

**Submission of the
National CRPD Monitoring Body of Germany
to the
CRPD Committee on the Rights of Persons with Disabilities
on the occasion of the preparation of a *list of issues* by the Committee in the review of
Germany's Initial Report in 2014**

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Introduction

The UN Convention on the Rights of Persons with Disabilities (CRPD) entered into force in Germany in March 2009. Two years later, Germany submitted its **Initial Report** under the CRPD (**Initial Report**).¹ The UN Committee for the Rights of Persons with Disabilities (CRPD Committee) will review **Germany's Initial Report** in September 2014. Mindful of the CRPD Committee Session in April 2014, at which the *list of issues* for Germany is to be adopted, the National CRPD Monitoring Body would like to take the opportunity to request the CRPD Committee to:

- Recognise the urgent need to get accurate and updated information on the developments from the State Party,
- Consider a number of pressing issues that were neglected or far from sufficiently covered by the **Initial Report**, and
- Take note of the often divergent perspectives on facts and their evaluation as put forth by the State Party in comparison to those of the National CRPD Monitoring Body.

In the following, the National CRPD Monitoring Body addresses a smaller number of selected fields of implementation that it suggests the CRPD Committee take up in its examination and take into account in its preparation of a *list of issues* in April 2014.

¹ UN Doc CRPD/C/DEU/1, 7 May 2013; unless specifically noted, all references in this document in the form of "para. XY" refer to the **German Initial Report**.

Purpose and general obligations (arts. 1-4)

a) New legislation in need of compliance with the CRPD

The National CRPD Monitoring Body has detected a problem for both the Federal and *Länder* levels with respect to how the legislative systems guarantee that the CRPD, with its rights and obligations, is taken into account into all law-making processes and the systems' capability to assure appropriate outcomes in the sense of the Convention with regard to the rights of disabled persons. Upon its ratification, the CRPD became a binding human rights standard for law-making processes both at the Federal and *Länder* level. However, it seems that the State Party's legislative mechanisms and procedures lack systematic means of ensuring CRPD compliance in all cases, although the CRPD represents a cross-cutting challenge potentially relevant for all legislative projects. We also believe that the implementation of the CRPD would benefit from an in-depth, systematic analysis of how legislative projects can be used to promote and protect the rights of persons with disabilities.

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Inform the Committee how many pieces of legislation were adopted between 2009 and 2013 which were specifically intended to implement the CRPD and provide separate data for the Federal Government and for each of the *Länder*;
- Explain the structures in place for guaranteeing CRPD compliance in all law-making processes;
- Provide information as to what additional steps are being taken by the State Party to ensure that new legislation is compliant with the CRPD.

b) Taking up a human rights approach to law-making, policies, programmes and strategies

The CRPD Committee has broached issues relating to the adoption of a human rights approach in several Concluding Observations, for example, those on Austria: "The Committee recommends that the State Party ensure that federal and regional governments consider an overarching legislative framework and policy on disability in Austria in conformity with the Convention."²

² UN Doc CRPD/C/AUT/CO/1, 30 September 2013, para. 11; see also UN Doc CRPD/C/SLV/CO/1, 8 October 2013, paras. 7-10, 12; UN Doc CRPD/C/PRY/CO/1, 15 May 2013, paras. 8, 11, 12; UN Doc CRPD/C/ARG/CO/1, 8 October 2012, paras. 8, 9; UN Doc CRPD/C/CHN/CO/1, 15 October 2012, paras. 9, 10, 54; UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paras. 11, 12.

At present one can find action plans intending the implementation of the CRPD at the federal and at the *Länder* level (10 *Länder* out of 16) in Germany. In general terms, this is to be commended and should be seen as an indication of positive momentum. **Germany's Initial Report** mentions the National Action Plan for the Federal level (para. 31). Further, the coalition agreement of the new Federal Government does reflect the need to elaborate the National Action Plan for the implementation of the CRPD, which is a positive development.³

However, the National CRPD Monitoring Body would like to draw the Committee's attention to the fact that at all of the German disability action plans, at the Federal and *Länder* level, lack a coherent human rights perspective that would give due weight to the state's obligation to respect, protect and fulfil the rights of persons with disabilities. Further, the human rights approach also brings with it the compelling necessity to promote and protect the rights of those persons with disabilities who are the most vulnerable. However, the aforementioned action plans provide no evidence that groups in the most vulnerable situations were comprehensively identified in the course of the drafting process and or that measures designed to overcome their specific difficulties have been elaborated.

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Provide information on the government's understanding of a human rights approach to disability policies and on how it plans to further strengthen the promotion and protection of the rights of persons with disabilities enshrined in the CRPD;
- Provide information on methods in place allowing the identification of groups in vulnerable situations;
- List those groups whose rights are addressed in the Federal Action Plan whose situation are addressed with specific measures;
- Provide *Länder*-specific information (specific for each of the 16 *Länder*) relating to how they have taken account of the concept of "groups in vulnerable situations" and request the *Länder* to list those groups whose rights have been addressed with specific measures.

