

Michael Ganner, Elisabeth Rieder,
Caroline Voithofer, Felix Welti (Eds.)

The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany



SERIES

Innsbrucker Beiträge zur Rechtstatsachenforschung: Vol. 12

Series Editors: Heinz Barta, Michael Ganner, Caroline Voithofer

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**The implementation of the UN Convention
on the Rights of Persons with Disabilities
in Austria and Germany**

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This publication was printed with the financial support of the Tyrolean Provincial Government (Department of Culture), the Province of Vorarlberg, the FP Center Interdisciplinary Gender Research Innsbruck, the “Behindertenbeirat” of the City of Innsbruck and the Vice-Rectorate for Research of the University of Innsbruck.



Forschungsplattform Center Interdisziplinäre
Geschlechterforschung Innsbruck



The Deutsche Bibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://ddb.de>.

The translation of the original German contributions was carried out by Wendy Lewin from the SprachUnion, afterwards checked and approved by the authors (Valentin Aichele, Lena Baltzer, Verena Bentele, Maximilian Bresch, Petra Flieger, Arne Frankenstein, Michael Ganner, Pablo Hesse, Hansjörg Hofer, Volker Lipp, Elisabeth Rieder, Max Rubisch, Volker Schönwiese, René Schröder, Caroline Voithofer, Felix Welti). The translation was funded by the project “Partizipatives Monitoring Rehabilitations- und Teilhaberecht” of the DVfR, which is funded by the German Federal Ministry of Labour and Social Affairs from the “Ausgleichsabgabefonds”.

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Universität Innsbruck

1st edition

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www.uibk.ac.at/iup

ISBN 978-3-99106-037-6

Preface and acknowledgements

Innsbruck, May 2021

As editors of the series “Innsbrucker Beiträge zur Rechtstatsachenforschung” (“Innsbruck contributions to empirical legal studies”), we are very pleased to publish the 12th volume. This book of proceedings includes the collection of articles presented at the conference on “The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany”, which took place on 13th February 2020 in Innsbruck and was organised in collaboration with Prof. Dr. Felix Welti from the University of Kassel as well as Dr. Elisabeth Rieder, Head of the Office for the Disabled Students at the University of Innsbruck.

In this preface to the conference proceedings, we would like to thank in particular

- Elisabeth Rieder and Felix Welti for the excellent cooperation and the successful staging of the conference;
- Tanja Ulasik for her enthusiastic and wide-ranging support which was essential for the success of the conference;
- the “Team in Kassel”, naming Michael Beyerlein, René Dittmann, Lilit Grigoryan, Christina Janßen;
- Carmen Drolshagen and Birgit Holzner who prepared the manuscript and represent the innsbruck university press;
- Martina Brugger and Elfriede Voithofer who supported the publishing of the conference proceedings.

The papers were finalised in autumn 2020. The translation of the original German contributions was carried out by sworn translators from the SprachUnion, afterwards checked and approved by the authors (Valentin Aichele, Lena Baltzer, Verena Bentele, Maximilian Bresch, Petra Flieger, Arne Frankenstein, Michael Ganner, Pablo Hesse, Hansjörg Hofer, Volker Lipp, Elisabeth Rieder, Max Rubisch, Volker Schönwiese, René Schröder, Caroline Voithofer, Felix Welti).

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Abbreviations¹

-D	Draft	BlgNR	Beilage(-n) zu den Stenographischen Protokollen des Nationalrates
ABGB	Allgemeines Bürgerliches Gesetzbuch (A)	BLK	Bund-Länder Kommission
AEDP	Act on the Elimination of Discrimination against PWDs	BMAS	Bundesministerium für Arbeit und Soziales
AFBG	Gesetz zur Förderung der beruflichen Aufstiegsfortbildung	BMJ	Bundesministerium für Justiz
AFG	Ausschuss für Arbeit, Familie und Gesundheit	BR-Drucks	Bundesratsdrucksache
AGG	Allgemeines Gleichbehandlungsgesetz (G)	BremHG	Bremisches Hochschulgesetz
ANED	Academic Network of European Disability Experts	BremLBO	Bremische Landesbauordnung
approx	approximately	BSG	Bundessozialgericht
Art	Article(s)	BSGE	Entscheidungen des Bundessozialgerichts
AVG	Allgemeines Verwaltungsverfahrensgesetz 1991 (A)	BTÄndG	Betreuungsrechtsänderungsgesetz (G)
B	Beschluss	BT-Drucks	Bundestagsdrucksache
BAföG	Bundesausbildungsförderungsgesetz (G)	BtG	Betreuungsgesetz (G)
BauO	Bauordnung (G)	BTHG	Bundesteilhabegesetz (G)
Bay	Bayrisch	BtPrax	Betreuungsrechtliche Praxis
BeckOK	Beck'scher Online-Kommentar	BVerfG	Bundesverfassungsgericht
BGB	Bürgerliches Gesetzbuch (G)	BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BGB-Draft	Bürgerliches Gesetzbuch-Draft (G)	BW	Baden-Württemberg
BGBI	Bundesgesetzblatt	CDU	Christlich Demokratische Union Deutschlands
BGG	Gesetz zur Gleichstellung von Menschen mit Behinderungen (G)	CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
BGH	Bundesgerichtshof	Cf	Confer
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen	CFR	Charter of fundamental Rights of the European Union

¹ In the case of legal norms, it is indicated in brackets whether they refer to Austria (A) or Germany (G), if the norm exists only in one of the two countries.

CJEU	Court of Justice of the EU	ErwSchG	Erwachsenenschutzgesetz (A)
COM	European Commission	esp	especially
COVID	Coronavirus Disease	et al	et alius/at alia
CRC	The Convention on the Rights of the Child	etc	et cetera
CRPD	UN Committee of Experts for the rights of persons with disabilities	EU	European Union
CSU	Christlich-Soziale Union	f	following page
DBR	Deutscher Behindertenrat	FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (G)
DIM	Deutsches Institut für Menschenrechte	FamFG-E	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit - Entwurf (G)
DIN	Deutsches Institut für Normung	FamRZ	Zeitschrift für das gesamte Familienrecht
DNotZ	Deutsche Notar-Zeitschrift	ff	following pages
DPO	disabled people organization	FRA	European Union Agency for Fundamental Rights
DPOs	disabled people organizations	GG	Bonner Grundgesetz (G)
Dr	Doctor	GGO	Gemeinsame Geschäftsordnung
Drucks	Drucksache	GP	Gesetzgebungsperiode
EBS	Europäische Behindertenstrategie	GVBl	Gesetz- und Verordnungsblätter
EC	European Council	GVG	Gerichtsverfassungsgesetz (G)
ECLI	European Case Law Identifier	GZ	Geschäftszahl
Ed	Editor	HambHochschG	Hamburger Hochschulgesetz
EDF	European Disability Forum	HBauO	Hamburger Bauordnung
Eds	Editors	HBO	Hessische Bauordnung
EDS	European Disability Strategy	HDI	Human Development Index
eg	for example	HIV	Humane Immundefizienz-Virus
EPRS	European Parliamentary Research Service	HK-BUR	Heidelberger Kommentar zum Betreuungs- und Unterbringungsrecht
ErläutRV	Erläuterungen zur Regierungsvorlage	HSchG	Hochschulgesetz (G)

ibid	ibidem	ME	Ministerialentwurf
ICCPR	International Covenant on Civil and Political Rights	Mio	Millionen
ICD	International Statistical Classification of Diseases and Related Health Problems	MPs	Members of Parliament
ICESCR	UN Charter for the economic, social, and cultural rights	MüKo	Münchener Kommentar
IDA	International Disability Alliance	NAP	Nationaler Aktionsplan
ie	id est	NBauO	Bauordnung Niedersachsen
iFamZ	Interdisziplinäre Zeitschrift für Familienrecht	NBGG	Niedersächsisches Behindertengleichstellungsg
ILO	International Labour Organisation	Nds	Niedersachsen
IMFR	Investitions- und Maßnahmenförderungsrichtlinie	NGO	Non Governmental Organisation
IPREG	Intensivpflege- und Rehabilitationsstärkungsgesetz (G)	NJW	Neue Juristische Wochenschrift
IRC	International Labour Conference	NJW-RR	Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht
JA	Justizausschuss	NLMR	Newsletter Menschenrechte
jurisPR-	juris Das Rechtsportal	No	Number
SozR	Sozialrecht		
JuS	Juristische Schulung	NO	Notariatsordnung (Ö)
KK-	Karlsruher Kommentar zur	NPM	Nationaler
StPO	Strafprozessordnung		Präventionsmechanismus
KMK	Kultusministerkonferenz	NRW	Nordrhein-Westfalen
LBauO	Landesbauordnung Rheinland-Pfalz	NVwZ	Neue Zeitschrift für
LG	Landesgericht		Verwaltungsrecht
LGBI	Landesgesetzblatt	NZS	Neue Zeitschrift für Sozialrecht
LG- BehM	Landesgesetz zur Gleichstellung behinderter Menschen (G)	ÖAR	Österreichische Arbeitsgemeinschaft für Rehabilitation
lit	litera	ÖBB	Österreichische Bundesbahn
LSA	Land Sachsen-Anhalt	OGH	Oberster Gerichtshof
LSG	Landessozialgericht	OLG	Oberlandesgericht
MBO	Mutterbauordnung (G)	ORF	Österreichischer Rundfunk

ÖZPR	Österreichische Zeitschrift für Pflegerecht	UN	United Nations
ÖZVV	Österreichisches Zentrales Vertretungsverzeichnis	UN CRPD	United Nations Convention on the Rights of Persons with disabilities
p	page	USA	United States of America
para	paragraph	v	versus
paras	paragraphs	VBIBW	Verwaltungsblätter für Baden-Württemberg
pp	pages	VG	Verwaltungsgericht
Prof	Professor(in)	VGH	Verwaltungsgerichtshof
PWDs	persons with disabilities	VÖZ	Verband Österreichischer Zeitungen
R&P	Recht & Psychiatrie	Vol	Volume
RdM	Recht der Medizin	VStG	Verwaltungsstrafgesetz
rec	recital	VwGO	Verwaltungsgerichtsordnung (G)
RES	Resolution	W3C	World Wide Web Consortium
Rev	Revision	WAI	Web Accessibility Initiative
RIS	Rechtsinformationssystem	WCAG	Web Content Accessibility Guidelines
SächsBO	Bauordnung Sachsen	WfbM	Werkstatt für behinderte Menschen
SDGs	Sustainable Development Goals	WIPO	Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled
SGB	Sozialgesetzbuch (G)		Zugänglichmachungverordnung (G)
SozR	Sozialrecht		Zivilprozessordnung
SPD	Sozialdemokratische Partei Deutschlands	ZMV	
SPF	special educational need	ZPO	
StipG	Stipendiengesetz (G)		
StPO	Strafprozessordnung		
SWK BR	Stichwortkommentar Behindertenrecht		
TEU	Treaty of the European Union		
TFEU	Treaty on the Functioning of the European Union		
ThürBO	Thüringer Bauordnung		
ThürGG	Thüringer Gemeinsame Geschäftsordnung		
O			
ThürHochschG	Thüringer Hochschulgesetz		
ThürMitwVo	Thüringer Verordnung über die Mitwirkung der Landesschülersprecher, der Landeselternsprecher und des Landesschulbeirats		

Glossar¹

German	English
ABGB	Austrian General Civil Code
Allgemeines Gleichbehandlungsgesetz	General Equal Treatment Act (G)
Allgemeines Verwaltungsverfahrensgesetz	Austrian General Administrative Procedure Act
Außenministerium	Ministry of Foreign Affairs
Außerstreitgesetz	Non-Contentious Proceedings Act (A)
B v	resolution dated
Bundesarbeitsgericht	Federal Labour Court
Entscheidungen - Bundesarbeitsgericht	Decisions - Federal Labour Court
Baumministerkonferenz	Conference of Ministers of Construction
Bayerisches LSG	Bavarian Higher Social Court
BayVBl	Administrative Journal form for Bavaria
Beauftragte:r für Menschen mit Behinderungen	Disability Commissioner
Behindertenanwalt	Disability Ombudsman
Behindertenbericht der österreichischen Bundesregierung	Disability Report of the Austrian Federal Government
Behinderteneinstellungsgesetz	Disabled Persons Recruitment Act (A)
Behindertengleichstellungsgesetz des Bundes	Federal Act on Equal Opportunities for Persons with Disabilities (G)
Behindertengleichstellungsgesetze	Laws on equality for persons with disabilities (A)
Behindertengleichstellungsrecht	Right to Equal Opportunities for People with Disabilities
Benachteiligungsverbot	discrimination prohibition
Beschäftigungsoffensive und verstärkte Angebote im Schnittstellenbereich zur Schule	Employment offensive and increased offers in the interface area with school
Betreuungsgesetz	Custodianship Act (G)
Betreuungsrecht	Law on Legal Protection of Adults (G)
Betreuungsvereine	associations for legal protection of adults
Betreuungsverfahren	proceedings concerning the legal protection of adults
BGB-E	Reform Draft on the German Civil Code
BGBI	Federal Law Gazette
Bildungsministerium	Ministry of Education
BlgNR	Supplement number
Bremisches Behindertengleichstellungsgesetz	Bremen Equal Opportunities for Persons with Disabilities Act (G)
Bremisches Gesetz zur Förderung von Kindern in Tageseinrichtungen und in Tagespflege	Bremen Act on the Promotion of Children in Day Care Facilities and in Day Care (G)

¹ In the case of legal norms, it is indicated in brackets whether they refer to Austria (A) or Germany (G), if the norm exists only in one of the two countries.

German	English
Bremisches Schulgesetz	Bremen School Act (G)
BRK-Allianz	German CRPD Alliance
BSG SozR	Federal Social Court Social Law
BSGE	Decisions - Federal Social Court
Bundesarbeitsgericht	Federal Labour Court (G)
Bundesbehindertenanwalt	Disability Ombudsman
Bundesbehindertenbeirat	Federal Disability Advisory Board (A)
Bundes-Behinderteneinstellungsgesetz	Federal Disability Employment Act
Bundes-Behindertengleichstellungsgesetz	Austrian Federal Disability Equality Act
Bundesfernstraßengesetz	law on federal trunk roads (G)
Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz	Federal Ministry of Social Affairs, Health, Care and Consumer Protection
Bundesmonitoringausschuss	Federal Monitoring Committee
Bundesrat	federal assembly
Bundessozialgericht	Federal Social Court
Bundestag	parliament
Bundesteilhabegesetz	Federal Participation Act (G)
Bundesverfassungsgericht	Federal Constitutional Court
Bundesvertragsgesetz	Federal Contracts Act (A)
Bund-Länder Kommission (BLK) für Informationstechnik in der Justiz	Federation-Länder Commission (BLK) for Information Technology in the Justice System
Bündnis 90/Die Grünen	Alliance 90/The Greens
Bürgerliches Gesetzbuch	German Civil Code
BVerfGE	Decisions of the Federal Constitutional Court
Deutscher Behindertenrat	German Disability Council
Deutsches Institut für Menschenrechte	German Institute for Human Rights
Eingliederungshilfe	integration assistance
Einschätzungsverordnung	assessment ordinance
Einwilligungsvorbehalt	reservation of consent by the court-appointed legal representative
Eisenbahn-Bau und Betriebsordnung	Ordinance on the Construction and Operation of Railways
Entwurf eines Gesetzes zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen (Bundesteilhabegesetz)	Draft of a law to strengthen the participation and self-determination of persons with disabilities (Federal Participation Law (G))
Entwurf eines Gesetzes zur Weiterentwicklung des Behindertengleichstellungsrechts	Draft of a law to develop the “Behindertengleichstellungsrecht” (right to equality for persons with disabilities) (G)
ErläutRV	Government bill
Erwachsenenschutzgesetz	Protection of Adults Act (A)
Erwachsenenschutzrecht	Adult protection law (A)
EuGH	European Court of Justice

German	English
FamFG	Family Matters and in Matters of Non-contentious Jurisdiction Act (G)
FamFG-E	Reform Draft to the Family Matters and in Matters of Non-contentious Jurisdiction (G)
Förder- und Pflegeheim Perchtoldsdorf in Niederösterreich	Special school and care home Perchtoldsdorf in Lower Austria
Gebrechlichkeitspflegschaft	curatorship for adults ordered in case of mental or physical incapacity
Genehmigungsvorbehalt	Reservation of authorisation
Gerichtsverfassungsgesetz	German Judicature Act
Gesetz über die Hochschulen des Landes Nordrhein-Westfalen	Law on the Higher Education Institutions of the State of North Rhine-Westphalia
Gesetz zur Reform des Rechts der Vormundschaft und Pflegschaft für Volljährige	Law on the Reform of the Law of Guardianship and Custody for Adults
GG	Basic Law (G)
Gesetzgebungsperiode	Legislative period
Heimaufenthaltsgesetz	Accommodation in Residential Homes Act
Hessisches Gesetz zur Gleichstellung von Menschen mit Behinderungen	Hessian Act on Equality for People with Disabilities
Inklusionsgrundsatzegesetz Nordrhein-Westfalen	Law on Basic Inclusion Principles, North Rhine Westphalia
Intensivpflege- und Rehabilitationsstärkungsgesetz	Intensive Care and Rehabilitation Strengthening Act
Justizministerium	Ministry of Justice
Kinder- und Jugendhilfe	child and youth welfare
Klagsverband	Litigation Association
Landesblindengeld	State Blindness Allowance
Leistungsbescheid	Claims decision
Landessozialgericht	Higher Social Court
Maßnahmenvollzug mit Anm	preventive forensic detention with annotation
Monitoringausschuss	Monitoring committee
Monitoring-Stelle des Deutschen Instituts für Menschenrechte	Monitoring Body at the German Institute of Human Rights
Musterbauordnung	Model Building Regulation (G)
Nationaler Aktionsplan	National Action Plan
Nichtannahmebeschluss	Decision not to accept
Niedersächsisches Behindertengleichstellungsgesetz	Lower Saxony Disability Equality Act
Notariatsordnung	Notarial Code
Normenkontrolle	Judicial review
ÖBB	Austrian Federal Railway
Oberösterreichisches Chancengleichheitsgesetz	Upper Austrian Equal Opportunities Act
Oberster Gerichtshof	Austrian Supreme Court of Justice

German	English
österreichische Arbeitsgemeinschaft für Rehabilitation	Austrian Association for Rehabilitation
Österreichische Volksanwaltschaft	Austrian Ombudsman Board
Österreichischer Behindertenrat	Austrian Disability Council
Österreichischer Rundfunk	Austrian Broadcasting Corporation
Österreichisches Zentrales Vertretungsverzeichnis	Austrian Central Representation Register
Pflegeversicherung	care insurance
Rechnungshof	Court of Audit
Rechtsinformationssystem des Bundes	Federal Legal Information System
Sächsisches LSG	Higher Social Court of Saxony
Sachwalterrecht	guardianship law (A)
Sammlung des Bundes- und Landesrechts	Collection of Federal and State Law
Schulpflichtgesetz	Compulsory Education Act
Schwerbehindertenrecht	Law on persons with severe disabilities
Sicherungshaft	preventive detention
Sozialgesetzbuch	German Code of Social Law
Sozialministerium	Ministry for Social Affairs
Sozialrecht	Social Law
Teilhaberbericht der Bundesregierung über die Lebenslagen von Menschen mit Behinderungen	Report on participation of the Federal Government about the position persons with disabilities find themselves in
Teilhabegesetze	Participation Laws (G)
Thüringer Hochschulgesetz	Thuringian Higher Education Act
Tiroler Monitoringausschuss	Monitoring committee in Tyrol
Unabhängiger Monitoringausschuss zur Umsetzung der UN-Konvention über die Rechte von Menschen mit Behinderungen	Independent Monitoring Committee on the Implementation of the UN Convention on the Rights of Persons with Disabilities
universelles Völkergewohnheitsrecht	Universal international customary law
Unterbringungsgesetz	Law on involuntary commitment
Urt v	Judgment of
Verbandsklage	Representative action
Verbindliche Richtlinie zur Entwicklung von Inklusiven Modellregionen	Binding guidelines to develop inclusive model regions
Verwaltungsgericht	Administrative court
Verwaltungsgerichtshof	Higher Administrative Court
Verwaltungsgerichtsordnung	Code of Administrative Court Procedure
Verwaltungsstrafgesetz	Administrative Penal Act
Zielvereinbarung inklusive Behindertenpolitik	agreement on objectives including policies for persons with disabilities
Zivilgesellschaft	Civil Society
ZMV	Ordinance on barrier-free accessibility of documents for blind and visually impaired persons in judicial proceedings
Zivilprozessordnung	Code of Civil Procedure

Introduction and reflections on the conference

A. The conference

The conference on “The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany” took place on 13th February 2020 at the University of Innsbruck. This was a joint event held by the University of Innsbruck (represented by Michael Ganner and Caroline Voithofer from the Institute of Civil Law and Elisabeth Rieder as the Head of the Office for the Disabled Students at the university) as well as the University of Kassel (represented by Felix Welti from the chair ‘Social and Health law, Rehabilitation and Disability Law’, Department of Social Work and Social Welfare). The reason for the joint conference were the almost simultaneous second state reviews of Austria and Germany on the UN CRPD. The State Reports were already available. The reports from the NGOs, from representatives of civil society, and the monitoring bodies were submitted to the Committee. The constructive dialogues are planned for the Spring 2021 at the earliest. The general recommendations then passed by the Committee will subsequently provide the framework that the national policies in implementing the UN CRPD will concentrate on in the next few years. That is why it is worthwhile making the state review the focal point of an international conference.

It was particularly important to us for the widest possible range of people to be able to participate in the conference itself.

We were also lucky that we were able to hold the conference without limitations shortly before the COVID-19 situation in Austria and Germany reached a peak. Although most of the 150 participants came from Austria, Germany, and Liechtenstein, participants from Japan, Taiwan, and Ireland also travelled to the conference. Anyhow, COVID-19 infections associated with the conference have not been determined retrospectively either. Which is a great relief for us.

So we value the memory all the more of the successful and exciting conference in person, and the opportunity to directly exchange views with other academics, activists, self-advocates and representatives of government authorities. Although it is possible to exchange content at online conferences, direct personal interaction, which often makes it easier to understand the positions of the other party, is lacking.

1. Best possible accessibility

Apart from the main programme topics, the conference organisers strived to implement best possible accessibility within the meaning of the UN CRPD. While doing so, as the event organisers on location, enthusiastically supported by Tanja Ulasik and the team in the Office of Public Relations, we found out that we are still learning. There are so many things to think about, eg providing straws for drinks and bowls of water for guide dogs.

The physical barriers in the main university building have already been greatly reduced. Enough rooms were made available to us for our working groups which were completely accessible and equipped with hearing loops. New FM-systems that can be connected via WiFi with smartphones, iPhones or hearing aids were tested in the auditorium that most of the items on the agenda took place in, and the subsequent feedback of participants on this was passed on. Sign language interpreters accompanied the event and also mastered the challenge of interpreting from English to German.

All speakers tried to ensure their presentations were easy to understand. Before the conference, the documents used by the speakers were available to download from the conference website in two file formats. This meant it was possible for the participants to prepare and follow up on the contents.

With an event of this size, however, it became apparent that having more accessible toilets wouldn't be a bad thing and height-adjustable buffet tables with seating for several participants is absolutely necessary and popular. Individual steps which had never been noticed before were suddenly obvious. However, these findings did not detract from the fruitful cooperation – maybe even the opposite, they would not have come to light without the cooperation.

B. Relevance of raising awareness according to Art 8 UN CRPD highlighted by the COVID-19 crisis

Art 11 UN CRPD, which refers to situations of risk and humanitarian emergencies and obliges the states parties to take all necessary measures “to ensure the protection and safety of persons with disabilities in situations of risk and emergencies, including [...] the occurrence of natural disasters”, was not a topic at the conference. Unfortunately, in the meantime we have become aware of numerous human rights abuses, especially at the start of the COVID-19 crisis:¹ “During the general lockdown in Austria between March and May 2020, gross violations of the basic rights and freedoms of people with disabilities (especially in institutions) occurred. The monitoring bodies are also concerned about the

¹ Cf for additional examples Tiroler Monitoringausschuss (2020).

fact that there have been restrictions on the provision of assistance under the Convention. Examples include assistance and support services for school-age children with disabilities.”²

Even if it can be assumed that the human rights violations were unconsidered side effects of protection measures, they clearly show the deeper problem: the lack of awareness that still exists about the situation of persons with disabilities. A very illustrative and simple example that can be used is the obligation to wear a mask over your mouth and nose to protect us from infecting each other. It is there to protect us all, but it creates a new obstacle, for example for people with a hearing impediment.

The fact that press conferences were only accompanied by sign language interpreters and given subtitles as the crisis progressed and the official information on the COVID-19 measures was only gradually made accessible on the websites of the Austrian Broadcasting Corporation (ORF) as well as by ministries and Länder shows that inclusion would appear to have taken a back seat while managing the crisis.

In our opinion, the only way to counteract this is if in future, more awareness-raising and sensitisation measures within the meaning of Art 8 UN CRPD are enforced. The economic consequences of the COVID-19 pandemic may not lead to measures that are urgently required here being omitted. Otherwise, in the next crisis, there is the fear of human rights abuses happening again as an unintended side-effect of protective measures. Even in times of a pandemic, there is no reason to play health protection off against guaranteeing fundamental rights under the rule of law, and even worse, at the expense of vulnerable groups of people. The quality of a social constitutional state becomes particularly apparent by its ability to function and its sensitivity in times of crisis.

C. The articles in the conference proceedings

In accordance with the timetable of the conference, **Michael Ganner** also opens the conference proceedings with **Insights into the UN CRPD and its implementation in Austria**. He thereby identifies the UN CRPD as a central driving force in the continued development on the topic of persons with disabilities in Europe; in law as well as in all other areas of life. Here, equal treatment, non-discrimination, accessibility, products with a universal design, and inclusion will benefit all people, young and old, healthy and ill, with disabilities and without. He also discusses the aspects of disability policies in the 2020 legislative program in Austria and critically asks what has been achieved and what still needs to be done.

² Unabhängiger Monitoringausschuss (2020) 11.

This is then followed by thoughts on the **Implementation of the UN CRPD in Germany** by **Felix Welti**. He presents case law by the Federal Constitutional Court, the Federal Social Court and the Federal Labour Court among others on the convention as well as legislation, in particular the “Bundesteilhabegesetz” (Federal Participation Act) and the law on further development of the “Behindertengleichstellungsrecht” (right to equality for persons with disabilities). He also names starting points for research on practical legal problems and research comparing law. Among other things, this would allow the role of DPOs and the impact of federal systems to be explored.

In his article, **Valentin Aichele** focuses on the function, purpose, and benefits of the **state review process**. He frequently makes insightful references to the international human rights protection system as well as topically to the sustainability targets of the 2030 Agenda and shares his precious experience gained as Head of the Monitoring Body at the German Institute of Human Rights. Aichele’s article is a profound presentation of the state reviewing process and a real treasure trove of practical tips. For example, when he explains the advantages of the shortened review – less shallowness, control of the list of issues via input from civil society, etc. He emphasises the potential of the “constructive dialogue” and addresses the preconditions for its success. Overall, his article is a critical stocktaking of the state reviewing process and is appropriate for gaining a better understanding of the opportunities and limits it – in particular, the opportunities of civil society and the monitoring bodies.

In his article, **Max Rubisch** vividly describes what **effect the first state review in Austria** has had. He clearly shows that Austria has taken the Committee recommendations seriously. Thus for example, a new translation of the UN CRPD in German language in Austria was announced³ and that in it, for example, “Integration” has been replaced with “Inklusion”, or that the Ministry for Social Affairs commissioned a scientific study of violence against persons with disabilities in 2016 which was published in December 2019⁴. Despite this, Max Rubisch does not expect the current state review to show that Austria has completely fulfilled the UN CRPD, but instead, identifies areas in his article where there is need for improvement.

The “Ministry’s” point of view is followed by a view of the “**civil society**”. In their article, **Petra Fliieger** and **Volker Schönwiese** discuss their experience within the process of the state review of the UN CRPD, on the UN Convention

³ Austrian Federal Law Gazette III 105/2016.

