asylum law provides for a 20-day admission procedure, in the course of which a first examination is made of the application for asylum. Until the completion of this first examination, the asylum-seeker cannot be deported; and as of the date of being admitted to the actual asylum procedure, the asylum-seeker has the right to stay temporarily in the country. In the course of the procedure, the reasons given by the asylum-seeker for fleeing his/her country are thoroughly evaluated as to their substance. It is only in cases that are determined in detail in the law that an appeal against an expulsion has a suspensive effect. Applications for asylum that are filed in the course of deportation via an airport must be processed within six weeks, at the most.

176. The rejection of an application for asylum is possible, *inter alia*, if the asylum-seeker entered Austria from a so-called "safe third country" or if another European country is responsible for the asylum procedure (Dublin Regulation). An appeal against an appeal connected to a refusal of entry only has suspensive effect if it is granted after examining the specific case.

177. In order to facilitate the work of the asylum authorities, the Federal Asylum Office will set up a documentation on the countries to this effect, which Austrian authorities, courts and foreign asylum and alien agencies or foreign courts will be able to access free of charge, in case of reciprocity, with other interested persons being allowed access against payment of a charge.

178. The Federal Asylum Office is responsible for asylum proceedings, and the Independent Federal Asylum Senate (UBAS) decides on appeals. In the appellate proceedings, the asylum-seeker may put forward new evidence which, for example, was not available to him/her earlier.

179. The 2005 Asylum Act requires that the asylum-seeker cooperate specifically in the asylum proceedings. Among other things, the asylum-seeker must provide information about the route travelled to Austria and about earlier applications for asylum, as well as information about the family situation and the whereabouts of documents that are no longer available. Possible compulsory attendance before the judge is meant to prevent that asylum-seekers delay or evade the proceedings. In addition, special provisions were created for asylum-seekers who became victims of violence (art. 30 of the Asylum Act). In cases of special protection requirements, a decision on substance is not possible in the admission procedure.

#### **Regarding Concern No. 10 (iii) - Carrier sanctions and pre-frontier arrangements**

180. Reference is made to Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 which prescribes sanctions against carriers. This Directive was transposed by way of article 112 of the Aliens Police Act, which entered into force on 1 January 2006. According to article 112 (2) of the Aliens Police Act no sanctions are to be imposed, if the transported alien is granted asylum or subsidiary protection according to the 2005 Asylum Act, or if it is established that the rejection at the border or deportation of the alien is not admissible in accordance with article 50 (1) of the Aliens Police Act.

#### **Border crossers and commuters**

181. Although border crossers and commuters no longer need a residence title since the most recent enlargement of European Union (EU) on 1 May 2004, as they do enjoy freedom from visa and settlement requirements as new EU citizens, there were still border crossers and commuters with intact residence permits as of the deadline date of 1 July 2004, namely with a “still” intact residence permit according to the old and an intact residence permit according to the “new” legal situation, which has also become obsolete under the EU enlargement to the east.

182. As a matter of principle, border crossers and commuters are different in the sense that the former are allowed to pursue their gainful occupation exclusively in the political border districts and return to their adjoining home districts every day, whereas the latter may go beyond the border district and need not return to their home-country everyday. As far as access to the labour market is concerned, major distinguishing characteristics continue to apply to the two categories.

183. As at the deadline date of 1 July 2004 there were altogether 5,500 border crossers in Austria, of whom 2,300 worked in Burgenland according to the “old” legal framework and

3,200 according to the “new” situation. Almost two thirds of all border crossers worked in Burgenland, 21.6 per cent in Lower Austria and 13.9 per cent in Styria. As compared to the situation one year ago, the number of border crossers declined by 13.2 per cent. The decreases were above average in Burgenland. Border crossers in Burgenland come mainly from Hungary, in Lower Austria from the Czech Republic and in Styria from Slovenia. The fact that border crossers mainly find work in Burgenland is mainly due to the border crosser agreement with Hungary, as a result of which Hungarian border crossers are only allowed to work in the districts of Burgenland, as well as at Bruck/Leitha in Lower Austria.

184. Contrary to the development regarding border crossers, the number of commuters with intact residence permits went up by 13.2 per cent to 2,500, in other words the share of commuters in the total number of commuters and border crossers (almost 8,000) went up in the course of that year to 31.1 per cent, from 25.5 per cent, and 21.2 per cent respectively (2002). Most commuters can be found in Lower Austria, followed by Styria, Upper Austria and Burgenland. In contrast to the year before, Hungary accounted for the largest individual nationality (42.2 per cent), followed by Slovaks (26.3 per cent), Slovenes (16.3 per cent) and Czechs (14.2 per cent). The commuters in Lower Austria come mainly from Slovakia, in Styria from Slovenia, in Burgenland and Upper Austria from Hungary.

185. Under the title of “commuter agreement” (*Pendler-Abkommen*) a total of 69 residence titles were granted in 2004, as compared to 25 as at July 2003. Almost four fifths applied to Lower Austria (56), 7 were granted in Vienna, 3 in Carinthia and 1 each in Upper Austria, Salzburg and Styria. In Lower Austria 17 Slovaks, 7 Czechs and 32 Hungarians received the residence, in Vienna 4 Slovaks and 1 Czech, 1 Hungarian and 1 Iranian each, in Carinthia 3 Slovenes, in Upper Austria and Styria 1 Hungarian each, and in Salzburg 1 Slovak citizen received the permits.

**Structure of the intact residence titles “Border Crossers, Commuters”  
according to nationality and federal provinces (as at 1 July 2004)**

	Border crossers						Commuters					
	H	SLO	CZ <sup>1</sup>	SK	Others	Total	H	SLO	CZ <sup>2</sup>	SK	Others	Total
Burgenland	3 065	99	3	146	9	3 322	317	7	1	48	2	375
Carinthia	0	72	0	0	0	72	10	85	1	0	0	96
Lower Austria	104	0	696	381	4	1 185	245	2	185	351	1	784
Upper Austria	0	0	122	0	3	125	199	8	136	96	5	444
Salzburg	0	0	0	0	3	3	9	0	0	7	2	18
Styria	1	755	0	2	1	759	222	293	2	13	6	536
Tyrol	1	0	0	1	5	7	7	9	0	7	1	24
Vorarlberg	0	0	0	0	7	7	1	0	1	0	0	2
Vienna	0	0	0	0	0	0	35	0	31	128	1	195
Austria	3 171	926	821	530	32	5 480	1 045	404	357	650	18	2 474

Source: Federal Ministry of the Interior, FIS.

<sup>1</sup> Including four nationals from “Czechoslovakia”.

<sup>2</sup> Including two nationals from “Czechoslovakia”.

**Article 13. Protection of aliens against arbitrary expulsion**

186. The following figures apply to the year 2004 as a whole:

Rejections at border	4 132
Deportations	5 811
Voluntary departures	5 510

187. The following figures apply to the months from January to June 2005:

Rejections at border	920
Deportations	2 123
Voluntary departures	2 825

188. On account of the federal law on aliens entering, staying and settling in Austria (1997 Aliens Act), Federal Law Gazette I No. 75/1997 in the currently valid version (most recently amended by Federal Law Gazette I No. 134/2002) the currently applicable legal situation is as follows.

**Refusal of entry**

189. Article 52 reads as follows:

- (1) At border checks, aliens shall be prevented from entering federal territory (refusal of entry) if there are doubts regarding their identity, if they do not satisfy the passport and visa obligation, or if they were instructed to use another border crossing (arts. 6 and 42). No refusal of entry shall be required if this complies with a federal law, bilateral agreements or international custom.
- (2) Aliens shall be refused entry if:
  1. An enforceable ban on residence has been issued against them and they were not given permission to re-enter;
  2. A contracting State has informed Austria that their stay on the territory of the contracting States would endanger public order and national security, unless they have a residence title by a contracting State or a title to enter the country issued by Austria;
  3. They are entitled to enter without visa for the indicated purpose of their stay, but specific facts justify the assumption that:
    - (a) Their stay on federal territory would endanger public peace, order or security, or the relations of the Republic of Austria with another State;
    - (b) They intend to take up a gainful occupation on federal territory without having the requisite permits;

- (c) They will commit alien smuggling or participate in it on federal territory;
  - 4. They do not have a domicile in Austria and do not have the means to meet the costs of their stay or their re-exit;
  - 5. Certain facts justify the assumption that they intend to use their stay on federal territory to deliberately commit a financial offence, with the exception of financial regulatory offences, or deliberately commit contraventions against foreign-currency stipulations.
- (3) The decision on admitting entry into Austria shall be taken after interrogating the alien, on the basis of the facts that he/she has established with credibility or that have otherwise become known. The refusal of entry may be visibly shown in the travel document of the alien.

### **Rejection at the border**

190. Article 55 reads as follows:

- (1) Aliens may be urged by the authority at the border to return to another country (rejection at the border) if they:
  - 1. Entered the country by evading the border controls and are found within seven days;
  - 1a. Entered the country without satisfying the requirements necessary for entry into and staying in the country and are found within seven days;
  - 2. Had to be taken back by the Republic of Austria within seven days after entering the federal territory, on the basis of a readmission agreement (art. 4 (4)) or international practices.
- (2) The rejection at the border may be visibly shown in the travel document of the alien.

### **Deportation**

191. Article 56 reads as follows:

- (1) Aliens against whom a ban on residence or an expulsion may be enforced may be urged by the authority to leave the country (deportation) if:
  - 1. Monitoring their departure from the country appears to be necessary for reasons of maintaining public peace, order or security, or
  - 2. They did not meet their obligation to leave the country in time, or

3. It must be feared, on the basis of certain facts, that they will not comply with their obligation to leave the country, or
  4. If they returned to the federal territory in violation of their ban to stay in the country.
- (2) The deportation of an alien must be postponed upon application or ex officio for a certain period of time, which must not exceed one year in every case (deferred deportation), if it is inadmissible (art. 57), or appears to be impossible for factual reasons. Articles 42 and 43 (1) shall apply to imposing conditions and to the revocation.
- (3) If the prerequisites for deportation are found at the same time with relatives (art. 72 of the Criminal Law Code), the authority shall take special care when performing the deportation that the effects on the family life of these aliens causes as little impact as possible.
- (4) The deportation may be visibly shown in the travel document of the alien.

#### **Expulsion of aliens without residence title**

192. Article 33 reads as follows:

- (1) Aliens may be expelled on the basis of a decree if they are staying on federal territory illegally.
- (2) Aliens who neither have a residence title, nor enjoy freedom from the visa requirement and of establishment (art. 30 (1)) may be expelled on the basis of a decree if they:
  1. Were convicted, albeit not in final and enforceable form, by a criminal court within one month of their entry into Austria for having committed an intentional offence, or
  2. Were found to have committed an intentional offence within one month after their entry into Austria, or were charged with credible effect as perpetrators, immediately after having committed an intentional offence, and if, in addition, the punishable act carries a considerable punishment and there is a statement by the responsible public prosecutor that a report will be filed with the Federal Minister of Justice pursuant to article 74 of the Extradition and Judicial Assistance Act, or
  3. Violate the provisions governing prostitution within one month of their entry into Austria, or
  4. Are not capable of proving possession of the funds necessary for their subsistence within one month of their entry into Austria, or



5. Are found pursuing an employment, by an officer of the customs services, the local offices or the regional offices of the labour market service, within one month of their entry into Austria, which employment they would not have been allowed to pursue according to the Employment of Aliens Act, or
  6. Entered Austria disregarding the provisions of the second main chapter or evading the border controls and are found within one month during their unlawful stay, and if their immediate departure from Austria is necessary in the interest of public order.
- (3) The expulsion according to paragraph 2 becomes enforceable as soon as it is issued - albeit not in final and absolute form; the alien must then leave the country immediately.
  - (4) If a person is found in accordance with item 5 of paragraph 2, this is tantamount to a notice by a customs authority or an office of the labour market service on the inadmissibility of an employment pursuant to the Employment of Aliens Act, provided that the alien was found at his/her employment by an officer of the public security service.

### **Expulsion of aliens with residence title**

193. Article 34 reads as follows:

- (1) Aliens who are staying on federal territory on the basis of a residence title, or in the course of proceedings for the granting of a further residence title, may be expelled on the basis of a decree if:
  1. A reason for refusal emerges or becomes known at a later stage which would have opposed the granting of the most recent residence title, or
  2. A reason for refusal opposes the granting of a further residence title, or
  3. The residence title was granted to an alien because he/she pleaded a marriage, although he/she did not share a family life as defined by article 8 of the European Convention on Human Rights.
- (2) Furthermore, aliens who are staying on federal territory on the basis of a residence title, or in the course of proceedings for the granting of a further residence title, may be expelled on the basis of a decree if they were granted a settlement permit and were at the disposal of the labour exchange service and did not pursue a permissible gainful activity for more than four months during the first year of their settlement.
- (2a) Aliens who entered into an integration agreement must be expelled on the basis of a decree if they did not comply with the agreement within four years after having been granted the settlement permit, on account of reasons for which they are

solely to blame, and if there are facts justifying the assumption that they are not prepared to acquire the skills for participating in the social, economic and cultural life in Austria; protection of the private and family life (art. 37) shall be taken into account.

- (2b) In addition, aliens shall be expelled on the basis of a decree if they have entered into an integration agreement, compliance with which they did not commence within three years after having been granted the first settlement permit, on account of reasons for which they are solely to blame, and if there are facts justifying the assumption that they are not prepared to acquire the skills for participating in the social, economic and cultural life in Austria; protection of the private and family life (art. 37) shall be taken into account.
- (3) Finally, aliens who are staying on federal territory on the basis of a residence title, or in the course of proceedings for the granting of a further residence title, may be expelled on the basis of a decree if they:
1. Were granted a settlement permit for every purpose of residence, except gainful activities, in order to ensure a subsequent family reunion, and if the respective requirements no longer apply before the expiry of four years after the relative has settled in Austria, or
  2. Were granted a settlement permit, and they have settled in Austria for more than one year but less than eight years and did not pursue any permitted gainful activity for an almost uninterrupted period of one year.
- (4) The periods of a permitted gainful employment activity according to paragraph 2 and item 2 of paragraph 3 shall be tantamount to periods:
1. In the course of which maternity pay or parental-leave allowance was received, although the employment relationship may no longer be intact, and
  2. Of disease, accidents at work or other mishaps, as long as there is still a title to continued payment of the remuneration by the employer, or a title to sickness benefits from a social security institute.

### **Implementing residence bans of EEA countries**

194. Article 34 reads as follows:

- (1) In case of third-country nationals who do not have a residence title, the final and absolute and thus enforceable repatriation decision (residence ban) of a member State of the European Economic Area corresponds to a final and absolute and thus enforceable Austrian repatriation decision if the reason given in it refers to a grave and acute danger to public security and order or national security and if the residence ban:

1. Is based on a criminal law conviction for a punishable act carrying a minimum sentence of one year imprisonment, or
  2. Was issued because there is good reason to suspect that the third-country national has committed serious offences, or if there is a specific indication that he/she plans such acts on the sovereign territory of a member State, or
  3. Was issued because the third-country national violated the provisions on entering and staying in the country that took the decision.
- (2) In case of third-country nationals who have an Austrian residence title and upon whom a residence ban according to items 1 or 2 of paragraph 1 was issued, the Aliens police authority must initiate proceedings according to article 15. If the authority arrives at the conclusion that a residence ban may be imposed, article 16, paragraph 2, is applied; otherwise the decision on repatriation is not implemented in accordance with article 57.
- (3) National decisions according to articles 33, 34 and 36 take precedence over paragraphs 1 and 2.

#### **Consolidation of residence in connection with aliens having a settlement permit**

195. Article 35 reads as follows:

- (1) Aliens who have already stayed five years, but not yet eight years, without interruption and lawfully, on the federal territory on a lasting basis before the substantial facts became apparent, may not be expelled for lack of own funds for their subsistence, for lack of sufficient health-insurance protection, or on account of the possibility of becoming a financial burden to a territorial entity. However, the foregoing shall only apply if and as long as it is discernible that the alien is making efforts to secure the funds for his/her subsistence by applying his/her own forces, and these efforts do not appear to be without chances of success.
- (2) Aliens who have already stayed eight years, without interruption and lawfully, on the federal territory on a lasting basis, before the substantial facts became apparent may only be expelled if they were finally and absolutely convicted by an Austrian court for having committed a punishable act, and if their continued stay would endanger public peace, order and security.
- (3) If the period mentioned in paragraph 2 has been longer than 10 years, aliens may no longer be expelled because a reason for refusal is taking effect, unless an Austrian court sentenced them with final and absolute effect:
  1. For a crime or for alien smuggling, or pursuant to articles 27 (2), 28 (1) and 32 (1) of the Drugs Act, or for the facts of an offence in the 16th and 20th chapter of the Special Section of the Criminal Law Code, to an unconditional prison sentence of more than one year, or

2. To an unconditional prison sentence of more than six months for an intentional offence that is based on the same destructive leanings (art. 71 of the Criminal Law Code) as another punishable act that they committed, the conviction of which has not yet been redeemed.
- (4) Aliens who have grown up in Austria since their childhood days and have settled here lawfully for many years may not be expelled. Aliens shall be deemed to have settled for many years on federal territory in any event if they have spent more than half of their life on federal territory and have been established here most recently for a minimum of three years.
- (5) The convictions mentioned in paragraphs 2 and 3 shall be tantamount to convictions by foreign criminal courts if they comply with the requirements of article 73 of the Criminal Law Code.

### **Residence ban**

196. Article 36 reads as follows:

- (1) A residence ban may be issued against an alien if, on the basis of specific facts, the assumption is justified that his/her stay:
  1. Endangers public peace, order and security, or
  2. Is contrary to other public interests mentioned in article 8 (2) of the European Convention on Human Rights.
- (2) Specific facts pursuant to paragraph 1 are, in particular, if an alien:
  1. Has been convicted with final and absolute effect by an Austrian court and sentenced to an unconditional prison term of more than three months, or to a prison term (partly on probation) or to a prison term (on probation) of more than six months, or more than once on account of a punishable act that is based on the same destructive leanings;
  2. Has been punished more than once with final and absolute effect for an administrative offence pursuant to article 99 (1) or (2) of the 1960 Road Traffic Code, Federal Law Gazette No. 159, pursuant to article 366 (1), item 1, of the 1994 Trade Regulation, Federal Law Gazette No. 194, in connection with a licensed trade requiring a permit, pursuant to articles 81 or 82 of the Security Police Act, Federal Law Gazette No. 566/1991, or pursuant to articles 9 or 14 in connection with article 19 of the 1953 Law Regulating Public Meetings, Federal Law Gazette No. 233, or more than once for a serious violation of the present federal law, of the Border Control Act, Federal Law Gazette No. 435/1996, the 1991 Registration Act, Federal Law Gazette No. 9/1992 or the Employment of Aliens Act;

3. Has been punished in Austria with final and absolute effect for an intentionally committed fiscal offence, with the exception of a fiscal regulatory offence or for intentionally committed infringements of the foreign-currency regulations;
  4. Has been punished in Austria with final and absolute effect for a serious violation of the provisions governing prostitution, or sentenced in Austria or abroad with final and absolute effect for procurement;
  5. Has committed or participated in alien smuggling;
  6. Has given to an Austrian authority or its agents incorrect information about his/her person, his/her personal circumstances, the purpose or the intended duration of his/her stay, in order to obtain the permit to enter and stay in Austria pursuant to article 31 (1) and (3);
  7. Is unable to prove possession of the funds for his/her subsistence, unless he/she entered the country lawfully in order to begin working and pursued a permitted gainful activity in Austria during more than six months in the course of the previous year;
  8. Is found by an agent of the customs authority, the local offices or the regional offices of the labour market service performing an employment that he/she should not have performed pursuant to the Employment of Aliens Act;
  9. Contracted marriage, or referred to the marriage, in order to be granted a residence title or a nationwide work permit but never shared a family life with the spouse, as defined by article 8 of the Convention, and supplied a pecuniary advantage for contracting the marriage;
  10. Was adopted and if obtaining or keeping the residence title was the exclusive or overwhelming reason for being adopted, but that the court was deceived about the true relationship to the adoptive parents.
- (3) It shall not constitute a conviction pursuant to paragraph 2 if it has already been redeemed. However, it shall constitute a relevant conviction if it was imposed by a foreign court and corresponds to the requirements of article 73 of the Austrian Criminal Law Code.
- (4) If an alien is found pursuant to paragraph 2, item 8, this is tantamount to a notice by a customs authority or an office of the labour market service on the inadmissibility of an activity pursuant to the Employment of Aliens Act, to the extent that the alien was found by the agent of the public security service when performing the activity.

### **Protection of privacy and family life**

197. Article 37 reads as follows:

- (1) If the expulsion pursuant to articles 33 (1) or 34 (1), (2a), (2b) and (3) or a residence ban were to interfere with the privacy and family life of an alien, such a withdrawal of the residence title is only admissible if this is urgently required in order to achieve the objectives listed in article 8 (2) of the European Convention on Human Rights.
- (2) An expulsion pursuant to article 34 (1), (2a), or (2b), or a residence ban must not be issued in any event if the effects on the living circumstances of the alien and his/her family carry more weight than the negative consequences of refraining from issuing it. When weighing the situation, special attention shall be paid to the following circumstances:
  1. The duration of the stay and the extent of integration of the alien or his/her family members;
  2. The closeness of the family or other relations.

### **Inadmissibility of a residence ban**

198. Article 38 reads as follows:

- (1) A residence ban must not be issued if:
  1. The alien - in the cases described in article 36 (2), item 8 - could have performed another activity for the same employer pursuant to the provisions of the Employment of Aliens Act, and if the activity at which the alien was found would not have required a change of purpose or for which a change of purpose according to article 13 (3) would have been admissible.
  2. An expulsion pursuant to article 34 (1), items 1 or 2, would be inadmissible, on account of the substantial facts;
  3. The alien could have been awarded Austrian nationality pursuant to article 10 (1) of the 1985 Nationality Act, Federal Law Gazette No. 311, before the substantial facts were constituted, unless the alien would have been sentenced in final and absolute form to a prison term of more than two years for an act punishable by court;
  4. The alien has grown up in Austria since his/her childhood days and has been established there for many years.
- (2) Aliens shall be deemed to have been established on federal territory for many years in any event if they have spent more than half of their life on federal territory and have most recently been established here for a minimum of three years.

### **Special procedural provisions**

199. Article 45 reads as follows:

- (1) The authorities of the federal government, of the regional governments and the municipal authorities, the offices of the labour market service, as well as the social-security institutes shall be authorized, and obliged upon request, to communicate person-related data concerning aliens to the authorities, which may be of importance regarding measures under the present section of the law. It is not admissible to refuse giving the information.
- (2) In proceedings for requiring expulsion or issuing a residence ban, the alien shall appear in person before the authority, if the authority so requires. If the expulsion is due to the reason given in article 33 (2), item 5, or if the residence ban is issued due to the reason of article 36 (2), item 8, the alien shall be interrogated concerning the unlawful activity; this information shall be made available to the authority responsible for conducting the administrative criminal proceedings pursuant to the Employment of Aliens Act (art. 28 of the cited law).
- (3) An appeal against an expulsion pursuant to article 33 (1) shall be disallowed to have suspensive effect if the immediate departure of the alien from Austria is required in the interest of public order. An appeal against an expulsion pursuant to article 33 (2) does not have a suspensive effect. An appeal against an expulsion pursuant to article 34 must not be disallowed its suspensive effect.
- (4) In the event of aliens, who are staying lawfully on federal territory, the suspensive effect of an appeal against a residence ban may be disallowed only if the immediate departure of the alien from Austria is required in the interest of public order or for reasons of national security.
- (5) Enforceable expulsions or residence bans may be visibly shown in the travel document of the alien.