³ See the Coalition Treaty of CDU / CSU / SPD <https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf>, page 77 (accessed on 01 Feb. 2014).

Equality and non-discrimination (article 5)

Equal access to and participation in society for disabled persons has not yet been fully achieved in Germany. In the context of non-discrimination, the CRPD Committee has emphasized the importance of reasonable accommodation in a number of prior review proceedings. In the Concluding Observations for El Salvador for instance, the CRPD Committee criticized the “absence of measures prohibiting and punishing all forms of discrimination against persons with disabilities and the fact that the law does not recognize the denial of reasonable accommodation as a form of discrimination”.⁴ At present, however, there is no provision in German law in any national law which makes it clear that the denial of reasonable accommodation is a form of discrimination.⁵ **Germany’s Initial Report** touches on the issue of reasonable accommodation in para. 23. However, Germany does not seem to take into account the full meaning of the concept of reasonable accommodation (defined in Art. 2 of the CRPD). It does not see the need to provide reasonable accommodation in individual cases, to put the necessary legal framework and funding in place, and to instruct those in charge to provide reasonable accommodation.

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Explain what steps have been taken since 2009 to ensure that reasonable accommodation is provided in all cases;
- Explain why neither the Federal Government nor the *Länder* have established the right to reasonable accommodation in the law, cross-cutting for all areas for law and life;
- Explain why neither the Federal Government nor the *Länder* has established in legislation, cross-cutting for all areas for law and life, that the denial of reasonable accommodation constitutes discrimination;
- Provide information on what steps the Federal Government has taken at the European Union level to ensure that the protection provided by non-discrimination law is strengthened for persons with disabilities in accordance with the CRPD.

⁴ UN Doc CRPD/C/SLV/CO/1, 8 October 2013, para. 13; see also UN Doc CRPD/C/ARG/CO/1, 8 October 2012, paras. 11, 12; UN Doc CRPD/C/PRY/CO/1, 15 May 2013, paras. 13, 14; UN Doc CRPD/C/CHN/CO/1, 15 October 2012, paras. 11, 12; UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paras. 15, 16; UN Doc CRPD/C/PER/CO/1, 16 May 2012, paras. 6,7, UN Doc CRPD/C/ESP/CO/1, 19 October 2011, paras. 19, 20; UN Doc CRPD/C/TUN/CO/1, 13 May 2011, paras. 12, 13.

⁵ There are provisions in German law that come close to the concept of reasonable accommodation, e.g. in labour law. However, one can nonetheless state that the concept is not clearly established. Neither the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*), adopted in implementation of the European non-discrimination directives) nor disability equality law at the Federal and the *Länder* level (*Bundesbehindertengleichstellungsgesetz*; *Landesbehindertengleichstellungsgesetze*) entail any acknowledgement of the concept.

Children with disabilities (article 7)

One of the groups most vulnerable to violations of their rights is the group of intersexual children. Neither the CRPD Committee nor **Germany's Initial Report** has broached the issue of intersexual children. In the view of the National CRPD Monitoring Body, intersexuality is neither a disability nor in itself a long-term physical impairment as these are defined in the CRPD. However, in the German context, intersexuality can be equated with a long-term physical impairment in the sense that it is a human condition which is stigmatized and not commonly accepted in Germany and in the sense that intersexual children and adults are, to some extent, severely restricted in the enjoyment of their human rights. Therefore, intersexual children and adults face disabilities in the spirit of the CRPD.

In addition, intersexual children are frequently subjected to “normalization” surgical procedures. The physical appearance of such children is aligned to the “male” or “female” sex by means of surgical procedures on the genitals, removal of gonads, ovaries or testicles, or through other forms of irreversible medical treatment, in particular hormone therapy. This treatment is performed in the absence of a concrete risk to life or of any other risks to health at an age when consent to these procedures is given by parents or other persons having custody of the child. There are reports that adults who were subjected to such treatments during childhood face severe problems in their lives in terms of health, social life etc. Physical impairments may grow out of this “normalization”.

Unless there is medical evidence that surgery or treatment is necessary to save a child's life, surgery on intersexual children for the alignment to the “male” or “female” sex is also irreconcilable with the view of the CRC Committee presented in General Comment No. 12⁶. The National CRPD Monitoring Body also strongly believes that surgery with irreversible consequences in early childhood is a clear case of substituted decision-making which cannot be in compliance with article 12 CRPD. It therefore recommends that the CRPD Committee request the State Party to:

- Indicate how many irreversible, non-life-saving surgical procedures have been performed on intersexual children between 2009 and 2013;
- Explain what measures have been taken to prohibit irreversible, non-life-saving surgical procedures on intersexual children until they are capable of issuing free and informed consent;
- Explain how the right of intersexual children to be heard has been guaranteed before such an irreversible surgery or other irreversible medical treatment is carried out.

⁶ Committee on the Rights of the Child (2009): General Comment No. 12, The right of the child to be heard, UN Doc CRC/C/GC/12, 20 July 2009.