⁴ <https://broschuere.service.sozialministerium.at/Home/Download?publicationId=718> (24/03/2021).

on the Rights of the Child, as well as the UN Convention on the Elimination of All Forms of Discrimination against Women. They share the important observation: “Committees carrying out the review are only able to get an idea of a differentiated and above all more complete picture of the status of implementation of human rights obligations in a country through critical statements and reports from NGOs supplementing the official State Reports.” Very specifically, they take deinstitutionalisation as an example to show how a topic is addressed in Austria’s state review. In their article, they share their precious experience also with reference to the dialogues between states and the critical dialogues. Their article supplements important points made by Valentin Aichele. The article by **Verena Bentele** “Yes to UN CRPD means yes to protection against discrimination. The active role of **civil society** in implementing the UN Convention on the Rights of Persons with Disabilities” is a passionate plea for the formation of alliances so that progress can actually be made in the state review and in implementing the UN CRDP. However, she also vividly describes that resources are required for self-advocacy and participation: “Personnel and the financial resources this entails required for real involvement are not available to all organisations by any means.”

From the **working group on “Rechtssubjektivität und Zugang zum Recht” (Legal subjectivity and access to the law)**, the inputs from **Michael Ganner** and **Volker Lipp/Lena Baltzer/Maximilian Bresch/Pablo Hesse/René Schröder** are included in the conference proceedings. **Michael Ganner** for his part comprehensively discusses the **legal capacity and the capacity to act** and the **access to the law in Austria**. Apart from the changes introduced by the Second Protection of Adults Act in Austria, he reports on initial experience with the new legal position as well as parts of Austrian law which continue to exist and are contrary to the convention. The 2020 government programme is promising improvements in many areas. However, even if the programme were implemented, there would still be need for action in several places. Thus for example, Ganner identifies that the focus on specific types of disability is too great.

In the second part, in a similar manner, **Volker Lipp, Lena Baltzer, Maximilian Bresch, Pablo Hesse, and René Schröder** discuss the existing legal position on legal subjectivity and access to the law in Germany and while doing so, contrast the respective provision of the UN CRPD with the law as it stands in Germany. Of particular interest is the authors’ presentation on the current plans of reforming the German law on legal protection of adults in the last section of their article. Therein, Lipp et al analyse the potential of the current draft against the background of the UN CRPD.

Caroline Voithofer summarises the in-depth discussions that were held in the **working group on education** (Art 24 UN CRPD). In her article, she subsequently outlines the requirements of Art 24 UN CRPD and provides some information on current developments in the area of education in Austria.

The inputs from the working group on education made by Arne Frankenstein, Elisabeth Rieder, and Lilit Grigoryan are printed in full in the conference proceedings.

Arne Frankenstein presents the **legal position** on education – from the laws on daycare and schools, to the law on equality for persons with disabilities, to labour law – in **Germany** with reference to the UN CRPD. Above all, he identified three central future actions which need to be taken to achieve an inclusive education system: 1. the recognition of inclusion and participation as an interdisciplinary issue; 2. the coordination of all participants involved and 3. the financial and structural safeguarding. He also vehemently pleads for the effects of the COVID-19 crisis to be particularly researched and for targeted proposals to be made available which offset the disadvantages caused by the crisis and also, to identify the structural deficiencies overall and to work through future tasks derived from this in a planned manner.

In the article following that, **Elisabeth Rieder** addresses **policy on education and disability in Austria**. She conclusively shows that Austria is still a long way off an inclusive education system and indicates that language above all will play an important role in this change, not only of policy on disability, but also educational policy in Austria. She illustrates her argumentation using an analysis of the terms “integration” and “inclusion”, of the models of disability that are implicitly represented, as well as “special education”. Her article is a heartfelt plea for inclusive education systems within the meaning of Art 24 UN CRPD.

In her article, **Lilit Grigoryan** discusses the right to **political participation** and **self-advocacy** of persons with disabilities which needs to be taken into consideration in the decision-making processes in education policy. She contrasts the legal position with the political reality in Germany, while providing exciting insights into the NGO and self-advocacy landscape. After an overview of the development of human rights covering the right to political participation, she describes actual participation processes, particularly highlighting the problematic focus of NGOs which are also economically dependent on public resources. In her article, there are important indications of barriers that continue to exist when trying to realise the right to political participation.

Hansjörg Hofer has recorded the key content of the working group on **work** in his article for the conference proceedings. As emancipation becomes possible through the remuneration received for work, accessibility to the labour mar-

ket for persons with disabilities is key. Art 27 UN CRPD prohibits discrimination based on disability in association with employment relationships and ensures equal pay for equivalent work. However, unfortunately the realities of the Austrian labour market in many respects are a long way off the provisions of the UN CRPD. Hofer's article centres on the role of workshops for persons with disabilities. At the end of his article, he specifies central minimum steps "towards approaching the UN CRPD standards".

Yi-Chun Chou enriches the conference proceedings with interesting insights into the East Asian judicial area. In her article, she shows that despite ratification of the UN CRPD, **protected and therefore segregated labour markets** for persons with disabilities continue to exist in **Japan, South Korea, and Taiwan**. The labour market policies are characterised by what is known as the "East Asian Productive Welfare Model", according to which socio-political concepts are only implemented if they are conducive to the economic development. If, in contrast, they are associated with obstacles for employers or could weaken economic growth, then they have no chance of being implemented. The rights guaranteed in the UN CRPD – such as in Art 27 UN CRPD – are often associated with costs which is why they have not been implemented. The governments would not even consider allowing employers to bear the increased costs of creating accessibility for example. If despite this, a state were to officially dispense with the protected labour markets, then this would have to be investigated in greater detail to find out if persons with disabilities do not experience disadvantages on other levels and for example, are made dependent on the welfare state.

The keynote of the conference was held by **Delia Ferri** and addressed the effects of the UN CRPD on the **EU policies concerning persons with disabilities** as well as on the **legal framework** of the Union. In her paper, she shows the central role of the UN CRPD as providing momentum in law on equal treatment and anti-discrimination laws as well as for policy on disability. The article gives an overview of policy on disability within the legal framework of the EU. The legal status of the UN CPRD in Union law as well as the role of what is a standard norm in the UN CRPD in case law at the European Court of Justice (CJEU) is also addressed. Ferri elaborates on the progress made towards meeting the commitments arising from the UN CRPD and identifies those areas where the EU has been most successful so far and where action is still needed. She closes with a look at the future. Here, the pending Conference on the Future of Europe and the topic of "Social fairness and equal rights" are considered to be the EU's highest priorities.

The articles in the conference proceedings group together the different perspectives that actually characterise the policy on disability as policy on equal treatment and discrimination prohibition in Austria and Germany. As varied as the perspectives are, all are agreed on the fact that there is still a lot of work to be done to realise the objectives of the UN CRPD in law and in (legal) reality. In this context, it is important not to lapse into a dispute over the interpretation of legal texts in an abstract manner detached from the everyday life of the persons concerned. Rather, it requires a holistic approach to the realities of the lives of persons with disabilities and a serious effort to bring to life the fundamental ideas of the UN CRPD in this regard. Knowing full well that people's individual needs require a variety of measures and choices as well as dynamic adaptation to change and understanding that "the journey is the destination".

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Michael Ganner

Insights into the UN CRPD and its implementation in Austria

A. General

The UN Convention on the Rights of Persons with Disabilities dated 13/12/2006 addressed the interests of persons with disabilities all around the world and turned them into a common plan of action. This heralded a new era in the rights of persons with disabilities. It was preceded by a lengthy international development. For this reason, coming into force on 13/12/2006 was just an interim step, which was then followed by implementation by many countries and then further development, but it still needs to be followed by many more. This convention is a binding agreement under international law, where the states parties that signed it undertake to support, guarantee, and protect the civil rights as well as cultural, political, social and economic rights of persons with disabilities. These people should be entitled to their fundamental rights and fundamental freedoms in the same way as persons without disabilities, with due respect for their dignity. Persons with disabilities having access to all human rights without discrimination should be ensured, among other things, by a ban on discrimination on the level of individual country law in areas such as education, employment, health, access to information, and public institutions. The aim is complete “inclusion” of persons with disabilities into society. The UN Convention on the Rights of Persons with Disabilities is the first legally binding instrument on a United Nations level, which covers all areas on the subject of persons with disabilities. Partial areas were already standardised in the World Programme of Action concerning Disabled Persons (1982), in the Declaration on the Rights of Persons with Mental and Intellectual Disabilities (1971) as well as in the Declaration on the Rights of Disabled Persons (1975).

The **Optional Protocol** on the UN Convention on the Rights of Persons with Disabilities regulates an international complaints procedure for infringements of the UN CRPD. With the ratification of this Optional Protocol, the respective state subjects itself to this complaints procedure. A “Committee on the Rights of Persons with Disabilities” was set up, which people or groups of people can turn to, asserting that they are the victim of an infringement of the UN CRPD by the respective State Party. However, all available legal remedies under domestic law must have been exhausted first.

B. Austria

The United Nations Convention on the Rights of Persons with Disabilities dated 13/12/2006 and the associated Optional Protocol were ratified in Austria in 2008. Subsequently, the **Federal Disability Advisory Board** set up a **Monitoring Committee** with the task of monitoring implementation of the convention on a national level. The monitoring Committees in the Austrian Länder are doing something similar in matters that the Länder are responsible for. Since then, they and DPOs have been initiating diverse activities in relation to the implementation of the convention.

In 2010, Austria prepared its first State Report on the implementation of the convention and submitted it to the United Nations. In the General Comments of the Committee of experts some aspects were quite critically scrutinised (eg guardianship law,¹ involuntary commitment, abortion, special schools).²

The **second State Report** is now available. It is based on 45 questions which the UN Committee on the Rights of Persons with Disabilities sent to Austria. In this book, the article by Max Rubisch deals with this in great detail: The UN Convention on the Rights of Persons with Disabilities in Austria: From the state review 2013 to the second and third State Report 2019.³

This second State Report also described in detail the measures taken thus far in line with the UN Convention on the Rights of Persons with Disabilities.

A really key point that should be mentioned here is the complete revision of guardianship law.⁴ Since 1/7/2018, in accordance with international trends, this has been renamed **Law on legal protection of adults**. During the reform, for the first time, self-advocates were involved and able to participate in all aspects. During the course of this three-year process, it was possible to attain broad consensus from all participants, in particular also among the DPOs. With the new Law on legal protection of adults, the autonomy of the affected person has been expanded and limitations on their capacity to act have been reduced.⁵ Initial results show that the new law has widely proven its worth (see study “Initial experience with the Second Protection of Adults Act”⁶).

Apart from that, measures have been put in place in the area of **education** and the employment of persons with disabilities in the civil service. Standards have been introduced for universities that the objectives of inclusive education should also be observed for the study curriculum at universities. An important step forward in the area of education was provided by the “Binding guidelines

¹ Corresponds to the Law on Legal Protection of Adults in Germany.

² www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx (29/03/2021).

³ See pages 79-90.

⁴ Ganner/Barth (2010) 204; Müller (2013) 241.

⁵ For more details see Barth/Ganner (2019).

⁶ <https://www.uibk.ac.at/rtf/> (29/03/2021).

to develop inclusive model regions” developed by the Ministry of Education in 2015, which defines the educational, legal, and organisational framework conditions for the development of inclusive model regions, providing orientation for the Länder.

Several Länder have reformed their laws on disability and some of them are calling them “Participation Laws”. Upper Austria, for example, with an amendment of the Upper Austrian Equal Opportunities Act (LGBl 10/2015), introduced the service of personal assistance in the client model, which provides a higher degree of self-determination for those affected. Claims decisions are to be provided in the format “Easy to read” or “Easy to understand” respectively. The service “Future personal planning” is a new addition. This is about consultation and information services provided by peers for persons with disabilities.

C. International development

The European Union has also ratified the UN Convention on the Rights of Persons with Disabilities, as have all EU member states apart from Ireland (came into effect 2011). In accordance with Art 216 (2) TFEU, the agreements reached by the Union are binding for the bodies of the Union and the member states. This results in a standardised development for the entire EU in the area of policy on disability and the body of law relating to disability and the elderly. The European Commission is also working closely with member states to implement the convention. The UN Convention on the Rights of Persons with Disabilities can therefore be described as a key driving force in the continued development on the topic of persons with disabilities in Europe. This not only affects legal aspects, but also all areas of life. Equal treatment, non-discrimination, accessibility, products with a universal design, and inclusion will benefit all people, young and old, healthy and ill, with disabilities and without.

However, the UN Convention on the Rights of Persons with Disabilities is not just a key driving force in the continued development on the topic of persons with disabilities in Europe, but also worldwide. 182 states have ratified it.⁷ Worldwide, the need to adapt existing legal and social welfare systems to the provisions of the UN Convention on the Rights of Persons with Disabilities is being discussed. This concerns

- the education system, where inclusive education is required,

⁷ <http://www.un.org/disabilities/documents/maps/enablemap.jpg> (29/03/2021).

- Law on legal protection of adults, where supported decision-making is required instead of decisions reached by representatives,
- active and passive voting rights for persons with disabilities,
- the legitimacy of coercive measures (enforced treatment and enforced medical treatment),
- access to health services free of discrimination,
- own choice of where to live (in a home or cared for at home),
- access to justice and protection and assertion of rights in general,
- etc.

However, the direct applicability and degree of actual implementation in the individual countries – including within Europe – differs greatly in some cases.

D. Government programme 2020

Austria has a new government since the start of 2020. They have fundamentally and comprehensively committed to the participation of all people in society.⁸ Correspondingly, concrete measures for implementing the UN CRPD have been included in the government programme.⁹

The government programme is called “Out of a Sense of Responsibility for Austria” (“Aus Verantwortung für Österreich”). This presumably means the responsibility for people in Austria. Happily, the new government has very clearly affirmed its commitment to the UN Convention on the Rights of Persons with Disabilities. With regards to the convention and inclusion of persons with disabilities in society, it clearly states: “The next few years are now to be dedicated to intensive implementation.” “The federal government is committed to introducing clear measures for the best possible inclusion of persons with disabilities in society and the labour market and for the removal of existing barriers in all areas of life.” It continues: “This federal government is paying particular attention to the areas of education and employment. The long-term goal here is to create an inclusive education system [...]”¹⁰

The following are the most important measures actually planned in the government programme:

⁸ On participation see Pitschas (2014) 461; Trenk-Hinterberger (2015) 91.

⁹ Republik Österreich (2020).

¹⁰ Republik Österreich (2020) 193.

- In general terms, **equal opportunities** is an important aspect for all which is expressed in many parts of the government programme.
- The opportunity to **participate in elections** should be improved for persons with disabilities. Austria is already exemplary in this regard, because a disability never justifies being excluded from the right to vote. In many other European countries, having a representative appointed as an adult (for all matters) leads to be excluded from the right to vote. This has not been the case in Austria since the 1980's. However, there is need for improvement in accessible election information and voting slips as well as being accompanied by an assistant in the polling booth.
- **Involuntary commitment (Unterbringung) and preventive forensic detention (Maßnahmenvollzug)** are to be changed. This is a form of “preventive detention” for mentally ill persons or persons with a similar impediment. In the “Law on involuntary commitment” (“Unterbringungsgesetz”), it is about being a risk to oneself or a third party, whereas preventive detention is only concerned with being a risk to others. Preventive forensic detention in contrast to involuntary commitment presumes that a criminal offence known as an “Anlasstat” (which is at least unlawful and to the realisation of which the legislature attaches the imposition of a security and correctional measure) – eg a dangerous threat) – has been committed. It has been found that regionally there are currently significant differences in the assessment of the conditions for involuntary commitment. The aim is to standardise procedure in practice. To compensate for the current shortage of public health officers in rural areas, there is a plan to create a “pool of public health officers”. The preventive forensic detention has been a legislative construction site for a long time now and is a long way from complying with the provisions of the European Human Rights Convention. The central basis for enforced implementation of restricting freedom in all of these cases is a prediction of danger in future. This is the crux of the matter. Serious predictions of danger in future are virtually impossible. Scientific studies presume between 50

and 90 %¹¹ incorrect predictions and the Ministry of Justice presumes 75 % incorrect predictions.¹² This means that in about three quarters of the cases, it is already being consciously accepted that people's freedom of movement is being unjustly restricted, which often results in psychological and physical damage.

Less of a threat for persons with disabilities, but fitting in this context is the **“preventive detention” (“Sicherungshaft”)**, which is planned in the government programme to protect the general public from terrorist attacks. Interestingly enough, recently, the law on involuntary commitment has in part been described as being discriminatory to persons with disabilities, because there was no provision for involuntary commitment for persons without disabilities. Here preventive detention has been introduced to balance things out, but which is not really that desirable.

- In the **labour market**, the inclusion of persons with disabilities is to be promoted. There is to be an employment campaign for persons with disabilities and they should be paid normal “wages” for their work and not, as is currently often the case, a small amount of “pocket money”, particularly if they are working in corresponding “workshops”. Because that would also be the requirement for their own entitlement to a pension.
- In **education**, inclusion is provided for up to the tertiary system, ie including university education. All schools and universities should be completely accessible. The training of teachers is to be improved and the curricula are to be more inclusive.
- Overall, more sign language interpreters are to be trained.
- In future, fully financed therapy places in the area of psychotherapy are to be available. Currently you frequently need to bear the majority of the cost yourself.
- To secure self-determined living for persons with disabilities, “personal assistance” is to be expanded and the introduction of an inclusion fund, to finance this among other things, is being

¹¹ <http://www.hrr-strafrecht.de/hrr/archiv/13-05/index.php?sz=8> (29/03/2021).

¹² Arbeitsgruppe Maßnahmenvollzug (2015) 42.

investigated. The right to personal assistance should be standardised across all the nation in all areas of life.

- Even needs-based finance to implement the UN Convention on the Rights of Persons with Disabilities and the National Action Plan (NAP) is provided for.

E. Concluding remarks

In Austria, the UN Convention on the Rights of Persons with Disabilities has led to an intensive and positive development in many areas of society which are important to persons with disabilities. This also always benefits the persons “without disabilities”, if there is any such thing. Moreover, those who in a conventional sense perhaps are considered to be persons “without disabilities”, may possibly become persons with disabilities due to illness, accident, or simply old age. Therefore, accessibility, non-discrimination, inclusion etc. will benefit everyone and society as a whole.

The positive developments are not primarily thanks to the UN Convention on the Rights of Persons with Disabilities as an agreement under international law, but thanks to those behind it (monitoring Committee, DPOs, self-advocates, Committee of experts of the United Nations with all its General Comments, and many others).

Austria does not score too badly in an international comparison. The Convention has been received positively in politics and administration as well as in many areas of society, and has certainly been implemented in several areas. With the “National Action Plan for Disability” (Nationaler Aktionsplan Behinderung 2012-2020) (NAP), passed by the Austrian government in 2012, which contains the guidelines for Austria’s policy on disability, setting out and still defining the politically binding programme for implementing the UN Convention on the Rights of Persons with Disabilities, 170 (68 %) of 250 planned measures have been implemented by the end of 2018 or respectively, implementation was being planned, 69 (27.6 %) have been partially implemented or were being prepared, and 11 measures (4.4 %) had not yet been implemented.

Much has been done but there is still a lot to do.

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The UN CRPD and its implementation in Germany

A. Introduction

The UN CRPD¹ passed in 2006 by the UN general assembly was ratified in 2008 by the parliament (“Bundestag”) and Federal Assembly (“Bundesrat”) for the Federal Republic of Germany, unanimously and without reservations². It came into force for Germany on 26th March, 2009³.

A lot has happened since then: The federal government memorandum on the ratification gave the impression it was not necessary to change laws⁴. In the Länder and municipalities, there were some discussions on whether this contract entered into by the Federation even gave rise to any duties requiring action from them. In individual cases, this discussion has also been reflected in case law⁵. In other cases, case law and jurisprudence were primarily engaged in debating the direct and indirect applicability of the convention⁶.

In the 18th (2013-2017) and 19th legislative period (since 2017) of the German Bundestag, and after examining the first State Report 2015⁷, the picture is mixed, to say the least: In the justification of several laws on a Federal and Länder level, namely the Federal Participation Act (“Bundesteilhabegesetz”) under labour and social law⁸ and for the amendment of the laws on equality for persons with disabilities (“Behindertengleichstellungsgesetze”)⁹, express reference was made to the UN CRPD. The Federation and all sixteen Länder set up coordination mechanisms and organised action plans¹⁰, which are committed

¹ Cf Degener/Bregg (2019) 43-77.

² About the process BR-Drucks 760/08; BT-Drucks 16/10808, 16/11234.

³ German Federal Law Gazette 2008 II p 1420; Announcement from 5/6/2009, German Federal Law Gazette 2009 II p 812.

⁴ BR-Drucks 16/10808: No need to amend a law is specified there.

⁵ Hessischer VGH Kassel 12/11/2009, 7 B 2763/09; Niedersächsisches OVG Lüneburg 16/9/2010, 2 ME 278/10. Justifiably against it: Riedel/Arend (2010) 1346-1349; Krajewski (2010) 120-125; von Bernstorff (2011) 203-217.

⁶ Summary of the discussion at the time of the first State Report: Uerpmann-Witzack (2016) 29-76; Nieding (2016) 77-92; Welti (2016c) 635-658.

⁷ Committee on the Rights of Persons with Disabilities (2015).

⁸ Entwurf eines Gesetzes zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen (Bundesteilhabegesetz – BTHG) of 5/9/2016, BT-Drucks 18/9522; cf Welti (2018a).

⁹ Entwurf eines Gesetzes zur Weiterentwicklung des Behindertengleichstellungsrechts of 9/3/2016, BT-Drucks 18/7824.

¹⁰ At federal level: Nationaler Aktionsplan 2.0 der Bundesregierung zur UN-Behindertenrechtskonvention – Unser Weg in eine inklusive Gesellschaft, BT-Drucks 18/9000 of 29/6/2016; cf interim

to an implementation of the convention. In the case law of the Federal Constitutional Court, the status of the Convention in the German legal system has become clearer. Courts, authorities, and academic literature refer to it. Thus for example, the legal database Juris shows 1,412 hits for the slightly unhelpful abbreviation for a standard “Unbehürk” (standing for UN Convention on the Rights of Persons with Disabilities), of which 169 are for case law, 158 for books, and 1,085 in essays. With the more common abbreviation “UN-BRK” (UN CRPD) in a text search you get an additional 98 court rulings as well as 324 Bundestag and Bundesrat printed matter references, and for the latter there are another 43 which only make reference to “CRPD” (status: 29/09/2020). That could really be more considering the relevance of the convention for millions of people. But in any case, with this, the UN CRPD leaves older human rights covenants behind, such as ICESCR, ICCPR, CEDAW and CRC in terms of in public, institutional, and academic resonance. That particularly applies in the jurisprudence of collateral sciences and professions, such as education¹¹ and medicine, which are concentrating their attention on the conception and contents of the UN CRPD. Through Disability Studies above all there is engagement with the social, political, and cultural sciences¹².

The second and third State Report of the Federal Republic of Germany was submitted in 2019¹³ and is expected to be examined by the United Nations Committee for the Rights of Persons with Disabilities in 2021. This provides an opportunity for a summary and comparative review of the first decade in which Germany signed up to the convention.

B. The legal status of the UN CRPD in Germany

In the Federal Republic of Germany, the UN CRPD applies with the rank of a simple federal law, the same as other international agreements. This means that it is binding overall – not just a political declaration or soft law – meaning it takes precedence over national law according to Art 31 Basic Law (GG) and also takes precedence over ordinances, statutes, directives and other sub-legislative standards at federal level and is the review standard. However, it is not always paramount law – as is EU-law (Art 23 GG), constitutional law (Art 20 (3) GG) and the general rules of international law (Art 25 GG)¹⁴. What remains

report from Federal Government: BT-Drucks 19/5260 of 25/10/2018. Cf Committee on the Rights of Persons with Disabilities (2015) 8b.

¹¹ Cf Biermann/Pfahl (2016) 199-207.

¹² Cf Hirschberg/Köbsell (2016) 555-568; Waldschmidt (2015) 334-344.

¹³ Second and third State Report of the Federal Republic of Germany on the United Nations Convention on the Rights of Persons with Disabilities, BT-Drucks 19/11745 of 18/7/2019.

¹⁴ Cf in summary: Banafsche (2018); earlier: Masuch (2012).

controversial in detail is how the UN CRPD relates to conflicting law of the Länder if this is only legislated for on a Länder level (Art 70 GG).

1. Human rights as a general rule for international law?

The usually presumed and not explicitly questioned statement that the UN CRPD as part of international law does not belong to the general rules of international law, which according to Art 25 GG takes precedence over laws, still requires some discussion. The general rules include the universal international customary law, which covers fundamental human rights¹⁵. What this means for the UN CRPD still needs to be clarified in academia and case law.

2. Human rights and basic rights

In the case law of the Federal Constitutional Court (BVerfG), the relationship with the Basic Law which since 1994 has included a discrimination prohibition (“Benachteiligungsverbot”) on the basis of disability (Art 3 (3) second sentence GG)¹⁶ – has in particular been worked out the detail on the decisions reached on enforced treatment (“Zwangsbehandlung”) according to the Law on Legal Protection of Adults (“Betreuungsrecht”) 2016¹⁷, on commitment in the case of involuntary commitment (“Unterbringung”) under public law 2018¹⁸ and on the right to vote to the parliament 2019¹⁹. Here, the Federal Constitutional Court has made it clear that the UN CRPD is to be used when interpreting the discrimination prohibition within the scope of what is methodically justifiable leeway²⁰. This follows on from case law concerning the meaning of the European Human Rights Convention since the “Görgülü” decision in 2004²¹. With this, the Federal Constitutional Court not only binds itself, but also the other courts, whose interpretation of the Basic Law and its effects on simple law in the light of the UN CRPD, the Federal Constitutional Court reviews in the

¹⁵ BVerfG 26/10/2004, 2 BvR 955/00, 2 BvR 1038/01, BVerfGE 112, 1 para 99. Cf Jarass in Jarass/Pieroth¹⁶ Art 25 GG para 14.

¹⁶ On this BVerfG 8/10/1997, 1 BvR 9/97, BVerfGE 96, 288 (Special school). In addition Caspar (2000) 135-144; BVerfG 19/1/1999, 1 BvR 2161/94, BVerfGE 99, 341 (prohibition on deaf-mute making a will (Testierausschluss Taubstummer)); in addition meeting of Rohlfing/Mittenzwei, FamRZ 2000, 654-660.

¹⁷ BVerfG 26/7/2016, 1 BvL 8/15, BVerfGE 142, 313. In addition: Schmidt-Recla (2017a) 92-96.

¹⁸ BVerfG 24/7/2018, 2 BvR 309/15, 2 BvR 502/16, BVerfGE 149, 293. In addition: Schemmel (2019) 277-284; Masur (2019) 121-126.

¹⁹ BVerfG 29/1/2019, 2 BvC 62/14, BVerfGE 151, 1. In addition comment by Schmalenbach (2019); Brosey (2019) 62-62.

²⁰ Comparative see Waddington (2018) 546-549.

²¹ BVerfG, B v 14/10/2004, 2 BvR 1481/04, BVerfGE 111, 307; in addition Grupp/Stelkens (2005) 133-143; Ruffert (2007) 245-255.

event of constitutional complaints (Art 93 (1) No 4a GG) and concrete judicial reviews (Art 100 GG).