### **Special provisions regarding the withdrawal of residence titles and measures not requiring formal proceedings**

200. Article 48 reads as follows:

- (1) Issuing a residence ban against EEA citizens or third-State nationals with preferential status is only admissible if public order and security are endangered on account of their conduct. Issuing a residence ban against EEA citizens or third-State nationals with preferential status who have had their principal domicile on federal territory for 10 years and without interruption is only admissible if it may be assumed, on account of the personal conduct of the alien, that public order or the security of the Republic of Austria would be endangered with sustainable and substantial effect, if he/she were to continue staying on federal territory.

- (2) Except for the cases of article 34 (1), item 3, the expulsion of an EEA citizen or a third-State national with preferential status is only admissible if he/she is not lawfully staying on federal territory (art. 33 (1)).
- (3) EEA citizens and third-State nationals with preferential status shall be granted an ex officio deferral of enforcement of one month when an expulsion or a residence ban is issued against them, unless the immediate departure of the aliens from Austria is required in the interest of public order or national security.
- (4) The rejection at the border of an EEA citizen is only admissible pursuant to article 52 (1), (2), item 1, item 3, letter c, and item 5, as well as in those cases in which specific facts justify the assumption that their stay on federal territory endangers public order or security.
- (5) The provisions of articles 54, 55 and 63 (1), item 2, do not apply to EEA citizens.

### **Special provisions for dependants of Swiss nationals**

201. Article 48a reads as follows:

The provisions of the present section also apply to dependants of Swiss nationals who are nationals of a third State, to the extent that they are dependants pursuant to article 47 (3) (third-State nationals with preferential status).

### **Establishing the inadmissibility of a deportation to a specific country**

202. Article 75 reads as follows:

- (1) Upon application by an alien, the authority shall establish by way of decree whether there are valid reasons to assume that the alien in question is endangered pursuant to article 57 (1) or (2) in a country named by him/her. The foregoing shall not apply to the extent that the decision of an asylum authority is available on the question of inadmissibility of deportation to a specific country, or if that authority has established that there is protection against persecution for that alien in a third State.
- (2) The application may only be filed during the proceedings for issuing a deportation or a residence ban; the alien shall be informed of such proceedings in good time.
- (3) In cases in which establishing the substantial facts may cause particular difficulties, the authority may obtain a statement from the Federal Asylum Office on the presence of a threat. Appeals against decisions establishing the admissibility of a deportation to a specific country shall be decided within one week, unless the detention would have ended earlier.
- (4) Pending a final and absolute decision on the application, the alien must not be deported to that State. After deportation of the alien to another State, the proceedings establishing inadmissibility shall be discontinued as being unfounded.



- (5) The decree containing a final and absolute decision on an application pursuant to paragraph 1 shall be modified upon application or ex officio if the substantial facts have changed essentially, so that the decision regarding that country would have to be different. Until a final and absolute decision is taken on an application filed by the alien, that alien may only be deported to the country in question if the application will obviously be rejected because the matter has been decided.

**Regarding Concern No. 10 (i) - Insufficient guarantees to prevent deportation in case of risk of ill-treatment**

203. According to the substantial provisions of the Aliens Act, every refusal of entry, rejection at border or deportation is inadmissible if the person concerned is thus exposed to the risk of torture.

204. Article 57 reads as follows:

- (1) The refusal of entry, the rejection at the border or the deportation of aliens to a State is inadmissible if this were to violate articles 2 or 3 of the European Convention on Human Rights or Protocol No. 6 of the European Convention on Human Rights concerning the abolition of the death penalty.
- (2) The refusal of entry or rejection at the border of aliens is inadmissible if there are valid reasons to assume that sending them to that State would endanger their life and freedom on account of their race, religion, nationality, affiliation with a certain social group, or their political views (art. 33, item 1, of the Convention relating to the Legal Status of Refugees, Federal Law Gazette No. 55/1955, as amended by the Protocol on the Legal Status of Refugees, Federal Law Gazette No. 78/1974).
- (3) Aliens who plead one of the risks mentioned in paragraphs 1 or 2 may only be refused entry or rejected at the border after they had an opportunity to present the reasons opposing these steps. In case of doubt, the authority shall be informed of the facts prior to the refusal of entry.
- (4) The deportation of aliens to a State in which they are not exposed to the risks listed in paragraph 1 is only admissible, though, if the aliens constitute a danger to the security of the Republic for serious reasons, or if they were sentenced in final and absolute form by an Austrian court for a particularly serious crime, and if they - on account of that particularly serious crime - constitute a danger to society (art. 33, item 2, of the Convention relating to the Legal Status of Refugees).
- (5) The existence of the requirements according to paragraph 4 shall be established by means of decree. This is the responsibility of the asylum authorities in those cases in which an application for asylum is rejected or in which asylum status is disallowed; otherwise it is the responsibility of the higher security agencies (*Sicherheitsdirektion*).

- (6) The deportation of aliens to a State is inadmissible as long as the recommendation of a temporary measure by the European Commission for Human Rights or the recommendation of a preliminary measure by the European Court of Human Rights opposes the deportation.
- (7) If the refusal of entry, the rejection at the border or the deportation of aliens to a third country, whose application for asylum was rejected pursuant to article 4 of the 1997 Asylum Act, proves to be impossible, the Federal Asylum Office shall be informed thereof immediately. The refusal of entry and the rejection at the border, as well as the deportation are carried out by the agents of the public security services as acts of their immediate power of command and their coercive power. It is admissible to appeal such acts to the Independent Administrative Senate. Complaints against its decision are admissible to the Constitutional Court or the Administrative Court. In such complaints, the reasons against the refusal of entry, the rejection at the border or the deportation can be claimed. An alien may be represented in proceedings before the Independent Administrative Senate. In proceedings before the Constitutional and the Administrative Court, he/she must be represented by a lawyer.

205. The provisions of the 1997 Aliens Act, which were explained above, correspond to article 41 (preventing entry into the country and refusal of entry), article 45 (rejection at the border), article 46 (deportation), article 50 (ban on deportation, rejection at the border and refusal of entry), article 51 (establishing the inadmissibility of deportation to a specific State), article 53 (expulsion of aliens without residence title), article 54 (expulsion of aliens with residence title), article 56 (consolidation of residence with aliens having a residence title “permanent residence - EC” or “permanent residence - family member”), article 60 (requirements of a residence ban), article 61 (inadmissibility of a residence ban) and article 66 (protection of family life and privacy) of the 2005 Aliens Act after the entry into force of the 2005 Aliens Police Act on 1 January 2006.

#### **Article 14. Procedural guarantees**

##### **Accelerating proceedings**

206. According to article 91 of the Courts Organization Act it is possible to apply for the fixing of a time limit in order to accelerate proceedings. When such a motion is filed, the superior court must fix a reasonable time limit for the defaulting (civil or criminal) court, before which the relevant procedural act must be taken. The defaulting court may ward off the fixing of such a time limit by taking the requested procedural act within four weeks. The European Court of Human Rights has stated that applying for the fixing of a time limit pursuant to article 91 of the Courts Organization Act is an effective and sufficient legal remedy in accordance with article 35 (1) of the European Convention on Human Rights in order to speed up the course of proceedings, or to prevent delays in proceedings - both in civil and in criminal proceedings (see, for example, the decision of 11 September 2001, *Talirz v. Austria*, Application No. 37323/97; decision of 2 October 2001, *V.P. v. Austria*, Application No. 375857/97, and of 7 May 2002, *A.S. v. Austria*, Application No. 42033/98).

207. Whereas article 91 of the Courts Organization Act relates to the operation of the courts, the law on the public prosecution offices stipulates comparable provisions for supervising the activities of public prosecutors. The provisions, which have been in force since 1 July 1986 without any amendment, are reproduced in the following paragraphs.

208. Article 36 reads as follows:

- (1) In exercising their supervisory competences, the senior public prosecutor's offices shall check regularly on the course of business at the public prosecutors' offices under their supervision by way of suitable measures, and they shall do so at least once every four years by scheduling a direct inspection.
- (2) The service supervision of the Federal Ministry of Justice regarding the public prosecution bodies shall be governed by article 4 (1) and (2) of the 1986 Federal Ministries Act.

209. Article 37 reads as follows:

- (1) Complaints against a public prosecutor regarding the exercise of his/her duties may be filed with any superior body. Whenever the complaint is not filed with the immediately superior body of a public prosecutor, it shall be referred, as a rule, to the competent one for further official action, if necessary together with an order to report back.
- (2) All complaints that are not obviously unfounded shall be communicated to the public prosecutor concerned, together with a request to take remedial action concerning the complaint within a certain period of time and to report accordingly, or to indicate the obstacles preventing such action.

## **Criminal proceedings**

### *Equality of arms*

210. Austrian criminal proceedings are characterized by the principles of exploring the truth ex officio and the obligation to objectivity. This means that the public prosecutor is required ex officio to successfully investigate all offences and crimes, however, by attaching equal consideration to the circumstances that may serve to incriminate or to exonerate the suspect (arts. 3 and 34 (3) of the Code of Criminal Procedure). On account of this overriding principle of instruction, the principle of equality of arms does not have the same formal significance as in a pure party process (adversarial model of litigation). Besides, the obligation to investigate the facts in preliminary proceedings often requires that the suspect be denied access to certain information (by way of inspecting the file), if there is reason to assume that the suspect would unfavourably affect witnesses or other means of evidence and influence the course of the proceedings in an unfair manner. At the trial and in the course of appellate proceedings, the principle of equality of arms is fully implemented, though. In appellate proceedings, the obligation to objectivity, in turn, has a special effect in that the public prosecutor may also lodge an appeal in favour of the defendant. Substantive reasons of nullity (reasons for legal remedies

which may be used to claim that an error had been made by the first-instance court when applying substantive law) must be observed ex officio by the appellate court and applied in favour of the defendant.

211. Pursuant to article 38 (4) of the Code of Criminal Procedure, the suspect must be informed as soon as possible of the proceedings that are pending against him/her with a court. The information must contain the subject of the charges in legal and factual terms, as well as instructions about the main rights in the proceedings. It may only be deferred for as long as the purpose of the investigation (e.g. search of premises or telephone surveillance) would be put at risk by the information (art. 45 of the Code of Criminal Procedure). Similar provisions apply to the right to inspect the file and/or to receive copies; this is a right to which the accused and/or his/her lawyer are entitled without restriction, as a matter of principle. In the event of special circumstances that justify the fear that the purpose of the investigation would be put at risk if certain sections of the file could be inspected immediately, individual parts of the file may be exempt from inspection and copying. However, once the charges have been served, such a restriction is inadmissible. The same applies to the right of the detained accused to consult with his/her lawyer, without a court person hearing or eavesdropping on the conversation. It is only when pretrial detention was also imposed for the risk of collusion, and if there are special, serious reasons to fear that the consultation with the lawyer, in particular, will unfavourably affect the means of evidence that the investigating judge is entitled, on the basis of a written and reasoned decision, to monitor himself/herself the written and oral contacts between the accused and his/her lawyer. This possibility of monitoring ends, though, in any event after the expiry of two months, or upon the bill of indictment being served (art. 45 (3) and (4) of the Code of Criminal Procedure).

212. An accused is to be provided with translation assistance, free of charge - if necessary by appointing an interpreter - if he/she is not sufficiently familiar with the language of the court and to the extent that this is necessary in the interest of judicial practice, especially to safeguard his/her rights of defence (art. 38a of the Code of Criminal Procedure). This applies, in particular, to hearings, as well as to those situations in which the accused asks for translation assistance in order to inspect the file, or on the occasion of being served a court decision or a motion by the public prosecutor.

213. The involvement of a lawyer in criminal proceedings is required, as a matter of principle, whenever the accused is threatened with serious interferences with fundamental rights, or is already exposed to such. According to article 41 (1) of the Code of Criminal Procedure a defence counsel is required, for example, as long as the accused is kept in pretrial detention and for the trial before a panel of lay judges or in the event of a jury trial, as well as before a single judge of a regional court, if the offence carries a prison term of more than three years. Other situations requiring a defence counsel are appellate proceedings, for example to handle a complaint for nullity and the day on which the public hearing regarding such a complaint or an appeal against a decision by a panel of lay judges or a jury is scheduled (arts. 285a, item 3, 286 (4), 294 (5), 344 and 348 of the Code of Criminal Procedure). In all these cases, the accused may freely choose his/her lawyer from a list of lawyers. However, if he/she is not in a position to bear the costs of a defence counsel without impairing the necessary subsistence (of a plain lifestyle) for himself/herself and his/her family, he/she is to be assigned a legal-aid counsel upon application or ex officio. The costs of such pro bono work by legal counsels need not be paid by him/her (legal-aid counsel).

214. The time for preparation (the period between being served with the summons to the trial and its commencement) amounts to a minimum of three days in the case of proceedings before a panel of lay judges, and a minimum of eight days in the case of proceedings before a jury (art. 221 (1) of the Code of Criminal Proceedings). In accordance with article 6 of the European Convention on Human Rights, the actual period for preparation will have to be determined beyond these minimum periods, depending on the scope and/or legal or factual complexity of the proceedings. According to article 90 (1) of the Federal Constitution Act and article 6 (1) of the European Convention on Human Rights, trials are public, as a matter of principle; everybody is allowed to attend a trial as a listener. Only persons carrying weapons and minors (whenever their presence would give rise to concern that their personal development may be jeopardized) are excluded. However, television and radio recordings and transmissions, as well as film and photo recordings of court hearings are inadmissible. For reasons of public morals or public order, the public may be excluded from attending; in juvenile criminal cases this will be done upon application or ex officio, if the interests of the juvenile so require (art. 42 (1) of the Juveniles Jurisdiction Act). In certain other cases, however, this will be the case only upon a motion by the accused. However, the court decision must always be announced in public (art. 228 and following of the Code of Criminal Procedure).

#### *Legal remedies in criminal proceedings*

215. Decisions in proceedings conducted before panels, lay judges or juries may be contested regarding the guilt issue by means of a nullity complaint, and regarding the sentence by an appeal (art. 280 and following, art. 340 and following of the Code of Criminal Procedure), in the case of proceedings before single judges and before local courts by means of an appeal (both regarding the guilt issue and concerning the sentence). In case of a judgement by default, an objection may be raised as a legal remedy, as a result of which the accused may force the order for a new trial if certain prerequisites are met (arts. 427 (3) and 478 of the Code of Criminal Procedure).

216. The lodging of complaints for nullity and appeals must be announced within three days of the pronouncement of the court decision; if the accused was not present, and thereafter as of the handing down of the decision of the first-instance court. They may take the form of a written or oral appeal which is recorded. The complainant must be served with a copy of the judgement. He/she is entitled to elaborate in writing upon the legal remedy within four weeks of the announcement of the filing of the legal remedy, and/or the serving of the written copy of the court decision. The elaboration of a nullity complaint must be drawn up by a lawyer. Whenever the convicted person applies for the assignment of a legal-aid counsel within the period allowed for filing a legal remedy, that period shall commence anew as of the date of serving the decree and the document to this effect addressed to the lawyer, as well as upon the serving of the notice to the convicted person rejecting such an assignment (art. 43a of the Code of Criminal Procedure).

217. With a nullity complaint against the decision reached by a panel of lay judges or by a jury certain procedural errors (formal grounds for nullity), as well as errors in applying substantive law, including grave violations of the rules for determining the sentence (substantive grounds for nullity) may be claimed. The weighing of evidence by the panel of lay judges (two professional and two lay judges who jointly deliberate on the guilt issue and the sentence) may only be

contested in favour of the accused and only within narrow limits (considerable concerns). The pronouncement of the sentence (type and amount of punishment) may be contested by way of appeal. With an appeal against the judgement of a single judge or of a local court, the reasons for nullity may be claimed, but also a review of the pronounced sentence may be demanded, and the weighing of evidence by the first-instance court (appeal against guilt) may be contested. In contrast to proceedings before a panel of lay judges or a jury, there is no restriction on changes.

218. As a matter of principle, the court of appeal must limit its deliberations to the claimed points of the complaint. However, errors in applying substantive law must be remedied in favour of the accused, also ex officio and even in those cases in which the legal remedy was filed only to the detriment of the accused.

219. In the case of a nullity complaint against a judgement by a panel of lay judges or a jury, the decision on the legal remedy may be appealed to the Supreme Court. It may rescind the judgement and refer the legal matter back to the first-instance court for a new hearing and decision, or it may itself take a decision on the matter (by way of reform). However, as a matter of principle, the appeal against a judgement by a panel of lay judges or a jury is decided by a second-instance court (higher regional court), which may reduce or increase the imposed sentence or if the appeal was at least also lodged to the detriment of the convicted person. However, if an appeal against a judgement by a panel of lay judges or a jury is lodged, together with a nullity complaint, the Supreme Court will also decide on the appeal, as a matter of principle.

220. The accused must be summoned together with his/her lawyer for the public hearing regarding the nullity complaint and the appeal before the Supreme Court, unless the lawyer of the accused expressly waives the requirement of a summons for the accused. In the public hearing the accused or his/her lawyer may present the complaint, and in the case of a complaint by the public prosecutor, he/she may reply to the arguments. The accused or his/her lawyer has the right to make the final statement.

221. The decision on the appeal against the judgement by a single judge is taken by a second-instance court (higher regional court), with the regional court deciding on appeals against decisions by local courts.

222. The second-instance court decides - in a non-public hearing - on appeals against court decisions by default taken by a regional court. However, appeals against a decision in absentia taken by a local court are decided by that same court, with the possibility of a complaint to the regional court being an option.

223. One should mention as extraordinary legal remedies and appeals the (ordinary) reopening of a case in favour of or to the detriment of the accused in accordance with article 352 and following, articles 480 and 490 of the Code of Criminal Procedure, as well as the extraordinary reopening pursuant to article 362 of the Code of Criminal Procedure, the nullity complaint for the preservation of the law pursuant to articles 33 and 292 of the Code of Criminal Procedure, the renewal of the criminal proceedings pursuant to article 363a and following of the Code of Criminal Procedure, and the subsequent reduction of the sentence pursuant to article 410 of the Code of Criminal Procedure.

224. As a matter of principle, a reopening of a case to the detriment of the accused is only admissible within narrow limits (art. 355 of the Code of Criminal Procedure). The requirement for reopening proceedings that ended with an acquittal is either that the judgement was brought about by the forging of a document or by a false testimony, by bribing or some other punishable act of the accused or a third party, or that the accused subsequently submitted a confession in or out of court, or that new facts or means of evidence emerged that make it appear likely that the guilt of the accused for the act can be established as such or in combination with already existing means of evidence. If the proceedings ended with a conviction, there must be a considerable discrepancy between the criminal law that should properly be applied and the criminal law that was applied. Pursuant to article 356 of the Code of Criminal Procedure this is the case if the offence that the accused actually committed is sanctioned by a prison term of a minimum of 10 years, whereas the accused was only punished for an offence sanctioned by a prison term of a maximum of 10 years, or which is sanctioned by a prison term of more than 5 years, whereas the accused was only convicted of a misdemeanour (act of negligence or intentional act carrying a maximum penalty of 3 years in prison), or which proves to be a crime (intentional act sanctioned by more than 3 years of imprisonment), whereas the accused was only convicted of a misdemeanour sanctioned by not more than a prison term of 1 year. All other extraordinary legal remedies are only possible for the benefit of the accused.

225. In the event of an ordinary reopening to the detriment of the accused, the matter will enter the stage of a preliminary court investigation, once the reopening has been granted. In the course of the preliminary proceedings and the trial, the accused may again exhaust all legal remedies and appeals.

226. If a decision of the Court of Human Rights establishes a violation of the provisions of the European Convention on Human Rights or one of its Protocols, on account of a decision or order by a criminal court, the case must be re-examined upon application pursuant to article 363a of the Code of Criminal Procedure since it cannot be ruled out that the violation was likely to exert an influence to the detriment of the accused on the contents of the criminal law decision. The Supreme Court decides on such applications.

*Compensation for detention/conviction by a criminal court*

227. If an innocent person is arrested and subsequently acquitted, he/she may file claims against the State pursuant to the Federal Law on the Compensation of Damage due to a Detention or Conviction by a Criminal Court (2005 Criminal Law Compensation Act), Federal Law Gazette I No. 125/2005. As a first step, the person concerned may file his/her claims with the Financial Procurator. According to article 1 (4) of the Procurator Act this office has the competence to receive written requests for the recognition of compensation claims against the Federal State under the Official Liability Act or the Criminal Law Compensation Act, as well as to inform the injured party whether his/her claims for compensation have been granted or rejected in full or in part. After this out-of-court procedure, the person concerned may pursue his/her claims before the civil courts. In this connection, both pecuniary and non-pecuniary damages may be claimed. Legal aid is granted to applicants without means.

*Juvenile offenders*

228. The special aspects in connection with the treatment of juvenile offenders in Austria are covered by the Juveniles Jurisdiction Act, Federal Law Gazette No. 599/1988, as most recently amended by the federal law published in the Federal Law Gazette I No. 164/2004. The objective, which can be gathered from the law, is to solve problems in connection with delinquent juveniles not exclusively by means of criminal law instruments. Consistent with a non-repressive approach, undesirable side effects and consequences of a court conviction should be avoided. The public prosecutors and judges dealing with juvenile offences dispose of a number of alternative procedural possibilities and ways to handle cases, contained in statutory stipulations, especially in connection with minor and medium-weight crimes. These help them to counter juvenile delinquency in a more flexible and realistic manner.

229. When punishing juvenile offenders, the following basic principles, which are also contained in the Juveniles Jurisdiction Act, must always be borne in mind:

(a) Special prevention: the primary purpose of the juvenile criminal law is to deter offenders from committing further punishable acts. The juvenile offender and his/her personality are therefore in the forefront;

(b) Personality development and progress of juveniles: special attention must be paid to the personality development of the juvenile concerned, not only when fixing a sentence but, in particular, when imposing fines. Juvenile law judges are therefore obliged to always look into the need for family law or juvenile welfare law measures. Moreover, the Juveniles Jurisdiction Act also provides for an intensive involvement of the person authorized to educate the young person concerned in all procedural stages, as well as a more intensive involvement of pedagogues and social workers;

(c) Rehabilitation and reintegration: the reintegration of the young person into the labour market, as well as establishing a permanent domicile for him/her and facilitating a situation in which an intact private and family life can be ensured are always a primary consideration. Rehabilitation, in particular, is an important guarantee for avoiding that the young person becomes a delinquent again. Before and during the criminal proceedings in court, social workers are therefore involved to a large extent. They can support the young person in coping with aforementioned tasks;

(d) Proportionality: increased attention is paid to the proportionality between the criminal conduct and the type of reaction chosen in each specific case. An adequate type of reaction does not only take account of the guilt and injustice issue of the committed act, but must also consider the adolescence of the offender. It is in this spirit that the Juveniles Jurisdiction Act provides that the applied measures, as well as the imposed punishments, must not be disproportionate to the personality development and the progress of the young person;

(e) Considerations of general prevention only play a subordinate role in juvenile criminal law and are only considered in exceptional cases, to the extent that for specific reasons (especially on account of the seriousness of the offence) it appears to be indispensable to conduct criminal proceedings or to impose a sentence in order to counteract any tendencies that others will commit punishable acts.