Awareness-raising (article 8)

Raising awareness seems to be the key for fostering an environment suitable for the full and effective enjoyment of the rights of persons with disabilities. The CRPD Committee has addressed the challenge of raising awareness in a number of Concluding Observations, underlining its importance, for instance in those for Paraguay.⁷ **Germany's Initial Report** elaborates a variety of measures the Federal Government has taken toward that aim (paras. 56 ff.). One of the key questions, however, is whether the measures taken since the CRPD went into force in 2009 do in fact reduce disability-related stigma and stereotyping. The National CRPD Monitoring Body sees the need for Germany to develop a much more comprehensive and scientific-based strategy to reduce stereotyping and stigma both in the general population and in professional groups and therefore recommends that the CRPD Committee request the State Party to:

- Provide information on available scientific data on disability-related stigma and stereotyping differentiated by disability groups (including psycho-social disabilities, HIV/Aids etc.) and gender;
- Provide information on the range of possible scientific approaches to elaborating a strategy for the reduction of disability related stigma and stereotyping in the general population and in professional groups;
- Provide an overview of awareness-raising measures taken since 2011 beyond the description provided in the Initial Report (para. 57b) and of the effects of all measures taken so far (2009-2011);
- Provide information on what, if any measures are planned in response to these findings.

⁷ In its Concluding Observation (UN Doc CRPD/C/PRY/CO/1, 15 May 2013, para. 22) the CRPD Committee underlined: "The Committee urges the State party to encourage extensive awareness-raising campaigns to reinforce the positive image of persons with disabilities as holders of all the human rights recognized in the Convention. It particularly urges the State to fully inform persons with disabilities – and society at large – about their human rights, using various formats, media and modes of communication such as Braille and sign language and other accessible formats, and to encourage a culture of respect for those rights by means of information, communication and education"; see also UN Doc CRPD/C/AUT/CO/1, 30 September 2013, paras. 21, 22; UN Doc CRPD/C/SLV/CO/1, 8 October 2013, paras. 21, 22; UN Doc CRPD/C/CHN/CO/1, 15 October 2012, paras. 15, 16; UN Doc CRPD/C/PER/CO/1, 16 May 2012, paras. 18, 19; UN Doc CRPD/C/ESP/CO/1, 19 October 2011, paras. 25, 26; UN Doc CRPD/C/TUN/CO/1, 13 May 2011, paras. 18, 19.

Accessibility (article 9)

With regard to the legal obligation under **article 9 (2) (b) CRPD** “to ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities”, Germany faces a real challenge. The challenge for States Parties entailed in ensuring that private entities provide accessible facilities and services was made even clearer by CRPD Committee Views issued in 2013.⁸ What are the appropriate means? **Germany’s Initial Report** outlines measures by which it intends to improve accessibility (see paras. 66-67). However, Germany has not seen any significant progress since 2009 in relation to the extension of accessibility **in the private sector**. The approach of “agreed goals” (para. 85-87) does not lead to structural changes and, simply in numerical terms, has not made a great deal of progress.

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Provide information on what measures are being taken to ensure that private entities offering facilities and services open or provided to the public take into account all aspects of accessibility for persons with disabilities.⁹
- Explain what steps have been taken to set general standards on accessibility which are compulsory for private entities.

⁸ See Szilvia Nyusti & Péter Takács v Hungary, UN Doc CRPD/C/9/D/1/2010, 21 June 2013.

⁹ Also see recommendation of the US coming out of the UPR procedure, UN Doc A/HRC/24/9, 8 July 2013, para. 124.175.

Equal recognition before the law (article 12)

The recommendation that substituted decision-making be replaced with supported decision-making has been one of the main issues in the CRPD Committee's Concluding Observations in the past.¹⁰ **Germany's Initial Report** (para. 103) expresses the opinion that a legal reform is not necessary in view of article 12 CRPD. However, translating the Committee's approach to **article 12 CRPD** to the German context, one must pose a number of questions. Ever since the CRPD was ratified, there has been some debate on whether German law and practice is in compliance with the CRPD.¹¹

Against this background, the National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Explain to the Committee the regulations of Sec 1896 et seq. German Civil Code in the light of article 12 CRPD and the Committee's approach to understanding it;
- Provide information on all measures taken to develop a comprehensive system of support for persons with disabilities in decision-making processes in legal matters;

¹⁰ For example, the Committee addressed this issue in its Concluding Observations on Austria: "The Committee recommends that substituted decision making be replaced with supported decision making. The Committee recommends that Austria do more to ensure that persons with disabilities have access to supported decision-making and are not placed under guardianship. The Committee recommends that supported decision making structures should respect the person's autonomy, will and preferences, and be in full conformity with article 12 of the Convention, including with respect to the individual's right, in his/her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, to work, and to choose a place of residence", UN Doc CRPD/C/AUT/CO/1, 30 September 2013, para 28; see also UN Doc CRPD/C/AUS/CO/1, 21 October 2013, paras. 24-26; UN Doc CRPD/C/SLV/CO/1, 8 October 2013, paras. 27, 28; UN Doc CRPD/C/PRY/CO/1, 15 May 2013, paras. 29, 30; UN Doc CRPD/C/ARG/CO/1, 8 October 2012, paras. 19, 20; UN Doc CRPD/C/CHN/CO/1, 15 October 2012, paras. 21, 22; UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paras. 25, 26; UN Doc CRPD/C/PER/CO/1, 16 May 2012, paras. 24, 25; UN Doc CRPD/C/ESP/CO/1, 19 October 2011, paras. 33, 34; UN Doc CRPD/C/TUN/CO/1, 13 May 2011, paras. 22, 23.