3. Sources of interpretation

However, at the same time, the BVerfG made it clear that it will carry out the review itself as to the extent to which the UN CRPD needs to be taken into consideration for constitution-compliant interpretation of German law and which content needs to be taken into consideration. The BVerfG sees the interpretation of the UN Committee of Experts in the state reviews, from General Comments and from individual complaints as less binding than that of the European Court of Human Rights on the European Convention on Human Rights. It does not regard the Committee of experts, as a non-court, as being entitled to provide a binding interpretation of the convention. Correspondingly, the BVerfG only ²² – but at least something –, requires that the courts engage with the documentation from the Committee of experts²³. It is engaging itself with the three decisions named and has respectively come to the conclusion, that – different interpretations are possible than those of the Committee of experts – not every case of enforced treatment, not every case of commitment and not every case of disenfranchisement is prohibited. It also always argues with the wording of the convention, and in some cases, with the case law passed by the European Court of Human Rights. While here it would be possible to get the impression when looking at the text passages in isolation, that the BVerfG was checking German law against the UN CRPD standard as it interprets the convention itself, the limitations are clearly shown by the decision in 2018 on the Schleswig-Holstein State Blindness Allowance (“Landesblindengeld”)²⁴. The complainant there had objected to the cut in this non-means-tested social benefit. The BVerfG already denied the admissibility and explained, the UN CRPD was not an independent review standard, even not indirectly through the legal obligation enshrined in Art 20 (3) GG. It can also be seen from the brief justification by the court that the opportunity had been missed in the complaint to establish the relationship to other basic rights and to the primacy of federal law.

²² Critical: Payandeh (2020) 125-128; Schmalenbach (2019) 567, 569. More positive: Reiling (2018) 311-338.

²³ BVerfG 26/7/2016, 1 BvL 8/15, BVerfGE 142, 313 para 89, 90; BVerfG 24/7/2018, 2 BvR 309/15, 2 BvR 502/16, BVerfGE 149, 293 para 91; BVerfG 29/1/2019, 2 BvC 62/14, BVerfGE 151, 1 para 64, 65.

²⁴ BVerfG 1/2/2018, 1 BvR 1379/14.

4. EU law and UN CPRD

An additional dimension of applicability arises from EU law²⁵. Since the ratification of the UN CPRD by the European Union in 2010²⁶, the CJEU has been referring to the convention when interpreting EU law, particularly the Employment Equality Directive 2000/78²⁷. In this respect, it is participating in the application precedence of EU law and the precept of interpretation in accordance with directives, as has been recognised by the Federal Labour Court in particular²⁸. Currently, the EU Website Directive 2016/2102²⁹ is influencing German law. In the next few years, implementation of the EU Directive on accessibility requirements 2019/882³⁰ will become effective in civil law by June 2022.

5. Direct applicability?

Now what about the dispute on direct applicability? Here it is a matter of whether rights to benefits can be directly derived from the convention and can be sued for. In most disputes involving social laws or school laws, this has been rejected across the board by social courts³¹ and administrative courts³², which continue to reach their decisions based on the Code of Social Law or the School Laws of the Länder and have not found in favour of claims alongside or against their standardisation. The courts were only prepared to accept an application of this kind alongside existing law or against it – based on the precedence of law to be passed later on³³ – if this was clearly apparent from the wording and intention of the states parties, which is not the case with formulations such as “the states parties recognize” in Art 19 or Art 24 UN CRPD.

²⁵ Cf Schär/Angermann (2015) 352-364; Waldschmidt (2019) 79-105.

²⁶ Council Decision 2010/48/EC, L 23/35.

²⁷ EJC 11/4/2013, C-335/11, C-337/11 (Ring, Skouboe Werge), ZESAR 2013, 415 annotation Hiebl, in addition Groskreutz/Welti (2013); EJC 18/12/2014, C-354/13 (Kaltoft), in addition Papadopoulou, www.reha-recht.de, B9-2015; EJC 1/12/2016, C-395/16 (Daouidi), ZESAR 2017, 505 annotation Welti; EJC 9/3/2017, C-406/15 (Milkova), ZESAR 2017, 444 annotation Porsche; EJC 11/9/2019, C-397/18 (Nobel Plastiques Ibérica), ZESAR 2020, 282 annotation Welti.

²⁸ BAG 19/12/2013, 6 AZR 190/12, BAGE 147, 60 para 51, 52.

²⁹ Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies.

³⁰ Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services.

³¹ Sächsisches LSG Chemnitz 17/4/2013, L 8 SO 84/11; LSG Baden-Württemberg Stuttgart 18/7/2013, L 7 SO 4642/12; LSG Nordrhein-Westfalen Essen 6/2/2014, L 20 SO 436/13 B ER; Bayerisches LSG München 30/9/2015, L 2 P 22/13; LSG Niedersachsen-Bremen Celle 25/2/2016, L 8 SO 52/14.

³² Hessischer VGH Kassel 16/5/2012, 7 A 1138/11.Z., Behindertenrecht 2013, 30; VGH Baden-Württemberg Mannheim 21/1/2012, 9 S 1833/12, VBIBW 2013, 386; Bayerischer VGH München 4/9/2015, 7 CE 15.1791, BayVBl 2016, 129.

³³ In addition Bayerisches LSG München 30/9/2015, L 2 P 22/13 para 33.

The discrimination prohibition from Art 5 UN CRPD was the only measure agreed to being directly applicable, initially by the Federal Social Court (“*Bundessozialgericht*”)³⁴, but not without the note that this did not result in anything more than an interpretation of the discrimination prohibition in the Basic Law which complies with the convention. This firmly places the responsibility for implementation of the UN CRPD in terms of benefits where it actually primarily belongs: with the national and federal legislator.

But the problem with the discussion and its impact on case law, authorities, and stakeholders was that it was not uncommon for the lack of direct applicability to lead to the conclusion that it was not applicable at all. However, the use of the UN CRPD in the interpretation of vague legal terms and the exercise of discretion is a different issue. It is not only possible, but also required in the international and human rights-friendly order of the Basic Law³⁵.

C. About the implementation

1. Legislation

Since 2009, the Federation and Länder in Germany have repeatedly made reference to the UN CRPD in legislation. Here, at least four large sets of regulations can be identified: the right to equality for persons with disabilities (“*Behindertengleichstellungsrecht*”), the social law (“*Sozialrecht*”) – rehabilitation and integration of persons with disabilities, the school law (“*Schulrecht*”), and the law on legal protection of adults and involuntary commitment (“*Betreuungs- und Unterbringungsrecht*”).

1.1. Right to equality for persons with disabilities (*Behindertengleichstellungsrecht*) in public law

Once the discrimination prohibition due to a disability was enshrined in Art 3 (3) second sentence of the Basic Law in 1994, the right to equality for persons with disabilities became visible as an independent regulated area. Between 1999 and 2008 the Federation and all the Länder passed laws on equality for persons with disabilities in public law and in one go, primarily incorporated regulations

³⁴ BSG 6/3/2012, B 1 KR 10/11 R, BSGE 110, 194.

³⁵ Also BVerfG 29/1/2019, 2 BvC 62/14, BVerfGE 151, 1 para 62; BSG 23/7/2014, B 8 SO 31/12 R, BSGE 116, 223 para 16; BSG 6/8/2014, B 11 AL 5/14 R, SozR 4-3250 § 2 No 5 para 21; BAG 19/12/2013, 6 AZR 190/12, BAGE 147, 60 para 51, 52. Cf Giese (2015).

on accessibility³⁶ in other legislation under public law, such as the law on building regulations (“Bauordnungsrecht”) of the Länder³⁷, the state law on public local transport (“Landesrecht des öffentlichen Nahverkehrs”)³⁸, and the federal law on long distance transport (“Bundesrecht des Fernverkehrs”)³⁹ as well as in commercial law⁴⁰. The UN CRPD became the catalyst for reviewing the efficacy of these laws⁴², discussing and reforming them. In 2016, the definition of disability in the Federal Act on Equal Opportunities for Persons with Disabilities (BGG) was adapted to that of the UN CRPD (§ 3 BGG), the obligation for public authorities to make suitable provisions⁴³ was explicitly incorporated (§ 7 (2) first sentence BGG)⁴⁴, in addition to sign language and communication aids (§ 6 BGG)⁴⁵ plain language was also introduced in administrative procedures (§ 11 BGG)⁴⁶, inventories on accessibility of existing federal buildings mandatory by 2021 (§ 8 (3) BGG), and – inspired by Austria⁴⁷ – an arbitration procedure with a Conciliation Board in the event of discrimination (§ 16 BGG) has been introduced⁴⁸. Currently (Status: 28/9/2020), eleven of sixteen Länder have reformed their right to equality for persons with disabilities in light of the UN CRPD. The more reticent third include Berlin, Mecklenburg-Western Pomerania, Lower Saxony, Rhineland-Palatinate, and Schleswig-Holstein.

1.2. Anti-discrimination law under civil law

There has been hardly any new federal legislation passed for accessibility obligations and suitable measures in civil law, even though there are extensive requirements made by the Committee of experts⁴⁹, the associations of persons with disabilities and by opposition parties⁵⁰, remarks from the Committee of

³⁶ Welti (2013) 23-34; Theben (2018a).

³⁷ Cf Fuerst (2018b); Agel (2016) 183-187; Lohse (2016) 446-469.

³⁸ Within the meaning of § 8 (3) passenger transport act (“Personenbeförderungsgesetz”); BT-Drucks 19/11745, 13.

³⁹ Cf § 3 (1) second sentence second half sentence Bundesfernstraßengesetz.

⁴⁰ Cf § 2 (3) Eisenbahn-Bau und Betriebsordnung.

⁴¹ Collection of Federal and State Law in Frehe/Welti (2018).

⁴² Welti/Groskreutz/Hlava/Rambausek/Ramm/Wenckeback (2014).

⁴³ Cf Welti (2012).

⁴⁴ Cf Welti/Frankenstein/Hlava (2019) 327-325; BT-Drucks 19/11745, 3; cf Fuerst (2018a).

⁴⁵ Brockmann (2018)

⁴⁶ Julia (2018).

⁴⁷ BT-Drucks 18/7824, 45.

⁴⁸ BT-Drucks 19/11745, 4 f. Since the establishment of the Conciliation Board, about 300 requests for arbitration have been filed. (Status: July 2019). Cf Schaumberg (2018).

⁴⁹ Committee on the Rights of Persons with Disabilities (2015) 21.

⁵⁰ BT-Drucks 18/8428, 3, 8, 10-13.

experts⁵¹ and scientific opinions that exist⁵². In particular, making an express mention of suitable provisions in the General Equal Treatment Act (“Allgemeines Gleichbehandlungsgesetz - AGG) is being demanded⁵³, while the Federal Government states that these would come to bear within the framework of the interpretation of the AGG⁵⁴.

1.3. Equal recognition before the law, Art 12 UN CRPD

At first glance there has been little legislative activity with direct reference to UN CRPD in the Law on Legal Protection of Adults. Here, there were significant differences in opinion whether and to what extent the Law on Legal Protection of Adults reformed in the German Civil Code (BGB) in 1992 is to be primarily assigned to a replacing or supporting decision-making role⁵⁵ and whether the incapacity to contract (§§ 104 No 2, 105, 131 BGB), which still exists, is compatible with Art 12 UN CRPD⁵⁶. The controversial discussion also covers the right proportion of self-determination and the state duty to protect⁵⁷. The federal government admitted there is need for reform⁵⁸. A draft bill has now been introduced in which, in the light of Art 12 UN CRPD and inadequacies in legal practice, the law on custodianship is to be reformed by 01/01/2023⁵⁹. Here, reference is expressly being made to the reforms in Austria and Switzerland⁶⁰.

On the one hand, in its decisions on the laws on involuntary commitment under public law and on preventive detention in Rhineland-Palatinate⁶¹, Baden-Württemberg⁶², Saxony⁶³ and Mecklenburg-Western Pomerania⁶⁴ and on forced

⁵¹ Committee on the Rights of Persons with Disabilities (2015) Z. 21, 22. Cf Committee on the Rights of Persons with Disabilities (2014) 29.

⁵² Wenckebach/Welti (2016) 209-216; Welti (2015b) 184-187.

⁵³ Eichenhofer (2018a); cf Committee on the Rights of Persons with Disabilities (2015) 13; Committee on the Rights of Persons with Disabilities (2018) 31b.

⁵⁴ BT-Drucks 19/11745, 4, 5.

⁵⁵ Cf Committee on the Rights of Persons with Disabilities (2015) 26; Harm (2015) 135-137.

⁵⁶ Cf Lipp (2013b) 329-354; Wolf (2015).

⁵⁷ Cf Schmidt-Recla (2017b) 197-206; Kuch (2019) 723-732.

⁵⁸ BT-Drucks 19/11745, 16.

⁵⁹ BR-Drucks 564/20 of 25/9/2020, Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Reform des Vormundschafts- und Betreuungsrechts. Re UN CRPD inter alia 1-3, 128-130, 147-155, 167, 171, 176, 181, 188, 205.

⁶⁰ BR-Drucks 564/20, 136-144.

⁶¹ BVerfG 23/3/2011, 2 BvR 882/09, BVerfGE 128, 282; cf Lawson (2018) 558.

⁶² BVerfG 12/10/2011, 2 BvR 633/11, BVerfGE 129, 269; cf Henking/Mittag (2013) 341-351; Lipp (2013a) 913-923.

⁶³ BVerfG 20/2/2013, 2 BvR 228/12, BVerfGE 133, 112.

⁶⁴ BVerfG 19/07/2017, 2 BvR 2003/14, BVerfGE 146, 294.

confinement in Baden-Württemberg und Bavaria⁶⁵, the BVerfG (Federal Constitutional Court) has tightened up the procedural requirements and proportionality of substitute decisions on residence and treatment, on the other hand, in these decisions, just as in those reached on enforced treatment according to the law on custodianship⁶⁶, they have strengthened the position that the balance between the right to self-determination and the state duty of protection should continue to be weighed up. Reforms in these areas have taken place⁶⁷.

1.4. Social Law (Sozialrecht)

In federal legislation pertaining to social law the German Code of Social Law (SGB IX) of 2001⁶⁸ had the requirement to include the discrimination prohibition from the Basic Law⁶⁹. In the labour market-related parts and in the labour law part the Directive 2000/78 has also been implemented⁷⁰, this continued in the shape of the General Equal Treatment Act (AGG) of 2006⁷¹. Stocktaking and reform of the German Code of Social Law (SGB IX) took place in the 18th legislative period in the shape of the Federal Participation Act, which was preceded by a complex consultation with the DPOs, the independent social welfare organisations, the Länder, and the local authorities⁷². The justification for the Federal Participation Act refers in various regulations to the UN CRPD and the Concluding Observations of the first state review⁷³. The Federal Participation Act is currently being implemented by the Länder and local authorities who are providing the services⁷⁴. There have been a few individual cases of further legislation of social law by the Länder to implement the UN CRPD, such as in North Rhine-Westphalia⁷⁵.

⁶⁵ BVerfG 24/7/2018, 2 BvR 309/15, 2 BvR 502/16, BVerfGE 149, 293.

⁶⁶ BVerfG 26/7/2016, 1 BvL 8/15, BVerfGE 142, 313.

⁶⁷ BT-Drucks 19/11745, 20.

⁶⁸ Sozialgesetzbuch Neuntes Buch – Rehabilitation und Teilhabe behinderter Menschen – (SGB IX) of 19/6/2001, German Federal Law Gazette I p 1046.

⁶⁹ BT-Drucks 14/5074 of 16/1/2001, 92.

⁷⁰ BT-Drucks 14/5074, 113.

⁷¹ Allgemeines Gleichbehandlungsgesetz of 14/8/2006, p I S 1897.

⁷² Sozialgesetzbuch Neuntes Buch – Rehabilitation und Teilhabe von Menschen mit Behinderungen (Neuntes Buch Sozialgesetzbuch – SGB IX) of 23/12/2016, German Federal Law Gazette I p 3234, announced as Art 1 of the law to strengthen participation and self-determination of persons with disabilities (Bundesteilhabegesetz – BTHG). Cf for classification: Welti (2019b) 15-42.

⁷³ BT-Drucks 18/9522.

⁷⁴ Beyerlein (2020).

⁷⁵ Inklusionsgrundsatzgesetz Nordrhein-Westfalen (IGG NRW) of 14/6/2016; in addition Fuchs (2016).

Important reforms were waiving the deduction of partner income, increased tax allowances for income and assets (cf § 3 135-142 SGB IX)⁷⁶, and the segregation of expert service benefits from the benefits for livelihood in the integration assistance (SGB IX – part 2). The segregation of integration assistance from welfare as demanded by the associations and put forward by the government⁷⁷ does not achieve this completely⁷⁸, but relaxing the narrow welfare principles does partially.

1.5. Special living arrangements and Art 19 UN CRPD

Institutions are now – as expressed by Art 19 UN CRPD – particular living arrangements in which the service benefits for living arrangements for persons with a permanent full reduction in their earning capacity (§ 42a SGB XII) and the specialist service benefits specific to disability for social participation (§§ 76-84 SGB IX) are segregated under the law on social benefits. The right to individual wishes and choice relative to assessments, services and institutions as well as to the various benefits (“Wunsch- und Wahlrecht”) has been refined with reference to particular living arrangements (§ 104 (3) SGB IX)⁷⁹. Today it is not yet possible to tell the extent to which this will lead to realisation of the right from Art 19 UN CRPD, because this depends on an interpretation of the law which is compliant with the convention⁸⁰. The Federal Government also agrees there is a need for further research in this respect⁸¹. What remains a problem is persons with disabilities with particular living arrangements being excluded from the same benefits from care insurance (“Pflegeversicherung”) (§ 43a SGB XI)⁸².

1.6. Right to work, Art 27 UN CRPD

The budget for work (§ 61 SGB IX)⁸³ and the budget for education (§ 61a SGB IX)⁸⁴ as well as companies offering jobs to persons with disabilities at standard pay (“Inklusionsbetriebe”) (§§ 215-218 SGB IX)⁸⁵ and other service providers

⁷⁶ Roesen (2018).

⁷⁷ BT-Drucks 18/9522, 2, 190.

⁷⁸ Cf BT-Drucks 18/9522, 197; BT-Drucks 18/10523, 38, 42; Wersig (2016) 549-556.

⁷⁹ This used to be governed in § 13 SGB XII. Cf Committee on the Rights of Persons with Disabilities (2015) 42; Munning (2013).

⁸⁰ Cf Frankenstein (2020a) 121-129; Frankenstein (2020b) 231-274; Theben (2019).

⁸¹ BT-Drucks 19/11745, 26.

⁸² BT-Drucks 19/11745, 26 f; cf Welti (2018b) 418-422; Welti (2016a).

⁸³ Nebe/Schimank (2016); Ritz (2018).

⁸⁴ Gast-Schimank (2019).

⁸⁵ Falk (2017).

(§ 60 SGB IX)⁸⁶ have been set up as an alternative to working and training in a workshop, which however may still be falling too short⁸⁷. In other respects, the Federal Government's position is that the right for persons with disabilities who are incapacitated from working to participate in work life derived from UN CRPD in future as well will only be able to be redeemed by them being guaranteed a place in the working area of a recognised workshop⁸⁸, whereas the Committee of experts had demanded "exit strategies" for the workshops⁸⁹. In WfbM (workshops for persons with disabilities), the co-determination rights of the workshop councils (§ 222 SGB IX)⁹⁰ and in the businesses on the general labour market, those of the representatives of the severely disabled (§ 178 SGB IX)⁹¹ have been improved. The extent to which the same right to work can be realised for persons with disabilities according to Art 27 UN CRPD through a combination of workshops⁹², occupational rehabilitation⁹³, employment obligations⁹⁴, accessibility⁹⁵, and suitable measures being taken⁹⁶ will continue to be the subject of critical discussion⁹⁷.

1.7. Right to education, Art 24 UN CRPD

The school laws have been reformed in the Länder⁹⁸. They stipulate a priority for inclusive education in very different ways⁹⁹, whereby the administrative courts pay attention to Art 24 UN CRPD in their interpretation, even if that is not always done adequately¹⁰⁰. With the exception of Bremen, all Länder continue to have special schools, to which assignment is also possible under various conditions¹⁰¹. It is disputed as to whether this is compatible with the convention¹⁰². The right to education is supported by social services, in particular the integration assistance ("Eingliederungshilfe") and the child and youth welfare

⁸⁶ Cf Wendt (2018).

⁸⁷ Cf Schmitt (2018) 247-255.

⁸⁸ BT-Drucks 18/9522, 253.

⁸⁹ Committee on the Rights of Persons with Disabilities (2015) 50b.

⁹⁰ Schachler/Nachtschatt/Schreiner (2019).

⁹¹ Kohte/Liebsch (2016).

⁹² Von Drygalski (2020).

⁹³ Cf Welti (2015a) 83-98; Nebe (2016) 177-190.

⁹⁴ Cf Deinert (2015) 119-138.

⁹⁵ Frankenstein (2018) 227-246; Groskreutz/Welti (2016) 105-108.

⁹⁶ Ferri (2018) 37-54.

⁹⁷ Frehe (2019); Welti/Nachtschatt (2018) 55-92; Palleit (2017) 64-69; Brose (2016) 135-144; Trenk-Hinterberger (2015) 105-117.

⁹⁸ Mißling/Ückert (2015) 63-78; cf BT-Drucks 19/11745, 32.

⁹⁹ Cf Eikötter (2015) 53-61.

¹⁰⁰ Bernhard (2015) 79-89.

¹⁰¹ Cf but Committee on the Rights of Persons with Disabilities (2015) 46.

¹⁰² Cf Fuerst (2018c); Wrase (2017) 16-20.

(“Kinder- und Jugendhilfe”), as suitable provisions for which the new category of services on participation in education has been created with the BTHG (§ 75 SGB IX)¹⁰³. The discussions about the right to inclusive education will continue¹⁰⁴, during which the focus on universities is increasing all the time¹⁰⁵.

1.8. Right to health, Art 25 UN CRPD

Accessible and inclusive health provision according to Art 25 UN CRPD has received less attention so far from the legislators, even though significant need for action can be identified here¹⁰⁶. This concerns among others the accessibility of doctor’s surgeries and health facilities addressed indirectly in social law (§ 17 (1) No 4 SGB I; § 103 (4) fifth sentence No 8 SGB V)¹⁰⁷ as well as access without discrimination for persons with disabilities to private health insurance (§ 19 AGG)¹⁰⁸.

2. Government and administration

In the meantime, the Federal government and all the governments of the Länder have presented action plans to implement the UN CRPD and have already revised and evaluated some of them¹⁰⁹. In the Federation and in all Länder, contact points for implementing the convention have been named¹¹⁰, however their prominence and efficacy appear to vary considerably. While the Federation has established the monitoring body at the German institute for human rights (“Deutsches Institut für Menschenrechte - DIM”)¹¹¹ as an independent monitoring mechanism, the approach taken by the Länder varies considerably regarding the extent to which their implementation of the convention is being independently monitored¹¹². The monitoring body at the DIM is only partially and selectively approached for this purpose¹¹³.

¹⁰³ Cf Conrad-Giese (2020); Welti (2017) 75-88; Nachtschatt/Ramm (2016).

¹⁰⁴ Dörschner (2014).

¹⁰⁵ Welti (2016d) 60-79; Welti/Ramm (2017b) 21-40; Welti (2019a) 33-41.

¹⁰⁶ Hlava (2018a); Welti/Ramm (2017a) e56-e61; Welti (2016b) 115-124; Schmidt-Ohlemann (2015) 204-216.

¹⁰⁷ Cf BT-Drucks 19/11745, 11, 32 f; Committee on the Rights of Persons with Disabilities (2015) 48.

¹⁰⁸ Cf Boysen (2018); Schäfer (2016) 77-88; BT-Drucks 19/11745, 34.

¹⁰⁹ At federal level: Nationaler Aktionsplan 2.0 der Bundesregierung zur UN-Behindertenrechtskonvention – Unser Weg in eine inklusive Gesellschaft, BT-Drucks 18/9000 of 29/6/2016; cf interim report from Federal Government: BT-Drucks 19/5260.

¹¹⁰ BT-Drucks 19/11745, 47; cf Knosp/Papadopoulos (2015) 77-84.

¹¹¹ Aichele (2015) 85-92.

¹¹² BT-Drucks 19/11745, 48.

¹¹³ Cf Kroworsch (2019) 212-216.

The official representatives for persons with disabilities in the Federation (§§ 17, 18 BGG) and Länder¹¹⁴ are also engaging with the convention, whereby there are considerable differences in the allocation, equipment and institutional networking and in the existence and composition of advisory bodies of the associations. Programmes to promote participation and accessibility, partially embedded in law (cf § 19 BGG) can be found in the Federal and Länder budgets, although there are considerable differences here as well.

The local authorities and community associations¹¹⁵ and the diverse holders of the indirect state administration in social insurance institutions, chambers, universities and other corporations and institutions under public law in Germany are increasingly, but not across the board, making references to the convention in action plans¹¹⁶ and in statutes as well as through representatives.

3. Case law

In published case law, there are currently approx 270 decisions made in German courts which make references to the UN CRPD. In some cases, the interpretation of vague legal terms and discretionary powers in the light of the convention is identified as being an element which at least also supports the decision¹¹⁷. The UN CRPD influencing further court proceedings – such as those which end in acknowledgement or settlement or in which the convention is not specifically mentioned in the justification of the decision – is probable, but difficult to prove apart from in individual cases¹¹⁸. Whether the UN CRPD overall has had a comparatively strong influence on case law in Germany¹¹⁹ and still has unexploited potential¹²⁰ or whether there is “little to be gained”¹²¹ from it and it should be seen as being a “smokescreen”¹²² or “overused”¹²³, cannot be expressed in concrete form, but depends on preconceptions and expectations. What the positive voices and the sceptics have in common is that they consider the UN CRPD to have become established in findings of justice. At the same time, a human rights convention remains at the interface between politics, society, and law and in this respect gives shape to their structural overlaps and mutual irritation¹²⁴.

¹¹⁴ Cf BT-Drucks 19/11745, 2. Cf Palsherm (2018).

¹¹⁵ Cf Becker (2013) 11-24; Pitschas (2016) 165-172.

¹¹⁶ Cf Wagener (2014) 290-301.

¹¹⁷ Overview and analysis of case law until 2016 at Aichele (2018) 153-185.

¹¹⁸ Cf Tolmeín (2015) 185-192.

¹¹⁹ Thus Aichele (2018) 177.

¹²⁰ Welti (2016c) 635-658; cf Theben (2018b).

¹²¹ Röhl (2016) 461-466.

¹²² Roller (2019) 368-376.

¹²³ Luthe (2015) 190-196; in this direction also Kastl (2017).

¹²⁴ Luhmann (1995) 480.

The decision reached by the Federal Labour Court should be highlighted, to regard a claimant infected with HIV who is not showing symptoms as disabled within the meaning of the AGG and to thereby give them increased protection against discriminatory termination¹²⁵. Of the Higher Courts, the Federal Social Court most frequently made reference to the convention (36 pieces of Juris evidence, status 28/9/2020). Among other things, with a new interpretation of the term household management, it has assigned adults with disabilities to a higher standard level of need in their basic income¹²⁶. In the law on persons with severe disabilities (“Schwerbehindertenrecht”) all impediments to access were equated to the markers: “impaired mobility” and “severely impaired mobility”¹²⁷. The Federal Constitutional Court made forced confinement in a psychiatric institution contingent upon a court order¹²⁸ and lifted the exclusion of persons who are under legal guardianship in all matters from the right to vote in elections to the Bundestag and European Parliament¹²⁹; the electoral law was subsequently reformed¹³⁰. Effective legal protection¹³¹ and accessibility to judicial process¹³² are increasingly being addressed.

4. Self-advocacy and society

The DPOs¹³³ in the narrower sense as well as social associations, associations for voluntary welfare work and trade unions which organise activities of, with, and for persons with disabilities, participate in the consultations on legislation of the executive and legislative branches. They are represented in advisory councils and Committees, which support governments (§ 86 SGB IX; in the Länder eg, §§ 16-19 LBGG Mecklenburg-Western Pomerania) and administration (§ 186 SGB IX), representatives (in the Länder eg § 12 LGGBehM Rhineland-Palatinate) and the monitoring body. They contribute directly or indirectly to self-governance bodies in pension, accident, health and long-term care insurance as well as to the Federal Labour Agency (§ 188 SGB IX) and provide honorary judges for the system of jurisdiction in social and labour matters (§ 12

¹²⁵ BAG 19/12/2013, 6 AZR 190/12, BAGE 147, 60; in addition Wenckeback (2014).

¹²⁶ BSG 23/7/2014, B 8 SO 31/12 R, BSGE 116, 223; in addition Lawson/Waddington (2018) 479.

¹²⁷ BSG 16/3/2016, B 9 SB 1/15 R, SozR 4-3250 § 69 No 22.