230. The concept of “juveniles” under Austrian Criminal Law can be summed up as follows:
- (1) Minors: persons who have not yet reached the age of 14 are minors and are not subject to any criminal law responsibility. However, if minors commit a particularly serious offence, it is possible to take appropriate measures in the framework of curatorship proceedings. For example, the minor may be accommodated in a home, if necessary, or the family with which the juvenile lives is assisted by a social worker.
  - (2) Juveniles: the concept of “juveniles” comprises persons who have reached the age of 14 but not yet the age of 18. A juvenile law offence is thus an act sanctioned by a court punishment which is committed by a juvenile.
231. In order to take account of the fact that, as they grow up, young persons often go through a personality crisis (the so-called “adolescence crisis”), in the course of which they are more prone to commit offences than other persons, an amendment of the Juveniles Jurisdiction Act, adopted in 2001, created the concept of the “young adult”.
232. This concept applies to persons who have reached the age of 18, but not yet the age of 21 years. As a matter of principle, the criminal law applicable to adults is applied to them. However, in individual special provisions of substantive criminal law attention was paid to the specificities that young adults experience in their development and accompanying measures were created for this group of persons (factual competences of the competent courts responsible for juvenile criminal matters; special assignment of persons to the bench of jurors or the panel of lay judges, etc.).
233. Apart from the foregoing, the amendment of the Juveniles Jurisdiction Act also expanded the right of young persons to call in a person of his/her confidence when being interviewed or formally examined (art. 37 of the Juveniles Jurisdiction Act).
234. There are no separate juvenile courts in Austria. In order to ensure that all matters relating to one and the same person are handled by one court department, juvenile criminal matters, the protection of young persons, criminal matters relating to young adults and curatorship matters regarding minors, in which there may be reason to fear a risk to the personality development, are assigned to one and the same court department. Juvenile criminal matters are handled by judges and public prosecutors with specific and specialized training.
235. The Juveniles Jurisdiction Act offers special types of reaction, and the public prosecutors and judges working in the field of juvenile criminal justice must strictly follow their sequence and check whether the prerequisites for the individual measures apply.
236. The Juveniles Jurisdiction Act exempts certain offences from punishment. If a young person has not acquired the maturity that is typical of his/her age, and if he/she is therefore not capable of realizing that his/her act was wrong, or to act on the basis of that knowledge, he/she will not be punished. In addition to delayed maturity in young persons, minor crimes - in connection with a “minor” guilt of young persons - will also not be punished.

237. As a next step the public prosecutor may refrain from prosecuting a young person, provided that the offence is a minor one and the young person cannot be accused of a serious guilt, if additional measures of special prevention are not necessary in order to hinder the offender from committing further offences. The background to this approach is that with many young persons a first encounter with the law-enforcement agencies will be enough to prevent them from committing further punishable acts.

238. However, non-penal settlements (“diversion”) account for the largest share in handling cases. The concept of non-penal settlement (“diversion”) refers to efforts to react to a conduct punishable by the courts, not necessarily by conducting formal criminal proceedings, or to divert in already commenced proceedings from the conventional type of settling a case by a court conviction. The idea is to waive conventional criminal law reactions, especially in connection with crimes of lesser gravity, and to clear up the conflict situation caused in society by the punishable act by means other than the classical criminal law methods.

239. Numerous requirements must be met in order to be able to take a non-penal settlement measure. The offence must be one requiring public prosecution, of which the facts have been sufficiently clarified. In addition, the guilt of the suspect must not be grave, and there should neither be reasons of special prevention, nor of general prevention that would require a punishment instead of a non-penal settlement. On account of its nature and seriousness, the offence must lend itself to a non-penal settlement. In connection with juveniles, this applies to juvenile criminal cases - as a matter of principle - which carry a fine or a maximum prison term of five years. The voluntary character is at the centre of the non-penal settlement measures; all non-penal settlement measures therefore require the consent of the young person.

240. The possibilities for a non-penal settlement, as described above, are offered to the suspect - sometimes after some clarifying talks - by the public prosecutor or the court. If the young person does not - or not fully - perform the activities imposed upon him/her, other alternatives for a non-penal settlement may be explored, or the formal criminal proceedings may be initiated and/or continued, which may end with a formal punishment of the young person. The conventional criminal proceedings must also be commenced if the young person so wishes. However, if the non-penal settlement measure is successful, the charges must be withdrawn, or the proceedings must be discontinued.

241. Non-penal settlement offers four types of reactions as alternative measures, which vary in the depth of their impact on the life of the young person, namely paying a fine, providing some community services, the preliminary rescission from prosecution, with a probationary period between one and a maximum of two years being fixed at the same time, as well as an out-of-court settlement of the offence. The latter is the heart of a non-penal settlement. The consent of the injured party is not a prerequisite under juvenile criminal law for successfully reaching a settlement. Choosing this type of non-penal settlement measure is primarily recommended if the cause for the punishable offence was a conflict situation in the family, at school or in some other closely related social setting. In connection with juveniles, four out of five cases are successfully concluded in which an out-of-court settlement measure is proposed.

242. Even if formal court proceedings are commenced, imposing a fine or a prison term is not necessarily the outcome of the proceedings. The court also has the possibility of convicting the

person without imposing a punishment, or of convicting a person with a punishment as a proviso. Both cases are only possible if it can be assumed that such a court decision will suffice in order to keep the juvenile delinquent from committing further punishable acts.

243. Fines and prison terms: with regard to the fines imposed under the general criminal laws, the maximum of the daily rates is divided by two. With regard to the prison terms, the maximum sentence imposed upon adults is again halved, with the minimum sanction possibly being ignored. The general rule is that no lifelong prison term may be imposed upon a young person.

244. In contrast to adult offenders, compulsory or pretrial detention may not be imposed upon or continued with juveniles if the purpose of the arrest can be obtained by means of family-law or youth-welfare-law dispositions - if necessary in connection with specific instructions. Moreover, a juvenile is to be arrested only if the drawbacks resulting from the arrest for the personality development and progress of the offender are not disproportionate to the significance of the deed and the punishment to be expected for it. When comparing young persons to adults, the maximum term of a pretrial detention is also much shorter. In connection with offences that come under the competence of a panel of lay judges or a jury trial, the detention may last for a maximum of six months and may be extended to one year only because of specific difficulties or the special complexity of the investigations. In all other cases, a juvenile may only be kept in pretrial detention for a maximum of three months.

245. In order to avoid any negative influence (especially from the so-called habitual criminals), juvenile prisoners are always accommodated separately from adult prisoners. Especially in the enforcement of sentences committed by young offenders, special attention is paid to rehabilitation. Young persons are not only engaged in work to a large extent, but they also receive education and training. While serving their prison term they have more possibilities for training and, in particular, the opportunity of finishing apprenticeship training. The social services in the penitentiaries provide special support in the reintegration of young persons into society.

## **Civil law proceedings**

### *Equality of arms*

246. The equality of arms in civil law proceedings is provided by the procedure for civil law cases, which is an expression of the equality principle vested in constitutional law. Article 7 of the Federal Constitution Act and article 2 of the 1867 Basic Law Act stipulate equality before the law, which is guaranteed by the Constitution. The principle of equality is implemented in several places in Austria's Code of Civil Procedure.

247. For example, the claim to the equal treatment of parties is ensured by the basic procedural right of a fair hearing. A fair hearing may take the form of an opportunity to make an oral statement, but it may also be implemented in written form. As a matter of principle, there must be the possibility to present a statement before the court takes a decision, because a decision may only be based on facts, in relation to which the parties were able to express an opinion. In most cases, this opportunity is also granted after a decision, by the right of appeal.

Giving a fair hearing is an obligation for judges, according to the Code of Civil Procedure. It finds expression in the obligation to properly serve all essential documents presented by the opposing side, as well as in the judge's orders and decisions, in serving summons for the oral hearings, in hearing the presentations of the parties during the hearing and in discussing their factual and legal arguments with them. The right to be given a fair hearing is rooted both in article 6 (1) of the European Convention on Human Rights, and thus in the Constitution, but also in the Code of Civil Procedure, where it is also protected. According to article 177, the court is obliged to hear both parties in an oral hearing. Additional requirements that serve to ensure a fair hearing are articles 230 and 231 of the Code of Civil Procedure (serving the civil action on the defendant), article 239 of the Code of Civil Procedure (statement of defence), article 416 of the Code of Civil Procedure (service of court decision), article 427 of the Code of Civil Procedure (service of decisions), article 168 of the Code of Civil Procedure (respondent's answer to an appeal), article 507 of the Code of Civil Procedure (respondent's answer to appeals on points of law), article 521a of the Code of Civil Procedure (respondent's answer to recourses in certain cases), article 248 of the Code of Civil Procedure (objection in collection proceedings), articles 550, 552, 557 and 562 of the Code of Civil Procedure (objections to mandate proceedings, mandate proceedings regarding bills of exchange and lease cases).

248. In addition, the principle of equality of arms is implemented when the judge compiles the evidence material. In the oral hearing, the judge must make every effort, by asking questions or in any other suitable manner, to ensure that the information, which is essential for the decision, is provided by both parties, or that incomplete information is supplemented, that the requisite evidence is indicated and offered, that insufficient evidence is supplemented and that, altogether, all information that appears to be necessary for determining the truth is provided (art. 182 (1) of the Code of Civil Procedure). The judge may also take certain measures *ex officio* in order to facilitate or bring about the determination of the facts in the framework of his/her obligation to successfully investigate a matter (art. 183 of the Code of Civil Procedure).

249. In proceedings before a local court, judges have an additional obligation of guidance *vis-à-vis* parties who are not familiar with the law and who are not represented by a lawyer; this goes beyond the obligation of conducting the proceedings. However, this obligation has its limits whenever the impression may arise that the judge is biased (art. 432 of the Code of Civil Procedure). Moreover, judges have an obligation to instruct the plaintiff and the defendant to improve their submissions. Whenever there is a formal deficiency that is likely to obstruct the proper businesslike handling of a document, the court must initiate improvement procedures (arts. 84 and 85 of the Code of Civil Procedure).

250. A violation of the principle of equality of arms may either be claimed as nullity or as a major procedural deficiency, depending on the type of violation (arts. 477 and 496 of the Code of Civil Procedure).

### **The basis in constitutional law of civil law proceedings**

251. The main stipulations in Austria's Constitution regarding civil law proceedings are the following:

- Jurisdiction originates with the Federal State (art. 82 (1) of the Federal Constitution Act). This means that every court is an institution of the Federal State with regard to its organization;
- Federal laws determine the charter of the courts (their creation, the rules for appointing the court staff and their hierarchy) and the competences of the courts (art. 83 (1) of the Federal Constitution Act). In accordance with article 6 of the European Convention on Human Rights, constitutional law is quite clear that the area of civil law claims is assigned to the courts;
- Nobody may be deprived of his/her legal judge (art. 83 (2) of the Federal Constitution Act). This does not only apply to the judicial but also to the administrative system, so that everybody has a right, guaranteed by the Constitution, to a decision by a competent body of the Federal State;
- Provisions on judges: judges are appointed by the Federal President or the Federal Minister of Justice, on the basis of proposals for appointment made by the responsible bodies (art. 86 of the Federal Constitution Act); the independence of judges in the exercise of their office as judges (art. 87 (1) and (2) of the Federal Constitution Act); a fixed distribution of court business and compliance with the system (art. 87 (3) of the Federal Constitution Act); non-dismissal from office and non-transferability of judges, and the exemptions to these provisions (art. 88 of the Federal Constitution Act);
- The institution and the scope of duties of senior court clerks (*Rechtspfleger*) (art. 87a of the Federal Constitution Act);
- Provisions of the review of legislation, ordinances and State treaties upon application by the courts (arts. 89, 139, 140, 140a of the Federal Constitution Act);
- Instructions that hearings before courts must be oral and public (art. 90 (1) of the Federal Constitution Act);
- Participation of the people in judicial decisions (art. 91 (1) of the Federal Constitution Act);
- Setting up a supreme court as the highest instance in civil and criminal matters (art. 92 (1) of the Federal Constitution Act);
- Keeping the judiciary separate from the administrative system in all instances (art. 94 of the Federal Constitution Act). The basic principle of a separation of powers means that one and the same body may not be a judicial and an administrative agency at the same time, that instances following upon an administrative agency may not be with a court, or vice versa, and that instructions by administrative agencies to instances of the judicial system are precluded.

**The different instances in civil law proceedings (Code of Civil Procedure)**

252. The regular courts in Austria are the local courts (*Bezirksgerichte*), the courts of first instance (regional courts = *Landesgerichte*), the courts of second instance (higher regional courts = *Oberlandesgerichte*) and the Supreme Court (*Oberster Gerichtshof*).

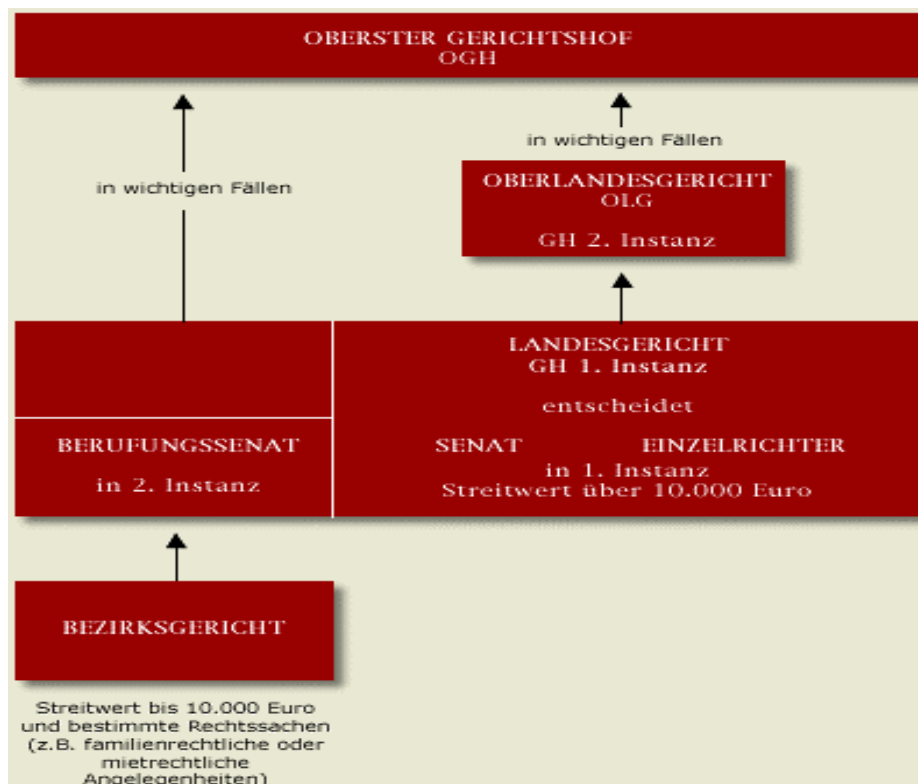
253. Up to an amount in dispute of €10,000 and in the legal matters defined by law (for example, family-law or rent-law matters, see article 49 of the Jurisdictional Regulations) the local courts have first-instance competences. They exercise civil law jurisdiction solely as first-instance courts and by way of a single judge. As a rule, one or several single judges are appointed to a local court. An appeal against a decision by a local court will be addressed to the higher-level regional court, where an appeals panel will decide as a second instance. In particularly important cases - in which legal issues of basic importance must be solved - a further appeal to the Supreme Court is possible against a decision of a second-instance court.

254. In cases with an amount in dispute of more than €10,000, and in a few legal matters (e.g. competition conflicts or copyright disputes), irrespective of the amount in dispute, the regional court will be the court of first instance (arts. 50 and 51 of the Jurisdictional Regulations). The regional courts exercise their civil law jurisdiction mainly by single judges, sometimes also by a panel of three professional judges (for example, for amounts in dispute of more than €50,000, if one of the parties submits a motion to this effect in due time, and in matters of appeal), as well as in commercial matters (again only with an amount in dispute of more than €50,000, upon application of one of the parties), and in labour and social-law cases (independent of the amount in dispute), with the participation of lay judges with special expertise (one each representing the employer's and the employee's side). The higher regional court is the second-instance court that has to deal with appeals against decisions by a regional court. In particularly important cases - in which legal issues of fundamental importance must be solved - a legal remedy may also be lodged with the Supreme Court.

255. The higher regional courts are only courts of appeal for the first-instance courts and, as a matter of principle, they decide by way of a panel of three judges, headed by a president of the panel. When operating under commercial-law provisions, two professional judges and one lay judge must be on the panel; in case of labour and social-law issues, three professional judges and two lay judges take the decision.

256. As a rule, panels of five professional judges (so-called ordinary panels; in labour and social-law matters three professional judges and two lay judges) - headed by a president of the panel president - will take decisions at higher regional courts. In certain decisions regarding procedural law, the Supreme Court will take decisions by way of a three-member panel. In legal cases concerning legal issues of particular fundamental importance, the deciding panel of 5 judges may be extended to a total of 11 members (in labour and social-law cases 7 professional judges and 4 lay judges) when taking decisions (so-called extended panels).

257. In civil law matters there may therefore be three instances, which can be illustrated as follows:



OBERSTER GERICHTSHOF (OGH) = Supreme Court

in wichtigen Fällen = in important cases

OBERLANDESGERICHT (OLG) = Higher Regional Court

GH 2. Instanz = second-instance court

LANDESGERICHT = regional court

GH 1. Instanz = first-instance court

entscheidet = decides

SENAT = panel

EINZELRICHTER = single judge

in 1. Instanz = in first-instance cases

Streitwert über 10.000 Euro = with an amount in dispute in excess of €10,000

BERUFUNGSSENAT = appeals' panel

in 2. Instanz = as second-instance court

BEZIRKSGERICHT = local court

Streitwert bis 10.000 Euro und bestimmte Rechtssachen (z. B. familienrechtliche oder mietrechtliche Angelegenheiten) = amounts in dispute up to €10,000 and specific legal matters (for example, family-law or rent-law matters)

## **The legal remedies according to the Code of Civil Procedure: appeal, appeal on points of law and recourse**

### *Appeal* (arts. 461 to 501 of the Code of Civil Procedure)

258. An appeal is the legal remedy open to both sides against decisions of first-instance courts. The respondent must be served a copy of the appeal. The respondent may submit a response to the appeal within a statutory time limit of four weeks, as a result of which the principle of equality of arms is ensured. According to article 492 (1) of the Code of Civil Procedure the parties may waive their right to an oral hearing in appeal proceedings.

### *Appeal on points of law* (arts. 502 to 513 of the Code of Civil Procedure)

259. An appeal on points of law is the legal remedy against decisions of appellate courts. The Supreme Court has powers to decide on an appeal on points of law. The Supreme Court is bound by the facts established by the second-instance court, it cannot re-examine the issue of the act. The Supreme Court decides on an appeal on points of law in a non-public session without holding an oral hearing before taking the decision (art. 509 (1) of the Code of Civil Procedure - proceedings merely on the basis of the file). The respondent in an appeal on points of law must be served a copy of the written appeal. The respondent may submit a response to the appeal within a statutory time limit of four weeks, as a result of which the principle of equality of arms is ensured.

260. The Code of Civil Procedure contains restrictions regarding appeals on points of law so that not every court decision must be open to an appeal to the Supreme Court. These are as follows:

- Restriction due to the value of the object in dispute (art. 502 (2) and (3) of the Code of Civil Procedure);
- The system of principles and grounds for admission to appeals on points of law (art. 502 (1) of the Code of Civil Procedure): an appeal on points of law is only admissible if the decision depends on solving a legal issue of substantive law or procedural law, or if maintaining the unity of the law, legal certainty and the further development of the law is of considerable importance, for example because the appellate court deviated from the jurisdiction of the Supreme Court or such a jurisdiction is absent or not uniform;
- Restriction of grounds for appeals on points of law: article 503 of the Code of Civil Procedure contains a complete list of the grounds for appeals on points of law: nullity of the appellate decision, other major procedural deficiencies in the appellate proceedings, the appellate decision being contrary to the contents of the file, incorrect legal evaluation of the matter by the appellate court.

### *Recourse* (arts. 514 to 528a of the Code of Civil Procedure)

261. Recourse is the legal remedy against court orders. Recourses may be filed by either side in cases pursuant to article 521a of the Code of Civil Procedure, which means that the other side



has the possibility of responding to a recourse within four weeks (as a result of which fair hearing is ensured). In all other cases, it may be filed by only one side. The competent court decides on the recourse in a non-public session without holding an oral hearing before taking a decision (art. 528 of the Code of Civil Procedure). A recourse against an appeal on a point of law (art. 528 of the Code of Civil Procedure) is the legal remedy against modifying or confirming second-instance court orders in connection with a recourse.

262. In addition to general requirements for lawsuits, the special requirements for lawsuits must also apply if a legal remedy is to be filed. In their absence, no factual decision may be taken on the legal remedy; rather, they must be rejected:

- Admissibility: it must be possible, as a matter of principle, to contest the decision and to contest it with the selected legal remedy. As a matter of principle, every court decision may be challenged, except for the decisions of the Supreme Court. There are, though, a number of exceptions;
- Entitlement to the legal remedy: it depends on the position of the person seeking the legal remedy in the legal dispute;
- Timeliness: the deadline for announcing a legal remedy only applies to appeals and here again only if the court decision was proclaimed orally in the presence of the two parties. The party which does not orally announce that it will appeal the decision immediately after it was announced must do so within 14 days, as of the service of the court record on the oral hearing in which the court decision was announced, in order to safeguard the possibility of filing an appeal;
- Deadlines for legal remedies: the period is four weeks for appeals, appeals on points of law and recourse by both sides. A recourse that can only be filed by one party must be filed within 14 days. As a rule, these deadlines commence as of the service of the court decision, in exceptional cases upon the oral announcement. Time required for mailing is not included. The deadlines for legal remedies are laid down in the law;
- Unique nature of the legal remedy: filing written pleadings designated as appeals, appeals on points of law or recourses prevents other written pleadings being filed in connection with the legal remedy;
- Absence of a waiver of legal remedies or withdrawal of a legal remedy: a waiver of legal remedies is the statement by a party, which has effect upon the lawsuit prior to filing a legal remedy, that this party waives the legal remedies against a specific court decision. Withdrawal of a legal remedy is done through a statement to the court, made by the party who lodged a legal remedy, to waive the processing of that legal remedy;
- Grievance: grievances are a special form of protecting the legal interests of the higher instance. They may always be resorted to if the person filing the legal remedy is affected by the challenged decision in a request for legal protection.

### **Effects of legal remedies**

263. *Suspensive effect*: when filing a legal remedy in time, a decision does not become final and absolute in the case of an appeal and, as a matter of principle, also in the case of an appeal on a point of law (one exception is the extraordinary appeal on a point of law). However, as a matter of principle, recourses do not suspend the enforceability of the court order, and an extraordinary appeal on a point of law certainly does not suspend the appellate decision.

*Ascending effect* (right of the chief prosecutor to be seized with a case): as a matter of principle, a legal remedy that is admissible and filed on time results in the transfer of the lawsuit to the next higher court.

*Effect for both parties*: both in the case of an appeal and an appeal on a point of law the respondent has to be able to file submissions. However, recourses have basically been designed by the legislator as a legal remedy open only to one side. In cases in which court orders concern the legal status of the parties in a special way (art. 521a of the Code of Civil Procedure), both sides are also given the opportunity to file an appeal on a point of law.

### *Decisions by the courts dealing with legal remedies*

264. As a matter of principle the court dealing with a legal remedy shall take its own decision in the matter concerned (reforming decision), which means that the decision of the next lower instance is modified if the legal remedy is well founded (or if the legal remedy is unfounded that decision is confirmed). On the basis of an admissible and reasoned legal remedy, the court dealing with the legal remedy may also revoke the decision of the next lower instances, instead of taking its own decision on the facts, and refer the matter back to the next lower court for new proceedings and a new decision (reversing decision). A decision on facts is not possible if the legal remedy is inadmissible. In this case, the matter must be rejected.

### **Regarding Concern No. 11 - Administrative proceedings**

265. When setting up Independent Administrative Senates, tribunals were created for administrative matters in keeping with article 14 (1) of the International Covenant on Civil and Political Rights (see also comments on article 2).