¹¹ In Germany, more than one million individuals have a custodian (*rechtlicher Betreuer*: literally, legal guide or assistant) pursuant to the German Civil Code (Section 1896 et seqq. *Bürgerliches Gesetzbuch BGB*).¹¹ German law in this regard seems significantly different from custodianship laws in other countries: "Appointment of a custodian" does not automatically deprive a person of full legal capacity. As a rule, the individual retains legal capacity to its full extent. However, the law does grant every custodian the power to act on behalf of the person concerned (*gesetzliche Vertretung*).¹¹ This feature allows substituted decision-making for an adult person with a custodian **when deemed necessary**. In exceptional cases and on individual basis the court may order that a reservation of consent (*Einwilligungsvorbehalt*) be established, meaning that although the individual retains legal capacity to act on his or her own behalf, such action has legal effect only subject to the consent of the custodian. In 2013, approximately 13,500 people were subjected to such a restriction of their legal capacity.

- Provide information on measures taken to reduce substituted decision-making for adults;
- Explain whether the Federal Government still believes that the legislation in question (on *gesetzliche Vertretung*) is not in violation of article 12 CRPD, in particular the prohibition of substituted decision-making (para. 103);
- Explain whether the Federal Government still believes that the reservation of consent (*Einwilligungsvorbehalt*), which restricts the legal capacity of the individual, can possibly be in compliance with article 12 CRPD.

Access to justice (article 13)

To our knowledge the CRPD Committee did not address the issue of domestic application of the CRPD by courts in its Concluding Observations.

In Germany, a significant number of persons with disabilities have tried to invoke the CRPD in court proceedings, however in most cases this attempt has failed. Legal norms of the CRPD theoretically can have legal effects in the German legal order and should be applied by German authorities and German courts.¹² However, authorities and courts often have difficulties in dealing with the CRPD adequately since neither the legal status nor the effects nor the contents nor the methods of interpretation of the CRPD seem to be clear to them. In addition, **Germany's Initial Report** does not touch upon that issue.

However, we strongly believe that strengthening the CRPD and informing courts about the relevance of CRPD norms for their jurisprudence, would constitute a huge step towards better implementation of the CRPD. The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Provide information on whether German courts have explicitly dealt with the CRPD. And, if they have done so, to provide a list of all relevant cases (Federal level, *Länder* level);
- Provide information on all measures the Federal Government and *Länder* governments have taken to support the appropriate reception of the CRPD by German courts in terms of content and method;
- Explain whether the Federal Government believes that the CRPD entails concrete legal obligations that should be respected by the courts (Federal courts, *Länder* courts);
- Explain whether the Federal Government believes that the CRPD entails concrete legal obligations that can be *enforced by the courts directly* in the context of individual cases.

¹² There are two ways of application: firstly, direct application - basing the legal decision on the respective provision - or secondly, using the CRPD as a standard of interpretation of statute law.

Liberty and security of the person (article 14)

In Germany, people can be institutionalised in general psychiatric institutions against their will (see **Germany's Initial Report paras. 113pp.**). This seems to be in contradiction with article 14 CRPD, which states “that the existence of a disability shall in no case justify a deprivation of liberty“. The CRPD Committee also has addressed this issue in its Concluding Observations on Austria by urging “the State Party to take all necessary legislative, administrative and judicial measures to ensure that no one is detained against their will in any kind of mental health facility. It urges the State party to develop deinstitutionalization strategies based on the human rights model of disability”.¹³

Two issues: Firstly, a comparison of involuntary placement statistics for the different *Länder* reveals enormous variation. Only a few institutions have an open door policy. Secondly, children with disabilities who are accommodated in closed institutions (*geschlossene Einrichtungen*) are in a particularly vulnerable situation. In Germany, children with disabilities can be deprived of their liberty under Section 1631b of the German Civil Code.¹⁴ The deprivation of liberty requires the approval of the family court (*Familiengericht*). It is unclear how many children with disabilities are deprived of their liberty under Section 1631b.

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Provide information on what measures have been taken to stop involuntary placement of persons with psycho-social disability and to report on measures taken by the State Party to ensure that disability is not a reason for deprivation of liberty;
- Provide information on what steps will be taken to establish a practice of psychiatric care that is based on free and informed consent in all situations;
- Explain to what extent it believes that the system of psychiatric treatment could be reviewed and developed on the basis of human rights goals such as free and informed consent, assisted autonomy and self-determination.