¹²⁸ BVerfG 24/7/2018, 2 BvR 309/15, 2 BvR 502/16, BVerfGE 149, 293.

¹²⁹ BVerfG 29/1/2019, 2 BvC 62/14, BVerfGE 151, 1; cf earlier: Palleit (2013) 302-325; Oelbermann/Pollähne (2015) 86-99; Leonhard (2017); Hellmann (2012).

¹³⁰ BT-Drucks 19/9228; BT-Drucks 19/11745, 43.

¹³¹ BSG 14/1/2013, B 9 SB 84/12 B; in addition Lawson/Waddington (2018) 493.

¹³² BSG 28/9/2017, B 3 KR 7/17 B, SozR 4-1720 § 186 No 1; BSG 21/12/2017 B 9 SB 61/17 B; cf Wenckeback (2015); Roller (2016) 17-24; Loytved (2018) 86-90; Luik (2018).

¹³³ Hlava (2018b).

Abs 4 SGG) and are entitled to take representative action (§ 14 BGG; § 85 SGB IX; state law)¹³⁴.

Inclusion officers are to be appointed in private companies (§ 181 SGB IX), works councils and staff councils have the job of monitoring the rights of persons with disabilities (§ 176 SGB IX) and selected representations of persons with severe disabilities (§ 177 SGB IX)¹³⁵ are a special part of the works constitution. They can also conclude inclusion agreements with the company or authority management (§ 166 SGB IX)¹³⁶. Some administrative bodies and private companies have already agreed their own action plans to implement the UN CRPD.

D. Challenges faced by academia

Many implementation steps of the UN CRPD cannot be assessed from a purely legal point of view. They pose the question as to how law is implemented by authorities, social services and facilities, legal custodians, companies, or associations and what this will result in. This means that the academics are facing challenging tasks which require sufficient support and finance for appropriate research in participation which also require participative methods and interdisciplinary approaches as well as Law in Action (“Rechtstatsachenforschung”)¹³⁷. For this purpose, Germany has formed an action alliance for research in participation made up of academia and associations¹³⁸, which also advocates participatory research¹³⁹.

With the new idea of the participation report¹⁴⁰ and the statutory provision for the report on the participation procedure (§ 41 SGB IX)¹⁴¹ as well as research orders in the Federal Participation Act for example to determine need (§ 13 (3) SGB IX)¹⁴² the executive and legislation have made contributions towards a better knowledge base. In recent years there have also been subsidised research projects for schools¹⁴³ and legal custodianship¹⁴⁴ – almost none on accessibility.

¹³⁴ Hlava (2018c).

¹³⁵ Däubler (2018).

¹³⁶ Winkler (2018).

¹³⁷ Aichele (2020) 15-27.

¹³⁸ <https://www.teilhabeorschung.org/> (29/03/2021); cf Beyerlein/Dittmann/Gast-Schimank/Mattern/Rambausek-Haß (2020a); Nachtschatt (2017).

¹³⁹ Beyerlein/Dittmann/Gast-Schimank/Mattern/Rambausek-Haß (2020b); Wontorra (2017).

¹⁴⁰ BT-Drucks 18/10940: “Teilhaberbericht der Bundesregierung über die Lebenslagen von Menschen mit Behinderungen”; in addition Wansing (2017) 132-143; Rambausek-Haß (2018).

¹⁴¹ <https://www.bar-frankfurt.de/themen/teilhaberverfahrensbericht.html> (29/03/2021).

¹⁴² Diedrich/Fuchs, H./Morfeld/Risch/Ruschmeier (2019).

¹⁴³ Knauf, H./Knauf, M. (2019).

¹⁴⁴ Matta/Engels/Köller/Schmitz/Maur/Brosej/Kosuch/Engel (2018).

Nevertheless, there are still large gaps in research and knowledge about the participation and self-determination of persons with disabilities, the barriers they face, and conditions.

E. Comparative law considerations

The implementation of the UN Convention on the Rights of Persons with Disabilities in its 181 states parties (status: 28/9/2020) provides a great deal of material for studies comparing legislation. Here it is possible to explore the different ways of implementing the ambitious treaty framework, which has opened up new avenues of international human rights protection overall¹⁴⁵. The reporting system can be used as a starting point for an institutionalised legal comparison¹⁴⁶.

1. Transfer between legal systems

It is thereby also possible to show the mutual effects legal systems have on each other, as can be seen in the intertwining of anti-discrimination law and welfare state rehabilitation and participation law in the exchange between, for example, the legal systems in the USA and continental Europe. Here, not only a transfer of elements of anti-discrimination laws can be seen in legal systems based on the welfare state¹⁴⁷, but also a globally growing awareness of the relevance of social rights and rehabilitation¹⁴⁸. The popular talk of a “paradigm shift”¹⁴⁹ can not adequately capture this dialectical further development.

Legal systems make use of institutional and standard solutions from other legal systems and in turn, adapt them to suit the new context, such as the Conciliation Board for discrimination against persons with disabilities, which has been transferred from Austria to Germany¹⁵⁰. The arbitration procedure only has a small scope of application in Germany at the moment – it only applies for asserted discriminations by federal authorities – on the other hand as a preliminary proceeding for representative action also has a function which it does not have in Austria. A comparison of both instruments from a legal and actual point of view would be a good idea.

¹⁴⁵ Cf McCrudden (2018) 594-608.

¹⁴⁶ Cf Köhler (1988) 157-168.

¹⁴⁷ Cf Heyer (2015); Bowen (2013) 79-94.

¹⁴⁸ Fuerst (2009); Shakespeare/Cooper/Bezmez/Poland (2018) 61-72.

¹⁴⁹ Most recently also in a chamber decision at the BVerfG, Kammerentscheidung of 30/1/2020, 2 BvR 1005/18 para 36.

¹⁵⁰ Cf Buchinger (2013) 95-98.

2. Institutional, societal, political and historical outline conditions

The implementation of the UN CRPD in legal systems significantly depends on whether they are more strongly influenced by the legislation or case law, as Lamplmayr and Nachtschatt have shown in a comparison of Germany, Austria, Australia, and New Zealand¹⁵¹.

It is also extremely relevant whether and to what extent official participation¹⁵² and social mobilisation of persons with disabilities' rights¹⁵³ through their DPOs is part of the implementation and monitoring^{154,155}. Here, on the one hand, the corporately influenced legal and political systems in Germany and Austria can show a rich in tradition and well organised group of associations of, for, and with persons with disabilities¹⁵⁶. On the other hand, it should be critically discussed the extent to which their various roles – for example as providers of services and facilities – and integration into existing legal and political institutions and arrangements can be considered to be compatible under the guiding principle of an independent and authentic representation of interests. Other institutional questions arise in the federal, multi-layer system, which in Germany and Austria assign each the European Union, the Federal state, the Länder, and the local authorities, specific responsibilities respectively. At first glance this appears to create additional complications for the implementation of a UN convention. However, whether and how central systems are really superior in this respect or whether federal systems in their complexity possibly allow even more sustainable implementation, still needs to be investigated in further comparative studies¹⁵⁷, which can also include the comparison within the federal system¹⁵⁸, as Walter Fuchs has shown using Law on legal protection of adults as an example¹⁵⁹.

In this context, political science will certainly also have to consider the role played by the extent to which political interests, insights, and strategies diverge on individual issues. While there is only minor publicly identifiable controversy in Germany and Austria about the abstract questions as to whether persons with disabilities should have the same rights and opportunities, it is a different matter when it comes to concrete questions, such as inclusive school attendance

¹⁵¹ Lamplmayr/Nachtschatt (2016); Nachtschatt (2018).

¹⁵² Hirschberg (2011).

¹⁵³ Cf Rambašek (2017); Kocher (2013).

¹⁵⁴ Arnade (2015) 93-101.

¹⁵⁵ Lamplmayr (2017) 18-21.

¹⁵⁶ Cf Fischer (2019) 213-242; Futh/Jeanrond (2013).

¹⁵⁷ In addition, the ongoing dissertation project by Lilit Grigoryan, University of Kassel.

¹⁵⁸ Cf Kruschel (2020) 202-209; Merz-Atalik/Beck (2020) 218.

¹⁵⁹ Fuchs, W. (2017) 64-117.

in standard schools and the need for protected employment. If human rights demands are the minimum standard of a plural democracy, then it must be possible to examine their respective adaptation to liberal, ecological, social, and conservative political programmes and their results and reflections in legal systems.

Here, it becomes clear that the UN CRPD does not represent a fresh start from scratch, but is preceded by at least a century of policies and legislation of institutional and mental pathways. In both countries, this includes the formative effect of social insurance¹⁶⁰, the rules introduced after both world wars pertaining to labour law and social law for persons with severe disabilities or invalids, including the formative power of associations arising from this¹⁶¹, but also the memory of the national socialist crimes against persons with disabilities that the German and Austrian place names of Hadamar and Hartheim stand for¹⁶². The differing paths during and arising from a history which is partly in common, partly separate¹⁶³ also appear as an attractive research programme.

F. Conclusion

In the first decade of the UN CRPD, Germany and Austria have focussed on different areas in their legislation for persons with disabilities. Whereas Austria concentrated on the reform of Law on legal protection of adults, Germany was concentrating on the reform of social law by means of the Federal Participation Act. These laws most clearly demonstrated the possibilities and limits of participatory legislation oriented towards the UN CRPD in the respective states. Both states were also deeply involved in other questions – with limited material reform respectively – such as realisation of the rights to work in an inclusive labour market, to education in an inclusive school system, and to accessibility and the absence of barriers in public areas. Each of these subjects would be suitable to inspire a whole interdisciplinary research programme.

Germany is not yet an all-round inclusive society – and neither is Austria. It is to be strived towards and remains an ongoing task, in which setbacks cannot be ruled out.

The UN CRPD presents legislation, government, and case law, civil society and academia with new tasks, leads them to the concept of an inclusive human

¹⁶⁰ Eghigian (2000).

¹⁶¹ Obinger/Grawe/Dörr (2020) 473-501.

¹⁶² Hadamar (Hesse), Hartheim (Upper Austria), Pirna-Sonnenstein (Saxony), Bernburg (Saxony-Anhalt), Brandenburg (Brandenburg), Grafeneck (Baden-Württemberg) and Am Spiegelgrund (Vienna) were sites of national socialist killings of persons with disabilities as part of the “T 4” campaign. cf Welti (2008) 985-1004; Aly (1989); Klee (1983); von Platen-Hallermond (1948).

¹⁶³ On the development in the GDR and at unification cf Ramm (2017).

rights theory¹⁶⁴ and a new framework for social law¹⁶⁵. At the same time, it offers them an international reference framework and with the comparison of different interpretations of a standard framework, simultaneously offers a new method of gaining knowledge that promotes action. We can but hope that the discussion documented in this book contributes towards making use of this.

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¹⁶⁴ Degener (2019) 487-508.

¹⁶⁵ Eichenhofer (2018b) 19-36.

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The state review and the CRPD Committee in the context of current challenges faced by the international human rights protection system

– at the same time a report on the experiences made by the Body of the UN Convention on the Rights of Persons with Disabilities at the German Institute for Human Rights

A. Introduction

The implementation of the UN CRPD¹ is monitored on an international level by the UN Committee of Experts for the rights of persons with disabilities (CRPD Committee). At the centre of its activities are the state reviews on the basis of State Reports.² Such reviews are currently ongoing in Austria and Germany. So it is good to remember: How does this process work and what is it good for?

1. How does the state review process work?

The state review in accordance with the UN CRPD follows a strict, but complex set of rules. General rules can be found in the UN CRPD³, the CRPD Committee “rules of procedure”.⁴ Last but not least, there is also the background paper on the working methods⁵ giving important insight in the CRPD Committee’s approach.

Within the framework of these sets of rules comparable for all contracting bodies, in comparison to other Committees of experts, the CRPD Committee has creatively developed its own independent practice with its own main focal points. This particularly emphasises a selection of specific human rights objectives. This includes among other things conveying the content of the convention to the states parties for example concerning inclusion, accessibility, understanding of disability, that the CRPD Committee appears to attach great importance to, but also integration into civil society or the active involvement of

¹ United Nations (2006).

² Degener (2018); O’Flaherty und Tsai (2011).

³ United Nations (2006) Art 35 f.

⁴ CRPD Committee (2016) Rule 39 ff.

⁵ CRPD Committee (2011) I para 1 ff.

national human rights institutions or other “independent monitoring mechanisms”⁶ in the state review and the other formats that it uses for its work.

As the first step in the state review, the CRPD Committee from its group of 18 members determines one or more reporters for the review of a state. With support from the secretariat for the Committee located at the offices of the United Nations High Commissioner for Human Rights, they prepare the state review. They accompany the process right to the end, unless their four-year term of office ends before the respective procedure has been completed.

If it is not the procedure to review the “initial report”⁷, then the states have the opportunity to decide to use what is known as the “simplified reporting procedure”.⁸ In contrast to the standard procedure according to which a State Report has to report on the implementation of all CRPD provisions, in the simplified procedure, reporting is limited to individual topics which are concentrated in a list of issues which has been passed by the CRPD Committee.⁹ Both Austria and German have decided to use the simplified reporting procedure for the current round of reporting.

It has advantages not having to go into detail on all the provisions of the UN CRPD. While the very limited space for the State Report leads to a tendency towards superficiality, the simplified procedure allows a certain amount of focus despite the number of characters being limited. Nevertheless, it is possible to produce good and bad reports and for there to be productive and dysfunctional procedures using either reporting procedure. If, for example, a report misses the point or lacks important information, eg to plausibly present progress or regression, or if the report merely paraphrases the legal situation without addressing the reality of life of persons with disabilities and the practical applicability of law, or if the state does not convey any idea at all whether the measures taken produce the desired human rights effects, it cannot be a good report either way. The decision in favour of or against a simplified procedure is secondary when it comes to the quality and effect of the procedure.

Even before the list of issues is passed by the Committee, there can be interaction between civil society and national human rights institutions or other independent mechanisms with the international monitoring level in the shape of the CRPD Committee.

In the current review on Germany, for example, the associations concerned with disability policy both together and individually made information available

⁶ CRPD Committee (2016) Annex.

⁷ CRPD Committee (2016) 18.

⁸ CRPD Committee (2016) 18.

⁹ CCPR Committee (2010) 1-3.

in 2019.¹⁰ The Monitoring Body of the UN Convention on the Rights of Persons with Disabilities at the German Institute for Human Rights – the national human rights institution – commented at this stage on the state of implementation and provided the Committee’s reporter with concrete justified suggestions for questions.¹¹ Before the final consultation on the list of issues, there was also a one hour hearing in Geneva at which representatives of German civil society including people involved in policy on disability and the monitoring body made a verbal representation and answered questions from Committee members. As Germany had chosen the simplified state review and therefore the review programme ultimately determines the list of issues, this input was made at a decisive point in the proceedings and participation in the hearing proved to be expedient in its own opinion.

After the CRPD Committee has accepted the list, the United Nations will distribute the list to the state. The state then has at least one year to answer these questions and to prepare an overall report from them.¹²

Preparing the State Report is a significant challenge for many countries; this applies in particular to the countries with particularly complex organisation, such as a greater degree of differentiation in the division of power, greater decentralisation, and an effective principle of subsidiarity. The questions of the CRPD Committee often tackle extremely complex matters which many different government agencies are responsible for on different levels or they enquire about the status of complex areas that are difficult to get an overview of, particularly in the area of private sector stakeholders. Whichever way, in the course of domestic investigation, the list of issues provides a justified cause to develop this request to reflect the state of affairs into the depths of a statehood. State agencies from all sectors of authority (from parliament, government, and courts) and from all government levels (Federation, Länder, and local authorities) are potentially required to contribute towards the State Report here. To activate these “relevant stakeholders” at short notice and to synthesise the information they provide in summary in the State Report will not be easy for a state focal point, even with good self-organisation. But even the request made to government agencies can have a direct effect in shaking them up; it is ultimately the impetus to fulfil the accountability obligation enshrined in international law and to reflect on their activities with regard to the UN CRPD. Addressing it alone can lead to new consideration in sectors so far untouched by the UN CRPD and lead to constructive processes – well at least that is the

¹⁰ BRK-Allianz (2013).

¹¹ Deutsches Institut für Menschenrechte (2015).

¹² CRPD Committee (2011).

theory of the state review. In actual fact, it then offers the opportunity for public bodies which have not yet come into contact with questions about the rights of persons with disabilities to connect to the ongoing process of implementation

According to the regulations of the CRPD Committee, parallel reports can be submitted to the United Nations before the State Reports are submitted. Parallel reports – sometimes also referred to as “shadow reports” – broaden the information base that the Committee has to review the State Report. They appear next to the State Report and the information that the High Commissioner has additionally compiled about the “review candidate”, for example via recently completed reviews or those running in parallel in other Committees of experts on human rights or to the results of the peer review process in the Human Rights Council (UPR process). The CRPD Committee emphasises how important these submissions are, as do the other Committees of experts. Some voices experienced with UN Committees go so far as to state that a Committee of experts could hardly manage its tasks in a meaningful way without this additional work.¹³ Naturally, that is motivation for civil society and the national human rights institution.

Although there are limits to the word count of parallel reports as well, the reports are often designed in very different ways. Sometimes they are longer and describe a wide spectrum of aspects of life, sometimes they are very short and focus on just a single point of implementation, such as a topic, or only impart the point of view of a very small social group. From an objective point of view, it is very important that the information provided is well founded, precise, and verifiable. As the members of the Committee, in particular the rapporteur, do not have much time, it is always expedient to be brief and select a catchy form of presentation.

The monitoring body which in Germany’s first review procedure submitted its parallel report at a very late point in the proceedings, took advantage of the circumstance of the abundance of information in the current procedure and reworked all the information available until then (State Report and shadow reports from civil society, current reports) in such a way that the Committee members appointed to the state review were able to quickly and easily access important implementation questions, taking all perspectives and opinions into account by means of a reference system.¹⁴

¹³ Riedel (2003).

¹⁴ Deutsches Institut für Menschenrechte (2015).

The state review then experiences a bit of a highlight officially at the point in time of the active dialogue between the CRPD Committee and the state which is represented in the shape of a delegation in Geneva. As distinct from court proceedings, the format of the interaction is officially characterised as “constructive dialogue”.¹⁵

This terminology symbolises an objective, which is, where possible, for those participating in the dialogue to succeed in coming to an understanding about the current human rights questions in reference to the respective country. However, the term “dialogue” is probably based not least on the expectation that all those involved in the state review do not see it as a pointless compulsory exercise that just has to be done and where the state is concerned with keeping as much criticism away from itself as possible, but that everyone is working with good intentions to take even better account of the goals of the UN CRPD in national matters. Despite simultaneous interpreting, a good understanding is not always easy or a matter of course, in view of the cultural differences, but also in view of the complexity of the circumstances being discussed, particularly under intense time pressure. The conceivably constructive point of this discussion particularly appears if an awareness of human rights problems takes root in all the participants and it is possible to openly consider possible solutions. The situation is asking a lot of the states, as in the meantime it takes place live on the Internet under the watchful eyes of the global community and which therefore can also be observed by all the other states¹⁶. However, experience shows that problem-oriented reporting and open consideration in the meeting on location by the Committees gains the greatest recognition.

In principle, the procedure is not intended for states to praise themselves right from the start or to exclusively be defensive. There may be states which consider it well justified to present themselves as being perfect and which may try to maintain this appearance at all costs. However, real life experience speaks against this and the CRPD Committee will also not allow themselves to be dazzled by this. So it would appear to be a more clever strategy to appear to be open and willing to learn, opening oneself up to the constructive potential of the procedure. The basic decision as to which approach a reporting state decides to take, can often already be seen in the State Report itself. In this point unfortunately it is still very easy for a state to stand out positively from many other appearances of the states.

As a general rule, six full hours are available as active dialogue time. Within this framework, there are initial statements by both sides, after which questions

¹⁵ Riedel (2003) 101.

¹⁶ <http://webtv.un.org/meetings-events/human-rights-treaty-bodies/> (29/03/2021).

from the Committee members are collected and subsequently answered. While civil society organisations do not have a formal role within the context of the dialogue, national human rights institutions and other independent mechanisms can take the floor in the case of the CRPD Committee – unlike with other Committees of experts. However, the number of these interventions and the duration of the verbal contribution must be registered with the Committee secretariat in advance.

In the state review of Germany's initial report in 2015 for example, the Monitoring Body made use of this right and made a one-minute statement at the start and a three-minute statement at the end.

Afterwards and as a general rule, in the same session, the Committee internally consults about the results of the review as to which recommendations are to be voiced to the state in the form of the "Concluding Observations". As the Committee of experts respect the sovereignty of a state including the scope for political design and decision-making associated with this, the recommendations usually tend to be quite abstract. Subsequently, the recommendations will have to be embodied by the government agencies within the framework of their function and area of responsibility, if necessary together with others.

In the case of the state review of Germany in 2015, the Concluding Observations were received with considerable irritation by some people. Because the document, which itself is subject to space restrictions imposed by the United Nations, contained much more criticism than praise. To be precise, you could have used a magnifying glass to find the acknowledgement of undisputed considerable efforts made by Germany, the criticism in contrast was across the board.¹⁷ The CRPD Committee in its recommendations underlined the fact that Germany with its interpretation that special schools could remain in place, was incorrect.¹⁸ According to the wording of the UN CRPD, an "inclusive system" is a school system without segregated special and support school structures. The criticism of the way people are treated in the psychiatric support system or in geriatric care also weighed heavily.¹⁹ The CRPD Committee classified violence against women and girls with disabilities as being so urgent that Germany was to submit a separate report within the year on which immediate measures had been taken.²⁰

¹⁷ CRPD Ausschuss (2015).

¹⁸ CRPD Ausschuss (2015) para 45 and 46.

¹⁹ CRPD Ausschuss (2015) 29, 30, 33 and 34.

²⁰ CRPD Ausschuss (2015) 36 and 63.

The fact that in the Concluding Observations on Germany, the “concerns” and recommendations prevailed (which, by the way, was the same for all the other states), probably has something to do with the CRPD Committee, who themselves are subject to restrictions to their choice of wording, not wanting to waste resources on broad brush acknowledgement or even adulation in this procedure which is under-resourced at every turn. Even the state which is justifiably fostering the expectation of great praise because for years it has been using all its power and actually protected the rights of persons with disabilities and in other respects has furthered them and could not be accused of not doing so, would no doubt be disappointed.

It should be remembered that both – “praise” and “criticism” – in the context of the state review can be understood differently: Praise highlights interesting things for other states as an example. And criticism more takes the shape of “concern for the current and future position of the rights of persons with disabilities”.

With the adoption of the Concluding Observations by the CRPD Committee, the procedure has come to a preliminary close. Important steps are to follow. The most important task is to transfer these recommendations into actual national policy, using the means available. The states are required by the CRPD Committee to translate the Concluding Observations into their own language and to disseminate them widely in accessible formats, not least to promote implementation services. The translation is a task which needs to be taken seriously. For many target groups, as well as the public authorities, this type of text is difficult to access, particularly in English. To avoid several translations of the same UN documents, the stakeholders in Germany (Federal Focalpoint, the Monitoring body and civil society) have been trying to work together for some time now on the translation to ensure that a translation which is supported by all of them is circulated.

The immediate consequences certainly include the timely follow-up programme limited to specific points by the CRPD Committee, as in the case of Germany regarding the protection of women and girls against violence. Essentially, the adoption of the Concluding Observations is linked to the state’s job to self-critically seize this momentum and now follow them up with action.

From a legal point of view, the concluding recommendations are not binding.²¹ However, the way that a state handles the recommendations is by no means optional. Rejecting the recommendations outright or not to follow up on them without just cause would be a problem in view of the general principle of good

²¹ O’Flaherty (2006).

faith in international law.²² Because there is a duty to comply which arises from the general principle of good faith in international law which extends at least as far as the fact that a state must sufficiently explain what they have undertaken as a result and in particular, why they do not wish to follow a recommendation. From a pragmatic point of view alone, they would do well to deal with them honestly. Because the recommendations refer formally to real obligations under international law, which actually exist for the state and apart from that, there is the possibility, that in future, the CRPD Committee will come back to them. However, it would appear to be more important that the state starts taking actual steps towards implementation.

The state review can also be understood to be a recurring exercise. Because after the phase of implementation of the UN CRPD organised on the basis of the Concluding Observations, there will sooner or later be a new state review. The diagram of a circle or a circuit is suitable for this. However, the diagram gives rise to the misleading interpretation that the regular state review is based on the international law standard that states would only have to change in a process or even improve step by step; the procedure would merely frame this “eternal process” of improvement, which sometimes goes faster and sometimes slower. That would be incorrect.

The fact that the procedure meets the needs of the “principle of progressive realisation” of human rights with targeted, rapid and effective measures, is part of the human rights programme of obligations, particularly in view of the economic, social, and cultural human rights.²³ However, according to its programme of obligations under international law, the UN CRPD demands already here and now that rights be respected, protected and guaranteed without discrimination.²⁴ To make good on this claim, no state may make reference to a future review or make excuses for themselves giving the reason that they had not yet had time.

On the contrary, the aim of the state review in this elementary area of human rights is to ensure that rights are effectively respected and protected, both in the past and in the future! From this perspective, the state which came off best in the state review was the state which was able in their report to refer to solid evidence that they had always succeeded here! But even with actual evidence of real progress, surprisingly, states sometimes find it very difficult.

²² Klein (2005) 29.

²³ Craven (2002).

²⁴ Aichele (2008) 15.

2. What is the state review good for?

The function, aim or benefits of the procedure are to obtain feedback on the current status of national implementation of the UN CRPD as well as give the necessary impetus to improve implementation of the rights of persons with disabilities when implementing them in one's own country. If the stakeholders involved in the procedure sincerely and seriously follow the procedure with this goal in mind, the chances for its success increase.

A general hoped-for benefit of the UN CRPD that goes beyond this, and is detached from the respective situation that persons with disabilities find themselves in, was to trigger developments to integrate the topic of disability much more strongly into the concepts and practice of international human rights protection.

The historic reason for developing the UN CRPD as a human rights instrument alongside the other human rights conventions of the United Nations was based on the fact that, at the time, systems for international human rights protection which existed until then did not pay enough attention to persons with disabilities before the UN CRPD was passed.²⁵ According to the results of a study, the system, in particular in the shape of the Committees of experts system ("Treaty Body System"), had for decades not proven itself to be in a position to satisfactorily address the discrimination against persons with disabilities that exists around the world, let alone to effectively counteract it.²⁶ In this respect, the question is justified as to whether now already – approx. 15 years after being passed by the UN general assembly in 2006 – it can be said that the UN CRPD has created momentum for improvement in the international human rights system with the institutions it has created. It is possible to easily see that this has gradually succeeded and can be explicitly stated at this point. The UN CRPD has been able to stimulate innovation to successfully set general impulses in the entire field for the benefit of the goals and contents of the UN CRPD, in the same way that, for example, the CRPD Committee, which is bound to it, has been able to in the institutional setting.²⁷ A few highlights will suffice to illustrate this.

From a content point of view for example, thanks to the UN CRPD, "inclusion" advanced on an international level to a new guiding concept of human rights and international law. Through the UN CRPD, now established as a hu-

²⁵ Quinn et al (2002).

²⁶ Degener (2019).

²⁷ Cf Lord/Stein (2020).

man rights principle, the convention opens up access to interpretation of human rights overall. For example, the principle of inclusion according to Art 3 UN CRPD in the sense of an interpretation aid, helps shine a light on the broader dimensions of education in the sense of a human right to inclusive education, or adds an important dimension to the right to housing within the meaning of Art 11 UN Charter for the economic, social, and cultural rights, such as accessibility and social relevance which goes beyond the elementary concerns of persons with disabilities, for example in the development of socio-spatially oriented urban spaces or also the design of facilities and buildings. Without the idea of inclusion being “added” to human rights, and their standardised content being highlighted, they can no longer be understood to be adequate.²⁸

The institutional entanglement of the CRPD Committee in the international human rights system and the inter-system interaction is already bringing about positive results; the rights and perspectives of persons with disabilities are already trickling into the programming of the other treaty regimes. This effect stems for example from the interaction, as seen within the context of the annual meetings of the chairpersons of all Committees of experts (“chairpersons’ meeting”) These meetings which last five days are aimed at consulting on common affairs of the Committees of experts.