266. With regard to the organizational provisions (and civil-service regulations), the minimum requirements are stipulated in article 129b of the Federal Constitution Act. Legislation by the federal provinces comprises more detailed provisions regarding the organization of the Independent Administrative Senates, as well as the civil service regulations for their members. In this connection, the following needs to be mentioned:

- According to article 129b (2) of the Federal Constitution Act, the members of the Independent Administrative Senates are not bound to any instructions when performing the tasks assigned to them by constitutional law;
- While not all members of the Independent Administrative Senates need to be appointed for an indefinite period of time (article 29b (1) of the Federal Constitution Act merely provides that the members of the Independent Administrative Senates are

to be appointed for a minimum term of six years). However, in three federal provinces (Upper Austria, Vorarlberg and Vienna) members are appointed for an indefinite period of time. In the other federal provinces, the first appointment is for a period of six years, and an unlimited reappointment is possible;

- The business is to be distributed in advance among the members of the Independent Administrative Senates according to the principle of a fixed distribution of business. A matter for which one specific member is responsible according to the distribution of business may only be reassigned by the chairperson of the Independent Administrative Senate to another member when he/she is prevented from pursuing the matter;
- A member of an Independent Administrative Senate may only be relieved of his/her office prior to the expiry of the period of appointment in specific cases indicated in the law and only upon decision by the Independent Administrative Senate itself; a member of an Independent Administrative Senate thus is just as irremovable from office as are judges.

267. Since the obvious goal was to create independent tribunals when setting up the Independent Administrative Senates, this goal must not be obstructed by the laws adopted with simple majority (such as the laws on organization by the federal provinces, but also the procedural provisions under federal legislation).

268. Uniform federal legislation governs proceedings before the Independent Administrative Senates. The most important provisions can be found in the General Administrative Procedures Act and in the Administrative Criminal Law. The following principles result from these two laws:

- Both in proceedings regarding administrative offences and those relating to coercive powers of administrative authorities, the Independent Administrative Senates have unrestricted cognition competences. The Independent Administrative Senates can alter or rescind the contested decision in any direction or declare the contested administrative act null and void. Where the administrative act that was declared to be contrary to the law still persists, the agency concerned must establish the legal status corresponding to the decision of the Independent Administrative Senate without delay;
- With regard to all other matters that have been assigned to the Independent Administrative Senates by way of legislation of the federal provinces or of the Federal State, it has already been pointed out that the 2001 Administration Reform Act has brought a considerable expansion of the competences. (On 1 January 2004, the Independent Administrative Senate of Vorarlberg, for example, was responsible for 93 laws.) To balance this situation, it was provided that the Independent Administrative Senate will have to decide on the facts in these matters, whenever the administrative authority involved does not object for reasons of simplifying or accelerating procedures, when the appeal is presented. As a result, the competences of the Independent Administrative Senate are limited to repealing the contested

decision and to refer the matter back to the first instance. It should be mentioned, though, that such an “objection” is only admissible if it is justified on grounds of simplifying or accelerating the proceedings, which is hardly ever the case in practice. (In Vorarlberg, there was not a single objection in 2004, for example.) Moreover, such an objection may be contested (at least indirectly) and thus also be repealed, as a result of which the Independent Administrative Senate has its full cognition competences in any event;

- The Independent Administrative Senates decide either through a single member or by a chamber to which three members belong;
- As a rule, the Independent Administrative Senate has to hold a public oral hearing; this requirement may only be waived in exceptional cases (see, for example, the decision on inadmissibility by the European Court of Human Rights of 20 November 2003 in the *Faugel* case, Application 58647/00 and 58649/00);
- In proceedings on administrative offences, the hearing is to be scheduled in such a manner that the parties have at least two weeks to prepare for it;
- Once a hearing has been held, the decision may be taken only by those members of the Independent Administrative Senate who actually participated in the hearing. The decision must be taken “on the basis of the hearing” (principle of immediacy). In proceedings regarding administrative abuses this principle is made clear insofar as only that material may be taken into account in the decision that was actually presented in the hearing (if such a hearing took place);
- As a rule, the decision of the Independent Administrative Senate must be publicly proclaimed; this requirement may also be waived in exceptional cases;
- Independent Administrative Senates must decide without undue delay, at the latest, though, within six months of receiving the application;
- Accused persons without means must be assigned a legal-aid lawyer for proceedings before the Independent Administrative Senate for administrative abuses, to the extent that this is in the interest of the administrative judicial system.

269. Although a limited appointment is admissible according to the Constitution, and the members of Independent Administrative Senates are thus not on an equal footing in all respects with the judges of ordinary courts, the provisions contained in laws adopted with a simple majority, but also those with constitutional ranking, are of such a nature - especially the freedom from instructions by their members - that it appears to be sufficient in order to classify the Independent Administrative Senates as “independent and impartial tribunals established by law” in accordance with article 14 (1) of the International Covenant on Civil and Political Rights, before which “fair and public hearings” are conducted. It should be pointed out in this connection that the European courts of justice qualified the Independent Administrative Senates as courts entitled to present cases pursuant to article 234 of TEU (see European Court of Justice, *Hospital Ingenieure* C-258/97), as well as “tribunals” pursuant to article 6 of the European

Convention on Human Rights (inadmissibility decision of the European Court of Human Rights of 20 December 2001 in the *Baischer* case, Application 32.381/96; regarding procedural safeguards specifically also the inadmissibility decision of the European Court of Human Rights of 4 July 2002, *Jancikova*, 53483/00).

**Articles 15 (Ban on laws with retroactive effect)  
and 16 (Recognition of a person before the law)**

270. There is no need to supply additional information beyond the reports on these provisions.

**Article 17. Protection of privacy**

271. The protection of personal rights has always been an important concern of civil law, in particular, in Austria. According to article 16 of the General Civil Law Code “every human being has innate rights which are understandable merely by reason, and is therefore to be regarded as a person”. This essential provision give citizens the right to submit claims that can be enforced directly in private law relations and that protect the essence of the dignity of the individual. The rights derived from article 16 of the General Civil Law Code are absolute rights that enjoy protection against unjustified interventions by third parties. Every individual can defend himself/herself against any threat to his/her legal position. He/She may take action against a violation of his/her personal rights, or a threat to them, by applying for an injunction. In addition, the person affected in his/her personal rights may demand the removal of the unlawful situation and claim damages. Article 16 of the General Civil Law Code, as such, does not define in detail the personal rights that are afforded absolute protection; rather, the individual rights and claims are derived from this provision and exist in combination with other statutory regulations. The personal rights include, among others, the right to honour and the right to the protection of and respect for one’s privacy.

272. The right to safeguarding one’s privacy and intimacy protects the individual against any interference by unauthorized persons with his/her private life, against the dissemination of lawfully obtained information regarding his/her private living environment, as well as against the disclosure and use of private circumstances or information that are subject to a statutory obligation of confidentiality. The right to safeguard one’s privacy can be derived from a number of statutory provisions - to be found in Austria’s legal system - which govern individual aspects in connection with the protection of privacy.

273. These include the following:

- The fundamental rights of articles 8 and 12 of the European Convention on Human Rights;
- The (constitutional) law on the protection of the domiciliary right;
- Articles 10 and 10a of the 1867 Basic State Law;
- The fundamental right to the protection of personal data (art. 1 of the 2000 Protection of Data Act), as well as the criminal provisions in this connection: article 51 (use of data with the purpose of achieving a profit or causing damage) and article 52 (administrative criminal provision);

- Criminal law provisions (art. 109 of the Code of Criminal Procedure on criminal violation of the privacy of a person's house, the fifth chapter of the Criminal Law Code - art. 118 and following): violations of privacy and certain occupational secrets. Here one should mention, in particular, article 118 of the Code of Criminal Procedure (violation of the privacy of correspondence and the suppression of correspondence), article 118a (unlawful access to a computer system), article 119 of the Code of Criminal Procedure (violation of the privacy of telecommunications), article 119a (abusive interception of data), article 120 of the Code of Criminal Procedure (abuse of audio-recording or interception devices) and article 121 of the Code of Criminal Procedure (violation of occupational secrecy);
- The obligation of secrecy under the legislation governing certain professions (art. 54 of the Physicians' Act, art. 9 (2) of the Regulations for Lawyers, art. 37 (1) of the Regulations for Notaries Public, art. 46 of the Civil Service Regulations Act, and art. 58 of the Judges Service Regulations Act);
- Articles 77 and 78 of the Copyright Act (protection of correspondence and images);
- Article 77 and following of the Media Act (violation of the highly personal living spheres, protection against the disclosure of identity and protection against forbidden publication).

274. The civil law provides citizens affected by a violation of their privacy not only with the possibility of applying for an injunction and the elimination of the unlawful situation, but also of claiming damages. However, in the past the persons affected had only very limited possibilities for filing claims for non-pecuniary damages. The 2004 amendment to the civil procedure therefore introduced an additional, general claim for damages in connection with unlawful and culpable violations of the privacy of an individual, which also stipulates compensation for non-pecuniary damages.

275. Article 1328 (a) of the General Civil Law Code, which entered into force on 1 January 2004, reads as follows:

- (1) Anyone, who unlawfully and culpably interferes with the privacy of another person or discloses or uses circumstances from the privacy of another person, shall compensate that person for the damage caused by him/her. In case of considerable violations of privacy, for example, if circumstances from private life are used in a manner that is suited to compromise that person in public, the claim to compensation also includes remuneration for the personal impairment suffered.
- (2) Paragraph 1 shall not be applicable if a violation of privacy is to be judged according to special provisions.

276. The responsibility for violations of privacy by the media is only governed by the substantial provisions of the Media Act: these provisions grant a person a claim to compensation for violation of his/her privacy, whenever the interference was committed in a culpable and unlawful manner. As a result, damages will be paid for any unlawful violation of an individual's

privacy, either because the damaging person enters the private sphere in an unauthorized and unlawful manner, or because the damaging person discloses or uses secret circumstances relating to the private situation of a person. These provisions are also relevant if the impairment of privacy is due to an unlawful and culpable conduct of a State office holder (for example, a violation of official secrecy). However, there is no obligation to compensate if the interference with a person's privacy does not affect the legitimate interests of the person concerned. The claim relates to the compensation of pecuniary damage that is linked to the interference with the private sphere. In addition, the person whose rights have been violated is entitled to claim non-pecuniary damages. The minimum amount stipulated in the law is €1,000.

277. In Austria's civil law, the right to one's honour is protected by the provisions of article 1330 of the General Civil Law Code. Paragraph 1 governs the facts constituting defamation. Defamation is an attack on the dignity of a person, for example, by abusive language, offence or ridicule. A person thus insulted is entitled to compensation of the pecuniary damage, pursuant to article 1330 of the General Civil Law Code. Paragraph 2 identifies the acts that constitute a defamation of business reputation (damage to reputation). This provision applies when somebody disseminates false information that jeopardizes the business reputation, the earnings or the advancement of another person. The impartial transmission of facts is admissible, unless a specific obligation of secrecy applies. To the extent that the party causing the damage is found guilty - in other words, if he/she knew or ought to have known that the disseminated facts were incorrect - the injured party may claim compensation for the pecuniary damage, as well as the revocation of the false statements and their publication.

278. The federal law which introduced special investigating measures into the Code of Criminal Procedure in order to combat organized crime (Federal Law Gazette I No. 105/1997) contains comprehensive arrangements for optical and acoustic surveillance, as well as for the automation-supported comparison of data. The following measures should be mentioned:

- Special legal protection and accompanying controls for ordering and implementing the optical and acoustic surveillance and the comparison of data by an independent person responsible for legal protection (*unabhängiger Rechtsschutzbeauftragter*) (art. 149n and following of the Code of Criminal Procedure);
- Improving the protection of secrecy with the security agencies and the judiciary (“separate files” and “classified files”, article 149m of the Code of Criminal Procedure);
- Extension of the instrument of extraordinary mitigating circumstances when imposing a sentence (art. 41 of the Criminal Law Code) for members of criminal organizations who are prepared to disclose to the law-enforcement agencies their knowledge about the structure of these organizations and the crimes committed or prepared by their members and thus to make a considerable contribution, beyond the solving of their own offences, to the uncovering of organized groups of offenders and to clearing up or preventing further crimes (art. 41a of the Criminal Law Code);
- Extension of the sanctions in connection with the ban on publishing the contents of “separate files” or “classified files” (art. 301 (3) of the Criminal Law Code), as well

as extension of the protection under media law against the prohibited disclosure of results of special investigative measures, to include the entire preliminary proceedings (art. 7c of the Media Act);

- Extension of the annual reports of public prosecutors to include the special investigative measures and telephone surveillance; opportunity for the review chambers to comment on these reports; communicating the summary report of the Federal Minister of Justice to the National Council, the Data Protection Commission and the Data Protection Council (art. 10a of the Public Prosecution Offices Act).

279. In connection with telecommunications, the 2002 Amendment to the Criminal Law Act (Federal Law Gazette I No. 134/2002), provided the express regulation by law of the admissibility of the so-called processing of external call data and the localizing of sites. At the same time, it was clarified that the provisions of the Code of Criminal Procedure relate to the surveillance of all modern forms of telecommunication. The powers of the independent person responsible for legal protection (*unabhängiger Rechtsschutzbeauftragter*) were extended to include the surveillance of telecommunications by the so-called keepers of professional secrets (lawyers, notaries public, chartered accountants, media entrepreneurs). These provisions entered into force on 1 October 2002.

### **Data protection**

280. Since 1978, data protection has been stipulated by law. However, the Data Protection Directive of the European Union (Directive 95/46/EC), which was adopted in 1995, made it necessary to revise the data-protection provisions. The objective of the directive is to harmonize the data-protection provisions of the States members of the European Union in order to create a uniform level of protection, while at the same time safeguarding the fundamental rights and liberties of individuals. This is the main prerequisite for the free exchange of data within the European Union, which is in turn of fundamental significance when building up and operating the internal market.

281. Directive 95/46/EC was transposed by means of the 2000 Data Protection Act, Federal Law Gazette I No. 165/1999, which entered into force on 1 January 2000. This Act also safeguards the fundamental right to data protection at the level of the Constitution. Paragraph 1 of the Constitution provides, for example, that everybody has the right to have data relating to his/her person kept secret, to the extent that there is an interest in keeping them secret. Such an interest in keeping data secret is absent, though, whenever the data are generally available or not related to any specific person.

282. Restrictions on the right to secrecy are admissible, to the extent that they are issued in order to protect the vital interests of the persons concerned, that they are applied with his/her consent or that they safeguard the overwhelmingly justified interests of another person. The legislator thus provided this basic right expressly with an immediate effect on third parties. Interventions by State agencies may only be allowed on the basis of laws which are necessary for the reasons listed in article 8 (2) of the European Convention on Human Rights, and they must provide adequate guarantees for the protection of the interests of the persons concerned, whenever sensitive data are processed. However, admissible restrictions may only be imposed in the mildest form necessary to achieve the desired goal.



283. The 2000 Data Protection Act recognizes as accompanying basic rights the right of everybody to obtain information about his/her data, the right to rectify incorrect data, as well as to delete data that were processed inadmissibly. The rights of the persons concerned are defined in more detail in articles 26 to 28 of the 2000 Data Protection Act.

284. The system of legal protection against possible violations of the fundamental right to the protection of data is divided between the civil courts and the Data Protection Commission (see article 1 (5) of the 2000 Data Protection Act).

285. Article 4 of the 2000 Data Protection Act contains a comprehensive catalogue of definitions which provides detailed definitions, inter alia, of the terms “sensitive data”, “person concerned”, “commissioning party” and “service provider”, as well as “to use” and/or “to process” data.

286. Essential principles on the use of data are contained in article 6 of the 2000 Data Protection Act. For example, data may only be used in good faith and in a lawful manner. In addition, the clear linkage to a purpose, the principle of materiality, the factual accuracy and topicality of the data, as well as the requirement that data are only kept in a person-related form, as long as this is necessary in order to reach the intended objective, are of fundamental significance for the admissibility of using data.

287. Further criteria under laws adopted with a simple majority for checking on the admissibility of the use of data can be derived from article 7 and following of the 2000 Data Protection Act. In consequence, data may only be processed, to the extent that the purpose and contents of the data application is covered by statutory competences or legal authorizations of the respective commissioning party and do not violate the interests of secrecy, deserving protection, of the persons concerned.

288. Moreover, the 2000 Data Protection Act contains provisions regarding the provision of services (arts. 10 and 11), data secrecy, or the necessary measures for the safety and security of data (art. 15), as well as the obligation to information of the commissioning party. Articles 12 and 13 govern international exchanges of data. In contrast to the general requirement for approval, the data exchange with States members of the European Union, as well as with third States having adequate data protection systems, is not subject to any restrictions.

289. With regard to institutions, the 2000 Data Protection Act contains provisions on the Data Protection Commission, including the Data Processing Register which it maintains and which serves to disclose data processing measures, and on the Data Protection Council. It should be mentioned especially in this connection that the members of the Data Protection Commission are independent and free from instructions when exercising their duties, pursuant to the constitutional provision of article 37 of the 2000 Data Protection Act. Whereas the Data Protection Commission has certain control and legal protection functions against violations of the right to information, secrecy, correction or deletion, the Data Protection Council is an advisory body that advises the federal and the regional governments on issues of legal policy related to data protection.

### **Article 18. Freedom of thought, conscience and religion**

290. Austrian constitutional law has several provisions that relate to the freedom of thought, conscience and religion. For example, according to article 14 of the Basic Law of the State on the General Rights of Citizens of 1867 and article 9 of the European Convention on Human Rights, everybody is guaranteed the full freedom of religion and conscience. According to the first-mentioned constitutional provision “the enjoyment of civil and political rights is independent of the confessed religion; yet, the confessed religion must not prevent a person from performing his/her obligations as a citizen” (for details concerning the residential population according to religions, both in Austria and in Vienna as stated by the National Census 2001, see annex 1a). Whereas in keeping with the aforementioned Basic Law of the State exercising one’s religion at home was ensured for all confessed religions (arts. 15 and 16 of the Basic Law of the State), the public exercise of one’s religion was only guaranteed to the churches and religious groups that were recognized by law (art. 15 of the Basic Law of the State). Article 63 of the State Treaty of Saint-Germain-en-Laye of 10 September 1919 broadened the right to exercise one’s religion in public to all confessed religions in Austria, irrespective of their legal status. As a result, both the religious societies recognized by law and the registered religious communities under the Registered Religious Communities Act, Federal Law Gazette I No. 19/1998 (for details see below), as well as the religious groups not covered by these two laws, are equal in the exercise of the freedom of religion.

291. In Austria, the exercise of the freedom of religion and conscience is therefore independent of whether or not a church or a religious group has been “recognized by law” under the 1874 Recognition Act. For the sake of equality in the freedom of exercising one’s religion, obtained by the State Treaty of Saint-Germain-en-Laye, the independent administration of internal matters - deriving from the principle of parity contained in the canon law - is not only ensured to the religious societies recognized by law but also to religious groups such as the registered religious communities under the Registered Religious Communities Act.

292. Based on the foregoing the Austrian Constitutional Court therefore stated in its decision, file number VfSlg. 10.915/1986, on the lawfulness of the conduct of an authority which had prevented the recognition of a church or a religious group for the public sphere, as defined by article 15 of the Basic Law of the State, that the authority’s conduct did not affect the freedom of religion and conscience guaranteed by article 14 of the Basic Law of the State, nor the freedom of religion protected by article 9 of the European Convention on Human Rights. These freedoms are guaranteed to everybody - in essence the same as the aforementioned freedom to exercise one’s religion in public or in private (arts. 63 and 67 of the State Treaty of Saint-Germain-en-Laye). They do not depend on whether the community in which the religion, the belief or the confessed faith is exercised has the status of a church or a religious society recognized by law (in this context see annex 1b containing a list of religious societies recognized by law in Austria).

### **Registered religious communities under the Registered Religious Communities Act, 1998**

293. The entering into force of the Registered Religious Communities Act (Federal Law Gazette I No. 19/1998) brought a further development for Austrian canon law: religious groups currently have easier access to a special legal personality and they have the right to call

themselves “State-registered religious communities”. When filing the application, evidence must be provided, inter alia, that this community has a minimum membership of 300 persons. Under specific requirements, recognition by law in accordance with the Recognition Act may also be obtained.

294. As a general comment, one should state that the Registered Religious Communities Act does not lay down rules on the exercise of religion, which is already provided for and guaranteed under constitutional law, but governs the granting of a legal personality. Thus, the right to exercise the freedom of religion per se is not affected in any way by these statutory provisions. In particular, the churches and religious societies recognized by law do not enjoy “more” freedom of religion than registered religious communities. They all enjoy the freedom of religion to the same extent.

295. In the past, when recognizing a religious group under the Recognition Act the legal consequences of recognition had to be taken into consideration. As a result, the 1874 Recognition Act was applied with great moderation and care. In public this was often felt to be a discrimination against the “non-recognized” religious groups. The religious groups therefore repeatedly voiced their wish to obtain legal status as religious groups, and to acquire the legal status not merely on the basis of other legal forms (e.g. under the law on associations, or on the basis of the commercial law, as this is the case in several other countries).

296. The Registered Religious Communities Act offered a remedy in this matter, since it ensured a simpler and faster process for acquiring legal status as registered religious communities. A special legal status for religious groups appeared to be appropriate, to take account of the requirement for legal certainty, since certain legal consequences derive from the character of a religious group (church, religious society, religious group or community), which are linked to the principle of the freedom of religion and conscience. When bearing this in mind, the status as a registered religious community may be an important first question in the official proceedings, which may lead to problems, unless clarification is obtained. By introducing a special legal status for religious groups it was possible to avoid such problems.

297. When the Registered Religious Communities Act was drafted in 1998, there were more than 20 applications for recognition pending with the competent authority. This large number of applications was also the result of the “New Religious Movements” in the late 1980s and 1990s. However, after the entry into force of the Registered Religious Communities Act, no more than 11 of the 20 religious groups mentioned above applied for registration under the new act. Nine of these groups finally acquired legal status under the Registered Religious Communities Act, one group withdrew its application for good, and another one withdrew for the time being. No more than one application was rejected. These figures indicate the instability of some of the religious groups (together with a high fluctuation regarding their representatives). In spite of intensive research on the part of the competent authority, the remaining nine religious groups that had originally applied for recognition could no longer be tracked down. In the light of these circumstances, it was certainly quite appropriate to stipulate additional requirements for being recognized under the Recognition Act - and thus for being granted the status of a public law corporation. After all, this is to provide some certainty that a community will continue to exist, especially since the Recognition Act assumes that a religious group has a lasting existence.

298. The requirements of article 11 of the Registered Religious Communities Act, which will be outlined below in detail, should not be seen as isolated conditions that registered religious communities have to fulfil in order to become recognized religious societies. They are consistent with the guiding standards contained in the 1874 Recognition Act that have been applied in order to recognize religious groups (apart from membership figures and the period of monitoring). These requirements are not expressly laid down in the 1874 Recognition Act, but should be seen as criteria that have developed by applying the 1874 Recognition Act. In keeping with the principle of the rule of law, these standards have now been expressly laid down in the Registered Religious Communities Act.

### **The requirement to have existed for a certain period of time**

299. According to article 11 (1), item 1, of the Registered Religious Communities Act, in order to be recognized under the Recognition Act, a registered religious community must have existed for a minimum of 20 years, of which a minimum of 10 years must have been spent as a registered religious community with legal status under the Registered Religious Communities Act.

300. As was explained above, the 1874 Recognition Act takes the continuing existence of a religious group as a basis. The earlier comments in connection with the applications for recognition submitted in 1998 and the number of procedures in which the procedure could not be ended upon any merits, in spite of intensive inquiries by the religious authority regarding the whereabouts of the applicants, also indicate that a religious group does not always have a continuing existence over a longer period of time.

301. The Austrian Constitutional Court already dealt with the provision of article 11 (1), item 1, of the Registered Religious Communities Act (decision with file number VfSlg. 16.102/2001) and did not raise any concerns under constitutional law. Rather, the Court stated that this provision changed the 1874 Recognition Act to the extent that henceforth the followers of a religious group are to be granted recognition as a religious society only if the competent authority is able to monitor the conduct of the religious group in question for a period of 10 years, also with a view to the way in which it succeeds in being integrated into the existing legal order with its teachings and their application. Such a provision, namely that the legal recognition as a religious society depends on a monitoring period, does not give rise to any constitutional law concerns, neither with a view to the requirement of materiality that is inherent in the principle of equality, nor with a view to article 15 of the Basic Law of the State, nor from any other viewpoint.