And to do the following with respect to children with disabilities in closed institutions:

- Provide detailed information and statistics on children with disabilities who are deprived of their liberty under Section 1631b of the German Civil Code;

¹³ UN Doc CRPD/C/AUT/CO/1, 30 September 2013, para. 30; see also UN Doc CRPD/C/AUS/CO/1, 21 October 2013, paras. 31, 32; UN Doc CRPD/C/SLV/CO/1, 8 October 2013, paras. 31, 32; UN Doc CRPD/C/PRY/CO/1, 15 May 2013, paras. 33, 34; UN Doc CRPD/C/ARG/CO/1, 8 October 2012, paras. 23, 24; UN Doc CRPD/C/CHN/CO/1, 15 October 2012, paras. 25, 26; UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paras. 27, 28; UN Doc CRPD/C/PER/CO/1, 16 May 2012, paras. 28, 29; UN Doc CRPD/C/TUN/CO/1, 13 May 2011, paras. 24, 25.

¹⁴ See http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5584.

- Report on measures taken by the State Party to ensure that disability is not a reason for deprivation of liberty;
- Report on steps taken by the State Party to provide reasonable accommodation for children with disabilities deprived of their liberty.

Freedom from torture or cruel, inhuman or degrading treatment or punishment (article 15)

The CRPD Monitoring Body would like to draw the Committee's attention to a piece of legislation which is in contradiction with article 15 section 1, sentence 2 of the CRPD.¹⁵ This right is particularly special since freedom from torture or cruel, inhuman and degrading treatment or punishment is a right in absolute terms.¹⁶ To our knowledge the CRPD Committee had not address the issue on medical research on children with disabilities in its Concluding Observations.

Section 41 of the German Medicinal Product Act (*Arzneimittelgesetz*) allows persons with mental disabilities to serve as subjects of scientific research without their free and informed consent.¹⁷ In the case of adults, consent is given by third parties and consent is only legitimate if the research if it is for "individual use" (the benefit of the person and his or her self-interest). However, in the case of children, German law has even further reduced the level of protection, lowering it to an unacceptable extent: if consent is granted by a third party (e.g. parents), medical and scientific research is possible according to the law **even if** the research that is being conducted is solely **not** of individual benefit and self-interest of the person but to the benefit of the "group" (referred to as "group benefit") - as the **German Initial Report** itself explains (**para. 124-25**). Germany seems to believe that the above mentioned law and related practices would fall outside of the scope of article 15 (para. 124) and are not problematic from a human rights point of view.

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Provide information on the number of cases, in which Section 41 AMG has been applied since 2009;
- Explain whether the present government still believes that Sec 41, which allows medical or scientific experimentation not solely when it is in the interest of the person involved and without an individual's free and informed consent,

¹⁵ Which reads: "In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation."

¹⁶ See Nowak, Manfred (2005): U.N. Covenant on Civil and Political Rights. CCPR-Commentary, article 7, 2nd revised edition, Kehl: Engel, p. 157ff.

¹⁷ See http://hh.juris.de/englisch_amg/englisch_amg.html#p0960

is in compliance with the right to be free from inhuman and degrading treatment.

Freedom from exploitation, violence and abuse (article 16)

The CRPD Committee has broached the issue of violence against women with disabilities in several Concluding Observations.¹⁸ On those addressed to Germany, the Committee on the Rights of the Child in 2014 recommended that the country:

Take every necessary measure to prevent all forms of violence against children with disabilities, placing particular attention on the safety of girls with disabilities. In this regard, the Committee recommends that the State party provide for particular protection and complaints mechanisms for children with disabilities who have become victims of violence.¹⁹

This recommendation is based on fairly recent research, which was commissioned by the Federal Government and was mentioned in **Germany's Initial Report** (see para. 129). Commissioning of such research is a good practice and should be commended.²⁰ The research findings indicate a much higher prevalence of violence against women with disabilities in comparison to non-disabled women. Women who are hearing impaired and/or deaf were most affected.

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Provide comprehensive information on what steps have been taken by the Federal Government since 2011 (date of submission of the state report) to protect girls and women with disabilities in institutions against exploitation, violence and abuse, (para. 128);
- Provide comprehensive information on what measures have been taken by the State Party since the study was published, (para. 129);
- Provide information on what steps have been taken in particular to protect the group of women with hearing impairments;

¹⁸ For example in its Concluding Observations on Austria: "The Committee recommends that the State party take further measures to ensure protection of women, men, girls and boys with disabilities from exploitation, violence and abuse" see UN Doc CRPD/C/AUT/CO/1, 30 September 2013, para. 35; see also UN Doc CRPD/C/AUS/CO/1, 21 October 2013, paras. 37, 38; UN Doc CRPD/C/SLV/CO/1, 8 October 2013, paras. 35, 36; UN Doc CRPD/C/ARG/CO/1, 8 October 2012, paras. 29, 30.

¹⁹ UN Doc CRC/C/DEU/CO/3-4, 31 January 2014, para. 53.

²⁰ Bundesministerium für Familie, Senioren, Frauen und Jugend (2013): Lebenssituation von Frauen mit Behinderungen und Beeinträchtigungen in Deutschland. Ergebnisse der quantitativen Befragung. Endbericht; available online at: <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationen.did=199822.html>.