In recent years, this has focussed on the discussion about the state review, the development of a common understanding of human rights, as well as interdisciplinary topics. It is absolutely not the aim of the Committees of experts to repeatedly review the same state on the same points in different procedures. Rather, the procedures, some of which run in parallel, aim to complement each other as much as possible, if only to make the most effective use of limited resources or to ensure that the specific expertise of the respective body is brought to bear. At the same time, the Committees of experts are faced with the challenge that, for example, the question of gender and gender equality can not only be left to the Committee for women’s rights, just as it would be inadequate for only the Committee for the rights of the child to work on the question of human rights for children and young people.

Not least, joint programmatic statements of the Committees of experts are an expression of institutional interconnectedness and the effect of the UN CRPD and the CRPD Committee. An example of this is the statement issued in 2019

²⁸ Aichele (2013).

by five Committees on human rights and climate change.²⁹ The CRPD Committee participated here as well and during the course of this has been able to secure the perspective of persons with disabilities in a qualified manner.

B. Current challenges faced by international human rights protection

However, this state review process on the UN CRPD has been taking place under more difficult conditions in recent years. The context of the state review is characterised by specific international challenges. Thus for example, the question about the meaningfulness of a state review against the benchmark of the UN CRPD not only becomes particularly urgent and current, but also gives the state review process on the UN CRPD yet another dimension of meaning.

Apart from the more difficult conditions, first of all, the growing pressure on the international human rights protection system, the core of which includes the CRPD Committee along with eight other Committees of experts with specific responsibilities, should also be mentioned.³⁰ Massive overloading and the difficulty with states which do not submit any reports at all are only part of the problem which has been known for some time now. In view of fulfilling reporting obligations, Austria and Germany are among the states which do little wrong. Much more, the cause of concern is that the overload of tasks in the state review, which has existed for many years, now is being added to in recent years by the cuts in funding initiated by the member states of the United Nations for the area of human rights.³¹

Scarce resources threaten to cut into working methods, meeting times, and travel opportunities. These measures also affect key institutions, such as the High Commissioner for Human Rights located in Geneva, which, as is well known, also serves as the offices of Committee secretariats and as an institutional framework for the Committees of experts. What effect will these cut-backs have if applicable on the state review by the CRPD Committee whose workload may be particularly high due to accessibility requirements? What specific challenges are the CRPD Committee faced with to comply with and implement the rights of persons with disabilities effectively?

²⁹ Joint Statement on “Human Rights and Climate Change”, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E> (29/03/2021).

³⁰ <https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (29/03/2021).

³¹ Cf Germany (2019).

To protect its own functionality and to prevent the credibility of international human rights protection from being undermined in this way, the Committees of experts are currently working on ways to increase efficiency and efficacy.³² The annual meetings of the Committee chairpersons which have already been mentioned are used for consultation. A reform process (key term “Treaty Body Reform”), which after a temporary break in 2014³³ has now started up again, is merely framed by the United Nations. The academic community, for example, is actively participating in this parallel discussion and is contributing considerations.³⁴

Another weighty question concerns the substantive and dogmatic coherence of the system, which is divided into Committees of experts. In order to harmonise human rights adjudication practice in the complaints procedures running in parallel, there are proposals coming from outside, such as the establishment of a World Human Rights Court, which should definitely be discussed further.³⁵

States such as Germany and Austria in particular are called upon to deal politically with the resistance within the United Nations and the attempt to attack the system of Committees of experts and human rights protection and, if possible, to fend it off. In times when multilateralism in general is also being deliberately devalued by players in the Western group of states, such as the USA, and the international “rule of law project” is also increasingly losing momentum or at least suffering greatly³⁶, the challenge for human rights is clear – to assert itself, even in this historical situation.

One important factor that has an impact on the level of attention and the impact of the UN CRPD and the CRPD Committee is, for example, the energetic pull that the implementation of the Sustainable Development Goals (2030 Agenda) has had on the international system of the United Nations and its member organisations as well as among its members in recent years since their adoption in 2015.³⁷ They receive the highest attention at the international level. This programme of work, structured by the members of the United Nations through 17 goals, pursues the intention of encouraging progress in essential areas of human life, such as overcoming poverty, hunger, health care deficits and lack of education, on the basis of an expanded concept of sustainability, and at the

³² Chairs of the human rights treaty bodies (2019).

³³ O’Flaherty (2011).

³⁴ Subedi (2017); Egan (2020).

³⁵ Kozma et al (2010).

³⁶ Krieger et al (2019).

³⁷ Kaltenborn et al (2020).

same time, demands contributions from all stakeholders, including individuals. The addressees are no longer just individual states or groups of states, but the community of states, international organisations, nationally organised civil societies, ie also the entire population.

With regard to the Sustainable Development Goals (SDGs), there is no question that important results have already emerged for persons with disabilities from the ongoing national and international processes, which are not easy for anyone to understand, and that this can still result in great opportunities for the future. This includes, for example, the inventory of knowledge about the living situation of persons with disabilities worldwide, which was created in this process.³⁸ Particularly the sustainability programme with its guiding principle “leave no one behind” demands a special responsibility from states and the international community for persons with disabilities. Not only would “inclusion” have been given a high conceptual status in the 2030 Agenda as an interdisciplinary idea and qualifying feature of all 17 main goals, but the process of the drafting phase and the initial period of implementation alone can be considered evidence of the influence of the human rights programme of inclusion at the international level. The importance of persons with disabilities in the concept and practice of the 2030 Agenda would never have been conceivable without the UN CRPD.

Nonetheless, the high profile of the 2030 Agenda threatens not only to marginalise the work of the expert human rights Committees in Geneva, such as the CRPD Committee, and cut them off, but also to weaken the legal approach inherent in international human rights protection and the importance of a regulatory framework. Because the 2030 Agenda is not a human rights document, it does not convey any subjective rights and in many points, remains short of the human rights obligations. For the state review, for example, the question arises as to how the 2030 Agenda relates to the UN CRPD. Does the 2030 Agenda serve the implementation of the UN CRPD or the other way round? Does the 2030 Agenda alone cover everything, or is there still something left open even after its full implementation, when measured against the benchmark of the UN CRPD?

The CRPD Committee cushions this problem in practice by already integrating the 2030 Agenda into its review and recommendation section. It starts by linking the agenda process with the discrimination prohibition according to Art 5 UN CRPD. Therefore, the goals of the UN CRPD can also be achieved through measures of the 2030 Agenda, but guaranteeing the rights of persons with disabilities is a purpose set exclusively by the UN CRPD.

³⁸ Department of Economic and Social Affairs (2018).

Another critical condition is the development at the international level, which could, in the long term, change the concept of human rights as we know it. For example, this addresses the advances towards a “right to peace”, which is being promoted by a group of members of the United Nations (“friends group”).³⁹ At first glance the “right to peace” sounds good. However, it is problematic that according to this, the states, which are themselves committed to individual human rights under international law, are put in the position of a rights holder and individual human rights, on the other hand, are relegated to second class or are at least diminished.

The danger is highlighted, for example, in the UN Human Rights Council resolution on the “right to peace”, which after being voted on in 2019, received considerable support from all but the Western group of states⁴⁰: The resolution speaks about this “right” allowing states to establish “zones of peace” at home and abroad with a view to peace. Current events, such as Turkey’s actions in the Iraqi part of Kurdistan or India’s internal war, in which the Indian state is taking large-scale action against its indigenous population groups, make people sit up and take notice of such formulations. In all these cases – presumably the intention of the resolution is to be interpreted this way – the human rights of the affected population are subordinate and, by subordinating them to the higher goal of peace, could be repressed and overridden.

Whether this development can be considered to be an attack on human rights as individual rights is being discussed and needs to be discussed. If human rights had to take a back seat to a right to peace in territory both at home and abroad, this new ranking of international concepts would also greatly diminish the rights of persons with disabilities. This consequence would be particularly dramatic for persons with disabilities, as their prospects are just beginning to unfold in the idea of human rights and to highlight the rights of persons with disabilities at the level of state obligations by an important dimension that has so far received too little attention.

C. Conclusion

From the arsenal of international monitoring at its disposal (in addition to the complaints and investigation procedure), the state review rightly assumes great importance as a procedural approach to a systematic and regular review of the implementation status in the respective country, combined with recommendations.

³⁹ Human Rights Council (2019).

⁴⁰ Human Rights Council (2019).

The state review demonstrates great potential for the practical effectiveness of the rights of persons with disabilities nationally, judging by the experience of just over a decade worldwide. It is thus theoretically optimally complemented thanks to monitoring by national human rights institutions and other national independent mechanisms, as well as by persons with disabilities and DPOs at the national level within the meaning of Art 33 UN CRPD.⁴¹

It is difficult to claim that this procedure always has its intended effects, just as it is impossible to state that it is having no positive effect at all. The procedure mobilises domestic attention and updates the human rights obligation to be accountable; the procedure allows for comparison with standards in the international sense and provides assistance in checking the derivations made domestically; it offers indications of possible political priorities set, also in relation to competing domestic objectives.

It is hard to underestimate the special function of the procedure to give persons with disabilities themselves a voice in international and national forums. The fact that persons with disabilities did not have to be heard at the international level is a thing of the past. The Committee itself is exclusively manned by persons with disabilities. Civil society organisations, of which many are self-help organisations, submit parallel reports and the international umbrella organisation International Disability Alliance (IDA) has become a major voice since the UN CRPD entered into force internationally in May 2008.

The fact that the state knows that it must answer internationally to the rights arising from the UN CRPD strengthens the position of persons with disabilities nationally. If, for example, their concerns are not heard domestically, but the CPRD Committee takes up the issue, this already gives these concerns a special, human rights weight and it is more difficult for the state to disregard it at the national level. However, questions of law and understanding can also be clarified in the course of the state review, which in turn can benefit not only the state in the procedure, but all states parties in general. This means that the state review can contribute towards settling internal disputes if the Committee can persuade people to read the convention in a specific way.

As the CRPD Committee reviews all states according to the same standards – taking into account country-specific characteristics – it is not the culmination of an ongoing harmonisation process, but acts as an upstream international platform for dialogue with a view to developing a universal understanding of

⁴¹ See Aichele (2018).

the rights of persons with disabilities and the human rights concepts associated with this.

The meaningfulness of the state review ultimately also depends on how seriously and sincerely the procedure is carried out by all those involved in view of the convention's goals, the enjoyment of human rights and equal participation in society.

In view of influential contextual factors of international human rights policy that are not very conducive to human rights, it is all the more important to give this procedure an importance that goes beyond the rights of persons with disabilities as defined by the UN CRPD. Too much of the initial progress would already have been wasted and the future potential of the UN CRPD lost if these factors were to cause the innovative power of the Convention to fizzle out and for the experiences of persons with disabilities to be sidelined from international human rights protection.

Especially in times when human rights are in danger of losing their prominent status at international level, the state review is a significant event for states that sends signals beyond the respective procedure. It is a demonstrative exercise of a confessional nature. This is especially true for those states that want to uphold human rights protection as an achievement of civilisation and that want to counter accusations of bigotry.

The state review thus not only offers the opportunity to enter into dialogue with an international expert body on the rights of persons with disabilities, to achieve practical progress, and to secure the status of the rights of persons with disabilities in domestic policy, but it is also an expression at the international level of the importance attached to human rights in the United Nations system, both today and in the future.

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The UN Convention on the Rights of Persons with Disabilities in Austria: From the state review 2013 to the second and third State Report 2019

In September 2013, Austria had to appear for the first time before the United Nations Disability Rights Committee in Geneva for a state review. In the Concluding Observations, apart from some acknowledgement, Austria received a great deal of criticism and corresponding recommendations to take home¹. This article will present the most important points of criticism and what has been done so far in Austria to implement the recommendations.

1. German translation of the convention

The first German translation of the convention was a joint effort by Germany, Switzerland, and Austria, where the three countries agreed to some compromises. The Committee quite rightly criticised the fact that the translation contained errors and some of the principles of the convention had not been reflected properly (thus for example the key term “inclusion” was not translated as inclusion, but as integration).

In implementation of the recommendations, a working group was formed under the leadership of the Ministry of Foreign Affairs, with the Ministry of Social Affairs, the Monitoring Committee and representatives of DPOs, which revised the German translation – the new translation was published in the Federal Law Gazette in 2016.²

What is interesting however, is that the new German translation only applies to Austria. Germany and Switzerland have not yet taken any steps towards a new translation.

As required by the UN CRPD, the new German version was translated on behalf of the Ministry of Social Affairs in easy to read version as well and was published on the website of the Ministry of Social Affairs in 2019.

¹ [https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=391\(29/03/2021\)](https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=391(29/03/2021)).

² Austrian Federal Law Gazette III 105/2016.

2. Social model of disability

One of the Committee's main criticisms was that in Austria, the medical model of disability dominates in legislation and practice and that the social model had not yet prevailed. The recommendation to Austria is therefore to modify the appropriate legal provisions so that disability is taken into account above all in its social dimension.

What is important in this context is what is known as the assessment ordinance ("Einschätzungsverordnung"), according to which the degree of disability of around 100,000 persons is assessed every year. The old assessment ordinance from 1957, which was still shaped by the principles of war victim care, was reformed³ by the Ministry of Social Affairs in 2010 and 2012 and is to be further developed. The aim is to include more social criteria in the assessment which until now has been carried out purely on a medical basis.

3. Standardised implementation of the convention

This was one of the central points of criticism of the Committee: policy on disability in Austria is fragmented between the Federation and the Länder, there are different definitions of disability, as well as different standards of accessibility and protection against discrimination.

The recommendation to Austria was to create an overarching legal framework and an overarching policy on disability between the Federation and the Länder. In the spirit of the convention, this of course needs to take place with participation from DPOs.

In view of the Austrian federalism and the fragmentation of responsibilities in policy on disability, this is probably the recommendation which is the most difficult to implement. In 2014-2015, the Ministry of Social Affairs worked out the draft for an "Agreement on an Inclusive Disability Policy" ("Zielvereinbarung inklusive Behindertenpolitik") between Federation and Länder for standardised implementation of the UN Convention on the Rights of Persons with Disabilities. As the Länder did not really show any interest in an agreement of this kind, it has not been concluded to date.

However, the 2022-2030 National Action Plan on Disability, which is currently being worked out, offers a second opportunity. While the first Action Plan 2012-2021 was only a plan of the Federation, the new Action Plan is jointly prepared by the Federation and the Länder. This would be an opportunity to at least set common goals for the Federation and the Länder to implement the convention.

³ Austrian Federal Law Gazette II 251/2012.

4. Equal Rights for persons with disabilities

The United Nations Committee has positively acknowledged that the Federation and the Länder in Austria have laws in place against discrimination on the grounds of disability. However, they criticised that their legal protection against discrimination is too weak. Most importantly, they can only claim for compensation and have no possibility to legally enforce the removal of a barrier or that discrimination be refrained from. For this reason, the Committee has recommended strengthening anti-discrimination laws by extending the options to initiate lawsuits.

A decisive step towards implementing this recommendation has been taken with the 2017 inclusion package⁴:

- It is now not only possible for the Austrian Disability Council to pursue a class action to establish discrimination, but also for the Disability Ombudsman and the Litigation Association (“Klagsverband”).
- A class action is also possible against large companies (such as banks and insurance companies), for injunction relief and removal of discrimination.
- In cases of harassment, there is also an action for injunction.

5. Raising awareness

The criticism by the Committee stated: Disability in Austria is seen through an outdated charity model, prejudices and stereotypes about persons with disabilities are reflected in the mass media, there is no understanding of the human rights approach of the Convention.

The Committee has therefore recommended that awareness-raising initiatives be launched to eliminate prejudices and to strengthen an image of persons with disabilities who are neither heroic nor pitiable, but “normal” human beings who have all human rights.

A working group under the leadership of the Federal Chancellor’s Office, which included the Ministry of Social Affairs, various sections of the media and representatives of persons with disabilities, drew up a recommendation on the portrayal of disability in the media between 2014 and 2017. The Association of

⁴ Austrian Federal Law Gazette I 155/2017.

Austrian Newspapers (VÖZ) has also set up a web portal on this topic and about accessibility in the media.⁵

6. Accessibility

The Committee has acknowledged that improvements to accessibility have been made in Austria in the areas of building, public transport, and information. However, it criticised the lack of accessibility in rural areas, in public institutions, and in the media.

The recommendation was to create an overarching and inclusive approach to accessibility in view of the different responsibilities of the Federation and the Länder, to create standards for all public facilities, to shorten the timetable for staged plans for public buildings, and to expand subtitling in the Austrian Broadcasting Corporation (ORF).

As far as implementation is concerned, Austria can point to some successes:

- The staged plan for accessible federal buildings, which is set out in the Federal Disability Equality Act⁶ was implemented by the end of 2019.
- The Federal Contracts Act 2018⁷ stipulates that in federal tenders, the technical specifications must observe the principles of accessibility.
- In implementation of the EU Directive on accessible websites⁸ the Web Accessibility Act 2019⁹ stipulates that all the federal government's public websites and those of institutions acting on behalf of the federal government must be accessible (the same is stipulated by laws of the Länder for their websites).
- The Austrian Federal Railway (ÖBB) stage plan envisages barrier-free stations and stops for 75% of passengers by 2020, and 90% of passengers by 2025.
- In some Länder, administrative decisions are also issued in easy to read language.

⁵ www.barrierefreiemedien.at (29/03/2021).

⁶ Austrian Federal Law Gazette I 82/2005.

⁷ Austrian Federal Law Gazette I 65/2018.

⁸ Directive (EU) 2016/2102 of 26 October 2016.

⁹ Austrian Federal Law Gazette I 59/2019.

In the housing sector, however, it must be noted that in the building regulations of some Länder, there have been backward steps regarding accessibility due to short-sighted economic considerations. By doing so, Austria is undoubtedly violating its obligations arising from the UN CRPD.

7. Recognition before the law

The Austrian guardianship law was massively criticised during the state review, as it contradicts Art 12 UN CRPD: too many people are under guardianship, too many of them in all areas of life, and their legal capacity is automatically restricted as a result of guardianship.

The central recommendation of the Committee was to replace substituted decision-making with supported decision-making. This means,

- respecting the will and autonomy of the affected person;
- ensuring freedom of choice about medical treatment, participation in elections, marriage, work, and choice of place of residence;
- offering training to the affected professional groups.

In a comprehensive participatory process that lasted several years, the Ministry of Justice replaced the guardianship law with the Second Protection of Adults Act which has been in force since 1 July 2018.¹⁰ Its principles are:

- the capacity to act is no longer automatically lost upon representation,
- representation of adults is limited to specific content,
- legal and judicial adult representation are limited to three years,
- clearing is made mandatory
- all existing guardianships will be abolished or converted into adult representations by 1 January 2024.

Training on the new legal situation is being offered for legal professionals, medical staff, bank staff etc. In 2020, it can be noted that the number of guardianships/representations has been decreasing since 2015.

Without doubt, this reform is a big deal. Whether it will actually be a success in practise however is not certain. The problems are mainly that there is not

¹⁰ Austrian Federal Law Gazette I 59/2017.

enough staff in the courts for implementation and that the Länder have so far created too few support structures for the people concerned.

8. Protection from violence

The Committee explicitly expressed its acknowledgement of the work of the Austrian Ombudsman Board which since 2012 has been using six commissions to monitor those institutions where violence and abuse may frequently occur, including institutions for persons with disabilities.

However, the Committee noted that it had received reports of violence and abuse against persons with disabilities in Austria and called for additional measures to better protect women, men, girls and boys with disabilities from violence.

In implementation of this recommendation, the Ministry of Justice organises regular education and training events on the topic of “victim protection” for justice personnel.

The Ministry of Social Affairs commissioned a scientific study on violence against persons with disabilities in 2016, which was conducted over three years and published in December 2019¹¹. The study “Experiences and Prevention of Violence against Persons with Disabilities” in two volumes contains comprehensive data on the topic of violence against persons with disabilities as well as positive examples of institutions and recommendations for the prevention of violence.

9. Independent living

The Committee criticised that the number of persons with disabilities in institutions has increased over the last 20 years and that there are too few community-based services, especially for persons with intellectual and psychosocial disabilities.

The recommendation was therefore to push for deinstitutionalisation so that the people concerned have real choices about where and how they want to live, and to provide more funding for mobile services.

All Länder are in the process of downsizing large institutions and also offering more and more options of independent living as alternatives to living in a home (in 2017, the Ministry of Social Affairs established a report on contemporary

¹¹ <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=718> (29/03/2021).

forms of living in the Länder and submitted it to the National Council¹²). It contains positive examples of inclusive forms of housing from all Länder as well as a particularly interesting project from Munich.

In this context, the 2020–2024 government programme should be mentioned, which announces the following measures under the title “Independent living in the community”:

- Demand-based funding for the implementation of the UN Convention on the Rights of Persons with Disabilities and the NAP („Bedarfsgerechte Finanzierung zur Umsetzung der UN-Behindertenrechtskonvention und des NAP“),¹³
- Pushing the implementation of the NAP with all ministries and involving stakeholders („Forcierung der Umsetzung des NAP mit allen Ministerien und unter Einbeziehung der Stakeholder“).¹⁴

10. Personal assistance

The Committee expressed its acknowledgement for Austria’s personal assistance programmes, but at the same time criticised the fact that personal assistance is designed very differently between Länder and is not available to some groups of persons – eg persons with intellectual or psychosocial disabilities.

The Committee recommends that Austria harmonise personal assistance programmes and extend them to persons with intellectual or psychosocial disabilities.

Personal assistance in the workplace is the responsibility of the federal government and is considered an example of best practice. However, personal assistance in leisure time is a matter for the Länder: Personal assistance now exists in all Länder, but according to very different criteria. A working group of the federal government and Länder, which tried to unify the systems, has not yet reached an agreement.

The 2020–2024 government programme contains the announcement: “Development of nationally uniform framework conditions for personal assistance in all areas of life regardless of the type of disability”.

¹² https://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_13168/imfname_671652.pdf (29/03/2021).

¹³ <https://www.bundeskanzleramt.gv.at/bundeskanzleramt/die-bundesregierung/regierungsdokumente.html> (29/03/2021) 194.

¹⁴ <https://www.bundeskanzleramt.gv.at/bundeskanzleramt/die-bundesregierung/regierungsdokumente.html> (29/03/2021) 194.

11. Inclusive education

While acknowledging that models of inclusive education exist in some Länder, the Committee could not see any progress towards an overall inclusive education. The main points of criticism were that the number of children in special schools in Austria is increasing overall, there are very few academics with disabilities, too few teachers with disabilities and with knowledge of sign language. Austria has been called upon to make greater efforts in inclusive education from kindergarten to university, and also to recruit more teachers with disabilities and with knowledge of sign language.

In implementation of this recommendation, inclusive education has been integrated into the pedagogical training for all studies since 2013 and inclusive model regions were launched in Styria, Carinthia, and Tyrol in 2015. However, the Kurz-Strache government (2017-2019) did not pursue the goal of inclusive education, but on the contrary, wanted to maintain and strengthen the system of special schools.

The 2020-2024 government programme in contrast contains an expressed commitment to inclusive education: “The aim [is] an inclusive education system in which all children and young people receive the support they need to be able to participate in joint education.”¹⁵

12. Employment

On the issue of employment, the Committee criticised the fact that some 22,000 people work in “sheltered workshops” and have no access to the open labour market. The quota system of the Disability Employment Act (“Behinderteneinstellungsgesetz”) is not working well, as the recruitment obligation is only fulfilled by 22 % of employers, and there is a big difference between women and men with disabilities in terms of employment rate and income.

This led to recommendations to expand programmes that enable persons with disabilities to be employed in the open labour market and to reduce gender gaps in employment and pay.

In implementation of these demands, the funds for active labour market policy for persons with disabilities were doubled to € 90 million annually with the 2017 inclusion package, persons with disabilities are also included in the federal civil service outside of the job plan, and special programmes for women with disabilities were also created.

¹⁵ <https://www.bundeskanzleramt.gv.at/bundeskanzleramt/die-bundesregierung/regierungsdokumente.html> (29/03/2021) 193.

The 2020-2024 government programme contains a whole range of objectives on the topic of employment, such as an “employment initiative and increased offers in the interface area with school” as well as “wages instead of pocket money” and inclusion in social insurance for persons in “sheltered workshops”.¹⁶

13. Elections

The Committee positively acknowledged that all persons are entitled to vote in Austria and no one is excluded from the right to vote on the basis of disability. However, it was criticised that some polling stations are not accessible.

Austria should ensure that elections are accessible to all persons and that election information is available in all accessible formats.

In the years since the state review, the following improvements have been made: voting is made easier for blind and visually impaired people by means of voting templates, there is more and more voting information in easy to read language and at least one polling station per municipality (in Vienna per district) must be accessible, without barriers.

14. Statistics

The Committee noted that overall, there is too little data on disability issues, especially on women with disabilities. Systematic collection, analysis and dissemination of data, especially on women and girls with disabilities, and the development of indicators to measure progress in policy developments are recommended.

On behalf of the Ministry of Social Affairs, Statistik Austria conducted a survey on disability in 2015, which was published in the “Disability Report of the Austrian Federal Government” in 2017.¹⁷

With the amendment to the Federal Disability Act 2017¹⁸, Statistik Austria was authorised to link together existing data on disability in an anonymised manner while ensuring data protection. This would be the basis for improving the statistics—but Statistik Austria needs concrete orders for this.

On behalf of the Ministry of Science, Statistik Austria developed the concept of an accessible statistical survey of persons with disabilities in 2018.

¹⁶ <https://www.bundeskanzleramt.gv.at/bundeskanzleramt/die-bundesregierung/regierungs-dokumente.html> (29/03/2021) 193.

¹⁷ <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=428> (29/03/2021).

¹⁸ Austrian Federal Law Gazette I 155/2017.

Within the framework of the 2022-2030 National Action Plan on Disability, it is planned to ensure regular and professional data collection in the field of disability in cooperation with Statistik Austria.

15. Monitoring Committee

The Committee acknowledged that Austria had already legally established a monitoring Committee immediately after ratifying the Convention in 2008. However, it criticised the fact that the Federal Monitoring Committee is not independent of the government, as required by the Principles for National Human Rights Institutions (Paris Principles), and has no budget of its own.

In implementation of this recommendation, in the amendment to the Federal Disability Act 2017 the Monitoring Committee was organised independently as an association and provided with its own budget of € 320,000 per year.¹⁹

Since the state review, all countries have also established monitoring Committees, but not all of them comply with the Paris principles of independence.

Summary

On 1 October 2019, Austria submitted its combined second and third State Report on the UN Disability Rights Convention.²⁰

Of the 23 recommendations that the Committee made to Austria during the first state review, I estimate that seven recommendations have been implemented, 15 are in the process of being implemented, and only one has not been addressed at all (the different time limits for abortion).

Since the 2013 state review, there has been progress in many areas of Austrian policy on disability, while in some areas there has been standstill, sometimes even steps backwards. Of course, this depends very much on the respective governments of the Federation and the Länder and their political objectives. Irrespective of this, however, there are some structural factors in politics and society that are opposed to the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria:

1. When it comes to the topic of disability in Austria, medicine strongly dominates. It will therefore be a very long and difficult process to

¹⁹ Austrian Federal Law Gazette I 155/2017.

²⁰ <https://broschuerenservice.sozialministerium.at/Home/Download?publicationId=728> (29/03/2021).

- move away from the medical model and to implement the social model of disability in legislation and practice.
2. In large parts of the population there are still prejudices against persons with disabilities, which are reinforced by the tabloid media. This makes it difficult to change awareness towards inclusion and human rights.
 3. When there is clear responsibility, also a major reform can succeed. However, Austrian federalism with its irrational fragmentation of responsibilities blocks any progress. Many attempts at reform have already been bogged down in the conflict between the federal government and the Länder over power, budget, and responsibilities.