302. The Constitutional Court, which did not regard a monitoring period of 10 years as being critical, further stated that:

“There is again no ground to object to the fact that the legislator is not only satisfied with merely monitoring the factual conduct of the religious groups, but also bears in mind the possibility of monitoring a community, endowed with a legal personality and subject to certain statutory obligations and the respective legal supervision. In this connection, special reference is made to article 5 (1), item 1, of the Registered Religious Communities Act. According to this provision, the Federal

Minister shall refrain from granting legal status if this appears necessary, with a view to the teachings or their application, for the protection of the interests existing in a democratic society. This is particularly the case when there is incitement to behave in an unlawful manner that carries penal sanctions, when there is interference with the mental development of adolescents, when the mental integrity is injured, or when psychotherapeutic methods are applied, particularly for the purpose of communicating the religion. Once a religious group has acquired legal status, the competent authority must monitor compliance with the requirements, which derives from the fact that the Federal Minister is obliged - subject to the requirements listed in article 9 (2) of the cited law - to suspend the legal status of a registered religious community, and especially in those cases when it does not satisfy, or no longer satisfies the requirements decisive for acquiring legal status, or if it behaves in violation of its charter. The Constitutional Court therefore does not deem it questionable to introduce a 10-year monitoring period, in the course of which a registered religious community is subject to the legal supervision of the competent authorities, with regard to compliance with certain rules of conduct which are uncontested as being in the public interest, especially when seen against the uncontested fact that there are religious groups where one may have doubts that they actually satisfy the requirements of article 5 (1), item 1, of the cited law.”

#### **The requirement of a certain number of members**

303. According to article 11 (1), item 2, of the Registered Religious Communities Act, in order to be recognized under the Recognition Act, a registered religious community has to have a certain number of members, i.e. at least two per thousand of the total population in Austria (according to the most recent census).

304. The number of members of a registered religious community is not only important for its existence, but also to ensure compliance with the tasks that accompany the position of being a church or religious society recognized by law such as, for example, organizing and supervising religious instruction in schools. If the number of members is small, it is often difficult to cope with the consequences of the position as a religious society recognized by law (for example in organizational terms). Experience also shows that a small number of members does not secure the existence in organizational terms.

#### **The requirement of using the income and the property for religious purposes (which also includes non-profit and charitable purposes that are part of the religious purpose)**

305. This requirement was not a new requirement when it was introduced by the Registered Religious Communities Act. It must be read in the light of the relevant provisions of the 1874 Recognition Act reproduced below.

306. Article 5 of the 1874 Recognition Act reads as follows:

“State approval for establishing a religious community is dependent upon the proof that it has sufficient funds, or is in a position to raise them in a lawful manner, in order to secure the necessary facilities for religious services, to maintain proper pastoral care and to provide proper and regular religious instruction. The religious community may not constitute itself as such, before it has been granted the requisite approval.”

307. Article 6, item 6, of the 1874 Recognition Act reads as follows:

“To the extent that the internal structure of religious communities has not yet been regulated by the general constitution of the religious society, it will regulate it by means of statutes which shall comprise the following items: ... 6. the manner in which the funds are raised to meet the economic needs of the community.”

308. The aforementioned provisions therefore show that recognition pursuant to the provisions of the 1874 Recognition Act also required that funds be earmarked for the economic needs of the community.

309. The aforementioned provisions of the 1874 Recognition Act and of article 11 (1), item 3, of the Registered Religious Communities Act must also be seen in the light of justifying the special treatment afforded to churches and religious groups recognized by law. Privileges granted to the churches and religious groups recognized by law, for example, under tax laws and provisions on levies, as compared to other legal entities, can be justified and defended by the requirement that the income and the property be used for religious purposes.

**The requirement of a positive attitude towards the State and society (see article 11 (1), item 4, of the Registered Religious Communities Act)**

310. In line with the historic legislator of the Registered Religious Communities Act, a positive attitude towards the State and society is understood to mean acceptance of a pluralistic State under the rule of law, an affirmation of public order, in the sense of the objectives of the society as a whole. The rejection of distinct rules of law for reasons of conscience is not in contradiction to the foregoing.

311. The requirement of a general agreement with the basic consensus in society and with human rights appears to be justified on account of the fact that the statutory recognition as a church or a religious group entails the position of a legal entity under public law. They obtain a qualified legal status - that of a public law corporation. This concept is used with various meanings and in various contexts. The common characteristic of all legal entities under public law is their public law status and the special definition of their purpose, in the form of ensuring tasks of public interest. Irrespective of their religious activities, churches and religious groups, for example, also take care of tasks in the public interest, such as of a social nature, for society or the cultural policy. The State has always promoted compliance with these tasks (especially by benefits under fiscal law or the provisions on charges), especially since these support society and the common weal - for example in the fields of the preservation of monuments, education, training, nursing care for the sick and the elderly, social welfare, assistance to refugees or development aid.

312. In addition, the churches and religious societies recognized by law must provide for religious instruction. This comprises the drafting of curricula, as well as the responsibility for designing textbooks. According to article 2 (3) of the law on religious instruction, only textbooks and teaching aids may be used for religious instruction at public schools and schools with public teaching status that are not in contradiction to civic education. When designing textbooks and teaching aids, the recognized religious societies are afforded a special measure of confidence, since their textbooks and the teaching aids used for religious instruction do not require State approval.

313. It therefore seems to be justified and not discriminatory to demand a basically positive attitude towards the State and society. Otherwise, the envisaged public law status and the accompanying readiness to handle public tasks could not be reconciled.

**The requirement that there be no interferences, contrary to the law, in the relationship to existing churches and religious groups recognized by law, as well as other religious communities (see article 11 (1), item 5, of the Registered Religious Communities Act)**

314. Especially from the viewpoint of ensuring the plurality of religions and ideologies, the State must make sure that there is religious peace, in order to ensure a climate of tolerance in society, so that the individual person can be guaranteed an undisturbed exercise of his/her religion. The European Court of Human Rights, for example, also recognized the general obligation and responsibility of the State in connection with the protection of this freedom to ensure the peaceful exercise of the rights guaranteed by article 9 of the European Convention on Human Rights (see, for example, the decision of 20 September 1994, *Otto Preminger Institut v. Austria*, Application 13470/87, item 47; 25 November 1996, *Wingrove v. United Kingdom*, Application 17419/90, item 48). Article 11 (1), item 5, of the Registered Religious Communities Act expresses this interest in maintaining religious peace. However, the cited provision does not stipulate an autonomous element of offending religious peace but rather relies on provisions contained in other laws for the protection of a peaceful coexistence of religious societies.

**Regarding Concern No. 14 - Benefits accorded to recognized religions**

315. The so-called “benefits” for churches and religious groups recognized by law are not privileges that the State affords arbitrarily to these institutions; rather, these are “non-applied fiscal measures” justified by facts in connection with fiscal regulations and imposed charges. The meaning and purpose of this regulation contained in the Austrian legal system is to ensure to the churches and religious societies recognized by law, which accept “public tasks” in a way that relieves the State, are ensured financial resources in this manner - resources that are required to comply with these tasks. “Public tasks” include activities which - centuries before the social welfare State and a performance-oriented society - were traditionally provided by the churches. This special treatment afforded by the State is all the more justified at a time in which the State is reaching the limits of financing all the social benefits and social tasks that citizens claim from the State, and which the State “outsources” to non-governmental organizations, which also include the church. One example is the care for the elderly, or the assistance given by Caritas or Diakonie to asylum-seekers.

316. In this connection, a passage from the literature should be quoted:

“Although fiscal law distinguishes between the church purposes and charitable, as well as non-profit purposes, one must - of course - bear in mind that - in term of legal policy - the benefits afforded to church purposes can hardly be separated from those afforded to charitable or non-profit purposes. From the viewpoint of social history, practically all charitable and non-profit activities originated with the churches. They were the *piae causae* in European legal history, which - with their purpose and intention - were also at the basis of the European laws on foundations and trusts. Church institutions thus became the prototypes of that sector of voluntary services and non-profit activities,

in which citizens fulfil important functions in society, outside State institutions or the market. For many social-charitable activities, church organizations or organizations close to the churches are currently also the biggest providers within the non-profit sector.” (See *Kalb/Potz/Schinkele*: “Religionsrecht” (Law of Religious Organizations), pp. 426 and 427.)

### **Article 19. Right to freedom of opinion**

317. With the adoption of a regional radio law in 1993, private terrestrial broadcasting became possible for the first time. In 1995, the first holders of broadcasting licences took up their operations. After an amendment in 1997, 8 private radio stations and 43 local radio stations, including also the so-called free, non-commercial radio stations, as well as 2 radio stations for the ethnic minorities in Carinthia and Burgenland, were able to start broadcasting.

318. The Private Radio Act, Federal Law Gazette I No. 20/2001, which was adopted in 2001, then provided for comprehensive new regulations of private broadcasting in Austria. At the same time, the Austrian Telecommunications Act, Federal Law Gazette I No. 32/2001, came into force, which created a uniform regulatory agency responsible both for granting licences and for managing the broadcasting frequencies. As at March 2005, there were 55 terrestrial private broadcasting stations, as well as 3 purely cable and 2 satellite radio broadcasting stations in Austria, in addition to the ORF programmes (3 nationwide and 9 regional programmes).

319. As far as television is concerned, there was first the possibility in Austria, by way of cable networks, to organize private television broadcasting. Existing restrictions, which first admitted only the unchanged and complete further transmission of radio broadcasts, were qualified by the Constitutional Court (decision of 27 September 1996, file number VfSlg. 14356/1995) as being a disproportionate interference with the freedom of licensing radio broadcasting pursuant to article 10 (1) of the European Convention on Human Rights. In the light of this decision, the Cable and Satellite Television Broadcasting Act, Federal Law Gazette No. 42/1997, was adopted, which has since provided the statutory basis for organizing radio broadcasting via cable systems and satellite.

320. In 2001 the Private Television Act, Federal Law Gazette No. 84/2000, entered into force. This Act contains uniform regulations for organizing private (also terrestrial) television, and thus replaced the Cable and Satellite Television Broadcasting Act. The result was a comprehensive liberalization of the broadcasting services in Austria. As at March 2005, there was one nationwide private terrestrial television broadcasting organizer (ATV), in addition to two terrestrial public law programmes, and there are also seven further local or regional terrestrial private television organizers. In addition, there are 14 satellite and 48 cable television broadcasting organizers with local operations which the supervisory agency has licensed.

### **Article 20. War propaganda and incitement to hatred**

#### **Regarding Concern No. 20 - Information about the application and effect of Section 283 of the Penal Code**

321. Article 283 of the Criminal Law Code states that a maximum prison term of two years for incitement to hatred shall be imposed on those who publicly - and in a manner that is likely to



jeopardize public order - call for or incite people to hostile activities against a church or a religious group existing in Austria, or against a specific group determined by affiliation to such a church or religious group, to a race or a nation, to an ethnic group or a State (para. 1), or who publicly advocate hatred of the groups defined in paragraph 1, or who abuse them by using offensive language, or who try to ridicule them in a manner violating human dignity.

322. Article 283 of the Criminal Law Code penalizes expressions of incitement to hatred which, as experience has shown, are especially dangerous, such as incitement to religious or racial hatred, as well as to national or church hatred. Intent is required with regard to the internal side of the act. Conditional intent (*dolus eventualis*) is sufficient.

323. The objects deserving protection are churches or religious groups existing in Austria, or a specific group of persons defined by their affiliation to a church or a religious group existing in Austria, to a race, a nation, an ethnic group or a State. The group of persons protected in this context comprises groups that have certain common “features”. Insulting individual persons of specific characteristics is punishable under articles 115 and 117 of the Criminal Law Code (see below).

324. A person violates this provision, when his/her action is likely to jeopardize public order, calls for or stirs a hostile activity against the objects of the act, or when people publicly agitate against them, or use offensive language in disrespect of their human dignity, or try to make them contemptible. Not only hostile acts are punishable; punishable acts also include every act that is directed in an emotional manner against the members of an opposing group, such as by way of a commercial or social boycott.

325. Human dignity is considered to have been injured whenever an act denies the attacked group the right to be treated as human beings altogether. This is the case whenever the members of the group in question are challenged to have the right to live the life of citizens having the same value, or whenever they are presented as being inferior or valueless elements of the entire population, or whenever they are subjected to another type of inhuman or degrading treatment.

326. Incitement to hatred is understood to be agitation, comprising an appeal to emotions and passions, in the direction of hatred and contempt. Merely derogatory comments or insults are not sufficient. Using offensive language refers to an expression of disregard that is particularly insulting in form or contents. Contempt is expressed whenever a person presents another person as being without value or dignity.

327. According to internal counts, charges or an indictment pursuant to article 283 (1) of the Criminal Law Code were brought against three persons in the time between early 1993 and the end of September 2003. During that period, two persons were convicted with final and absolute effect on the basis of the charges. In one case the matter was adjudicated by means of a non-penal settlement (“diversion”). The incidents in question are as follows:

- Attempts to instigate violent riots against foreign visitors of a national soccer game by National Socialist and xenophobic slogans;
- Public appeals on the Internet for the reopening of concentration camps and gas chambers for the destruction of Jews by gas;

- Boisterous appeals by an itinerant merchant (selling, inter alia, military insignia) on a public market to lead a final attack of destruction against Muslims.

328. During the same period 93 persons were indicted - partly solely, partly in connection with other offences - under article 283 (2) of the Criminal Law Code. A total of 56 persons were convicted with final and absolute effect; 14 were acquitted with the same final and absolute effect. The case concerning one person was discontinued with final and absolute effect upon decision by the review chamber. Proceedings against seven juveniles were ended with final and absolute effect within the framework of a non-penal settlement (“diversion”).

329. According to internal counts, charges were brought against 14 persons (of these 3 juveniles and 5 young adults) in 2004. To the extent known so far, there were 14 convictions with final and absolute effect, and 4 acquittals with final and absolute effect.

330. Examples of cases falling under article 283 (2) of the Criminal Law Code include the use of offensive language in public against foreigners or Jews, such as “Scheiß Türken” (You shit Turks), “Hitler hätte Euch vergast” (Hitler would have sent you to the gas chambers), “Saujuden” (Jewish pig), “Scheißjuden” (Shit Jews), “Juden raus” (Off with Jews), as well as the public playing of songs with a stirring content; partly also connected with conduct that complies with the facts constituting an offence pursuant to article 3g of the constitutional law on the ban of NSDAP (swastika graffiti, “German Greeting” and NS slogans), if the presence of a subjective act (the intent to become active in a National Socialist sense) can be proven.

331. The Federal Office for the Protection of the Constitution and Combating Terrorism is taking increasing measures against extreme right-wing skinhead events, especially against skinhead concerts, as these serve as essential factors in paving the way and acting as catalysts for extreme right-wing, xenophobic and racist thoughts. Among other things, a “folder to raise awareness” (*Sensibilisierungsfolder*) was distributed in May 2005 which is directed both at potential rental firms of premises for extreme right-wing skinhead events and/or concerts, as well as at the administrative bodies. It is meant to draw the attention of rental firms and administrative agencies of events to the problems of skinhead events, motivating them to cooperate with the law-enforcement agencies.

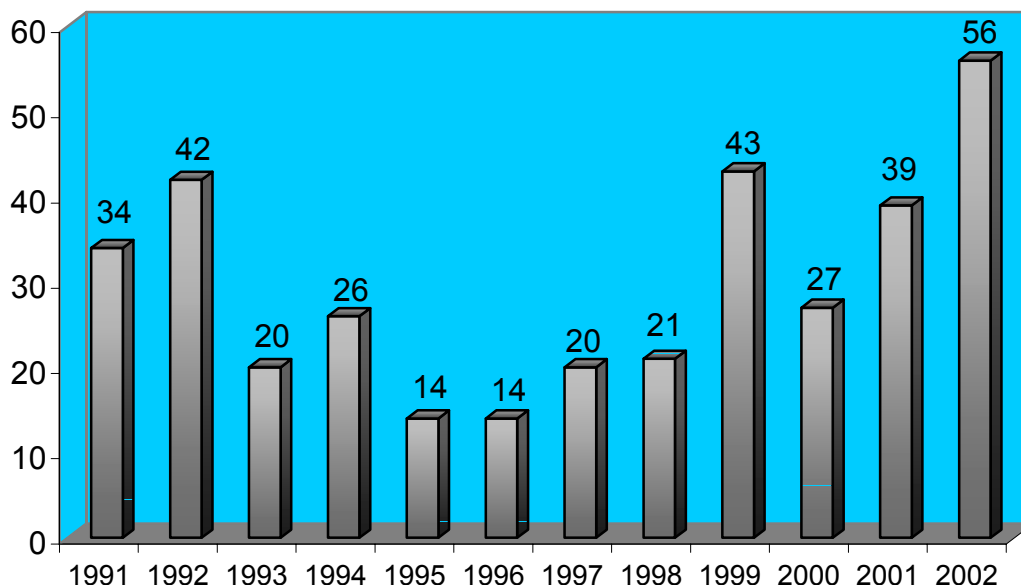
332. Special attention continues to be paid to raising awareness among young people at schools. The law-enforcement agencies have been instructed to get into contact with the responsible persons at schools (teachers, principals, regional school inspectors, etc.) at least once every semester and to support them in their efforts to combat racist, xenophobic and anti-Semitic ideologies.

333. In the course of their basic and further training Austrian law-enforcement officers are particularly alerted to and trained for the aforementioned phenomena.

334. A chart showing the number of reports submitted to the police pursuant to article 283 of the Criminal Law Code that were forwarded to the judicial authorities during the period 1991-2002 is reproduced below as additional information about the activities of the law-enforcement agencies.

**Reports submitted to the police pursuant to article 283  
of the Criminal Law Code, 1991-2002**

**Anzeigen nach dem § 283 StGB, Jahresvergleich 1991-2002**



335. During the first quarter of 2005, four acts each with xenophobic and anti-Semitic motivation, as well as five offences under article 283 of the Criminal Law Code were reported to the police.

336. Other provisions of the Criminal Law Code of relevance in this connection include article 321 on genocide which reads as follows:

- (1) Anyone who, with the intention of destroying all or part of a specific group defined by its affiliation to a church or religious group, a race, a nation, an ethnic group or a State, kills members of that group, causes them serious physical (art. 84 (1)) or mental damage, subjects the group to living conditions that are likely to bring about the death of all or part of the members of the group, imposes measures that are directed at preventing births within the group, or transfers children of the group by violence or threat of violence to another group shall be punished by life imprisonment.
- (2) Anyone who conspires with another person to jointly execute the punishable acts defined in paragraph 1 above shall be punished by a prison term of between 1 and 10 years.

337. The right of all nations to existence and life, as well as of the groups designated in the Convention on the Prevention and Punishment of Genocide of 9 December 1948 (Federal Law Gazette No. 1958/91) is protected. It is therefore not the killing or harming of individual persons, which is the primary consideration, but rather the destruction of protected groups

(which may be of a national, ethnic, racial or religious type). Protection is also afforded to the churches and religious groups that do not exist in Austria. According to article 321 groups of a political or economic nature are not protected.

338. Article 282 of the Criminal Law Code reads as follows:

- (1) Anyone who incites others to commit punishable acts, by means of a printed publication, on the radio or in any other manner that is accessible to a broad public, shall be punished to a maximum prison term of two years, unless he/she is likely to be punished with a more severe punishment as an accessory to such acts (art. 12).
- (2) Those shall also be punished who approve of an act as defined in paragraph 1, committed with intent and sanctioned with a prison term in excess of one year that is likely to upset the general sense of justice or to provoke the commission of such acts.

339. Article 320 of the Criminal Law Code (Prohibited Support to Parties in Armed Conflicts) reads as follows:

- (1) Anyone who, in Austria, knowingly provides equipment or weapons to one of the warring parties, during a war or an armed conflict in which the Republic of Austria is not involved, or upon an imminent risk of such a war or conflict, so that a military formation or a water, land or air vessel of one of the parties is prepared for participation in a war campaign, who sets up or maintains a unit of volunteers or an advertising body for it or for the armed service of one of these parties, who exports from Austria or transits through Austria combat means, contrary to existing provisions, who grants financial loans for military purposes or organizes a public gathering or communicates military intelligence without authorization, or who sets up or uses a telecommunication facility for this purpose shall be punished with a prison term of six months to five years.
- (2) Paragraph 1 shall not apply in cases in which a decision of the Security Council of the United Nations, a decision under Title V of the Treaty on European Union, a decision in the framework of the Organization for Security and Cooperation in Europe, or another peacekeeping operation conducted in keeping with the principles of the Charter of the United Nations such as, for example, measures to avert a humanitarian disaster or to prevent serious and systematic human rights violations, is implemented in the framework of an international organization.

### **Law Prohibiting National Socialist Activities**

340. Pursuant to the law with constitutional status of 8 May 1945 regarding the prohibition of NSDAP (1947 Law Prohibiting National Socialist Activities) everyone is banned from engaging in National Socialist activities, with a prison term being the sanction otherwise.

341. Below are the reports submitted to the police pursuant to the Law Prohibiting National Socialist Activities.

	Number of reports	Indictments	Convictions	Acquittals
1999	413	45	25	2
2000	604	14	32	4
2001	554	40	24	3
2002	618	25	20	2
2003	765	37	31	3

342. In 2004 charges were brought against 24 persons (of these 6 juveniles and 4 young adults). To date, the public prosecutors' offices have reported 29 convictions with final and absolute effect, as well as 7 acquittals with final and absolute effect.

343. Article 33 of the Criminal Law Code contains a non-exhaustive list of especially aggravating reasons, i.e. reasons that must particularly be taken into consideration when fixing the punishment. According to article 33, item 5, of the Criminal Law Code it is considered as an aggravating circumstance if the perpetrator "has acted out of racist, xenophobic or other particularly despicable motives".

344. According to article 115 of the Criminal Law Code, which defines a private criminal act, an insult may carry a prison term of up to three months or a fine of up to 180 daily rates, if a person uses offensive language, insults, physically maltreats or threatens to physically maltreat another person in public or in the presence of several persons.

345. However, according to article 117 (3) of the Criminal Law Code it is an offence which the public prosecutor is authorized, with the permission of the injured person, to prosecute ex officio, if the insult is directed against the injured person on account of his/her belonging to one of the groups listed in article 283 (1) of the Criminal Law Code and consists either in a maltreatment or a threat of a maltreatment, or in abusive language or ridicule injuring human dignity.

#### **Article 21. Right of assembly**

346. The right of assembly is guaranteed under constitutional law. The Assembly Act contains more detailed provisions regarding this right.

347. According to the case law of the Constitutional Court an assembly is defined as a gathering of several persons which is organized with the intention of bringing the persons present to act jointly (debate, discussion and manifestation) so that there is a certain association of the persons assembled. An assembly is thus the gathering of persons (also in the streets) for the common purpose of discussing opinions or announcing opinions to others. The merely accidental meeting of persons is not an assembly. The Constitutional Court decides whether a gathering is an assembly "by the purpose and the elements of the outer appearance (which includes the detailed modalities, the duration and the number of participants in the event)". When clarifying this issue, the decisive factor is the noticeable, planned event, and not perhaps whether the organizer formally reported the intended gathering as an assembly to the authorities.

348. The freedom to make arrangements for an assembly is one component of the right to assemble, just as the choice of location, time and purpose.

349. In implementation of the fundamental right of assembly, the Assembly Act specifies the conditions of the right of assembly by detailing those requirements which must apply to the exercise of this freedom. The following assemblies are exempt from the provisions of the Assembly Act, but not from the right of assembly and their protection under constitutional law:

- Assemblies that are restricted to invited guests, irrespective of whether they take place outdoors or indoors;
- Public entertainments, wedding processions, folklore festivals or processions, funeral processions, pilgrimages and other events or processions to exercise a cult that is permitted by law, if they are held in the traditional form;
- Gatherings of voters to discuss elections, as well as discussions with the elected office holders, if they take place at the time of proclaimed elections and not outdoors.