- Explain to the CRPD Committee what steps will be taken by the State Party in order to implement the recommendation of the CRC Committee to protect girls with disabilities against exploitation, violence and abuse, (CRC/C/DEU/CO/3-4, para. 53).

Protecting the integrity of the person (article 17)

The Federal Constitutional Court decision of 23 March 2011 (2 BvR 882/09) barred the **use of force** as a last resort in **forensic psychiatric hospitals**, though it held force to be exceptionally admissible subject to strict requirements for patients who, because of an illness, are medically held incapable of giving consent. Prior to that ruling involuntary treatment was widespread (estimation of up to 10% of patients); yet, the documentation is weak and there are difficulties associated with monitoring and legal protection. The ruling practically stopped the practice of **involuntary treatment** in many cases and prompted a discussion on whether all forms of involuntary treatment violate the CRPD. However, a new federal law passed in early 2013 provides a reviewed legal basis for forced treatment.²¹ On the basis of the Committee's Concluding Observations, the National CRPD Monitoring Body criticised the legislation when it was in draft form and questioned its compliance with human rights. However, this intervention had no effect and the *Bundestag* passed the law.

Since the adoption of the federal legislation, some *Länder*, e.g. Hamburg, Baden-Württemberg or Saarland, have been taking initiatives to pass corresponding laws. **Germany's Initial Report** does not contain information on the issue of forced treatment.

Recently, the CRPD Committee has stated very clearly in the past that health services should in all cases be based on free and informed consent; for example in its Concluding Observations on Austria:

The Committee also urges the State party to ensure that all mental health services are provided based on the free and informed consent of the person concerned. It recommends that the State allocate more financial resources to persons with intellectual and psychosocial disabilities who require a high level of support, in order to ensure that there are sufficient community based outpatient services to support persons with disabilities.²²

²¹ Section 1906 German Civil Code (*Bürgerliches Gesetzbuch, BGB*).

²² UN Doc CRPD/C/AUT/CO/1, 30 September 2013, para 31; see also UN Doc CRPD/C/CHN/CO/1, 15 October 2012, paras. 21-24; UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paras. 25-28; UN Doc CRPD/C/ARG/CO/1, 8 October 2012, paras. 19-26; UN Doc CRPD/C/PER/CO/1, 16 May 2012, paras. 22-29; UN Doc CRPD/C/ESP/CO/1; 19 October 2011, paras. 33-36; UN Doc CRPD/C/AUS/CO/1, 21 October 2013, paras. 33, 34; UN Doc CRPD/C/TUN/CO/1, 13 May 2011, paras. 22-25, 28, 29.

Accordingly, the National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Provide the text of all legal provisions that can be invoked in order to conduct involuntary treatment;
- Provide comprehensive information on the number of cases (differentiated by *Länder* and gender) in which involuntary treatment has been conducted since the Court's decision in April 2011;
- Provide comprehensive information on the number of cases (differentiated by *Länder* and gender) in which involuntary treatment has been conducted since the new legislation at the Federal level went into force in February 2013;
- Provide information on all steps taken to prevent the use of force and compulsory treatment within the psychiatric system.

Living independently and being included in the community (article 19)

Regarding the right to live independently and to be included in the community, we would like to make the CRPD Committee aware of two issues.

The first is the need to establish a comprehensive inclusive societal structure providing meaningful (alternative) arrangements for persons with disabilities in the field of housing, education and work and the second is that of access to personal assistance.

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Indicate whether there is an over-arching strategy in place for establishing an inclusive societal structure providing meaningful alternative arrangements for persons with disabilities outside of special institutions, in particular regarding housing, education and labour;
- Indicate whether representative data is available on the wishes and preferences of persons with disabilities (differentiated by disability, gender) regarding existing special institutions and what the data says;
- To provide information on steps which have been taken to consult with persons with disabilities and collect differentiated data relating to how German society can be transformed into an inclusive society, including the wishes and preferences of persons with disabilities;
- Explain what steps have been taken to evaluate the effects of institutions on the individual autonomy and the rights of persons with disabilities.

Secondly, it has been repeatedly reported to the National CRPD Monitoring Body that individual applications for personal assistance have been unduly refused by the respective authorities. Either the authority refers to a certain standard amount of

assistance without giving due consideration to the individual circumstances of the case and thus provides for less assistance than would be required to allow full enjoyment the rights enshrined in the CRPD or the applicants are referred to service providers with under-qualified personnel who are not able to provide the necessary support at a sufficient quality level. Consequentially, the individuals affected are unable to receive adequate assistance services outside institutions.²³

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Provide information on what steps have been taken to ensure that personal assistance is provided by competent authorities in both the amount and quality required to fully enjoy the rights of persons with disabilities;
- Provide information on what steps have been taken to ensure that the individual circumstances of a case are given due consideration, including in cases where the assistance applied for exceeds, or deviates from, regular schemes or budgets.

Personal mobility (article 20)

Liberty-restricting measures in care facilities for older persons very likely are widespread and have increased significantly in Germany.²⁴ In Germany, these restrictions on mobility include confinement in beds or wheelchairs, and sedation. **Germany's Initial Report** does not offer detailed information on this issue (see para. 150).