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Austria's state reviews on the implementation of the UN CRPD as well as other UN conventions from the perspective of civil society

As representatives of non-governmental organisations (NGOs), we have been involved in several state reviews in recent years and have observed several public dialogues in Geneva, not only on the UN CRPD, but also on the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention on the Rights of the Child (CRC).¹ This text is therefore explicitly indebted to a civil society perspective, the role of which in the reviews can hardly be overstated. Committees carrying out the review are only able to get an idea of a differentiated and above all more complete picture of the status of implementation of human rights obligations in a country through critical statements and reports from NGOs supplementing the official State Reports.

Lilian Hofmeister, an Austrian lawyer who was a member of the CEDAW Committee from 2015 to 2018, sums it up this way in an interview with the newspaper *Wiener Zeitung*: “The states have to send a report to the Committee every four years where they explain what they have done for women. Often it is just window dressing when nothing has actually happened or something is described as particularly successful and then we learn through civil society, especially through women’s organisations, that the measure either doesn’t work or is counter-productive and even harms women.”² The result of the entire review process are the Concluding Observations and recommendations published by the respective Committee responsible. Theresia Degener, who was a member and most recently chair of the UN Committee on the Rights of Persons with Disabilities for eight years, comments on this: “The public hearing, which lasts one to two days, ends with the Concluding Observations, in which the Committee determines whether the country is complying with or violating its obligations under the Convention and what steps it should take to improve implementation. The Committee also checks that these recommendations are being adhered to. The state review is not intended to be a judicial process, but to facilitate constructive dialogue with the states.”³

¹ Cf eg Flieger (2013) 22-23.

² Interview with Lilian Hofmeister in the *Wiener Zeitung* on 12.10.2014: https://www.wienerzeitung.at/magazine/wiener_journal/668901_Wir-leben-in-einer-globalen-Gewaltgesellschaft.html (29/03/2021).

³ Degener (2015) 55-65.

1. Wealth of documents for state review

The basis for Austria's first state review on the UN CRPD was a large number of reports and documents, among which the following were key:

- The State Report from the Austrian federal government,
- the Civil Society Report handed over by the Austrian Association for Rehabilitation (“österreichische Arbeitsgemeinschaft Rehabilitation” - ÖAR),
- a report by the Federal Monitoring Committee (Independent Monitoring Committee on the Implementation of the UN Convention on the Rights of Persons with Disabilities),
- a report by the Austrian Ombudsman Board,
- the list of issues from the UN Committee to Austria,
- the Austrian federal government's answers to the list of issues,
- the civil society's answers to the list of issues,
- the recommendations for action (Concluding Observations) and recommendations of the UN Committee.⁴

The second state review with the constructive dialogue in Geneva will take place in 2021; the documents for this procedure have also already been submitted by the state and NGOs and are available for public review.

These documents allow for an unusually comprehensive and differentiated presentation of policy on disability, structures and contexts, at least for Austria. They “do not deal with isolated topics, such as school integration or guardianship, but, analogous to the 33 substantive articles of the Convention, they deal with all aspects in detail and in their interrelation or interdependence. This results in a complex analysis of the current status of Austrian policy on disability.”⁵

2. Deinstitutionalisation as an example topic

The variety and complexity of the issues dealt with and examined is therefore enormous, so as an example, only one topic will be singled out here, as it has received little attention in Austria so far and the systematic implementation of

⁴ All the documents mentioned can be found on the UNO official website (UN Treaty Body Database): <https://tbinternet.ohchr.org/> (29/03/2021).

⁵ Flieger (2013) 22.

it is still pending: Deinstitutionalisation. An institution is considered to be a facility

- “in which residents are isolated from the wider community and/or have to live together involuntarily;
- in which residents do not have sufficient control over their lives and over decisions that affect them;
- and which tends to prioritise the needs of the organisation itself over the individual needs of the residents.”⁶

Deinstitutionalisation is to be understood as a long-term and differentiated process of change “that envisages a shift in the living arrangements and circumstances of persons with disabilities – from institutional or other segregating settings to a system that empowers participation in society – [...]. Regaining control over one’s own life is an important aspect of this. The process takes place on both a political and also a social and individual level.”⁷

In the course of the first state review, this issue was raised by civil society, but it does not appear at all in the State Report. In April 2013, a delegation of NGO representatives pointed out to the UN Committee that in Austria many women and men live in institutions only for persons with disabilities: “In 2011, more than 1,800 persons with disabilities lived in institutions with more than 100 residents. 3,800 people lived in institutions with more than 30 residents and almost 5,700 persons with disabilities lived in institutions with 11 to 30 residents. Only 1,805 lived in arrangements with up to 10 residents. No gender specific data is available. We doubt that all these people had a proper choice and gave their informed consent to live in an institution.”⁸ Accordingly, the List of Issues asks for an explanation as to whether there are plans to deinstitutionalise existing institutions so that more persons with disabilities can live⁹ in a self-determined and integrated way, which is briefly referred to in the answer with exemplary references to activities in individual Länder.

In the State Report for the 2021 review, the issue is addressed in somewhat more detail, both in relation to boys and girls, and to men and women with disabilities. For the first time, for example, data was collected from all Länder on how many children with disabilities do not live with their families, but in

⁶ Europäische Expertengruppe zum Übergang von institutioneller Betreuung zu Betreuung in der lokalen Gemeinschaft (2012) 27.

⁷ Unabhängiger Monitoringausschuss zur Umsetzung der UN-Konvention über die Rechte von Menschen mit Behinderungen (2016) 4 f.

⁸ NGO Delegation (2013) 5.

⁹ Cf Committee on the Rights of Persons with Disabilities (2012) 3.

residential facilities.¹⁰ Likewise, for the first time, more precise figures are published on the number and size of residential facilities in six of the nine Länder.¹¹ This can be understood as progress, but nevertheless a comprehensive, practical plan for deinstitutionalisation with timelines, concrete measures at all levels, and meaningful indicators is still missing, as the Ombudsman Board most recently emphasises yet again in its report to the National Council: “For years, the National Preventive Mechanism (NPM) has been criticising the fact that there is still no comprehensive, national plan for deinstitutionalisation. This means: moving away from homes for the disabled and towards forms of housing that are also usual for other people. Individual, well intentioned, but uncoordinated steps are not enough to achieve this.

The fragmentation of responsibilities and the resulting uncoordinated and unsystematic developments of disability policies were already clearly raised as issues by the Committee in 2013 and it accordingly recommended “that the State Party ensure that the governments of Federation and Länder – in accordance with the Convention – consider adopting an overarching legal framework as well as overarching policy in the area of ‘disability’ in Austria”.¹²

In summary, it can be said that thanks to civil society input, deinstitutionalisation has arrived as a topic, but consistent and systematic implementation is still lacking.

3. References to other UN conventions

Since the adoption of the UN CRPD by the UN General Assembly in 2006, detailed references to persons with disabilities are also increasingly being taken into account in state reviews of other conventions. This will be illustrated by the examples of Austria’s state reviews on the implementation of CEDAW in July 2019 on the one hand, and on the implementation of the CRC by Austria in January 2020 on the other. Both the List of Issues and the dialogue with the state delegation included detailed questions on the situation of girls and women or respectively children with disabilities. In both cases, the written response and the response by the state delegation on the ground in Geneva must be described as sobering.

At the state dialogue on CEDAW, concrete questions on the situation that girls and women with disabilities are living in were essentially not answered by the state delegation. Inquiries, for example, about the questions as to why many

¹⁰ Cf Bundesministerium für Soziales, Gesundheit, Pflege und Konsumentenschutz (2019) 26 f.

¹¹ Ibid 71 ff.

¹² Ausschuss der Vereinten Nationen für die Rechte von Menschen mit Behinderungen (2013) 6 f.

women with disabilities work in sheltered workshops, were not answered or were answered with the blanket statement that everything is inclusive in Austria. The human rights of girls and women with disabilities do not yet seem to have arrived in the departments of the ministries responsible for women's issues, quite in contrast to the recommendations for action of the CEDAW Committee, which in several places contain explicit references and recommendations on girls and women with disabilities, eg:

With regard to gender-based violence, the Committee¹³ recommends that Austria "collect statistical data on domestic and sexual violence disaggregated by gender, age, disability, nationality and victim-perpetrator relationship" or expresses concerns about "the lack of progress in promoting inclusive education for persons with disabilities" and therefore recommends "clearly establishing inclusion and the corresponding objectives at all levels of education so that girls with disabilities have access to inclusive learning opportunities in the mainstream education system".

At the state dialogue on the UN CRC in January 2020, the response on the living situation or data on children with disabilities in Austria was completely inadequate. In the state dialogue, the Committee was essentially given answers with information and data on adult persons with disabilities. The impression was repeated that policy on disability issues or questions on human rights of boys and girls with disabilities have not arrived in mainstream or are not embedded as a matter of course.

The fact that children with disabilities and their deinstitutionalisation receive so little attention is all the more surprising in that the reviewing Committee already expressed concern in 2012 about the high number of children with disabilities in institutions and urgently recommended "taking measures to deinstitutionalise children with disabilities and further strengthen support for families to enable children to live with their parents"¹⁴. Also, in the run-up to the constructive dialogue on the UN CRC, NGOs had submitted reports to the Committee and worked on the List of Issues in parallel to the state response. Accordingly, members of the Committee were able to go into detail about the human rights situation of boys and girls with disabilities and ask specific questions about deinstitutionalisation, among other things.

¹³ Committee on the Elimination of Discrimination against Women (2019).

¹⁴ Ausschuss der Vereinten Nationen über die Rechte des Kindes (2012) 12.

The fact that facilities for children with disabilities are still being built or existing ones renovated in Austria, contrary to all human rights agreements, caused incomprehension¹⁵. One member of the Committee even said very clearly that Austria was going in the wrong direction because new facilities were being built here. However, the answers to the questions only included information on the situation of adults with disabilities in sheltered workshops.

Accordingly, the Committee formulated its recommendation to Austria clearly: „Develop in a participatory way the National Action Plan on Disability 2021-2030, and formulate as part of it a coherent strategy on Deinstitutionalisation and prevention of separation of children with disabilities from their families with a clear time frame and a mechanism for its effective implementation and monitoring.”¹⁶

4. Constructive and transparent dialogue or simply diplomatic-political ritual?

How far can the “Constructive Dialogue” in the state review effectively work towards development in line with the UN CRPD? This is one of the decisive questions on the efficiency of human rights reviews. From the state under review, dialogue is often characterised by diplomacy and positive self-promotion. The NGOs involved are faced with the dilemma of striking a balance between confrontational demands for clarity and transparency and constructive dialogue. Transparency requires sufficient data, as enshrined in Art 31 of the UN CRPD: “Collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.” Austria is far from providing sufficient data in many areas addressed by the UN CRPD.¹⁷

Comprehensive transparency also includes the disclosure of constellations of interests and conflicts of interest between the requirements of meeting human rights, (social) economy, social partnership interests, and politics. We were a lone voice calling for this transparency during the state review of Austria in Geneva in 2013, for example with regard to transparency concerning the influence of politically active interest groups, such as business associations, trade unions, and church organisations that do not sit at the state review table, but are influential stakeholders and players in the background.

¹⁵ Cf eg Förder- und Pflegeheim Perchtoldsdorf in Lower Austria, <http://www.pfz-perchtoldsdorf.at/> or Konradinum in Salzburg: <https://www.bizeps.or.at/grundsuetzliches-unverstaendnis-zu-un-brk-und-inklusion/> (29/03/2021).

¹⁶ Committee on the Rights of the Child (2020).

¹⁷ Cf The Academic Network of European Disability Experts (2019).

The question remains whether the state reviews sufficiently reflect all these dimensions. The long-term perspective of regular procedures gives hope in principle, but understandable signs of fatigue in civil society reduce the chances of successful “constructive dialogues” if the procedures are repeated over the long term with unresolved problems. It remains to be feared that the state reviews will be forgotten, as already seems to be the case in the context of CEDAW, or that the representatives of civil society, exhausted and disillusioned, will give up in checkmate.

While civil society and NGO members can provide background information to the members of the reviewing Committees and put the state delegation in uncomfortable situations of having to justify themselves, in the long run, the members of the state delegation are in the more powerful positions and define the situation. With this in mind, the danger remains that constructive dialogue generates little political pressure for action beyond a diplomatic-political ritual to counter the violation of formulated human rights.

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Verena Bentele

Yes to UN CRPD means yes to protection against discrimination

The active role of civil society in implementing the UN Convention on the Rights of Persons with Disabilities

To sustainably progress with participation, there need to be alliances. Alliances of people and organisations who have common objectives and who also want to enforce them consistently. As every civil society organisation represents one or more groups, a basic requirement for functioning alliances is the ability to reach consensus and agree on essential areas. The German CRPD Alliance (“BRK-Allianz”) was a functioning alliance which existed from 2011 to 2015. This alliance was a great opportunity for the associations in Germany that represent the interests of persons with disabilities. It was a chance to stand up for a common cause with a strong voice.

The aim of the Alliance was to prepare and translate the parallel report, which is prepared by civil society to present the perspective of persons with disabilities to the members of the United Nations Committee of Experts as part of the state review on the implementation of the UN CRPD.

On the one hand, the work of the German CRPD Alliance was an organisational achievement; on the other hand, negotiating compromises was often not easy. But with the result – the parallel report in the context of Germany’s first state review by the United Nations – the German Disability Council (DBR) has shown that alliances beyond the limitations of the DBR are meaningful and effective. The parallel report offers the great opportunity to participate, which is one of the leading principles of the UN Convention on the Rights of Persons with Disabilities. “Nothing about us, without us”, Art 4 (3) of the Convention provides for precisely this involvement of civil society in the implementation of the Convention. The members of the Committee of Experts were given essential insights from the perspective of persons with disabilities, non-disability-specific and from all areas covered by the Convention.

In the parallel report, you will find the view of those we represent, who we help to obtain their rights through legal counselling, who find support for a self-determined life through participation counselling. The parallel report summarises the experiences of the self-advocacy organisations, the self-help organisa-

tions, and those of the large social associations with their comprehensive perspective. Different professional and technical backgrounds are also included in the report.

These insights are an important basis for the issues raised by the Committee, whose members, often from far away countries, get a picture of the situation of the State Party.

The parallel report vividly portrays the reality of life for persons with disabilities.

The Committee also needs to get a picture of state organisational structures, benefit entitlements, structures, and service providers. However, this can only ever be complete if the effects of state action on the lives of individuals become visible.

In order to make these effects visible, the active involvement of persons with disabilities is a basic prerequisite.

Participation is still a challenge at various levels – and that not only in the state review. On one level, state structures are often not in place or insufficient for adequate involvement. The deadlines for commenting on legislation are often very tight. This is almost impossible for organisations with few staff and high accessibility requirements. If the issue is not obviously a participation issue, the relevance for persons with disabilities is often not sufficiently appreciated. In these cases, far too often there is no involvement at all.

On the other level, there is the question of resources: Personnel and the financial resources this entails required for real involvement are not available to all organisations by any means. For this reason, the Participation Fund was established in Germany at the Federal Ministry of Employment and Social Affairs (BMAS) with the 2016 amendment to the Disability Equality Act. This provides financial support for small self-advocacy organisations in particular, so that they can become more intensively involved in social and political design processes with the necessary accessibility measures.

Short deadlines for comments and lack of accessibility complicate the work of DPOs. Therefore, mandatory standards for participation should be negotiated as a matter of urgency. This issue should be regularly discussed by civil society with representatives of the legislature and the executive, also to create awareness of the challenges of participation.

Involvement and participation can be made easier if resources are pooled. For this reason, the DBR has also successfully relied on strong alliances in other policy on disability projects, for example in the legislative process for the Federal Participation Act or currently in the DBR-wide alliance with a joint declaration on IPREG, the Intensive Care and Rehabilitation Strengthening Act. Here, we also learn: If an alliance wants to be effective, everyone has to give up individual points that they would like to see given special consideration from their own association's point of view. This allows us to show that we are in a position to influence legislative procedures in a sustainable way and, in exceptional cases, also to overturn bills completely.

A clear difficulty in legislative procedures remains the connection to the UN CRPD. That is why it is still a central task today to raise awareness of the CRPD at all levels of government.

Next year, ie in February 2021, the second parallel report of civil society on the implementation of the UN CRPD in Germany is to be sent to Geneva. Currently, the Secretariat of the German Disability Council is coordinating the preparations for this. This time, however, there is unfortunately no support from a subsidised office, as was the case with the German CRPD-Alliance. Here, the demands on the individual contributors, to organise their work professionally and accessibly, are particularly high.

As the UN CRPD covers all areas of life, it is crucial to set up specialised working groups with facilitators who will then identify focal points and develop the individual chapters of the parallel report. An editorial team will then write the overall report from the chapters provided, will revise the language, and pay attention to the specified scope of the report.

The coordinated report is then to be translated in autumn, in order to arrive in Geneva in time for Germany's state review.

It will be exciting to see which areas still have the same criticisms as the first report, where changes are imminent, and which areas there is still no apparent development in.

Already in the first state review, the issue of disenfranchisement was a central point of criticism. A lawsuit against disenfranchisement was successfully won. This lawsuit was ultimately decided before the Federal Constitutional Court. When disenfranchisement was overturned, it was a great success, achieved of course through the lawsuit, but also through civil society engagement.

In addition to the state review, there are important issues for civil society that are being politically advanced. In all these topics, the implementation of the UN CRPD is the guiding principle.

One focus of the German Disability Council this year is to be the reform of the General Equal Treatment Act (AGG). The reason for this is that the coalition agreement of CDU, CSU and SPD – apart from a small section of a review mandate on accessibility in health care – is not planning to tackle this reform. So the DBR will work hard to make this issue a talking point again.

In this context, the DBR will also campaign against the EU's 5th Anti-Discrimination Directive being blocked by Germany and other states. The directive is intended to supplement the existing Europe-wide protection in labour law with minimum standards in civil law. It has already been blocked by several governments, including Germany, since 2008, even though it is supported by the EU Parliament.

Certain regulations in civil law and towards the state have so far only applied on the grounds of "race" and gender, although the latter ground also partially protects persons identifying as transsexual from discrimination through court rulings and parliamentary decisions. Various EU directives, some of which focused on different groups of people, have given rise to hierarchies of grounds of discrimination.

The 5th Anti-Discrimination Directive aims to create a uniform minimum level of protection against all grounds of discrimination. Europe-wide regulations for protection against discrimination on the grounds of disability, sexual orientation, age, religion, or ideology must finally be established.

Much of the draft directive has already been implemented in Germany with the AGG, which has existed since 2006. The AGG was to regulate all European prohibitions of discrimination in diverse areas, including access to employment and occupation, also for the self-employed, working conditions, remuneration, or vocational guidance and training. But the implementation in the AGG is not comprehensive, here are some examples:

1. There are some regulations for employment and occupation only (but without the right of termination or protection for the self-employed).
2. Social protection is regulated in the books of the Social Code with its own limited prohibitions of discrimination.

3. There are no further norms on education in the AGG – this is the responsibility of the Länder.
4. In the area of goods and services (such as credit, housing, gastronomy), comprehensive protection is only granted against racial discrimination. The same should apply to gender, but it has not been implemented, nor has the promised super-mandatory protection regarding the other characteristics. If a publican turns away persons with disabilities because he “does not want his guests to see” persons with disabilities, then it is difficult to fight against this.
5. There is no explicit protection against discrimination on grounds of ideology or sexual harassment in access to and supply of goods and services.
6. Discrimination on the grounds of pregnancy or maternity is not considered direct sex discrimination – breastfeeding mothers can also be denied access to shops and restaurants as a result.
7. The remaining protection is limited to so-called bulk business and private insurance and can be very easily leveraged.
8. The housing market is widely excluded from the AGG. The entire catalogue of discrimination grounds is only to be observed if someone permanently rents out more than 50 flats.
9. Terminations are not covered by the AGG.
10. Protection of the self-employed against discrimination is largely non-existent, and they are excluded from maternity protection. And reasonable arrangements to allow persons with disabilities to participate in working life remains very limited.
11. In order to receive damages or compensation, those affected must prove intent or fault – a blatant breach of the system – while at the same time the reversal of the burden of proof exists rather on paper only.
12. There is no right to representative action, which could relieve those individually affected. The fact that the deadlines are too short is, for once, not a direct implementation deficit, but it is contrary to effective legal protection.

The AGG thus contains some gaps in protection, which cannot merely be explained by the much-criticised patchwork of different levels of protection in the anti-discrimination directives. These are also implementation deficits contrary to European law.

The 5th Anti-Discrimination Directive aims to remedy this. The adoption of the Directive would put an end to putting discrimination grounds in a hierarchy, it would prevent hidden discrimination and facilitate the fight against multiple discrimination.

Unfortunately, even after Bündnis 90/Die Grünen asking the question of the federal government in January 2019, there is little hope that the German government's blockade will change. So there is no point hoping for the necessary unanimity in the EU any time soon.

The good cooperation in the DBR – to come back to the beginning – is absolutely indispensable. Only if the associations pull together will we make a difference for participation. Civil society, which must not look the other way in cases of discrimination, is required to take an active role. In both a professional environment, and also in private life, it is important to remember: Human rights apply to all people – regardless of origin, religion, or whether with or without disabilities. It is unacceptable for an architect's office to reject an applicant in a job advertisement with a handwritten note "no Arabs". It is unacceptable that people with non-German names find it very difficult to find housing, or that persons with disabilities have enormous problems with authorities and administrations. Almost every third person in Germany has experienced discrimination; half of them in their working life. This was shown in a study by the Federal Anti-Discrimination Agency in 2015.

That is why we as DBR, but also each and every one of us, as part of civil society, must stand up for solidarity among the discriminated groups. True to the motto: "Together we are stronger".

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Working group 1: Legal subjectivity and access to the law

A. Legal capacity and the capacity to act

1. General

People – as natural persons – are always legal persons under Austrian law (as are legal entities; eg limited liability companies). They can therefore acquire rights and obligations. This even applies to the unborn child (Nasciturus).¹ If a person cannot establish these rights and duties through their own actions, they may need support or a representative.²

According to Art 12 of the UN CRPD, persons with disabilities enjoy “legal capacity and the capacity to act” on an equal basis with others in all areas of life.³ To exercise this capacity to act, they may need help to varying degrees. The states parties must take all necessary measures to ensure that persons with disabilities are supported in their decision-making (“supported decision-making”); legal representation (“substitute decision-making”) is only permitted as a last resort.⁴

In Austria, the automatic deprivation of capacity to contract was abolished – almost without replacement – with the Second Protection of Adults Act (ErwSchG). “A represented person’s capacity to act is not restricted by a power of attorney for health care or an adult representation.” (§ 242 (1) ABGB).

2. Reservation of authorisation

However, at the same time, the possibility was created for the court to order a reservation of authorisation – which essentially corresponds to the reservation

¹ According to § 22 Austrian General Civil Code (ABGB), the unborn child – always under the condition that it is born alive – has legal capacity and therefore acquires rights independently; eg it can assert its own claims for damages if it is harmed as a foetus (eg in a traffic accident or during medical treatment). The nasciturus is also entitled to inherit independently if one parent – usually the father – dies during pregnancy.

² Schulze (2011) 269.

³ Schmalenbach (2014) 271.

⁴ In particular Lachwitz (2008) 146; Fritz (2014) 62.

of consent by the court-appointed legal representative (“Einwilligungsvorbehalt”) under German law^{5,6}. “Where this is necessary to **avert a serious and substantial danger** to the represented person, the court shall order within the scope of the judicial adult representation that the effectiveness of certain legal acts of the represented person or certain procedural acts before administrative authorities and administrative courts [...] requires the approval of the adult representative and, in the cases of § 258 (3) [judicial approval for measures of extraordinary property management], also that of the court” (§ 242 (2) ABGB).⁷ The reservation of authorisation can only be ordered **in the case of judicial adult representation** and only in the case of serious and substantial danger⁸ to the person to be represented. In the case of elected adult representation, it can be agreed upon at the request of the person to be represented anyway (§ 265 (2) ABGB).

If there is a reservation of authorisation, the **contract is provisionally invalid** and can subsequently be approved by the legal representative (§ 865 (5) ABGB) (and additionally by the court in the case of measures of extraordinary economic operation within the meaning of § 258 (4)).

The vast majority of literature assumes that the reservation of authorisation – just like the reservation of consent by the court-appointed legal representative in German law – is compatible with the UN Convention on the Rights of Persons with Disabilities because it is ensured that the adult representative must always ascertain the will of the represented person and comply with their wishes in principle.⁹ Personally, I doubt whether the **reservation of authorisation complies with the Convention**, because in individual cases it still partially deprives people of their capacity to contract, which is not in the spirit of the UN Convention on the Rights of Persons with Disabilities. Legal certainty is thus created primarily for legal transactions. It means a restriction of autonomy for the persons concerned. Persons with a comparable cognitive impairment often do not have an adult representative or guardian ad litem, so that in this way

⁵ As with the reservation of consent by the court-appointed legal representative under German law, ordering a reservation of authorisation does not require the lack of capacity to contract of the represented person; cf Lipp (2000) 173.

⁶ Cf Parapatits/Perner (2017) 160.

⁷ For more details see Barth/Ganner (2019) 71.

⁸ On the one hand, there must not merely be a vague presumption that the represented person could endanger themselves through their actions. There must be clear indications of this (eg pending lawsuits, adverse contracts already concluded). On the other hand, the threatened damage to the represented person must be significant, with significant pecuniary losses playing a role here in particular. The reservation of authorisation is intended to protect only the represented person and not third parties (eg possible contractual partners); cf ErläutRV 1461 BlgNR 25. GP 21.

⁹ Thus eg Brosey (2014) 245 f.

there is considerable unequal treatment of persons with a mental illness or comparable impediment¹⁰. It may therefore be practicable in the existing legal system and in some cases the only way to ensure efficient legal protection. However, in my opinion, this does not correspond to the intention of the UN Convention on the Rights of Persons with Disabilities.

In any case, the reservation of authorisation may **only** be ordered **in exceptional cases**.¹¹ Cases may be considered where the person represented frequently enters into disadvantageous contracts where reversal is very difficult and where the person may become indebted or lose the assets necessary for their livelihood as a result.

New case law is also restrictive – in line with the intention of the law: For the permissible order of a reservation of authorisation, there must be sufficient indications of a concrete danger that the person concerned is threatened with harm within the meaning of § 242 (2) ABGB and the reservation of authorisation must be limited to the necessary extent. Ordering a reservation of authorisation in legal transactions without any restriction does not comply with the legal requirements because such a reservation would affect all legal transactions. The specification of which legal transactions are covered by the reservation of authorisation must therefore be specific.¹²

3. Co-Decision

In the case of elected adult representation, a “co-decision” can also be agreed at the request of the person to be represented. The represented person does **not need full decision-making capacity** for the elected adult representation and also for the determination of the co-decision. The “natural will” and the ability to express it (capacity to express) are sufficient.¹³

In these cases, the elected representative always needs the consent of the represented person for decisions to be effective.

The adverse effects on legal relations resulting from co-decision constellations is considerable, as the exact scope and extent of the “co-decision reservation” can only be determined from the representation agreement entered in the **Austrian Central Representation Register** (ÖZVV) pursuant to § 140h NO (Notarial Code), but which is ultimately internal.¹⁴ Until the second party to the co-

¹⁰ For more details see Ganner (2016) 210.

¹¹ ErläutRV 1461 BlgNR 25. GP 21; Parapatits/Perner (2017) 164.

¹² OGH 20/2/2020, 6 Ob 244/19d, iFamZ 2020/58, 107.

¹³ Fritz (2019) 680.

¹⁴ Schweighofer (2019) 86.

decision agrees or refuses to agree, the contract is provisionally invalid and the contracting party is bound by it.¹⁵

A co-decision is not possible in **court proceedings** (§ 1 Code of Civil Procedure (ZPO)), but it is possible in administrative proceedings.

If the represented person loses the capacity to form or express a “natural” will, another form of adult representation (eg judicial adult representation) must be sought.¹⁶

4. Legal transactions in daily life

Persons of full age do not require any decision-making capacity whatsoever to conclude legal transactions of daily life, if these do not exceed their life circumstances (§ 242 (2) ABGB). However, the validity of the respective legal transaction presumes that the adult **fully fulfils their own obligations**. This significantly expands the room to manoeuvre for affected persons when entering into legal transactions. However, this also entails higher risks in terms of property law.¹⁷

This applies to all persons who have reached adulthood and do not have the capacity to make decisions, and not only to those with a guardian ad litem or adult representative.