350. The organizer of an assembly may be any physical or legal entity with the capacity to act. Several persons may also appear jointly as organizers. Foreigners may be neither organizers nor ushers nor leaders of assemblies if the assembly is intended to debate public matters.

351. If a person wishes to organize a generally accessible assembly he/she must report this in writing to the responsible authority (district administrative authority and/or federal police authority) at least 24 hours in advance of the event, indicating the purpose, the place and the time. If the assembly is to take place on a public traffic area (street), another notice must be filed, three days in advance, with the traffic police authorities.

352. Already before the assembly is held, the authority may forbid it for the reasons outlined below.

#### **Assemblies forbidden for non-compliance with criminal law**

353. Assemblies, the purpose of which is contrary to criminal law, must be forbidden by the authorities. The purpose can be understood from the notice submitted in connection with the assembly. The concept “criminal law” comprises both judicial criminal law and administrative criminal law. For example, assemblies may be forbidden if their purpose is “to cause noise for the sake of noise”, in other words “causing noise” or disturbance of the peace, as defined in the respective statutory provisions (of the federal provinces). Further examples for forbidding assemblies for being contrary to criminal law are assemblies in opposition to assemblies, the purpose of which is to disturb another assembly, as well as assemblies for the purpose of disseminating National Socialist thoughts or neo-Nazi arguments. Individual provisions of the Assembly Act also come under this heading. For this reason, assemblies must be forbidden in which participants are all or overwhelmingly masked or in which “arms are carried”.

354. Certain modes of conduct, which as such correlate with the facts of a criminal provision, must be tolerated with a view to the fundamental right of the freedom to assemble, unless the interests of the general public predominate, when weighing them against the interests of the right to assemble.

### **Assemblies forbidden for jeopardizing public security or the public weal**

355. At first sight, these requirements for forbidding an assembly appear to provide the authorities with a wide scope of action. However, the case law of the Constitutional Court has reduced this scope considerably by demanding that an assembly may only be forbidden in the presence of such circumstances that can be put into objective terms and provide sufficient reasons to assume such a risk. The mere assumption or fear that circumstances may arise that will jeopardize public security or the public weal, without there being substantiated facts in this respect, is not enough to forbid an assembly. Especially street assemblies and the associated obstruction to traffic are an issue which helps only in a specific case to assess whether an assembly should be permitted or forbidden. It is obvious that a street blockade, for which a detour is difficult to find, on account of the local conditions, must be evaluated differently from a street blockade for which a detour can be provided easily. For example, the Constitutional Court arrived at the conclusion that it was not admissible to forbid a demonstration procession, which was to take place in the city centre, already burdened by traffic, on a day on which a weekly market was also being held, so that an above-average traffic volume could be expected, because the authority would still have been in a position to reduce the relatively short-lived obstruction of traffic, caused by the assembly, to a still acceptable level by taking the appropriate measures. However, the Constitutional Court considered that forbidding assemblies which served the purpose of propagating National Socialist thoughts was admissible, because such activities were a risk to the public weal, on account of being contrary to the law, and constituted a risk to the State.

356. A special problem arises if several demonstrations are being announced in opposition to a demonstration. In one case, in which protest actions had been threatened against a generally accessible assembly, organized by an association, as a result of which the assembly was forbidden, the Constitutional Court held this to be a violation of the right of assembly and gave the following reasons (file number VfSlg. 6095): “It is not in the hands of third persons or other organizations to impair, by protest actions of all kinds, the fundamental right to assemble freely, against an association which they dislike, but which exists lawfully. This also includes a situation in which the protest action might have led to disturbing the peace. If, after all, protest actions suffice to make it appear appropriate to forbid an assembly, without there being specific reasons for forbidding it, this would be the end of the rights, guaranteed under constitutional law, to hold assemblies, possibly also of other fundamental rights and basic freedoms. Specific findings regarding facts and evidence may not be replaced by any protest action. The threats implied in protests (demonstrations, self-help) are even less a reason to forbid an assembly.”

357. The case law is based on the assumption that a mode of conduct that, as such, is contrary to the law is permitted (exceptionally) under the rule of law if it is indispensable in order to hold the assembly in the planned way. However, the public interest in complying with the relevant provisions must not rank higher than the interest of the organizer in holding the assembly.

### **Assemblies forbidden for violation of the Assembly Act**

358. If an assembly is organized in violation of the provisions of the Assembly Act, the authorities shall forbid and, if necessary, dissolve it. An assembly is to be dissolved if, in the

course of the assembly, unlawful processes take place, or if the assembly assumes a character that threatens public order. As soon as an assembly has been declared dissolved, all participants are obliged to leave immediately the venue of the assembly and to disperse.

359. In this connection, reference is made to the case law of the Constitutional Court which emphasizes that one of the most essential elements of the right of assembly is the right that an assembly is not dissolved against the will of its organizers. For an authority to dissolve an assembly, therefore, requires a sufficient reason. The Constitutional Court is of the opinion that, for example, the mere neglect to file a notice regarding the assembly should not lead to it being dissolved. In this connection it refers to article 11 (2) of the European Convention on Human Rights. The circumstances that must also apply, in addition to violating the reporting obligation, in order to justify the dissolution of an assembly must be of such a nature, in the opinion of the Constitutional Court, that one of the protected goods listed in article 11 (2) of the European Convention on Human Rights would be jeopardized.

360. It is an acknowledged fact that the right to assemble freely also includes the positive obligation of the State to protect assemblies. This does not only apply to generally accessible assemblies, but also to assemblies restricted to invited guests. Although the obligation of the State to protect assemblies has been unchallenged to date, the decision of the European Court of Human Rights in the case of the platform “*Physicians for Life*” (*Ärzte für das Leben*) v. *Austria* (see decision of the European Court of Human Rights A-139) is of major significance in this connection. Ever since it has been completely uncontested that, in the case of demonstrations, there is a title to State protection against opposing demonstrations, in order to secure the effective application of the right to demonstrate. It is the State’s obligation to take reasonable and suitable measures in order to ensure the peaceful course of permitted demonstrations.

361. As far as the means to protect assemblies are concerned, the State does have a wide scope of discretion; however, the means applied must be commensurate with the perceived threat. In the case law of the Constitutional Court this means that the State agents are not only authorized but actually obliged to take the measures necessary to protect permitted assemblies. The Austrian legal system provides the enforcing agencies with many different arrangements for the protection of assemblies. For example, according to articles 284 and 285 of the Criminal Law Code, breaking up or preventing an assembly, or qualified forms of disturbing an assembly, are punishable acts.

362. The Assembly Act and also the Security Police Act contain provisions which allow the protection of demonstrations. The Constitutional Court has established that there are statutory provisions which justify police interventions, in order to ensure the protection of assemblies. With regard to police interventions, the Constitutional Court established the following principles in its decision of 12 October 1990, file number VfSlg. 12501:

“This, however, only within certain limits which can first be found in that the measures to reach the goal, i.e. to ensure the undisturbed course of an assembly, must be suitable and adequate and must not go beyond that goal. The police measures to be taken to safeguard this protection obligation of the authorities must also be in a practical correlation to those fundamental rights (such as the right to freedom of expression or the right to property), with which there is interference; the measures must be of such a nature that they cause the smallest possible interference with other fundamental rights.”



“An assembly must therefore be protected by all those means that result - upon objective inspection - in an adequate balance between the interests to be safeguarded, which often diverge. Such interests are primarily those of the organizer and the participants in the assembly, who are close to him, those of the groups that want to pursue, in or in connection with the assembly, goals other than those at which the organizer aims, and those of the general public, which is to be affected as little as possible by the assembly. Moreover, it must also be taken into account which means of intervention are at the disposal of the authority, and which measures can be expected from it. It results from the principle of proportionality, which must be observed, that, on the one hand, it depends on the specific nature of the assembly or event requiring protection and, on the other, on the type of disturbance that is expected or has already occurred. These two aspects must be weighed against one another. For example, expression of opinions at political discussion events, which are contrary to the views of the organizer, will have to be judged completely differently with regard to their contents and form than, for example, at a festive ceremony or at a procession, which is an event of a religious character, which are also afforded the additional protection of articles 14 and 15 of the State Basic Law and of article 9 of the European Convention on Human Rights.”

363. The Constitutional Court has stated that the competent authority is only authorized to forbid an assembly, also there is a reason for forbidding it, if the prohibition is necessary in the specific case for one of the reasons listed in article 11 of the European Convention on Human Rights (“interests of national and public security, maintenance of public order and prevention of crime, protection of the health and morals or protection of the rights and freedoms of others”) (“necessity test”). When thinking of forbidding an assembly, the authority must take into consideration the interests of the organizer in holding the assembly in the planned form, and weigh them against the public interests, listed in article 11 (2) of the European Convention on Human Rights, in forbidding the assembly. The authority must, in particular, weigh whether the inconvenience caused to unconcerned persons on account of the assembly (for example, blocking road traffic, causing noise) is to be accepted by the general public in the interest of the freedom to assemble or not.

364. In any event, the dissolution of an assembly must also be necessary for one of the reasons listed in article 11 (2) of the European Convention on Human Rights.

## **Article 23. Marriage and family**

### **Right to the use of a name**

365. With another change in the right to the use of a name in 1995 (art. 93 of the General Civil Law Code, Federal Law Gazette No. 25/1995, in force since 1 May 1995), the options for choosing a name upon marriage have been expanded. The current legal situation, which applies to marriages contracted after 1 May 1995, is described in the following paragraphs.

366. According to article 93 of the General Civil Law Code in the version of Federal Law Gazette No. 25/1995, future spouses now have several possibilities to choose a surname, as well as the surname of their children.

367. Before or at the wedding the engaged couple can decide to use the “previous surname” of the bridegroom” or the “previous surname” of the bride, as their joint surname. In the absence of such a decision, the “previous surname of the bridegroom” becomes the joint surname. The spouse who has to use the “previous surname” of the other spouse, as the joint surname, can make a statement to the civil registrar or at the wedding to the effect that the previous name will either be put before or after the joint surname. A hyphen is put between the two names. It is mandatory to use this double surname (“mandatory double name”).

368. Every betrothed can also declare to the civil registrar before or at the wedding that he/she wishes to continue using his/her “previous surname”, which up to 30 April 2007 may also be the “alternative double name” acquired at an earlier marriage, in accordance with article 72a and e of the Civil Status Act. However, whenever such an “alternative double name” from an earlier marriage continues to be used upon a person’s statement, article 72a of the Civil Status Act requires that the double name used be noted in the marriage register (arts. 13 (1) and 25 of the Civil Status Act). With the entry in the marriage register, the use of the earlier “alternative double name” becomes mandatory.

369. If the parents use a joint surname, the child will be given that name. When different names are used by the spouses, the betrothed must determine before or at the wedding the surname of children born in the course of that marriage. It may either be the “previous surname” of the father, or the “previous surname” of the mother. However, if the betrothed do not indicate a name, the child will be given the “previous surname” of the father. Double names cannot be transferred to a child.

370. Every illegitimate child born prior to 1 May 1995 is given the maiden name of the mother. However, every illegitimate child born after that date is given the surname that the mother chooses at the time of birth. This surname need not be the maiden name of the mother. If the mother has a double name, this may not be transferred to the child, though.

371. The surname of the established father, or of the spouse of the mother, may be given to the child if the district administrative authority grants the change of name.

372. Since 1 May 1995 persons whose marriage has been dissolved may state, in a public or in an officially certified document, to the civil registrar that they wish to resume the use of an earlier surname (which may be any earlier surname), according to article 93a of the General Civil Law Code, in the version of Federal Law Gazette No. 25/1995. However, the surname that is derived from an earlier spouse from a divorced or dissolved marriage may only be taken on again, if there are children from that earlier marriage.

373. Under Austrian matrimonial law there are no inequalities between the spouses regarding the legal effects of the marriage upon their respective persons. The relevant provisions take a partnership-like relation of the married couple as a basis, which is laid down in the basic provisions of article 89 of the General Civil Law Code: “The personal rights and obligations of spouses in their mutual relations are the same, unless the present chapter stipulates otherwise.” In article 91 (1) of the General Civil Law Code, which was given a new wording in the course of amending the matrimonial law in 1999, this equality of the spouses in their mutual relation is defined in more concrete terms.

374. Article 91 (1) reads: “The spouses shall design their respective contribution on a consensual basis, regarding their consortium, especially the maintenance of the household, the gainful activities, the mutual services and support and the care, giving due consideration to each other and to the well-being of the children, with the goal of achieving a complete balance.”

375. The central concern of this provision is to provide that there must be a fair sharing of all burdens connected with conducting the conjugal life. In this connection, the various spheres of life are listed, at first, by way of illustration, as they may typically appear in a conjugal community. The spheres of life that were listed in the earlier version of article 91 of the General Civil Law Code, i.e. maintaining a household and carrying on gainful activities, were now extended to also include the provision of assistance and care for the children.

376. For both men and women the marriageable age is 18 years. If the betrothed have not yet come of age (i.e. are younger than 18 years), they need the consent of their legal custodian or the person responsible for their education, or a court decision that will replace the missing consent. Upon application, the court has to declare a person who has reached the age of 16 years to be of marriageable age, if the future spouse is of age and if that person appears to be mature enough to get married.

377. Blood relations in straight lineage (mother and son - father and daughter - grandmother and grandson - grandfather and granddaughter) and major and minor siblings cannot get married; such a marriage would be null and void. A person who is married cannot get married a second time, before the earlier marriage has been dissolved. The civil registrar must therefore check before every wedding whether one of the betrothed is (still) married.

#### **Article 24. Children**

378. In this connection, reference is made to the second periodic report of Austria submitted in June 2002 pursuant to article 44 (1) (b) of the Convention on the Rights of the Child, which the Committee on the Rights of the Child considered in January 2005. In the course of amending the criminal law in 2004, the necessary modifications were made in the field of child pornography (art. 207a of the Criminal Law Code) to bring Austrian legislation in line with the international instruments ratified by Austria. In that context there was need for modification especially with regard to the age group of minors of full age (i.e. those who have reached the age of 14, but not yet the age of 18 years), as well as with regard to the penal sanction for possession (art. 5 (1)) and certain qualifying circumstances (art. 5 (2)) - with a view to meeting the further requirements of the framework decision.

379. In addition, the criminal law protection against abuses within the family was enhanced by including in the relevant provisions (art. 212 (1)) also the sexual abuse of a minor by a person related in ascending line. Apart from the biological parents, prior to the reform the provision did not cover relatives in ascending line in the group of possible perpetrators, i.e. persons exploiting their position with regard to the education, training or supervision of the minor.

380. In connection with the prostitution of minors and/or the participation of minors in pornographic presentations, the Draft Framework Decision of the Council on combating the sexual exploitation of children and child pornography (most recent paper Doc. 12418/02

DROIPEN 68 MIGR 92) sees a need to penalize recruitment (“recruiting into”; art. 2 (b), the making of a profit from others (“profiting from”) and other forms of exploitation (“or otherwise exploiting”; art. 2 (a)). According to article 5 (1) the member States shall impose certain minimum or maximum penalties for these acts, as well as correspondingly higher penalties under certain qualifying circumstances (art. 5 (2) (b) and (c)).

381. According to article 3 (1) (b) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, the offering, procuring, negotiating and providing of a child for the purpose of child prostitution, as defined by article 2 (b), should also be penalized. On the basis of this requirement it was appropriate to stipulate a new set of criminal acts for the protection of minors against sexual abuse immediately following upon article 215, which would address the aforementioned aspects of promoting and profiting from prostitution and pornographic presentations.

### **National Action Plan**

382. At the special session of the United Nations General Assembly on children, the “World Summit for Children” held in New York from 8 to 10 May 2002, the Member States committed themselves to implementing the rights of the child, as defined in the Convention on the Rights of the Child, and to draw up national action plans. The Council of Ministers, therefore, decided on 11 March 2003 that the Federal Government should entrust the Federal Ministry for Social Security, Generations and Consumer Protection with drawing up a National Action Plan on the Rights of Children and Juveniles. All institutional levels - the federal government, the municipalities, the social partners, NGOs, children and juveniles - cooperated in the preparation of the National Action Plan. No criteria or requirements were linked to participation in order to ensure the broadest possible participation of all interested parties and thus a high level of personal commitment.

383. Up to the end of 2003 four parallel approaches were pursued under the title “YAP - Young Rights Action Plan” in order to determine which topics are regarded as important for the future policy on the rights of the child. These are as follows:

(a) The objectives and the substance of a future policy on the rights of the child were drawn up in four working groups with interdisciplinary membership. These are guided by the four principles of the Convention on the Rights of the Child. The topics covered by the four working groups were: basic objectives of the policy regarding children and juveniles; participation of children and juveniles; the right of the child to basic care; the right of the child to protection against abuse, violence and exploitation;

(b) Setting up a database on measures, accessible via the Internet ([www.yap.at/bmsg.mdb](http://www.yap.at/bmsg.mdb)), served mainly to facilitate cooperation and coordination of the typical cross-sectional topics of policies regarding the rights of children, as well as to ensure effective implementation of the envisaged measures by providing definition criteria;

(c) Participation of children/juveniles: in forms of participation suitable for children, children of all age groups expressed their views on a future policy regarding their rights. In this connection, the Federal Ministry for Social Security, Generations and Consumer Protection called upon all organizations dealing with the rights of the child and included in the National

Coalition to submit projects for the participation of children and juveniles. The Federal Ministry commissioned a great many different activities, which were implemented and successfully completed with the votes of 25,000 children. A delegation of children and juveniles handed the ideas on a policy regarding the rights of the child to representatives of the Federal Government and the National Council;

- (d) Public relations and information about the rights of the child consisted of the following:
- (i) The Internet platform [www.yap.at](http://www.yap.at) was set up as an information portal. In addition to information material on the Convention on the Rights of the Child, on the World Summit for Children and on the National Action Plan, the site contains many important links and documents which can be downloaded, as well as a discussion forum with important subjects relating to the rights of the child;
  - (ii) Web forums: in addition to the Internet portal ([www.yap.at](http://www.yap.at)), set up specifically for the National Action Plan, the already existing websites have made it possible for children to participate in the effort;
  - (iii) The information brochure entitled “The Rights of Children and Juveniles” (*Die Rechte von Kindern und Jugendlichen*), published by the Federal Ministry of Social Security, Generations and Consumer Protection, informs pupils as of the 5th grade about the rights of children and invites them to send in their thoughts about a future policy regarding children and juveniles;
  - (iv) The booklet of postcards called “Children have Rights” (*Kinder haben Rechte*) served to reach primary-school children;
  - (v) Information about the NAP process was placed in journals sent to children and juveniles, but also in the media for regional and municipal politicians, inviting readers to participate;
  - (vi) Podium discussions on the topic of “Listening to Children” (*Kindern zuhören*) throughout Austria: Experts discussed the need of listening to the opinions of children and to integrate them into the decision-making process.

384. Four experts on the rights of the child put together the results of this open process in a report which the Federal Ministry commissioned. In addition, describing the important aspects of a child’s realities, the report contains many ideas that were the subject of controversial discussions, as well as the knowledge of the more than 100 participants in the working groups, of the roughly 90 entries into the database on measures, as well as the outcome of the projects involving children. The Federal Government used the results to enter them into its National Action Plan on the Rights of Children and Juveniles. The declared goal of this action plan is to raise awareness about the values of the Convention on the Rights of the Child among all those with political and administrative responsibilities for children and juveniles, as well as among those who live and work with children.

## Article 26. Equality

### **Regarding Concern No. 12 - Minimum age of consent for sexual relations in respect of male homosexuals**

385. The concerns of the Committee relate to article 209 of the Criminal Law Code regarding illicit sexual practices of homosexuals below the age of 18 which has been revoked in the meantime. According to that provision a person of the male sex who, after reaching the age of 19 years, engaged in illicit homosexual practices with a person, who had reached the age of 14 but not yet 18 years of age, had to be punished with imprisonment for a term of between six months and five years.

386. Article 209 of the Criminal Law Code - which applied neither to heterosexual nor to lesbian relations - banned men who had reached the age of 19 years from starting a sexual relation with a male person who had reached the age of 14 but not yet the age of 18 years. Article 209 thus set a minimum age of 18 years for consensual sexual relations between men, whereas a protected age of 14 years applied to heterosexual and lesbian couples.

387. As early as 1997, a working group, set up by the Federal Ministry of Justice to reform sexual criminal law, had considered a reform of the penal law protection of juveniles that would be as neutral as possible regarding the sexes. In particular, it considered cases in which the potential of juveniles between the ages of 14 and 16 to determine their sexual conduct on an individual basis is impaired, on account of a position of constraint, the offer of remuneration or the like.

388. In its decision of 21 June 2002, file number G 6/02-11, the Constitutional Court suspended article 209 of the Criminal Law Code as being unconstitutional and set a date (28 February 2003) for revoking and possibly creating a successor provision - with the case in question being regarded as an exemption.

389. In its decision, the Constitutional Court regarded it to be irrelevant that a relationship carries a punishment which involves male partners with a difference in age of more than one but less than five years, after the older partner has reached the age-limit of 19 years and before the younger partner has reached the age of 18 - in other words only for a certain period. It was lacking in relevance that - according to article 209 of the Criminal Law Code - homosexual contacts between juveniles or young men with an age difference of one to five years should first be exempt from punishment, then punishable as an offence and later again exempt from punishment.

390. The Constitutional Court did not express an opinion in connection with other concerns regarding the constitutional law; it stated, though, that it was not questioning, from the viewpoint of constitutional law, the objective of protecting children and juveniles against early heterosexual and homosexual contacts, which the legislator regarded as being detrimental to their development, as well as to protect them against sexual exploitation - these were at the basis of the relevant provisions of the sexual criminal law. Setting a specific age for the protection of juveniles is largely at the discretion of the legislature and its policy regarding the legal system. Any possible new provisions ought also to cover other elements such as, for example, the age

difference of the partners. In January 2003, the European Court for Human Rights finally also held that the provisions of article 209 of the Criminal Law Code were in contradiction to articles 8 and 14 of the European Convention on Human Rights (see decision of the European Court of Human Rights of 9 January 2003, *L. and V. v. Austria*, Application 39392/98, 39829/98, as well as *S.L. v. Austria*, Application 45330/99).

391. In the course of the discussions regarding a successor provision, the Federal Government considered it to be indispensable to find a solution that would take account of the idea of protecting juveniles of both sexes and any sexual orientation, because the existing protection under criminal law - also that of female heterosexual juveniles - was regarded to be insufficient.

392. The Austrian legislator reacted to the decision of the Constitutional Court with a decision of the National Council, taken as early as 10 July 2002, which revoked article 209 of the Criminal Law Code (illicit homosexual practices with persons below the age of 18 years) in the course of adopting the 2002 Amendment to the Criminal Law Code, Federal Law Gazette I No. 134. While the law amending the Criminal Law Code did not enter into force until 1 October 2002, the revocation of article 209 of the Criminal Law Code became effective already on the day following the publication in the Federal Law Gazette (13 August 2002), i.e. on 14 August 2002. The same applied to the new criminal provision of article 207b of the Criminal Law Code (sexual abuse of juveniles).

393. The new article 207b of the Criminal Law Code punishes the following type of conduct:

(a) Sexual acts with girls or boys below the age of 16 years if the older partner exploits the absence of maturity, due to that person's development, in a person of less than 16 years, as well as his/her own age-related superiority. The criminal sanction for such an offence is a prison term of up to one year or a fine of up to 360 daily rates;

(b) Sexual acts with girls or boys below the age of 16 years if the perpetrator exploits a position of constraint of the person below 16 years (e.g. drug dependency, illegal residence, homelessness). Here, too, the offence carries a prison term of up to one year or a fine of up to 360 daily rates;

(c) Sexual acts with girls or boys below the age of 18 years if the sexual contact is performed against payment. Sexual contacts with juvenile prostitutes have now become punishable for the paying party. The sanction is a prison term of up to three years.