To our knowledge, the CRPD Committee has not addressed the issue of the rights of elder persons, whose life situation is in many case linked with a long-term impairment (mental, physical, and sensory) and who therefore can experience disabilities in terms of the Convention.

It seems necessary for Germany to take concrete steps limiting and regulating liberty-restricting measures and practices, in order to protect the rights of residents in care

²³ The issue of personal assistance was addressed with regard to the financial aspect by the Committee in its Concluding Observations on Austria, where the Committee advises the Austrian government to “ensure that the personal assistance programmes provide sufficient financial assistance to ensure that a person can live independently in the community”, UN Doc CRPD/C/AUS/CO/1, 30 September 2013, para. 39.

²⁴ Meyer, Gabriele / Köpke, Sascha / Haastert, Burkhard et al (2009): Restraint use among nursing home residents: cross-sectional study and prospective cohort study, in *Journal of Clinical Nursing* 18, 981-990. Between 1998 and 2009, the number of cases in which custodianship courts legitimized such measures increased by a factor of nearly two hundred and fifty per cent, see Brucker, Uwe (2011): Pflegefachliche Fürsorge oder verselbständigte Routine. Freiheitseinschränkende Maßnahmen in Heimen und Genehmigungspraxis der Betreuungsgerichte, in: *Pro Alter*, Januar/Februar p.47-53.

facilities. One approach that has been developed for the sustainable reduction of the number of liberty-restricting measures became known as the “*Werdenfelser Weg*” (the “Werdenfelser Path”), which strengthens the role of the court in monitoring more closely the right of elder persons to mobility.

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Report the number of cases of liberty-restricting measures which have occurred in Germany since 2009 disaggregated by *Länder*,
- Provide updated and detailed information concerning the measures taken to guarantee the rights of elder persons in care facilities in all cases and to reduce the extent of liberty-restricting measures, (para. 150);
- Provide information on the “*Werdenfelser Weg*” approach and on what steps have been undertaken to apply it nationwide.

Education (article 24)

Germany has not yet developed an inclusive educative system. Special schooling has a tradition in the field of child education in particular; the country has a highly differentiated (segregated) system that is based on a division between regular schooling and special schooling. When the CRPD came into force in 2009, 85% of persons with recognised special needs attended special schools.

Germany’s Initial Report (see paras. 188-205) does not provide information on any measures intended to transform segregating structures into an inclusive educational system. Rather, the State Party presents the view that special schooling has a special role to play. However, according to the CRPD the challenge is to overcome segregation in schooling by progressively building and retaining an inclusive educative system and to fulfill the right to inclusive education here and now by providing access for persons with disabilities to a high-quality and meaningful place in regular schools.²⁵

The National CRPD Monitoring Body’s view of the developments in the 2009-2013 period - whilst acknowledging the steps the *Länder* have been taking to promote inclusive education and taking into account the practical difficulties associated with dismantling the system of separate schooling - is that the *Länder* have a long way to go in terms of strategy and practice towards creating an inclusive educative structure as it is presented in the Convention and realizing the right to inclusive education for everyone.

²⁵ See United Nations / General Assembly, Thematic Study on the rights of persons with disabilities to education. Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/25/29, 18 December 2013, paras. 26ff., 56ff., 68 ff.

Recently, the Committee on the Rights of the Child urged Germany to take “[a]ll necessary legislative and structural reforms to ensure that the right to inclusive education is guaranteed to children with disabilities and provide for it to encompass the right to individual support and reasonable accommodation in the area of education.”²⁶ The CRPD Committee itself has broached the issue of an inclusive educational system in several Concluding Observations, for example in its Concluding Observations on Austria.²⁷

In relation to the obligation to develop a single inclusive educative system and to overcome segregation in schooling, the National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Report the number of school-aged children with disabilities who are receiving instruction in the regular school system, requesting specification of the development on the rate of inclusion in the 2008-2013 periods in absolute numbers and percentages;
- Report the number of children who are integrated in the regular school system, if so-called “*Außen- und Integrationsklassen*” [external and integration classes: special classes for persons with special needs under the roof of a regular school] are not included in the integration rate, again requesting specification of the development in the 2008-2013 period in absolute numbers and percentages;
- Report the number of children with disabilities who are not taught in the regular school system (“exclusion rate”), in absolute figures and as a percentage of the total number of children required to attend school, again, requesting specification of the developments over the 2008-2013 period;
- Clarify whether there is a uniform basis for calculating the inclusion and exclusion rates in the *Länder* and, if not, what steps have been taken to achieve a common ground for statistics;
- List all legal amendments relating to schooling that have been introduced in the light of the CRPD obligation to develop an inclusive educative system.

²⁶ UN Doc CRC/C/DEU/CO/3-4, 31 January 2014, para. 51 (b).