All legal transactions of daily life that correspond to the life circumstances of the adult are covered, not merely legal transactions that concern a “minor matter in daily life”. “Here, too, legal transactions are to be included which are usually part of everyday life, eg the purchase of personal clothing, visits to the cinema, the repair of household appliances such as a washing machine, the purchase of small items of furniture or the booking of a holiday.”¹⁸

The legal transaction must correspond to **the life circumstances of the adult** in order to be effective. The individual income and assets of the persons concerned are the benchmark for the life circumstances.

For the protection of persons concerned, the representative may restrict the means left at the free disposal of the represented person. In addition, a reservation of authorisation can also be ordered for these contracts – in the case of judicial adult representation – or – in the case of elected adult representation – agreed upon. In these cases, despite the fulfilment of the obligations by the

¹⁵ Riedler (2018) 44.

¹⁶ Fritz (2019) 682.

¹⁷ For more details see Barth/Ganner (2019) 66 f.

¹⁸ ErläutRV 1461 BlgNR 25. GP 23.

represented person, the contract requires the approval of the adult representative.

This comprehensive way of concluding legal transactions for persons who do not have the capacity to make decisions – as already mentioned above – certainly entails **risks** in terms of property law. For example, it is possible for people to repeatedly order the same product on the internet (eg television) and also pay for it (eg with a credit card), without jeopardising their life circumstances because they have a correspondingly high income or assets. In such cases, the purchase contracts are valid, but the televisions are not used and can no longer be returned if consumer protection law return deadlines have expired.

5. Procedural capacity

An important exception to the new concept of capacity to act, according to which there should be no restriction due to the existence of a legal representative, exists in the case of capacity to be a party to court proceedings. Pursuant to § 1 (2) of the Code of Civil Procedure, a person who falls within the scope of having an adult representative or a guardian ad litem does not have the capacity to be a party to proceedings.¹⁹ In my opinion, this provision is **in direct contradiction to the provisions of the UN Convention on the Rights of Persons with Disabilities**.²⁰ In administrative proceedings, there is no longer a restriction on procedural capacity. This also clearly shows the constitutional issue of unequal treatment in different procedures. For affected persons, administrative proceedings involve comparable procedures to civil court proceedings. A differentiation, as it is made in Austrian Law on legal protection of adults, lacks any objective justification.²¹

6. Obligation to determine wishes

The primary task of guardians ad litem and adult representatives is to ensure that the represented person can shape their life circumstances according to their wishes and ideas within the scope of their wishes and expectations. They must, as far as possible, enable the represented person to manage their own affairs. The focus is therefore on **self-determination and the realisation of the will**

¹⁹ In adult protection proceedings, however, special procedural rights exist for affected persons. In particular, they can perform procedural acts irrespective of their procedural capacity; cf § 116a Non-Contentious Proceedings Act (AußStrG.)

²⁰ Cf for a different opinion ErläutRV 1461 BlgNR 25. GP. 79.

²¹ Barth/Ganner (2019) 87 f.

of the person concerned.²² While autonomy is the primary goal of the Law on legal protection of adults, the protection of the person concerned from financial abuse and exploitation is also a central aspect. These two antipodes must therefore be weighed up in the specific case. In case of doubt, however, the primacy of freedom applies (“**in dubio pro libertate**”). Therefore, the represented person has an explicit right (§ 241 (2) ABGB) to be informed in due time about planned measures by the guardian ad litem or adult representative and to comment on them within a reasonable period of time (**right to information and expression**). The wish expressed by the person concerned is also to be implemented by the representative, unless this would endanger the well-being of the person concerned considerably (§ 241 (2) second sentence ABGB).²³

In connection with the right to communicate and express oneself under § 241 para 2 ABGB, the law establishes a duty for the legal representative to determine the wishes of the person concerned,²⁴ in order to ensure that the **subjective interests** of the represented person are safeguarded.²⁵

Guardians ad litem and adult representatives are obliged to actively work towards the represented person forming an intention about the matters to be taken care of.²⁶ Accordingly, they must provide the represented person with the necessary information in good time on their own initiative, ie without asking for it, and subsequently ask them about their wishes and ideas in this regard.

Regular personal contact (cf § 247 ABGB) is in any case an essential prerequisite in order to be able to comply with the obligation to determine wishes.

The representative’s duty to determine wishes also extends to the time before their appointment. Therefore, statements made before a guardian ad litem or adult representation becomes effective must also be collected and observed. This applies, for example, to living wills.

²² For more details see Barth/Ganner (2019) 139; LG Innsbruck 51 R 35/02z RdM 2002/63.

²³ A similar situation applies in Germany: according to § 1901 (3) BGB the custodian does not have to comply with the wishes of the person concerned if this is unreasonable, which may be the case, for example, if the person under custodianship wishes to visit a large number of institutions when looking for a place in an institution; Bienwald in Staudinger¹⁵ § 1901 BGB para 39. The same must apply, without explicit regulation, under Austrian law. However, visiting several institutions (three to five, depending on regional conditions) will usually be reasonable.

²⁴ Cf Traar/Pesendorfer/Fritz/Barth (2015) para 2; Müller (2017) 330 f; so too § 1901 (3) BGB.

²⁵ Ganner (2005) 82. In the ErläutRV 1461 BlgNR 25. GP (1420 BlgNR 22. GP 18) it expressly states that the represented person is basically free to shape their own life.

²⁶ ErläutRV 1420 BlgNR 22. GP 18.

7. Supported decision-making

Proxy is only **ultima ratio**; before that, attempts must be made to enable the person concerned to make the necessary decisions for themselves through supported decision-making. If this is not possible despite this, proxy by a guardian ad litem or adult representative is permissible.

In any case, however, before a decision is made by a representative, an attempt must be made to get the person concerned to become capable of making a decision themselves²⁷ through **a wide range of supporting measures**.

This is particularly pronounced in the legal provisions on **medical treatment**: As of now, if there are doubts about decision-making capacity, the attending physician has to initiate a process of supported decision-making. They must “demonstrably seek the assistance of relatives, other close persons, persons of trust and professionals who are particularly experienced in dealing with people in such difficult life situations [...] and who can support the adult person in attaining their decision-making capacity” (§ 252 (2) ABGB). However, similar measures should also be taken for all other decision-making processes, whereby the more important the decision is for the person concerned (eg permanent change of residence; nursing home), the more comprehensive the support measures must be.²⁸

8. Experience with the new Law on legal protection of adults

Experience so far with the new legal situation since 1 July 2018 have been quite positive; see survey on initial experiences with the Second Protection of Adults Act (ErwSchG).²⁹ Especially for certain groups of people, this is an improvement that is also perceived subjectively. Banks, for example, are reducing their risk by only making payments to the adult representative if the amount exceeds that of an “everyday transaction”.

In the case of elected adult representation, for example, the fact that the corresponding agreement can be tailored to the individual needs of the person concerned has been positively emphasised.

²⁷ Hammerschick/Mayrhofer (2017) 46.

²⁸ For more details see Barth/Ganner (2019) 19 ff.

²⁹ Cf Ganner (2020) 55; <https://www.uibk.ac.at/rtf/> (29/03/2021).

B. Access to justice

In order to exercise **legal capacity and capacity to act** in an equal manner, persons with disabilities must be guaranteed easy access to justice.

According to Art 13 UN CRPD (access to justice), states parties shall ensure **equal access to justice** for persons with disabilities; including through procedural and age-appropriate accommodations to facilitate their participation.

The **Federal Legal Information System** (RIS) provides barrier-free access to all laws of the Federation and the Länder law as well as EU law, free of charge. Important case law, official social security announcements, and selected legal standards of local authorities as well as selected decrees of federal ministries can also be found there. Accessibility is assessed according to the state of technical development. In particular, the current guidelines of the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C) – at least according to the “AA” level of the WCAG – are used for this purpose.

The accessibility of public services, especially in the education, health and social sectors, is being successively expanded by the Länder. In the administrative sector, **notices are also made available in easy-to-read** or “plain language” versions, for example in Upper and Lower Austria and Styria. Most public websites are accessible to a large extent.

With regard to the **accessibility of court buildings**, the Ministry of Justice has defined a minimum constructional standard for court buildings, which makes the entrance area freely accessible and usable, provides an information centre (eg service centre), at least one courtroom and a toilet for people with restricted mobility, as well as for people with sensory impairments. The current accessibility of court buildings is shown on the homepage of the Ministry of Justice for each Austrian criminal and civil court in the “Accessibility” section. The data show that the vast majority of Austrian courts are already freely accessible for persons with reduced mobility.

“**Sign language**” is designated as a language in its own right in a list of generally sworn and court-certified interpreters³⁰ that is freely accessible on the Internet. This not only facilitates the search for appropriately competent sign language experts for the courts and public prosecutors, but also for all interested parties. The requirement to involve a sign language interpreter if a party, a defendant, or a victim of a crime is deaf, severely hearing-impaired or speech-impaired, is

³⁰ <https://sdgliste.justiz.gv.at> (29/03/2021).

expressly stipulated in the procedural rules for the ordinary courts (cf esp § 73a ZPO and § 56 (7) Code of Criminal Procedure (StPO). The costs for this, including those costs incurred for the contact with their legal representatives necessary for conducting the proceedings, shall be borne by the state.

In administrative (criminal) proceedings as well, parties or persons to be heard who are mute, deaf or severely hearing-impaired also have the right to be assisted by an interpreter (§ 38a Administrative Court Procedure Act (AVG), § 33 (2) Administrative Penal Act “Verwaltungsstrafgesetz” - VStG). The Austrian Federal Act Austrian Federal Law Gazette I 57/2018 improved this right for proceedings before administrative courts in administrative criminal cases to the extent that it now also covers the contact of the accused with their defence counsel (§ 38a AVG).

A key improvement with regard to access to justice is the expanded **areas of responsibility of the adult protection associations** created by the Second Protection of Adults Act accordingly, they are responsible for comprehensive (legal) advice in connection with law on legal protection of adults . The low-threshold of access to counselling as well as the establishment and registration of elected and legal adult representation and also the obligatory clearing before a judicial adult representative is appointed are rated particularly positively.

The new government programme also includes some planned improvements:

- For example, the mandatory publication of judgements of the higher regional courts in the Federation’s legal information system.
- There is also the promotion of language in the judiciary that is easier for lay people to understand. Judges and magistrates should therefore use language that is easier to understand in future, because many people are already unable to understand the information and decisions of the courts because of the language used.
- In future all police stations must be freely accessible.

This makes it clear that some headway has been made, however there is still considerable need for action in some areas. The existing regulations only refer to selected disabilities. What is needed, however, are arrangements that cover all disabilities.³¹

³¹ See earlier on this: Rechtswissenschaftliche Fakultät der Universität Innsbruck (2014) para 285 ff.

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Legal subjectivity and access to the law (Art 12, 13 UN CRPD) in Germany¹

A. Introduction

The UN CRPD guarantees persons with disabilities equal legal subjectivity, equal legal capacity, ie the legal capacity to have rights and the legal capacity to act (Art 12 UN CRPD) as well as the right to equal access to justice (Art 13 UN CRPD). There is a controversial assessment of the extent to which German law, and in particular German law on legal protection of adults, meets these requirements.² However, there is a need for action, at least with regard to the deficits in practice, on a legislative level. For this reason, the Federal Government recently introduced a bill to reform the law on legal protection of adults as of 1 January 2023.³

In the following, the legal subjectivity of persons with disabilities and their access to justice will first be presented, as they are expressed in the applicable law (B.-H.). In conclusion, the draft reform will be briefly outlined (I.).

B. Legal capacity and the capacity to act

According to German law, all persons have legal capacity once they have been born (§ 1 BGB). As legal subjects, they have the capacity to be bearers of rights and obligations.⁴

With regard to legal capacity to act, German law distinguishes in substantive law between the capacity to conduct legal transactions independently, ie essentially the ability to enter into contracts and to property transactions, testamentary capacity, capacity to enter into marriage, capacity to consent as the ability to consent independently to interventions in one's own person, and capacity to

¹ This article was written on the basis of the lecture given by the author Lipp as part of a student research project at the Chair of Civil Law, Civil Procedure Law and Medical Law at the University of Göttingen.

² Critically, for example, the Committee of Experts on the UN CRPD in the state review for Germany, CRPD/C/DEU/CO/1 (2015) 26; in detail for discussion Lipp (2012) 669 ff; Lipp (2017) 4 ff; Wolf (2015).

³ Entwurf eines Gesetzes zur Reform des Vormundschafts- und Betreuungsrechts, BR-Drucks 564/20 of 25/9/2020.

⁴ Spiekhoff in MüKo/BGB § 1 BGB para 6; Lorenz (2010) 11.

be held liable for torts as well as in procedural law the capacity to exercise one's rights in judicial proceedings. When a person comes of age (18 years), he or she basically gains full legal capacity to act in all aspects mentioned above. If, however, in a specific individual case he or she is unable to understand the scope and significance of a certain legal act or to act in accordance with this understanding due to an illness or disability, his or her declaration or legal act is directly invalid by law (cf §§ 104 No 2, 105 (1) and (2) BGB as well as § 130 BGB). Moreover, he or she is not responsible for his or her action (cf § 828 BGB). The Act on Legal Protection of Adults (BtG)⁵ abolished incapacitation, guardianship and curatorship for adults ordered in case of mental or physical incapacity ("Gebrechlichkeitspflegschaft") on 1 January 1992.⁶ Since then, adults who are unable to manage their own affairs are assigned a legal representative ("Betreuer") by a special court for Betreuung ("Betreuungsgericht") within the local court of first instance ("Amtsgericht").⁷ The primary purpose of this court-appointed legal representative is to support the person concerned in exercising his or her rights and to realise⁸ his or her self-determination. The assignment of a legal representative does not limit his or her legal capacity to act (for the reservation of consent by the court-appointed legal representative, see below D.).⁹

C. Adult legal welfare

The primary task of legal protection of adults¹⁰ is to secure and realise the rights and the right to self-determination of an adult, insofar as he or she actually lacks the ability for self-determination due to illness or disability: On the one hand, it supports the adult in exercising his or her legal capacity to act. On the other hand, it protects the adult from harming him- or herself due to his or her illness or disability.¹¹

The orientation towards the right to self-determination limits the legal protection of adults to the extent necessary in the specific individual case ("principle of necessity"). The special court for Betreuung only appoints a legal representative (at the request of the adult or ex officio) if an adult is unable to manage his

⁵ Gesetz zur Reform des Rechts der Vormundschaft und Pflegschaft für Volljährige (Betreuungsgesetz – BtG) of 12/9/1990 (German Federal Law Gazette 1990 I p 2002).

⁶ BT-Drucks 11/4528, 38 ff; Gernhuber/Coester-Waltjen § 78 para 1; Janda (2013) 16.

⁷ Overview Taupitz (1992) 9.

⁸ Lipp (2012) 669; Lipp (2000) 12 ff; Gernhuber/Coester-Waltjen § 78 para 2; Bürgle (1988) 1881.

⁹ Schwab (1992) 493; Dethloff § 17 para 3; Lipp (2017) 7; Veit (1996) 1310.

¹⁰ BT-Drucks 13/7158, 33; Lipp (2005) 6 ff; Knittel § 1901 BGB para 25; Schneider in MüKo/BGB § 1901 BGB para 5 f.

¹¹ On the following in detail Lipp (2000) 40 ff, 75 ff; Lipp (2008) 52; Lipp (2005) 4.

or her own affairs in whole or in part due to an illness or disability (§ 1896 (1) sentence 1 BGB).

It is an expression of the constitutionally enshrined right to self-determination that the adult can make use of the privatised form of legal protection with priority.¹² An appointment of a legal representative by the court is therefore subsidiary if in the specific case the adult grants a (lasting) power of attorney and the legal representative authorised by him or her can perform the tasks just as well as a court-appointed legal representative (§ 1896 (2) sentence 2 BGB). This private organisation for the legal protection of the adult can manage both partial tasks of legal protection – support and protection – to a great extent, and then takes precedence over a court-appointed legal representative.¹³

Respect for the self-determination of the adult requires that a legal representative is not appointed by the court against his or her own free will (§ 1896 (1a) BGB).¹⁴ A legal representative may only be appointed by the court against the objection of the person concerned if the objection is not based on his or her free will, ie his or her personal responsibility is excluded precisely with regard to the appointment of a legal representative (§ 1896 (1a) BGB).¹⁵

The primacy of self-determination and the principle of necessity also applies to the activities of the court-appointed legal representative (§ 1901 BGB). The court-appointed legal representative may only act insofar as it is necessary to (§ 1901 (1) BGB). The court-appointed legal representative is obliged to comply with the wishes of the adult, unless this is contrary to his or her best interests or it is unacceptable for the court-appointed legal representative (§ 1901 (3) sentence 1 BGB). If there is no wish, or if it may be disregarded exceptionally, the legal representative has to act in accordance with the subjective best interests of the adult, ie in accordance with his or her presumed will (§ 1901 (2) sentence 1 BGB).

The court-appointed legal representative's duty to comply with the wishes of the adult extends to his or her entire area of responsibility according to § 1901 (3) sentence 1 BGB and concerns all matters.¹⁶ The primary criterion is the will of the adult at the present time. Accordingly, the court-appointed legal representative has to find out his or her current wishes and, if necessary, discuss important matters with him or her (§ 1901 (3) sentence 3 BGB).¹⁷ The duty to discuss is a manifestation of the principle of personal legal protection of adults.

¹² Lipp (2013) 918.

¹³ On this Lipp (2009) § 4 para 17.

¹⁴ Jurgeleit in Jurgeleit § 1896 BGB para 133; Janda (2013) 17; Sonnenfeld (2005) 941; Brosey (2014) 212.

¹⁵ Cf BGHZ 35, 1, 6; BGHZ 48, 169; BGHZ 70, 252, 258 ff.

¹⁶ BT-Drucks 11/4528, 133; Bienwald, W. in Bienwald/Sonnenfeld/Harm § 1901 BGB para 22.

¹⁷ Peter/Kieß in Jurgeleit § 1901 BGB para 36; Bauer in HK-BUR § 1901 BGB para 58.

It demands that the legal representative investigates the wishes of the adult and creates a personal relationship of trust.¹⁸

According to § 1901 (3) sentence 2 BGB, the above also applies to wishes expressed before the appointment of the legal representative, in particular in the form of an advance directive (§ 1901c BGB).¹⁹ The same applies to living wills or wishes related to medical treatment (cf §§ 1901a, 1901b BGB).

For decisions of a legal representative against the wishes of the adult, ie for the so-called “welfare barrier” of § 1901 (3) sentence 1 BGB, the same requirements apply in principle as for the appointment of a legal representative by the court against the will of the adult. As such, neither the inability of the adult to understand or judge nor the risk of harming him- or herself justify acting against his or her will. Rather, there must be a threat of self-harm precisely because of his or her inability for insight or judgement.²⁰ If, in an individual case, the law allows the legal representative to decide against the current wishes of the adult, the legal representative is obliged to follow the previously declared or presumed will of the adult (§ 1901 (2) BGB, for health care affairs cf §§ 1901a, 1906a (1) No 3 BGB).²¹

D. Supported decision-making

The fundamental right in Art 12 UN CRPD²² guarantees persons with disabilities to enjoy legal capacity equally with others.²³ This right would be a mere “right in the book” if a person is in fact unable to exercise his or her rights due to a disability. Therefore, Member States are obliged under Art 12 (3) and (4) UN CRPD to provide instruments that support the person concerned in exercising his or her legal capacity to act and which are geared towards the realisation of his or her rights, will, and preferences.²⁴ The UN CRPD leaves the implementation to the States Parties, but requires that their law on legal protection of adults is linked to the primacy of necessary support (supported decision-making regime) instead of basing it on the (lack of) legal capacity to act and to make decisions.²⁵ A system that does not take into account the wishes and preferences of the person concerned, but rather his or her “objective welfare” as the standard for decision-making (substitute decision-making regime), deprives

¹⁸ Peter/Kieß in Jurgelcit § 1901 BGB para 39; BayOLG BtPrax 2003, 130.

¹⁹ Loer in Jürgens § 1901 BGB rec 12.

²⁰ Lipp (2000) 155 ff, 241 f.

²¹ On this, see already Lipp (2017) 7.

²² Lipp (2012) 672; Brosey (2014) 244.

²³ Lipp (2012) 672; Brosey (2014) 244.

²⁴ Lipp (2012) 673; Lipp (2017) 6; Brosey (2014) 212.

²⁵ Brosey (2014) 212; Lipp (2017) 6.

the person of his or her legal capacity to act and declares his or her will irrelevant.²⁶ This is not compatible with the UN CRPD.

Because of the priority of self-determination and the principle of necessity for court-appointed legal representatives, the primary goal of every activity of a legal representative is to enable the adult to look after his or her own affairs independently. First of all, the question is if the action of the court-appointed legal representative belongs to his or her tasks of legal protection of the adult, further if it is necessary, and if so, by what means this task is to be fulfilled (§ 1901 (1) BGB). Primarily, they have to counsel and provide support, with the aim of activating the adult to act on his or her own. Only when these weak forms of legal protection are insufficient and proxy becomes necessary, may the legal representative act as proxy.²⁷

Although the legal representative always has the power to act as proxy (§ 1902 BGB), the power of representation thus conferred on them is not an end in itself, but merely a means to fulfil his or her task. The use of this means is also governed by the provisions of § 1901 BGB.²⁸ If the adult only needs help, but can still act legally him- or herself, support in the form of counselling and accompaniment are sufficient.²⁹ If the adult can no longer act legally him- or herself, it is necessary as a support measure to act as proxy. This is compatible with Art 12 UN CRPD because it realises the legal capacity to act and does not restrict it.³⁰

E. Reservation of consent

The legal capacity of the adult is not restricted by the appointment of a legal representative by the court. In the area of contracts and property transactions, however, the capacity to contract may be restricted in accordance with § 1903 BGB by a separate order of the court. This only occurs if it is necessary to avert a considerable danger to the person or property of the adult. In that case the adult requires the consent of the legal representative for the contracts or property transactions mentioned specifically in the court order (§§ 1903 (1) sentence 1, 183 sentence 1 BGB).

Like the appointment of a legal representative in general, the reservation of consent may not be ordered against the free will of the adult and only to the

²⁶ Brosey (2014) 212; Brosey (2014) 244; Lipp (2017) 6 f.

²⁷ Lipp (2008) 53.

²⁸ Schwab in MüKo/BGB § 1902 BGB para 2; Lipp (2000) 237; Lipp (2017) 7.

²⁹ Cf in this respect also (2015) 67 ff.

³⁰ Brosey (2013) 358.

extent that this is necessary.³¹ Accordingly, it is to be limited both in terms of subject matter³² and time³³.

The reservation of consent is under discussion with regard to its compatibility with the UN CRPD.³⁴ However, the reservation of consent would only have to be classified as a substituted decision if the court-appointed legal representative were obliged to act in the objective best interests of the adult. This is not the case. The duty of the legal representative to act in accordance with the wishes of the adult or his or her subjective well-being, ie his or her presumed will (§ 1901 (3) sentence 1, 2 or § 1901 (2) sentence 1 BGB) is a general duty covering all actions of the legal representative. It therefore also applies to the reservation of consent. Accordingly, the adult has a right to have the court-appointed legal representative give his or her consent. The legal representative may only refuse to do so if the adult's wish is an expression of his or her lacking ability to decide for him- or herself and if he or she would harm him- or herself by the contract.³⁵ The reservation of consent can only be considered as a last resort in order to protect the adult from self-harm.³⁶ This interpretation of the law is also demanded by German constitutional law as well as Art 12 UN CRPD.³⁷

According to this interpretation, the reservation of consent is compatible with Art 12 UN CRPD.³⁸

F. Legal transactions in daily life

Legal capacity to act is specifically regulated for everyday cash transactions. § 105a BGB – also referred to as the “pocket money paragraph for adults” – allows adults to participate in legal transactions regardless of their capacity to contract.³⁹ In case of a transaction in daily life where the adult effects the performance with low-value means, ie cash transactions, it is valid even though the adult was lacking the capacity to contract according to §§ 104 No 2, 105 (1) and

³¹ BGH FamRZ 2017, 1341 f.

³² BGH NJW-RR 2017, 518 para 11; BGH FamRZ 2015, 1793.

³³ Bienwald, W. in Staudinger § 1903 BGB para 22.

³⁴ Lipp (2012) 677; Lipp (2017) 8; Brosey (2014) 214; Brosey (2014) 243; Schneider in MüKo/BGB § 1903 BGB para 2.

³⁵ Lipp (2000) 155 ff, 241 f.

³⁶ Brosey (2014) 246 f; Lipp (2000) 172.

³⁷ Brosey (2014) 246 f; Lipp (2017) 8.

³⁸ Brosey (2014) 247, who sees a deficient implementation in practice: Custodians had declared the will of the adult irrelevant merely on the basis of the reservation of consent and without regard to § 1901 BGB and therefore in breach of duty.

³⁹ Spickhoff in MüKo/BGB § 105a BGB para 1.

§ 105 (2) BGB.⁴⁰ The word “daily” is to be understood as “normally”. Therefore, it is not required that the transaction is made every day.⁴¹ Whether the transaction is to be classified as low-value depends on the personal economic circumstances of the person concerned.⁴² However, according to sentence 2 of the provision, § 105a sentence 1 BGB does not apply if there is a considerable danger to the person or the assets of the adult.

In a similar way, legal transactions concerning minor matters of daily life are regularly excluded from a reservation of consent by the court-appointed legal representative (§ 1903 (3) sentence 2 BGB), unless the court exceptionally orders otherwise. As with § 105a BGB, it is not necessary that the transaction is carried out on a daily basis, but that it is classified as an everyday transaction according to the understanding of the trade.⁴³ The economic circumstances of the adult are again decisive for the quality of the transaction as of “minor nature”.⁴⁴ That covers all cash transactions, as the legal representative usually knows how much cash is available, so that there is no risk of the adult harming him- or herself.⁴⁵

§ 105a BGB and § 1903 (3) BGB follow the same basic idea for everyday cash transactions.⁴⁶ They differ, however, in that the legal transaction under § 105a BGB is only deemed to be effective if the adult with an incapacity to contract has effected the performance – provided there is no substantial danger to person or property (§ 105a sentence 2 BGB).⁴⁷ According to § 1903 (3) BGB, the adult retains his or her capacity to contract despite the reservation of consent; the legal transaction is effective from the outset.⁴⁸

G. Procedural capacity

As a rule, the German legislator links the capacity to act in court proceedings to the (unrestricted) capacity to contract (§§ 51 (1), 52 Code of Civil Procedure

⁴⁰ Spickhoff in MüKo/BGB § 105a BGB para 6 ff; Mansel in Jauernig § 105a BGB para 4.

⁴¹ Mansel in Jauernig § 105a BGB para 4; BT-Drucks 14/9266, 43.

⁴² Mansel in Jauernig § 105a BGB para 5; BT-Drucks 14/9266, 43.

⁴³ Schneider in MüKo/BGB § 1903 BGB para 48; BT-Drucks 11/4528, 139; Götz in Palandt § 1903 BGB rec 9.

⁴⁴ Götz in Palandt § 1903 BGB para 9; Zimmermann in Damrau/Zimmermann § 1903 BGB para 35; Schneider in MüKo/BGB § 1903 BGB para 51; Bauer in Prütting/Wegen/Weinrich § 1903 BGB para 9; Loer in Jürgens § 1903 BGB para 24; different view Cypionka (1991) 581: all declarations of intent bound by a form are not minor matters of everyday life.

⁴⁵ Lipp (2003) 727 f; Lipp (2000) 90, 242; as well as Roth in Erman § 1903 BGB para 17.

⁴⁶ Cf on this and further Lipp (2003) 725.

⁴⁷ Schneider in MüKo/BGB § 1903 BGB para 63; Götz in Palandt § 1903 BGB para 11.

⁴⁸ Schneider in MüKo/BGB § 1903 BGB para 63; Knittel § 1903 BGB para 65.