394. The introduction of article 207b of the Criminal Law Code resulted in the introduction of a uniform "age of consent" which is basically 14 years, both for heterosexual but also for male homosexual and lesbian sexual contacts. The new special facts constituting abuse for specific age groups is now no longer restricted to specific sexual orientations, which is also the case with the existing provisions (see arts. 208, 212 and 213).

### **Equal Treatment Act**

395. Since 1979 an Equal Treatment Act has been in force in Austria which deals with the equal treatment of men and women in working life (see Austria's third periodic report for detailed comments in this connection).

396. In 2000, the European Union adopted two new anti-discrimination directives, in keeping with article 13 of the Treaty on European Union, namely:

- Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of their social or ethnic origin (Anti-Racism Directive);
- Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation which prohibits all forms of discrimination based on religion or ideology, disability, age or sexual orientation (Framework Directive on Equal Treatment).

397. In addition to the areas of employment and occupation, the Anti-Racism Directive also covers the areas of social protection, social benefits, education and access to and provision with goods and services. The Framework Directive on Equal Treatment only covers the areas of employment and occupation. Both directives apply to the private, as well as the public sector.

398. In addition, in September 2002 the European Union adopted an amendment to the Equal Treatment Directive (Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions).

399. The Austrian legislator transposed these directives by way of two laws: the previous Equal Treatment Act was given a new name and amended by the Federal Law on the Equal Treatment Commission and the Equal Treatment Ombudsperson (Federal Law Gazette No. 108/1979 in the version of the federal law published in Federal Law Gazette I No. 66/2004) to the extent that it now governs the institutions (Equal Treatment Commission and Equal Treatment Ombudsperson) as well as proceedings before these - taking also account of adaptations required by the directives. Furthermore, the federal law on equal treatment (Equal Treatment Act, Federal Law Gazette I No. 66/2004) was enacted, which carries forward the substantive provisions of the earlier law on equal treatment and expands it by those provisions that result from the need to transpose the directives.

400. The provisions govern the civil law aspects of equal treatment and/or non-discrimination. Of course, the already existing criminal and administrative criminal law provisions remained unaffected and intact. The facts constituting discrimination due to a disability are exempt because the transposition of the directives was mainly covered by a separate federal law on the equal treatment of disabled persons, whereas the area of federal service regulations, for which provisions are contained in the Federal Equal Treatment Act, and matters that are the responsibility of the federal provinces, were covered by transposing them at the regional level by a regional law on the equal treatment of persons.

401. As a result, no one may be discriminated against directly or indirectly on grounds of sex, ethnic origin, religion or ideology, age or sexual orientation in connection with a working relationship, especially:

- When commencing a working relationship;
- When fixing the remuneration;



- When granting voluntary social benefits that do not constitute a payment;
- In connection with basic, further and retraining measures;
- In connection with occupational promotion, especially advancements;
- In connection with the other working conditions;
- Upon ending a working relationship;
- In connection with access to career counselling, vocational training, vocational further training and retraining outside the working relationship;
- When participating in employees' or employers' organizations;
- Concerning the conditions for access to a self-employed gainful activity.

This applies to employees, home workers and employee-like persons.

402. In addition, ethnic origin may not serve as a direct or indirect ground for discrimination in connection with other areas, namely:

- Social protection, including social security and the health services;
- Social benefits;
- Education;
- Access to and provision of goods and services that are available to the public, including housing.

403. In addition to the ban on sexual harassment, as contained in the earlier law on equal treatment, sex-related harassment, as well as harassment due to one of the aforementioned discrimination characteristics are now also considered to constitute discrimination.

404. Another new feature is that the requirement of active equal treatment of men and women was formulated as a target provision. This goal must be taken into account when formulating and implementing legal and administrative provisions, policies and activities. Moreover, it is possible to take positive measures in all areas listed above.

405. In contrast to the earlier legislative situation, which only imposed administrative sanctions on private labour exchanges, as well as on the labour market service, when the requirement of advertising job vacancies in a gender-neutral form was violated, the penal sanction in connection with an infringement in this area now also pertains to employers. In order to avoid any hardship, especially in connection with small enterprises, only a warning is issued at the first violation. Moreover, the requirement of advertising job vacancies free from any discrimination is introduced for the other, new facts constituting discrimination, including penal sanctions.

406. The provisions on damages following violation of the requirement for equal treatment provide for:

- Compensation for the pecuniary damage, i.e. positive damage and lost profit, or
- Establishing the discrimination-free situation and - in both cases - also,
- Refund for the intangible damage for the personal prejudice suffered.

407. The following cases are pointed out, in particular:

- In the event of discrimination when commencing a working relationship, the minimum amount of the pecuniary damage is one monthly payment according to a scale without ceiling, if the job candidate had been given the job in a non-discriminating selection;
- If the job candidate only suffers the insult that his/her application is discarded from the beginning but would not have resulted in a working relationship if it had been taken into consideration by the employer, because other candidates were better suited for the vacancy, the intangible damage is limited to €500;
- If an employee is discriminated in his/her promotion, the minimum amount of the pecuniary damage is the difference in payment for three months according to a scale without ceiling, if the employee would have been promoted in a non-discriminating selection, or up to €500 if the employer can prove that the damage suffered by the employee on account of the discrimination only consists of a denial of his/her application;
- In the event of harassment, the minimum amount of the intangible damage is €400; in the event of sexual harassment it is €720.

408. The arrangements on the distribution of the burden of proof are taken from the previous law on equal treatment and have been highlighted further, in line with the provisions on the burden of proof laid down in the European Union directives. In consequence, the plaintiff must establish a credible case of discrimination, but the court may dismiss the action only if the defendant succeeds in proving that, when weighing all circumstances, it is probable that the motives, which the defendant can establish in a credible way, were decisive for the unequal treatment, and/or that the facts correlate with the truth, in other words that evidence for exoneration has successfully been established.

409. Certain deadlines must be met when filing claims with the court under the Equal Treatment Act: discrimination when commencing a working relationship, or in connection with an occupational advancement, as well as in the case of harassment must be claimed within six months. The period during which one can claim sexual harassment is one year. A termination or dismissal on grounds of discrimination must be contested within 14 days. A three-year lapse period applies to all other claims. In addition, a prohibition on prejudicial treatment was introduced as a measure of strengthening the protection against discrimination. It does not only cover the complaining employee but also other employees such as witnesses or fellow employees who support the complaint.

410. The terms of reference of the Equal Treatment Commission that has been set up in the Federal Ministry of Health and Women, which was responsible to date for the equal treatment of the sexes, were expanded to include all the aforementioned facts constituting discrimination. The Commission comprises the following three panels, which have already taken up their activities:

- Panel I for the equal treatment of men and women in the workplace;
- Panel II for an equal treatment without distinction as to ethnic origin, religion or ideology, age or sexual orientation in the working environment;
- Panel III for an equal treatment without distinction as to ethnic origin in the other areas.

411. The Equal Treatment Commission serves to implement the principle of equality. It has to deal with all issues relating to discrimination and can, in particular, draw up expert opinions and examine individual cases. However, claims for damages of performance may not be filed with the Commission; these are the exclusive responsibility of the courts. The decisions of the Commission are not binding. Infringement of the equal-treatment requirement may also be claimed directly in court; in fact, the Commission and the courts may be seized independently of each other. The costs of interpretation services in proceedings before the Commission are borne ex officio. Expert opinions of the Commission are published in their entirety, in anonymous form, though, on the homepage of the Federal Ministry for Health and Women. The courts must take account of expert opinions or the results of an examination carried out by the Commission. If the court decision deviates from the foregoing, the court must give its reasons for doing so.

412. The scope of powers of the Equal Treatment Ombudsperson, which is responsible for counselling and supporting persons who feel discriminated against, will be expanded.

413. The participation of NGOs that regard themselves as representing the interests of certain groups affected by discrimination is defined as follows for the administrative proceedings before the Equal Treatment Commission:

- A person affected by discrimination may be represented by a representative of an NGO in the proceedings;
- The person concerned may move that a representative of an NGO be called in as an expert in the proceedings.

414. The participation of NGOs in court proceedings is ensured in the form of a third-party intervention. A third-party intervener is a person who joins the legal dispute pending between other persons to support one of the parties, without being a party in the proceedings. The provision stipulates that the organization concerned with an action - in order to enforce the rights of victims of discrimination - may join the court proceedings as a third-party intervener in support of the victim of discrimination.

415. In addition to the Equal Treatment Commission, persons authorized to deal with equal-treatment issues and working groups for issues of equal treatment also deal with questions

regarding the equal treatment of men and women at the level of the federal ministries or the lower-level service units. The Equal Treatment Ombudsperson should especially be mentioned in this connection. The experience gathered since 1990 with the institution of an ombudswoman for issues of equal treatment in Vienna showed that counselling and support to women was available only for the region of Vienna and its environs but not for the remaining parts of the country. In 1998 the Federal Equal Treatment Act therefore introduced the possibility of setting up, by way of ordinance, regional offices for an ombudsperson on issues of equal treatment, as well as regional ombudswomen.

416. Since that date, four regional offices have been set up: in 1998 one office for Vorarlberg, Tyrol and Salzburg, in 2002 one each for Styria and Carinthia, and in 2003 one office for Upper Austria. The considerable workload of these offices correlates with expectations.

417. The offices advise and support persons who feel discriminated against, as defined by the Equal Treatment Act and an ombudsperson accompanies them in proceedings before the Equal Treatment Commission. In addition, the Equal Treatment Act facilitates counselling in connection with positive measures for all groups exposed to discrimination, as well as support of projects that aim at the equality of the sexes. The offices comprise:

- An ombudswoman for the equal treatment of women and men in the working environment;
- An ombudsman/woman for the equal treatment without distinction as to ethnic origin, religion or ideology, age or sexual orientation in the working environment;
- An ombudsman/woman for the equal treatment without distinction as to ethnic origin in the other areas.

### **Further laws penalizing discrimination**

418. Article IX (1), item 3, of the Law Introducing Legislation for Administrative Proceedings states:

“... Those who put other persons at an unjustified disadvantage merely on grounds of their race, colour, nationality or ethnic origin, religion or disability, or prevent them from entering premises or accessing services that are intended for general public use shall be punished with a fine of a maximum €1,090 ...”.

419. Article 87 of the Trade Regulations is closely linked to article IX (1), item 3, of the Law Introducing Legislation for Administrative Proceedings. The former stipulates the withdrawal of a trade licence as a sanction for any discriminating conduct by holders of such licences.

420. As far as the security police is concerned, the so-called Guidelines Ordinance was issued on the basis of article 31 of the Security Police Act, among other regulations, which deals with the intervention of officers of the public security services and stipulates that a police officer must pay special attention to respect for human dignity in performing his/her duties.

421. Article 5 of the Guidelines states:

“In performing their duties, the officers of the public security services shall refrain from any action that is likely to create the impression of prejudice or that may be considered to constitute discrimination on grounds of sex, race, colour, nationality or ethnic origin, religion, political understanding or sexual orientation.”

422. Any person who thinks he/she may have suffered a violation of these Guidelines may file a so-called Complaint Concerning the Guidelines to the competent Independent Administrative Senate, which must then determine whether such a violation has taken place.

423. With regard to the labour market, article 4 (3), item 4, of the Employment of Foreigners Act bans the employment of foreigners at a lower wage and under different working conditions than those afforded to Austrian nationals.

### **Equality of disabled persons**

424. Following the change in paradigms, as a result of which persons with disabilities are increasingly perceived as participating in society and less as objects of welfare services, a special clause of protection in favour of disabled persons was firmly integrated into the Constitution in 1997. In July of that year the National Council adopted the following additional provision of the Federal Constitution Act (art. 7 (1)) with all parties voting in favour of the amendment:

“Nobody shall be put at a disadvantage on account of his/her disability. The Republic (federal, provincial and municipal authorities) is committed to ensuring the equal treatment of disabled and non-disabled persons in all spheres of daily life.”  
(Federal Law Gazette I No. 87/1997.)

425. According to accompanying legislative materials, “this creates a right guaranteed by constitutional law which can be enforced before the Constitutional Court. However, in contrast to the general principle of equality which only applies to nationals, this ban on discrimination is meant to apply to all persons ... The provision also offers a yardstick for evaluation in order to judge the constitutionality of general legal standards, especially with a view to ensuring that the legal stipulations are admissible and necessary, which are meant to balance the disability”.

426. In 1998, as a first consequence of this new constitutional provision, a working group reviewed the entire federal legal system in search of explicit and implicit prejudices of disabled persons, with the first result being a federal law that was adopted in the summer of 1999, in the wake of which a total of nine laws had to be amended in order to remove provisions discriminating against disabled persons.

427. On 6 July 2005 the National Council adopted the package on the equality of disabled persons which comprises, in particular, the Federal Equality of Disabled Persons Act, as well as amendments to the Employment of Disabled Persons Act and the Federal Disabled Persons Act, which entered into force on 1 January 2006 (Federal Law Gazette I No. 82/2005). With the amendment to the Employment of Disabled Persons Act, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation was transposed.

428. The Federal Equality of Disabled Persons Act is based, in particular, on the civil law competence of the Federal Government. As a result, the scope of application of this law in the field of private law comprises mainly consumer transactions. With regard to the public sector, the Federal Equality of Disabled Persons Act comprises the entire federal administrative system, including the autonomous self-governing corporations.

429. The ban on discrimination does not only apply to persons with disabilities; it also covers specific groups of close relatives, so that marriage and live-in partners are also protected by this law under certain circumstances.

430. The law defines - in analogy to the aforementioned European Union Directive - the indirect and direct discriminations and stipulates the legal consequences when the ban on discrimination is violated. It is stated expressly that harassment is also a form of discrimination. For the first time, claims for damages may be filed in case of discriminations based on a disability, which must be claimed in court. In serious cases, it is also possible for an association to file a legal action. In this connection, the "Austrian Working Group for Rehabilitation" (*Österreichische Arbeitsgemeinschaft für Rehabilitation*) can bring an action to establish a case of discrimination, on account of a decision taken by a two thirds majority by the Federal Advisory Board for Disabled Persons.

431. The mandatory step before court proceedings is an arbitration procedure at the Federal Social Office, in the course of which mediation must be offered as an alternative conflict resolution tool.

432. In connection with court proceedings there are regulations concerning the burden of proof in favour of the person concerned, who must only establish a credible case regarding discrimination. An essential element of the court proceedings is the reasonableness test. In contrast to other groups of persons, discrimination against persons with disabilities is often linked to constructional or other barriers, the removal of which may often require considerable financial expense. When judging whether discrimination is due to barriers, one must therefore examine whether the expense involved in the removal of the barriers would constitute a disproportionate burden. If the barriers cannot be removed at a reasonable expense, then - as a minimum - a decisive improvement of the situation for the person concerned must be the goal, in line with the greatest possible approximation to equal treatment.

433. Transitional provisions are intended to provide the possibility to make the necessary adaptations of buildings, traffic systems, traffic facilities and means of transport within a reasonable time. As a matter of principle, claims for damages based on discrimination due to already existing constructional barriers or barriers in the transportation sector may be claimed only after 1 January 2016. Before that date, a case of discrimination may be challenged, on the one hand, in the event of new buildings, traffic facilities or systems or vehicles, or if the barriers were built unlawfully. On the other hand, claims may also be filed for discrimination in case of already existing buildings or traffic facilities or systems if the financial expense for removing the barriers does not exceed a certain amount (as of 2007: €1,000, as of 2010: €3,000, and as of 2013: €5,000).

434. The amendment to the Employment of Disabled Persons Act governs the ban on discrimination to the extent that it relates to the working environment (including the federal civil service). This must also be seen from the perspective of legal transparency for employees and employers, as the Employment of Disabled Persons Act already contains considerable labour law provisions protecting persons with disabilities.

435. The protection against discrimination included, in particular, equal treatment when commencing a working relationship, in the determination of the payment, in connection with basic, further and retraining measures, upon ending a working relationship, when belonging to and participating in an employees' or employers' organization, or an organization whose members belong to a specific occupational group, as well in connection with conditions regarding access to a self-employed gainful activity.

436. Definitions of the group of persons, the legal consequences, the mandatory arbitration procedure involving mediation, the reasonableness test, and the arrangements on the burden of proof are the same as in the Equality of Disabled Persons Act. In addition, employers are obliged to take adequate precautions with regard to persons with disabilities (transposition of article 5 of the European Union Framework Directive).

437. Moreover, there is a plan to amend the Federal Disabled Persons Act so as to set up an independent ombudsperson for disabled persons in the Federal Ministry for Social Security, Generations and Consumer Protection.

438. At the time when the equality package was adopted, Austrian sign language was recognized in the Federal Constitution Act (Federal Law Gazette I No. 81/2005).

## **Article 27. Minorities**

### **Regarding Concern No. 13 - Restriction of the definition of minorities**

439. Austria by no means restricts its understanding of ethnic, religious and linguistic minorities to the autochthonous ethnic groups. However, the statutory basis and the competences in administration are different, depending on which minority is concerned. The reason for this is the historical development, the obligations under international law, especially in favour of the Slovene and the Croatian ethnic groups, and the special needs of the different minority groups. Below, these aspects are dealt with according to the different minority groups.

440. According to article 1 (2) of the Ethnic Groups Act, ethnic groups are defined as "groups of Austrian citizens with a non-German mother tongue and their own folklore, who reside on and are domiciled in parts of the federal territory". Today, ethnic groups, as defined by the Ethnic Groups Act, are the Slovene ethnic groups in Carinthia and Styria, the Croatian ethnic group in Burgenland, the Hungarian ethnic group in Burgenland, the Czech ethnic group in Vienna, the Slovak ethnic group in Vienna, as well as the ethnic group of the Roma in Burgenland.

441. There is no need to further explain that the members of the ethnic groups in Austria are Austrian citizens and, as such, have the same rights as all other citizens. In addition, the Austrian legal system comprises a number of laws that especially concern the ethnic groups and their members.

442. On the constitutional level, this includes article 8 of the Federal Constitution Act which was broadened in 2000 by a basic policy clause for the benefit of ethnic groups. The first two paragraphs of article 8 of the Federal Constitution Act read as follows:

“The German language is the national language of the Republic, without prejudice to the rights of linguistic minorities, as they are granted under federal law.”

“The Republic (federal, provincial and municipal authorities) is committed to their grown linguistic and cultural diversity, which finds expression in the autochthonous ethnic groups. Language and culture, existence and preservation of these ethnic groups shall be respected, secured and promoted.”

443. One should also mention articles 66 to 68 of the State Treaty of Saint-Germain-en-Laye. In addition to a ban on discrimination, article 66 of the law cited above contains a provision regarding the free use of the language:

“No restrictions shall be imposed on any Austrian citizen in connection with the free use of any language in private or business transactions, in matters of religion, the press or any type of publications or in public gatherings.”

444. Article 67 of the same law guarantees the right of minorities “to establish, to manage and to supervise charitable, religious or social institutions, schools and other educational institutes, with the right to use their own language in these at their discretion and to exercise their religion freely”.

445. Article 68 provides, inter alia, that minorities also share in the financial means of the State “for example, for educational, religious and charitable purposes”.

446. Article 7 (of which items 2, 3 and 4 are on the constitutional level) of the State Treaty on the Re-establishment of an Independent and Democratic Austria (1955 State Treaty of Vienna) continues to be of central significance for the Slovene and Croatian ethnic groups. It reads as follows:

“Article 7: Rights of the Slovene and Croatian minorities

“Austrian citizens of the Slovene and Croatian minorities in Carinthia, Burgenland and Styria enjoy the same rights on the basis of the same conditions as all other Austrian citizens, including the right to their own organizations, gatherings and a press in their own language.

“They are entitled to elementary schooling in the Slovene and Croat languages and to a proportional number of their own secondary schools; in this connection, the school curricula are reviewed and a department of the school supervisory authority will be set up for the Slovene and Croatian schools.

“In the administrative and court districts of Carinthia, Burgenland and Styria with a Slovene, Croatian or mixed population, the Slovene or the Croat language is admitted as an official language, in addition to the German language. In these districts, the designations and inscriptions of a topographical nature are drawn up in the Slovene or Croatian language, as well as in German.



“Austrian nationals of the Slovene and Croatian minorities in Carinthia, Burgenland and Styria participate in the cultural, administrative and court institutions in these regions on the basis of the same conditions, as they apply to all other Austrian nationals.

“The activities of organizations shall be banned if these aim at depriving the Croatian or Slovene population of their character and their rights as minorities.”

447. The federal law of 7 July 1976 on the legal status of ethnic groups in Austria, referred to in short as the Ethnic Groups Act, serves, first of all, the function of a law implementing article 7 of the State Treaty of Vienna (with the exception of the school law provisions which are contained in the minority school laws for Burgenland and Carinthia); secondly, it created the legal basis for setting up ethnic groups advisory councils and promoting ethnic groups; thirdly, it does not limit its scope of application to the Croatian and Slovene ethnic groups, but on account of its definition of the concept of “ethnic groups”, it subsequently also permitted the application of this provision to the Hungarian ethnic group, the Czech ethnic group, the Slovak ethnic group and the ethnic group of the Roma.

448. The following ordinances serve to implement the Ethnic Groups Act:

- Ordinance of the Federal Government on the Ethnic Groups Advisory Councils, Federal Law Gazette No. 38/1977, as amended and promulgated in Federal Law Gazette No. 895/1993;
- Ordinance of the Federal Government defining the geographical areas where bilingual (German and Slovene) topographical signs are to be put up, Federal Law Gazette No. 306/1977, as amended and promulgated in Federal Law Gazette Volume II, No. 37/2002;
- Ordinance of the Federal Government of 31 May 1977 defining the courts, administrative authorities and other official bodies where Slovene is admitted as an official language in addition to German, Federal Law Gazette No. 307/1977, as amended and promulgated in Federal Law Gazette, Volume II, No. 428/2000;
- Ordinance of the Federal Government defining the Slovene place names, Federal Law Gazette No. 308/1977;
- Ordinance of the Federal Government defining the courts, administrative authorities and other official bodies where Croat is admitted as an official language in addition to German, Federal Law Gazette No. 231/1990, as amended and promulgated in Federal Law Gazette No. 6/1991;
- Ordinance of the Federal Government defining the geographical areas where topographical signs and inscriptions are to be put up not only in the German but also in the Croat or Hungarian languages, Federal Law Gazette II No. 170/2000;

- Ordinance of the Federal Government defining the courts, administrative authorities and other official bodies where the Hungarian language is admitted as an official language in addition to German, Federal Law Gazette II No. 229/2000, as amended and promulgated in Federal Law Gazette II No. 335/2000.

449. An advisory council has been set up with the Federal Chancellery for each of the six autochthonous ethnic groups. The task of these advisory councils is to advise the Federal Government and the Federal Minister on issues regarding matters concerning ethnic groups. They are called upon to protect and represent the overall cultural, social and economic interests of their ethnic groups. In particular, they shall be heard prior to the issuance of legal provisions and regarding general plans in the field of promotional measures. They may make suggestions which aim at improving the situation of ethnic groups and their members. In particular, ethnic groups also issue recommendations regarding the distribution of the promotional funds for ethnic groups (see Chapter II of the Ethnic Groups Act).

450. According to the provisions of the Ethnic Group Act, in connection with the implementing ordinances, names and topographical signs and inscriptions, set up in public places, shall be drawn up in two languages. In addition, one is entitled to use the language of the ethnic group as an official language in contacts with authorities in the bilingual regions.

451. With 1 July 1998 as the effective date, Austria acceded to the European Framework Convention for the Protection of National Minorities, and on 1 October 2001 it effectively acceded to the European Charter for Regional or Minority Languages.