²⁷ In the case of Austria the Committee recommended that greater efforts be made to support students with disabilities in all areas of inclusive education from kindergarten to secondary school. It particularly recommends the State Party to ensure that persons with disabilities, including children with disabilities and their representative organisations be involved in the day-to-day implementation of the models of inclusive education introduced in various *Länder*. See UN Doc CRPD/C/AUT/CO/1, 30 September 2013, para. 43; see also UN Doc CRPD/C/AUS/CO/1, 21 October 2013, paras. 45, 46; UN Doc CRPD/C/SLV/CO/1, 8 October 2013, paras. 49-50; UN Doc CRPD/C/PRY/CO/1, 15 May 2013, paras. 57-58; UN Doc CRPD/C/ARG/CO/1, 8 October 2012, paras. 37, 38; UN Doc CRPD/C/CHN/CO/1, 15 October 2012, paras. 35, 36; UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paras. 39-42; UN Doc CRPD/C/PER/CO/1, 16 May 2012, paras. 36, 37; UN Doc CRPD/C/ESP/CO/1, 19 October 2011, paras. 43, 44; UN Doc CRPD/C/TUN/CO/1, 13 May 2011, paras. 30-32.

- Explain what steps have been taken by the Federal Government to communicate to the *Länder* that their efforts relating to article 24 CRPD have not been sufficient and are not in compliance with the obligation to evolve an inclusive educative system;
- Explain what steps will be taken by the State Party to ensure the implementation of the recommendation of the Committee on the Rights of the Child (CRC/C/DEU/CO/3-4, para. 51 (b)).

Further, with reference to article 24 (2) (a) the National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Report the number of cases in which a child with special needs has been sent to special school against his or her will, listing the figures by each Land for each year;
- Report the number of legal proceedings undertaken since 2009 in which children or their guardians have requested access to regular schooling, listing the figures by Land for each year;
- Explain whether the State Party believes that the right to inclusive education recognised by the Convention is an individual and legally enforceable right; if no, explain what steps have been taken to ensure that the human right to inclusive education becomes an enforceable right under statute law.

Adequate standard of living and social protection (article 28)

Germany has a programme in place known as the integration assistance scheme (*Eingliederungshilfe*), which provides financial support to persons with disabilities who require personal assistance or other services. However eligibility for that support requires individuals to draw on their income and assets until those resources have been depleted to the level of a very low exclusion amount. For persons who are dependent on integration assistance services on a regular and continuous basis, this entails being confined to a living standard equal to that of a person on welfare, regardless of the actual level of their employment income. As a consequence, such persons can neither benefit from their employment income nor enjoy equal access to pension schemes. As a result, the likelihood that persons with disabilities will face poverty in old age is much greater than it is for persons without disabilities.

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Indicate whether the State Party plans to provide integration assistance services not dependant on income and assets;
- Provide information on what steps are being taken to ensure equal access to retirement benefits and programmes by persons with disabilities who receive integration assistance services (*Eingliederungshilfe*).

Participation in political and public life (article 29)

Not all persons with disabilities in Germany have the right to vote and to be elected. Persons who are under a custodianship **encompassing all affairs** or are confined in a forensic institution as the result of a criminal court decision are excluded from voting. The CRPD Committee has addressed the issue of exclusion from the right to vote in a number of its Concluding Observations, for example, those on Hungary in which it recommended that “all relevant legislation be reviewed to ensure that all persons with disabilities regardless of their impairment, legal status or place of residence have a right to vote, and that they can participate in political and public life on an equal basis with others.”²⁸ The CRPD Committee also adopted a view on the issue.²⁹

In contrast, the German government stated in its **Initial Report** that certain groups of disabled persons “are unable to take a highly-personal decision on who to vote for on their own responsibility” (para. 253).

The National CRPD Monitoring Body recommends that the CRPD Committee request the State Party to:

- Provide detailed data numbers of persons excluded from the right to vote;
- Provide information on what steps have been taken to ensure that all persons with disabilities could participate in the Federal elections in September 2013;
- Provide information on what steps will be taken to ensure that all persons with disabilities may participate in the Federal elections in autumn 2017;
- Provide information on what steps have been taken to ensure that all persons with disabilities may participate in election to the European Parliament in May 2014;
- Provide information on developments to ensure the right to participation in elections of persons with disabilities at the *Länder* level;
- Indicate how the measures listed in the Initial Report have been implemented in practice (para. 255).

²⁸ UN Doc CRPD/C/HUN/CO/1, 22 October 2012, para. 46; see also UN Doc CRPD/AUS/CO/1, 21 October 2013, paras. 51, 52; UN Doc CRPD/C/PRY/CO/1, 15 May 2013, paras. 69, 70; UN Doc CRPD/C/ARG/CO/1, 8 October 2012, paras. 47/48; UN Doc CRPD/C/CHN/CO/1, 15 October 2012, paras. 45, 46; UN Doc CRPD/C/PER/CO/1, 16 May 2012, paras. 44, 45; UN Doc CRPD/C/ESP/CO/1, 19 October 2011, paras. 47, 48; UN Doc CRPD/C/TUN/CO/1, 13 May 2011, para. 35.

²⁹ See UN Doc. CRPD/C/10/D/4/2011 of 20 September 2013, Zsolt Bujdosó and five others v. Hungary.

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