452. The following supreme court decisions offer an insight into current developments in the field of legislation for ethnic groups:

(a) *Decision of the Constitutional Court of 9 March 2000, file number G2-4/00-7.*

In this decision the Constitutional Court stated that “elementary schooling” as defined in article 7, item 2, of the State Treaty of Vienna, which has constitutional ranking, refers to the first four school grades. There, instruction must therefore be given in two languages in the schools in question. In its decision the Constitutional Court commented that elementary schooling in the Slovene language is no longer ensured if Slovene - like any other foreign language - is only taught as a compulsory subject and if instruction in the other subjects is only given in the German language;

(b) *Decision of the Constitutional Court of 4 October 2000, file number V 91/99-11.*

In the reasons given in this decision, the Constitutional Court stated that an administrative district, as defined by article 7, item 3, of the State Treaty of Vienna, which has constitutional ranking, also refers to a municipality; an administrative district with a “mixed population”, as defined in article 7, item 3, of the State Treaty of Vienna, also includes a municipality in which the share of the Slovene-speaking population, using Slovene as an informal language, in the total population amounts to 10.4 per cent (Ebendorf was the municipality that gave rise to this lawsuit);

(c) *Decision of the Constitutional Court of 13 December 2001, file number G213/01-18, V 62, 63/01-18.* Built-up areas are also “administrative districts with a mixed population” (in connection with topographical signs and labels, as defined by article 7, item 3, of the State Treaty of Vienna. For the case in question, the Constitutional Court monitored the village of St. Kanzian/Lake Klopeinersee over a longer period of time and established that the share of the population using Slovene as their informal language amounts to more than 10 per cent. It regarded this as an “administrative district with a mixed population”;

(d) *Decision of the Constitutional Court of 27 June 2002, B 1230/01.* It complies with article 7, item 2, of the State Treaty of Vienna, if there is a bilingual elementary school (of any type) in a bilingual municipality, for the pupils belonging to this school district. The organization under school law does not matter in this connection.

453. Most autochthonous ethnic groups and/or their members are very well integrated into the majority population. However, the ethnic groups that are traditionally domiciled in Austria are confronted with the problems of a declining number of members and overageing. The trend towards assimilation is reinforced by the following circumstances: the small size of ethnic groups in absolute numbers; the fact that - at least in Carinthia - they largely live in scattered settlements; that mixed-language marriages predominate; and that the agrarian lifestyle is on the decline, which accounts for more mobility and a mostly German-speaking occupational environment. Austria therefore offers promotional support to the languages and cultures of ethnic groups, and to improving their bilingual educational system, in an effort to preserve their cultures and languages. The achievements of the Church (especially the Catholic Church, and with the Hungarian ethnic groups also of the Protestant churches AB and HB) are also of great historical and current importance to preserving the languages of ethnic groups.

454. The structures in the ethnic groups are primarily supported by ethnic-group organizations which are set up on the basis of the laws governing associations. Ethnic-group organizations are associations which, in keeping with their purpose, serve to preserve and secure an ethnic group, its folklore, as well as its characteristics and rights. Also private law foundations and funds with this intention as the purpose for their establishment are considered to be ethnic-group organizations; yet, they hardly play any role. Ethnic-group organizations may obtain funding from the financial funds earmarked for promoting ethnic groups. As far as promoting specific projects of ethnic groups is concerned, the religious groups have the same status as the ethnic-group organizations (see article 9 of the Ethnic Groups Act).

455. With the fall of the Iron Curtain, and the accession of Hungary, Slovenia, the Czech Republic and Slovakia to the European Union, the prestige of ethnic groups, as well as the functionality of ethnic-group languages, has improved. Of special benefit to the members of these ethnic groups is the growing number of cross-border events and exchange programmes, not to mention the occupational and economic benefits deriving from an active knowledge of the ethnic-group languages, which are official languages of the European Union and the neighbouring countries

456. The bilingual education in Carinthia and Burgenland is governed by the school laws for the minorities. The number of schoolchildren who participate in the bilingual instruction is

actually on the increase. However, a closer look reveals that there is a decreasing linguistic competence among these schoolchildren. This is not only due to the fact that the use of the ethnic-group languages in the families is on the decline, but also that monolingual parents will decide to send their children to a bilingual school and that these children will therefore begin without any previous knowledge of the ethnic-group language.

457. For the Czech ethnic group living in Vienna, there is the Komensky School, which is a private school entitled to operate like a public school. It offers bilingual education from the nursery school to the school-leaving certificate. The Schulverein Komensky is the association owning and running the school. It receives considerable grants from public funds. Instruction in the Slovak language is partly offered at the Komensky School and in a lower-level secondary school where “mother-tongue instruction” is offered. In Vienna, instruction in the Hungarian language is offered by the ethnic-group organizations in the form of extramural language support and/or language courses, as well as in the form of “mother-tongue instruction” in some public schools, as well as by commercial service providers. Adult education facilities (*Volkshochschulen*) offer a great many language courses, including also the ethnic-group languages.

458. With regard to the preschool education in the ethnic-group languages, one should mention two improvements that have been achieved since the last report: the Carinthian Nursery School Fund Act of 12 July 2001 has offered the possibility of promoting bilingual or multilingual private nursery schools in the settlement area of the Slovene ethnic group in Carinthia by means of financial support. The law also contains measures for the quality assurance of the bilingual education. In addition to the bilingual private nursery schools, Carinthia also has bilingual groups in public nursery schools. In Burgenland preschool instruction in the Burgenland-Croat and German languages, as well as Hungarian/German instruction is traditionally provided by the municipal nursery schools in the municipalities in question. By an amendment to the Burgenland Nursery School Act of 8 July 2005, the use of the Burgenland-Croat and/or the Hungarian languages was expanded from a minimum of 9 hours to 12 hours per week in the bilingual nursery schools. In Vienna, an ethnic group association runs a bilingual nursery school in Burgenland-Croat, and the Schulverein Komensky operates a bilingual Czech nursery school, where Slovak is also being taught.

459. The ethnic group of the Roma holds a special position in many respects. To begin with, an important aspect is that the number of autochthonous Roma was considerably reduced as a result of persecution during National Socialist times. This persecution also led to a major break in the linguistic and cultural tradition. The occasional reports on prejudicial treatment are very often the result of an interaction between insufficient education and a poor integration into the labour market. Major efforts are therefore being undertaken by Austria to promote success at school and integration into the labour market.

460. In this connection, one should mention the assistance provided to pupils by the ethnic-group associations in Burgenland and Vienna. A new project is the “RomBus” offering mobile learning support, mainly to Roma children in Burgenland, but which also offers courses in the ethnic-group language of the Burgenland Roma and engages in public-relations activities.

461. Moreover, Austria supports a labour market consultant who belongs to the ethnic group of the Roma. Her task is mainly to advise Roma on occupational and educational options.

462. The labour market project “Mri buti” began initially as a European Union project, but was then continued with domestic financing. This project offers jobs on an hourly or daily basis and takes account of the different levels of readiness and potential to perform.

463. The administrative unit for ethnic groups at the Eisenstadt diocese does outstanding work in looking after juveniles by caring for Roma youths in their free time.

464. A decision taken recently will provide some of the remaining financial means of the Reconciliation Fund, i.e. an amount of €1.1 million - spread out over 10 years - for the trusteeship project “Roma and Sinti”. The largest part of the money will go to school activities, and the remaining amount will be made available to collect the names of Roma and Sinti members who were killed by the NS regime.

465. The Romani project at the University of Graz is being continued. In the course of this project, the main varieties of Romani, spoken in Austria, are compiled and analysed scientifically and - for the first time - set down in writing. As a result, the association journals of the Roma can be published in two languages, bilingual collections of Roma stories and teaching games appeared on the market. As a consequence of the fact that Burgenland-Roma is becoming codified and can be taught, instruction in Romany is now being offered on a voluntary basis at the elementary schools of Oberwart and Unterwart, at the lower-level secondary school of Oberwart, at the Special Pedagogic Centre at Oberwart and at the bilingual federal upper-level secondary school at Oberwart. Curricula and teaching materials are also being produced for this purpose. Scientific support is provided for publishing the bilingual association journals and preparing instruction in the Romany language.

### Census<sup>3</sup>

466. The figures of the most recent census held in 2001 are given below in order to give a rough impression of the numerical strength of ethnic groups, domiciled in Austria. However, it should always be borne in mind that these statistics can only give approximate values because Austria does not record membership in an ethnic group but only asks for the actually used informal language in the course of a census, with multiple answers being possible. The number of users of a language can therefore not be equated to the number of persons belonging to an ethnic group. Statistical investigations based on committing oneself to an ethnic group are strictly rejected by the ethnic groups themselves.

Informal language	Total number of citizens		Born in			
	absolute	in %*	Austria	in %*	abroad	in %*
Burgenland-Croat	19 374	5.9	18 943	11.3	431	0.3
Romani	4 348	1.3	1 732	1.0	2 616	1.6
Slovak	3 343	1.0	1 172	0.7	2 171	1.3
Slovene	17 953	5.4	13 225	7.9	4 728	2.9
Czech	11 035	3.3	4 137	2.5	6 698	4.2
Hungarian	25 884	7.8	9 565	5.7	16 319	10.0
Windisch **	567	0.2	547	0.9	20	0.0

\* Figures in per cent refer to the total number of indications concerning a non-German informal language.

### **Radio and television**

467. In its radio and television channels, as well as on the Internet and its teletext, ORF (Austrian Broadcasting Corporation) offers a great diversity of programmes for the six ethnic groups. Efforts to expand the available services have not yet come to an end. These are, on the one hand, programmes in the different languages of ethnic groups and, on the other, programmes in German which are intended to familiarize that segment of the population that only speaks German with specific topics relating to ethnic groups. In addition, ORF continuously organizes a great many open-air events which are intended for ethnic groups.

468. Since May 2004 all ethnic groups are also offered presentations in a modern online design on the online platform of ORF at “volksgruppen.ORF.at”. All ORF regional radio stations, as well as Radio 1476 - and thus also all ethnic-group broadcasts on Radio Burgenland, Radio Carinthia, Radio Vienna and Radio 1476 - are now also available via Live Stream on the Internet (<http://volksgruppen.orf.at>, <http://1476.orf.at>, <http://burgenland.orf.at>, <http://kaernten.orf.at>). An especially developed content-management system also makes it possible to use diacritical signs.

469. In addition to current radio and television programmes for ethnic groups, prepared by the regional ORF studios in Burgenland and Carinthia, which have been available for downloading from the Internet as Real Audio or Real Video since 2000, the regional studio in Carinthia has been broadcasting information programmes of the regional studio in Carinthia on the broadcasting frequency of the Slovenian private radio station as Real Audio programmes for downloading since 21 March 2004.

470. All programmes offered for ethnic groups by Radio Burgenland, Radio Carinthia, Radio Vienna, as well as ORF 2 (including the local programmes in Burgenland and Carinthia, as well as on teletext) can be received in digital form throughout Austria via ORF, which also ensures that those members of ethnic groups who live outside the autochthonous settlement areas can be supplied.

471. ORF TELETEXT offers daily information regarding all radio and television programmes of special relevance to ethnic groups, and since 2003 it offers daily topical information about events of relevance to ethnic groups on page 639.

### **Migration populations**

472. According to the 2001 census, German is the only informal language for 95 per cent of Austria's citizens. At the census, 330,600 Austrians (4.5 per cent) indicated another informal language; however, the majority stated this language in combination with German (see tables 1 to 6 of annex 8 - 2001 census, informal language). On account of the migration to Austria, the autochthonous ethnic-group languages no longer constitute the majority among the non-German informal languages used by Austrians. These are currently the languages of the naturalized migrants and refugees. Chart 3 in annex 8 shows the significance of the new language groups: Turkish ranks first (60,000, or 18.2 per cent of the Austrian population using a non-German informal language), Serbian ranks second (42,000, or 12.7 per cent), and English takes third place (33,400, or 10.1 per cent).

473. According to the 2001 census, parallel to the 60,000 Austrians speaking Turkish there are 123,400 foreign citizens using Turkish as an informal language. However, the most common informal language among foreign nationals living in Austria is Serbian (135,400 counts or 19.0 per cent - table 7 of annex 8). German comes second (124,000) as the informal language used by foreigners and actually ranks before Turkish (17.4 per cent) and Croat (105,500, or 14.8 per cent). Other languages, also shown in Chart 4 of annex 8, such as Bosnian, English, Albanian, Polish, Hungarian and Romanian are represented at rates between 2 and 4 per cent. More than one fourth of foreign nationals (27.4 per cent, or 195,000) do not speak German in their private settings. However, most foreign nationals indicated both the other language and German (55.1 per cent) as their informal languages (see annexes 5 and 6 with regard to the statistical data on the subject of residential populations according to countries of birth and/or nationality).

474. Persons with a migration background account for 13.9 per cent (1,119 million people) of the total population. These are directly or indirectly affected by international migration. More than one half (53.1 per cent) belong to the “first migrant generation”, who were born abroad and who have a foreign passport. Some 10.4 per cent belong to the second or third migrant generation (foreigners born in Austria).

475. A third group are Austrian nationals who were born abroad. One can assume that the majority of persons in this group were naturalized in earlier years and decades and that only a few were Austrian by birth. Altogether, these total about 408,500 persons, or 36.5 per cent. One can therefore estimate the number of naturalizations of recent decades for the different regions of origin (table 4 in annex 7).

476. Among foreigners and migrants from the former Yugoslavia 66.8 per cent (247,102 persons) belong to the “first migrant generation”. The number of persons who were previously Yugoslav citizens and who were born in Austria amounts to 54,570, or 14.8 per cent, which is lower than the number of naturalized former Yugoslavs (68,213, or 18.4 per cent). The second largest population group migrating to Austria comes from Turkey and amounts to a total of 159,100 persons. Of these, 58.8 per cent (93,630 persons) belong to the “first migrant generation”. One fifth (or 31,898 persons) of the Turkish population residing in Austria were born in Austria. Slightly more persons obtained Austrian citizenship (21.1 per cent, or 33,592 persons). The situation regarding persons from the Czech Republic and Slovakia, as well as from Hungary, is completely different. Here, especially the percentages of the “second and third migrant generation” are very low, whereas the percentage of persons with Austrian nationality who were born in the Czech Republic/Slovakia or Hungary is very high.

477. When looking at the individual “migrant generations” according to age, sex and region of origin, further interesting information can be obtained on the “lifetime migrants”, i.e. foreign migrants, but also naturalized persons of the first migrant generation in Austria. In this way, the impact of international migration on the population can be shown as a cross-section and over the course of time for the different regions of origin (see charts 2 and 3 of annex 7).

### **Teaching principle “Intercultural Learning”**

478. Intercultural learning was first firmly established as a teaching principle at the beginning of the 1990s (Federal Law Gazette No. 439/1991 for elementary schools, Federal Law Gazette

No. 528/1992 for special schools, as well as Federal Law Gazette No. 616/1992 for the polytechnical schools). The curricula for lower-level secondary schools (Federal Law Gazette II No. 134/2000) and for upper-level general secondary schools (Federal Law Gazette II No. 133/2000, as amended and promulgated in Federal Law Gazette II No. 277/2004) list intercultural learning as a teaching principle in the general educational objective (see Item 5: Educational Areas), which is explained in more detail in the general didactic principles.

479. Intercultural teaching is meant to “contribute to a better mutual understanding and/or a better mutual appreciation, to recognizing the common features and to removing prejudices” (see Federal Law Gazette No. 439/1991). It is to run through everyday school life like a red thread. It is to be part of all subjects taught, since it is cross-sectional material, and should not only feature in “intercultural projects” at the end of the school day. “A positive approach is to be pursued if two or several languages are represented, and pupils should be encouraged to contribute mother-tongue skills in a meaningful manner.” (See Federal Law Gazette II No. 134/2000 and Federal Law Gazette II No. 133/2000, as amended and promulgated in Federal Law Gazette II No. 277/2004.) The educational principle also applies in cases where no pupils with a migration background and no pupils belonging to an autochthonous ethnic group can be found in a class. When properly implementing the teaching principle, it is meaningful to take account of the linguistic and cultural make-up of the class (statistical evaluation for the school year 2004/2005, see annex 4).

480. Furthermore, in the course of independently determining the school curriculum, intercultural priorities may be established at the middle- and upper-level vocational schools. Every school is free to focus on promoting language skills in German, the language of instruction, and under certain circumstances in the mother tongues of the pupils, as part of the range of foreign languages offered.

481. Both the new curriculum for commercial colleges (Federal Law Gazette II No. 315 of 8 July 2003, as of the school year 2003/04) and the new curriculum for upper-level commercial colleges (Federal Law Gazette II No. 291 of 19 July 2004, as of the school year 2004/2005) contains a uniform curriculum for all of Austria for the optional exercise “Language support - German” (= USD). This optional course is meant for pupils with a first language other than German who still need special support in the language of instruction. The material taught at USD covers the entire lower-level secondary school, as well as the first three grades of the upper-level commercial college, but, if necessary, this optional exercise may also be taught to pupils of the fourth and fifth grades of the upper-level commercial colleges as part of the autonomy granted to schools, with the contents of the curriculum being adapted accordingly in this case.

482. The schools determine the number of lessons per week and are free to independently apply the ordinance for starting and dividing a class. The necessary units of values must be taken from a quota that is made available to a school.

483. As a matter of principle, every language may be offered as the second living foreign language at upper-level commercial colleges (i.e. also the mother tongue of the pupils), if qualified teachers are available and if there is sufficient interest on the part of the pupils for the particular language, with the autonomous provisions making it possible to offer also a third



living foreign language as a compulsory subject, in addition to English - the first living foreign language - and the second living foreign language. At commercial colleges other languages may be taught as optional subjects in addition to English, which is a compulsory subject.

484. As there are no admission barriers at the business schools for gainfully employed persons, immigrants increasingly attend these schools in the big urban centres. However, on account of deficits in German - the language of instruction - it is sometimes difficult for many students to follow the courses, especially in the first semesters.

485. In order to prepare the specific technical vocabulary of an occupation in the language of instruction, but also in the first language, accompanying instruction is offered as part of the ESF project "*Team Teaching und offenes Lernen an kaufmännischen Schulen für Berufstätige*" (Team Teaching and Open Learning at Business Schools for Gainfully Employed Persons). Depending on the staff situation at the school location, this learning support is provided in the mother tongue and/or by German-speaking teachers in the form of team-teaching models. The approach of teaching in the mother tongue is future-oriented, especially with a view to the extension of the European Union. The project is being implemented at 13 school locations (business schools for gainfully employed persons) and runs for a period of three years (1 February 2003 to 31 January 2006). The implementation is based on the experience of the Federal Upper-Level Commercial College Steyr and the schools run by the Institute for Occupational Promotion Vienna ("Open Learning" and "InterCultural Learning").

486. As part of the autonomy enjoyed by schools, additional subjects may be taught at upper-level technical, trade or applied art institutes and specialized schools. The curriculum is always developed at the location of the school and decreed by the committee for the school community. The number of lessons per week is also fixed by the schools. These flexible provisions also make it possible to offer German as a second language, as well as to expand the number of foreign languages offered. At some specialized schools, German will be offered as a second language among the optional subjects, as of the school year 2005/06.

487. Furthermore, at all technical schools a second living foreign language may be offered as an optional subject. As the curriculum does not list the possible languages, basically every language may be offered, provided that a qualified teacher is available and that there is sufficient interest in this language on the part of the pupils.

488. In recent years, the possibility to learn a Central or Eastern European language - in addition to French and Italian (mainly in Carinthia) - is also used on an increasing level.

489. At the special schools for the social occupations, every language may be taught as the first living foreign language, whereas the special schools for commercial occupations, for the fashion industry and garment technology, as well as the special schools for the hotel and catering industry and the tourism industry must teach English as the first living foreign language. At all schools mentioned here, an extension of the languages offered is possible, as part of the autonomy granted to schools.

490. At the higher teaching institutes for commercial occupations, for the fashion industry and garment technology, as well as the higher teaching institutes for tourism English must be offered

as the first living foreign language. As a matter of principle, every language may be offered as the second living foreign language. Moreover, as part of the autonomy granted to schools, additional living foreign languages may be offered.

491. At the higher teaching institutes for the fashion industry and garment technology and for artistic design there is also the possibility to increase the number of lessons taught in German and/or the first living foreign language instead of offering a second living foreign language.

492. Determining the curriculum available as part of the autonomy granted to schools is the responsibility of the committee for the school community which must be guided in its decision by the respective needs and problems of the school in question. The mother tongues of the pupils may therefore also be taught, provided that a qualified teacher is available and that there is sufficient interest in that language on the part of the pupils.

493. For the medium- and upper-level vocational schools in Vienna, the regional school boards may fix regional priorities for the use of units of values, possibly remaining after the first week in September. Since September 1996 the City School Board of Vienna assigns, from the pools of units of values remaining at the individual types of schools, units of values to those medium-level commercial, humanities-oriented and technical/applied-science schools that wish to divide their classes in the first course years/grades for German as a subject, on account of the large number of pupils with a first language other than German. This measure may only be taken in those years in which remaining units of values are available.

494. As a matter of principle, the optional subject “living foreign language” may be used at vocational schools to offer every language (including also the mother tongue of the pupils), provided that a qualified teacher is available and there is the necessary minimum number of pupils.

495. At teacher training institutes or colleges for nursery-school pedagogy and/or social pedagogy, emphasis is placed on promoting the language competence in German, the language of instruction, and different living foreign languages are offered as compulsory or optional subjects. As part of the autonomy granted to schools, supportive teaching may be offered in German. This option is used increasingly by pupils who use a language other than German as their first language. The course may be held in one or several grades during parts of the school year. Whenever necessary, this may be set up for a maximum total of three times and for a maximum duration of 8 weeks per school year and grade (i.e. a maximum of 24 weeks). Per school year every pupil can opt for a total of four supportive teaching courses (German, mathematics, a living foreign language and music education). A pupil may therefore attend, for example, three supportive teaching courses in German and one in mathematics, or two courses in German and one each in the living foreign language and in music education.

496. Beginning with the school year 2004/05, a new curriculum went into force at the five-year teaching institutes for nursery-school pedagogy (Federal Law Gazette II No. 327/2004). As part of the compulsory subject “living foreign language” (a curriculum that expires as of the school year 2007/2008) and/or “living foreign language/ethnic group language” (new curriculum) the school may use its autonomy to offer any foreign language/ethnic-group

language (including also the mother tongues of the pupils). When determining the ethnic-group language the provisions of the curriculum must be adapted with a view to the requirements of relevance to the ethnic group in question.

497. In addition, the following living foreign languages are being offered among the optional subjects at the five-year teaching institutes for nursery school pedagogy: French, Italian, (Burgenland) Croat, Slovene and Hungarian. At the five-year teaching institute for social pedagogy the languages are French or Italian. An optional subject may be chosen to deepen/expand the available skills in the living foreign language. Example: compulsory subject “living foreign language” = Slovene, optional subject = also Slovene (more depth/expansion). Example 2: compulsory subject “living foreign language” = English, optional subject = Slovene.

498. Intercultural learning is firmly established as an educational principle at the five-year teaching institutes for nursery-school pedagogy and at the five-year teaching institutes for social pedagogy, as well as at the college courses. The new curriculum of the teaching institute for nursery-school pedagogy formulates intercultural learning as the general didactic principle in designing instruction (“education for intercultural thinking and acting”) and it is listed explicitly as a competence of relevance to the occupation among the general educational objectives (“ability to plan, implement and evaluate ... measures for intercultural learning”).

499. Moreover, “intercultural education” is offered once in the entire training programme of the five-year teaching institutes, as well as of the college courses for nursery-school pedagogy as an optional exercise covering a total of two lessons per week. The college courses for social pedagogy offer “intercultural education” as an optional exercise with one lesson per week in the third and fourth semesters. The optional exercise may also be run as a multi-grade course at all of these institutes.

#### Notes

<sup>1</sup> Based on investigations conducted for the year 2003.

<sup>2</sup> Based on investigations conducted for the year 2003.

<sup>3</sup> *Source:* Austrian Statistical Office.

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