(ZPO), 62 Code of Administrative Court Procedure (VwGO)⁴⁹).⁵⁰ In proceedings concerning the legal protection of adults (“Betreuungsverfahren”), however, the adult is legally deemed to have the capacity to act in these proceedings irrespective of his or her capabilities (§ 275 Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction Act (FamFG)); special rules also apply to matrimonial matters (§ 125 (1) FamFG).⁵¹

In civil proceedings, an adult with a court-appointed legal representative is able to sue and be sued according to §§ 51 (1) and 52 ZPO, unless the subject matter of the proceedings is subject to a reservation of consent under § 1903 BGB.⁵² However, a person who is incapable of insight or judgement with regard to the specific conduct of the proceedings is lacking capacity to act in these proceedings according to §§ 51 (1), 52 ZPO in conjunction with §§ 104 No 2, 105 BGB.⁵³

In addition to this, § 53 ZPO restricts the procedural capacity of adults with court-appointed legal representatives even where they have capacity to contract outside of court. In civil proceedings, only either the party itself or his or her court-appointed legal representative should be able to act.⁵⁴ § 53 ZPO solves the problem of the so-called dual competence of a party and its court-appointed legal representative by monopolising the conduct of proceedings with the court-appointed legal representative: If the court-appointed legal representative appears at trial, the adult is equivalent to a person who is lacking procedural capacity.⁵⁵ However, some of the consequences of § 53 ZPO raise concerns with regard to the fundamental- and human rights of the adult.⁵⁶

It is argued that the appointment of a legal representative by the court retroactively removes the legal capacity of the adult, with the consequence that all previous procedural acts – in the absence of authorisation – become ineffective.⁵⁷ Correctly, the majority of authors and the courts do not agree.⁵⁸ They are of the opinion that neither an action brought against the adult nor his or her own procedural acts become retroactively invalid if the court-appointed legal representative takes over the proceedings. It is not necessary to approve the previous

⁴⁹ Cf for further details Kintz in BeckOK/VwGO § 62 VwGO para 8; Buchheister in Wysk § 62 VwGO para 6; Bier/Steinbeiß-Winkelmann in Schoch/Schneider/Bier § 62 VwGO para 5.

⁵⁰ Weth in Musielak/Voit § 52 ZPO para 1; Lindacher/Hau in MüKo/ZPO §§ 51, 52 ZPO para 1; Bendtsen in Saenger § 52 ZPO para 1.

⁵¹ Lindacher/Hau in MüKo/ZPO §§ 51, 52 ZPO para 5.

⁵² Bendtsen in Saenger § 52 ZPO para 4, 6; Jacoby in Stein/Jonas § 52 ZPO para 1 f.

⁵³ Jacoby in Stein/Jonas § 52 ZPO para 2; Weth in Musielak/Voit § 52 ZPO para 4.

⁵⁴ Lindacher/Hau in MüKo/ZPO § 53 ZPO para 1.

⁵⁵ Bendtsen in Saenger § 53 ZPO para 2; Lindacher/Hau in MüKo/ZPO § 53 ZPO para 1.

⁵⁶ For more details see Lipp (2021).

⁵⁷ OLG Hamm FamRZ 1997, 301 para 5.

⁵⁸ LG Hannover FamRZ 1998, 380 f; BSG FamRZ 2013, 1801 para 3; Gottwald in Rosenberg/Schwab/Gottwald § 44 ZPO para 26; Jacoby in Stein/Jonas § 53 ZPO para 11.

conduct of the proceedings by the adult. The adult loses his or her capacity to act in court proceedings only by the takeover of the court-appointed legal representative.

It is highly problematic that the will and wishes of the adult are irrelevant in the proceedings, insofar the court-appointed legal representative appears in court. The prevailing opinion only applies § 53 ZPO with respect to the proceedings. The court-appointed legal representative's obligation under § 1901 (3) BGB does not matter; it is significant only within the internal relationship. The adult can therefore neither take over the process conducted by the legal representative against the latter's opposition, nor prevent the legal representative from taking over the process against his or her opposition.⁵⁹ It would be necessary to protect the adult and also needed in the interest of business transactions.⁶⁰ Consequently, the only option left to the adult is to influence the process indirectly by acting out of court.⁶¹ This is both incompatible with Art 12 UN CRPD and unconvincing from a procedural point of view.⁶²

H. Access to justice

Art 13 (1) UN CRPD guarantees persons with disabilities a right to equal access to justice. States parties are obliged to ensure access to justice for persons with disabilities in an (in)direct manner through procedural and age-appropriate accommodations. In this context, Art 13 (1) UN CRPD includes the right to (barrier-free) access to legal information, legal advice, and legal assistance, as well as to all stages of the judicial process.⁶³

German constitutional law guarantees access to court for public law disputes according to Art 19 (4) German Basic Law (GG) as well as for civil law disputes based on the general principle of the rule of law (Art 20 (3) GG in conjunction with subjective fundamental rights, in particular Art 2 (1) GG).⁶⁴ Both access to court and the effectiveness of legal proceedings are guaranteed. The codes

⁵⁹ OLG Hamm FamRZ 1997, 301 para 5; LG Hannover FamRZ 1998, 380 f; BSG FamRZ 2013, 1801 para 3; Bork (1997) 98; Jacoby in Stein/Jonas § 53 ZPO para 9, 10, 12.

⁶⁰ BT-Drucks 11/4528, 167; OLG Hamm FamRZ 1997, 301 para 5; LG Hannover FamRZ 1998, 380 f; BSG FamRZ 2013, 1801 para 3; Bork (1997) 98; Jacoby in Stein/Jonas § 53 ZPO para 9, 10, 12.

⁶¹ Bendtsen in Saenger § 53 ZPO para 2; LG Hannover FamRZ 1998, 380 f; BSG FamRZ 2013, 1801 para 3; Gottwald in Rosenberg/Schwab/Gottwald § 44 ZPO para 26. The principle of priority applies to dispositions and the exercise of rights (Lindacher/Hau in MüKo/ZPO § 53 ZPO para 1).

⁶² Lipp (2021); also, critical Lindacher/Hau in MüKo/ZPO § 53 ZPO para 3.

⁶³ Loytved (2018) 87.

⁶⁴ Most recently BVerfG NJW 2019, 3138 m Anm Muckel JA 2020, 159; BVerfGE 88, 124; on the general right to justice cf BVerfGE 93, 107; BVerfGE 54, 291.

and acts on court proceedings implement these general directives.⁶⁵ These regulations must thereby comply with the requirements of the constitution.⁶⁶ In view of Art 3 (3) sentence 2 of the GG, access to court for persons with disabilities have not to be made difficult in a way that can no longer be reasonably justified.⁶⁷ Conversely, they have a right to get support in various respects, eg physical access to judicial buildings or access to legal information.

If legal information is required by public authorities, § 12a (1) Federal Act on Equality for Persons with Disabilities (BGG)⁶⁸ standardises an obligation for federal authorities to provide barrier-free information technology. Websites and graphic programme interfaces are to be designed in such a way that they can also be used without restriction by persons with disabilities.⁶⁹ However, this provision does not apply to federal courts.⁷⁰ Despite this, the federal courts also provide an option for plain language and sign language on their websites.

Some Federal States (Bundesländer) have introduced similar obligations for state authorities⁷¹, partially extending their acts on equality for persons with disability to courts.⁷²

Physical access to administrative and judicial buildings can also be a problem. In this regard, § 50 (2) sentence 2 MBO⁷³ stipulates that buildings that are accessible to the public must be designed to be freely accessible in accordance

⁶⁵ BVerfGE 10, 268; BVerfGE 60, 268 f; BVerfGE 77, 284.

⁶⁶ BVerfGE 88, 124.

⁶⁷ BVerfGE 10, 268; BVerfGE 77, 284; BVerfGE 41, 26; BVerfGE 44, 305.

⁶⁸ Behindertengleichstellungsgesetz (BGG) v 27/04/2002 (German Federal Law Gazette I p 1467, 1468), most recently amended by Art 3 of the law on 10/07/2018 (German Federal Law Gazette I p 1117).

⁶⁹ Bund-Länder Kommission (BLK) für Informationstechnik in der Justiz (2015) 4.

⁷⁰ On the inapplicability of the BGG and some LBG to the judiciary, see Welti (2012) 727; more differentiated still Dopatka in Kossens/von der Heide/Maaß § 7 BBG para 5.

⁷¹ On the acts on equality for persons with disability of the states Theben (2018) para 15.

⁷² For example § 2 (1) sentence 1 No 2 Niedersächsisches Behindertengleichstellungsgesetz (NBGG) of 25/11/2007 (Nds GVBl p 661), most recently changed by Art 1 of the law of 25/10/2018 (Nds GVBl p 217).

⁷³ Musterbauordnung (MBO) in the version of November 2002, most recently changes by Bauministerkonferenz 22.02.2019, <https://www.bauministerkonferenz.de/Dokumente/42322694.pdf> (30/03/2021). The relevant laws of the states are, of course, legally binding.

with DIN Standard 18040-1⁷⁴. This also applies in particular to offices, administrative and court buildings (No 4)⁷⁵. In this respect, wheelchair ramps or guidance systems in Braille could be considered.⁷⁶ Since the federal and the state laws on equal opportunities for persons with disabilities came into force, new buildings are increasingly being built to be accessible and old buildings are being modernised.⁷⁷

Besides the barriers already mentioned, barriers may also exist in the court process itself.

Everyone has the right to be heard by the court (Art 103 (1) GG). To this end, each party to the proceedings must have the opportunity to communicate with the court throughout the proceedings and, in particular, to take note of and comment on all essential aspects.⁷⁸ A disabled person must receive support in a manner that enables this person to participate in the process in the same way as a person without disabilities (Art 3 (3) sentence 2 GG).⁷⁹ Therefore, there is an obligation for the courts to provide suitable personnel and technical aids for communication.

There are explicit regulations for the compensation of sensory disabilities. Hearing- and speech-impaired persons receive support with communication throughout the procedure, regardless of their type of involvement in the procedure (§ 186 (1) German Judiciary Act (GVG)). For the person concerned, there is a choice between different types of communication.⁸⁰ Communication with the court can take place orally, in written form or with the help of an intermediary – usually a sign language interpreter or another person familiar to the person concerned.⁸¹ It is the court's task to point out the right to choose and to provide the appropriate technical aids.⁸² If the right to choose is not exercised or if the communication in the chosen form is not possible, the court may demand a written communication or the involvement of an interpreter

⁷⁴ DIN 18040-1 Construction of accessible buildings – Part 1 Publicly accessible buildings of October 2010, https://www.stmb.bayern.de/assets/stmi/buw/baurechtundtechnik/planungsgrundlagen_barrierefreies_bauen.pdf (30/03/2021).

⁷⁵ For the respective state standards, see for Baden-Württemberg § 39 BW LBO; for Bavaria Art 48 BayBO; for Berlin § 50 BauO Bln; for Brandenburg § 50 BbgBO; for Bremen § 50 BremLBO; for Hamburg § 52 HBauO; for Hesse § 54 HBO; for Mecklenburg-Vorpommern § 50 LBO M-V; for Lower Saxony § 49 NBauO; for North Rhine-Westphalia § 49 BauO NRW; for Rhineland-Palatinate § 51 LBauO; for Saarland § 50 LBO Saarland; for Saxony § 50 SächsBO; for Saxony-Anhalt § 49 BauO LSA; for Schleswig-Holstein § 52 LBO; for Thuringia § 50 ThürBO.

⁷⁶ Roller (2016) 17.

⁷⁷ Palleit (2016) 3.

⁷⁸ See also BSG SozR 4-1720 § 186 No 1, Juris para 12, with note Röhl, jurisPR-SozR 13/2018 note 1 rec D.

⁷⁹ BVerfG NJW 2014, 3567 para 6; Luik (2018) para 2.

⁸⁰ BT-Drucks 14/9266, 3, 40; BT-Drucks 18/10144, 14.

⁸¹ Mayer in Kissel/Mayer § 186 GVG para 12; Diemer in KK-StPO § 186 GVG para 2 ff.

⁸² Lückmann in Zöller § 186 GVG para 2; Rathmann in Saenger § 186 GVG para 1.

(§ 186 (2) GVG). Furthermore, § 66 StPO and § 483 ZPO provide for assistance for persons with a hearing and speech impairment in taking the oath. Pursuant to § 191a GVG, persons who are blind or have a visual impairment have the possibility to submit pleadings and other documents to the court in a form that is perceptible to them. In addition, they can request barrier-free access (§ 3 Ordinance on barrier-free accessibility of documents for blind and visually impaired persons in judicial proceedings (ZMV)⁸³) to pleadings and other documents. However, the person concerned has a duty to cooperate in this respect (§ 5 ZMV). Provided that he or she personally has sufficient means of conversion the documents into a form that is perceptible to him or her, there was no entitlement to the court making the documents available to him or her in that specific form.⁸⁴ Furthermore, there is also no such claim if the subject matter of the dispute is clear enough to have it explained by an attorney representing the party in the proceedings.⁸⁵ However, since the amendment of § 191a GVG on 1 July 2014, barrier-free access can always be asked for.⁸⁶ Attorneys and other representatives in the proceedings being visually impaired are also entitled to it (§ 191a (1) sentence 4).

§§ 186, 191a GVG do not apply to people with cognitive disabilities.⁸⁷ In that case, general procedural principles must be applied. It is then within the court's discretion to choose an appropriate form of notification and hearing in order to ensure the legal hearing of the party and his or her participation in the proceedings. For example, it is possible to call in a psychosocial facilitator in analogy to § 186 GVG.⁸⁸ If the court communicates verbally with the person concerned, the judges have to exercise special care when doing so.⁸⁹ Expenses are not to be charged for communication support.⁹⁰

The support has to, of course, remain within the framework of the procedural rules. A “digital hearing” from home using a computer therefore requires that

⁸³ Zugänglichmachungsverordnung (ZMV) of 26 February 2007 (German Federal Law Gazette I p 215 (no 7)), most recently changed by Art 20 of the law of 10 October 2013 (German Federal Law Gazette I p 3786).

⁸⁴ BGH NJW 2014, 1455 para 8; Roller (2016) 20.

⁸⁵ BGH NJW 2014, 1455 para 9; BGH NJW 2013, 1011 para 13 (the constitutional complaint filed against this remained unsuccessful, cf BVerfG NJW 2014, 3567); Roller (2016) 20; different view BSG NZS 2014, 838 para 10 ff.

⁸⁶ Amended by Art 19 No 1 of the Act on the Promotion of Electronic Legal Transactions with the Courts of 10/10/2013 (German Federal Law Gazette I p 3786); Langenfeld in Maunz/Düring Art 3 (3) GG para 120.

⁸⁷ Roller (2016) 21.

⁸⁸ Mayer in Kissel/Mayer § 186 GVG para 9; Second and Third State Report of the Federal Republic of Germany on the United Nations Convention on the Rights of Persons with Disabilities 26.

⁸⁹ BSG SozR 4-1500 § 153 No 14, Juris rec 14.

⁹⁰ Mayer in Kissel/Mayer § 186 GVG para 12; Second and Third State Report of the Federal Republic of Germany on the United Nations Convention on the Rights of Persons with Disabilities 25.

the relevant rules of procedure open up this form of digital hearing. This is the case, for example, for civil proceedings (§ 128a ZPO).⁹¹

I. Reform plans

As already mentioned at the beginning, the Federal Government introduced a bill to reform the law on the legal protection of adults as of 1 January 2023.⁹² This is linked with a large reform of the law on guardianship for minors, thus restructuring an important part of family law. For reasons of space, this major reform project cannot be presented and explained here. However, the most important cornerstones for the reform of the law on legal protections of adults shall be outlined.⁹³

With respect to the law on legal protection of adults, the reform aims to create a practice that is consistently oriented towards the realisation of the right of self-determination of the adult. It also enables the adult to exercise his or her legal capacity to act by means of support, both within and outside, legal protection by a court-appointed legal representative. To this end, the central on the appointment of a legal representative by the court (§§ 1814-1816 BGB-D), on the tasks and duties of the court-appointed legal representative in relation to the adult, and on the court-appointed legal representative's powers in relation to third parties (§§ 1821-1823 BGB-D) are revised in order to enshrine the requirements of Art 12 UN CRPD more clearly in the law on the legal protection of adults. In particular, it is more clearly regulated that court-appointed legal representation primarily ensures support for the adult in the management of his or her affairs by his or her own self-determined action and that the court-appointed legal representative may only act as proxy if it is necessary (§§ 1821, 1823 BGB-D).

The priority of the wishes of the adult is made the central directive of the law on court-appointed legal representation which applies equally to the legal representative (§ 1821 BGB-D), to the court when selecting the legal representative (§ 1816 (1) and (2) BGB-D) and when supervising him or her, in particular also with respect to the management of the adult's property and authorisation procedures related thereto (§§ 1838, 1862 (1) BGB-D) as well as to the guardian ad litem (§§ 276 (3), 317 (3), 419 (2) FamFG-D).

⁹¹ Without such a basis, there is no entitlement to a "digital trial", cf BVerfG FamRZ 2019, 463 with note Muckel JA 2019, 234.

⁹² BR-Drucks 564/20.

⁹³ An overview is provided by Schnellenbach (2020) 119 ff; more in depth from Brosey (2020) 161 ff; Fröschle/Pelkmann (2020) 165 ff.

In judicial proceedings related to court-appointed legal representation, the adult has to be informed better and to get more involved, in particular in the judicial decision on appointing a legal representative (§§ 275 (2), 278 (2) sentence 1 FamFG-D), in the selection of the person to become a legal representative (§ 1816 Abs 2 BGB-D), but also in his or her own control by the court (§ 1816 (2) BGB-D).

Judicial supervision will be more strongly oriented towards determining the wishes of the adult as the central directive. The supervisory instruments will be sharpened so that breaches of duty by the legal representative, especially those that adversely affect the self-determination of the adult, can be better detected and sanctioned (§§ 1861-1867 BGB-D).

The principle of subsidiarity of court-appointed legal representation vis-à-vis other forms of assistance is to be made more effective. On the one hand, a new instrument of “extended support” by the local authority (“Betreuungsbehörde”) is being introduced. The measures of extended support go beyond the previous mandate of the local authority to mediate access of the adult to those forms of assistance which are suitable to avoid the appointment of a legal representative and which do not require legal representation of the adult. On the other hand, the subsidiarity of court-appointed legal representation vis-à-vis assistance provided for by social law is more clearly regulated in social law. The draft also provides for various measures to improve the conditions for voluntary, ie non-professional court-appointed legal representation, for associations for legal protection of adults (“Betreuungsvereine”) as well as for professional court-appointed legal representation with the overall aim to improve the quality of work within the system in the interest of the adult so that the interests of the adult are more appreciated.

Even from this brief sketch it is clear that this is an ambitious reform project. Its aims are to be welcomed, as are most of the proposals, since they contribute to further developing the basic structures of German law on legal protection of adults presented here (B.-G. above).

The introduction of a statutory power of representation for spouses which is also part of the reform bill will certainly meet with criticism. Spouses are to be able to represent each other in health care affairs by law for a period of three months if one spouse is temporarily legally unable to take care of their health care affairs due to unconsciousness or illness (§ 1358 BGB-D). It is also to be noted critically that the draft does not address the problems of legal capacity to act in court proceedings and in administrative proceedings, leaving these important issues open.

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Working group 2: Right to education (Art 24 UN CRPD)

A. Introduction

Education plays a fundamental role in emancipation and increasing equal opportunities in society. Therefore, exclusions from access to education are to be questioned particularly critically. The fact that exclusions due to disability/disabilities still exist is again made particularly clear by the UNESCO World Education Report, according to which millions of children with disabilities have no chance of school education.¹ There were therefore good reasons for holding a separate working group on to the topic of education at the conference.

In the working group, we were fortunate that during my short opening statement on the legal framework of the UN CRPD, the discussions in the group immediately became intense. This continued with Arne Frankenstein's input, so that we decided as group to use the time together for exchange and to print the inputs of the three experts – Arne Frankenstein (State Disability Commissioner of the Free Hanseatic City of Bremen), Elisabeth Rieder (Head of the Office for the Disabled Students at the University of Innsbruck) and Lilit Grigoryan (now post-doctoral researcher at the University of Cologne) in full text in the conference proceedings and thus also make them generally accessible.

In this article, I start by summarising the main contents of the discussions in the group (B.)² and then outline the legal framework of the UN CRPD (C.). Under D. some brief remarks on developments in Austria will follow.

B. Discussion in the work group

Specific problem areas discussed in the working group were:

- The federal structure and the resulting fragmentation of responsibilities between the Federation, the regional states, and the local authorities as an obstacle to the implementation of the UN CRPD.
- The importance of participation of parents, children and young persons with disabilities in decisions about educational pathways

¹ Cf UNESCO (2020).

² I would like to warmly thank Arne Frankenstein, Lilit Grigoryan, Elisabeth Rieder, and Volker Schönwiese for valuable additions to my transcript of the topics discussed.

and systems. Parents with disabilities should receive adequate support to be able to fulfil their educational responsibilities in connection with the education of their children.³

- Assignment of children to special schools against the will of the parents as a practice that still exists. There should be no discriminatory procedures for filling special schools.
- The situation of children with severe or multiple disabilities: What are persons with disabilities expected to be able to do or not to do? How does the education system react to this?
- Lack of figures and data on accessibility of educational institutions.
- Lack of knowledge about the reasons for dropping out of a school or an apprenticeship.
- Clear definitions and demarcations between integration and inclusion and the measures associated with each.
- The establishment of the “Permanent Advisory Board of the Education Directorate” (“Ständiger Beirat der Bildungsdirektion”) according to § 20 of the Education Directorate Establishment Act (“Bildungsdirektionen-Einrichtungsgesetz”)⁴ in Austria was criticised because it did not ensure that inclusive education was represented and parent initiatives for inclusion were not represented. In addition, the Standing Advisory Board (“Ständiger Beirat”) – in contrast to its predecessor body (the College at the state school Advisory Council [“das Kollegium beim Landesschuldrat”]) – has no personnel competence

On a more abstract level, the realisation of the human right to education from Art 24 UN CRPD and the resulting requirements were discussed:

- Art 24 UN CRPD requires that persons with disabilities are not excluded from the mainstream education system on the basis of disability, as well as

³ See the article from Lilit Grigoryan in this volume (177 ff) where she goes into detail about the importance of participation of pupils and parents with disabilities.

⁴ Austrian Federal Law Gazette I 138/2017.

- a bilingual (spoken language and sign language) education system for all and in all levels of education and establishments.
- Art 24 UN CRPD includes all levels of education and establishments.
- The enforcement of the human right to education and its implementation are the core challenges, for which it takes:
 - financial means for:
 - training teachers in inclusive teaching,
 - enshrining inclusive teaching as compulsory content for the training/continuing education of teachers,
 - monitoring, eg through unannounced visits to schools, that real inclusion is taking place and that children are not being placed in “mainstream schools”,
 - better pay for teachers and assistants,
 - sufficient assistance for all those who need assistance – ie also regardless of citizenship or wealth/income situation,
 - redistribution of funds and resources towards inclusion,
 - achieving accessibility throughout the education system.
 - effective legal remedies, ie costs and (lack of) legal knowledge must not be a barrier.

It was not possible to reach a consensus in the group on the question of how the transition from special schools to an inclusive education system can be achieved and an inclusive society realised. But, as expected, it was intensively discussed.

Furthermore, the images in people’s minds and the associated ideas of what children and adults with disabilities are capable of was a hot topic. Measures raising awareness within the meaning of Art 8 UN CRPD seemed to be urgently needed in order to realise a society that is inclusive in all areas of life.

Finally, we discussed learning throughout a person’s life.

C. The requirements of UN CRPD⁵

Art 24 (1) UN CRPD enshrines the human right to education of persons with disabilities. It should be possible to realise this human right without discrimination and with equal opportunities. The discrimination prohibition in Art 24 (1) UN CRPD specifies the general nature of Art 5 (2) UN CRPD.⁶ Those considered particularly at risk of not being able to make use of the right to education are: “persons with intellectual disabilities or multiple disabilities, persons who are deafblind, persons with autism, or persons with disabilities in humanitarian emergencies.”⁷

Therefore, **the entire (training and) education system must be designed as an inclusive one**⁸, regardless of whether the education offered is provided by the public or private sector⁹.

The other paragraphs of Article 24 of the UN CRPD explain in more detail what is meant by the right to education and list measures for its realisation.

Regarding the measures, General Comment No 4 states:¹⁰

“The measures needed to address all forms of discrimination include identifying and removing legal, physical, communication and linguistic, social, financial and attitudinal barriers within educational institutions and the community. The right to non-discrimination includes the right not to be segregated and to be provided with reasonable accommodation and must be understood in the context of the duty to provide accessible learning environments and reasonable accommodation.”

In order for Art 24 CRPD to be realised, the entire education system must be transformed into an **“inclusive education system”** at all levels of education and training. An inclusive education system is described in the Committee’s General Comment No 4 as follows:

“10. Inclusive education is to be understood as:

(a) A fundamental human right of all learners. Notably, education is the right of the individual learner and not, in the case of children, the right of a parent

⁵ These remarks are based on Voithofer (2019) rec 432 ff.

⁶ Cf Krajewski/Bernhard (2012) rec 15.

⁷ Committee on the Rights of Persons with Disabilities, General comment No 4 (2016) on the right to inclusive education, CRPD/C/GC/4 para 6. See also *ibid* para 35.

⁸ Cf Committee on the Rights of Persons with Disabilities (2016) para 8, Krajewski/Bernhard (2012) para 3.

⁹ *Ibid* para 76; Krajewski/Bernhard (2012) para 2.

¹⁰ Committee on the Rights of Persons with Disabilities (2016) para 13.

or caregiver. Parental responsibilities in this regard are subordinate to the rights of the child;

(b) A principle that values the well-being of all students, respects their inherent dignity and autonomy, and acknowledges individuals' requirements and their ability to effectively be included in and contribute to society;

(c) A means of realizing other human rights. It is the primary means by which persons with disabilities can lift themselves out of poverty, obtain the means to participate fully in their communities and be safeguarded from exploitation. It is also the primary means of achieving inclusive societies;

(d) The result of a process of continuing and proactive commitment to eliminating barriers impeding the right to education, together with changes to culture, policy and practice of regular schools to accommodate and effectively include all students.

11. [...] Integration is the process of placing persons with disabilities in existing mainstream educational institutions with the understanding that they can adjust to the standardized requirements of such institutions. Inclusion involves a process of systemic reform embodying changes and modifications in content, teaching methods, approaches, structures and strategies in education to overcome barriers with a vision serving to provide all students of the relevant age range with an equitable and participatory learning experience and the environment that best corresponds to their requirements and preferences. Placing students with disabilities within mainstream classes without accompanying structural changes to, for example, organization, curriculum and teaching and learning strategies, does not constitute inclusion. Furthermore, integration does not automatically guarantee the transition from segregation to inclusion.”¹¹

In addition, General Comment No 4 lists nine core elements of an inclusive education system, which are also described there in detail¹² and which are themselves inseparably linked to the four other core elements of the right to inclusive education: **Availability, Accessibility, Acceptability, Adaptability**. All these elements are detailed in the Comment, so reference can be made to them here.¹³ In an inclusive education system, mutual respect and recognition should prevail and be taught. The aim is to develop a learning environment that includes diversity of people as a value in its own right.¹⁴ Instead of focussing on any possible deficits in people, Art 24 UN CRPD demands of the states parties, “[to]

¹¹ Committee on the Rights of Persons with Disabilities (2016) para 10 f.

¹² Committee on the Rights of Persons with Disabilities (2016) para 12.

¹³ Cf Committee on the Rights of Persons with Disabilities (2016) para 21ff, 39. Refer also to Kälın/Künzli/Wytenbach/Schneider/Akağündüz (2008) 58 f.

¹⁴ Committee on the Rights of Persons with Disabilities (2016) para 15.

support the creation of opportunities to build on the unique strengths and talents of each individual with a disability.”¹⁵

According to Art 24 of the UN CRPD and Art 23 (3) of the UN Convention on the Rights of the Child¹⁶, children with disabilities must be provided with **assistance and support**, so that their access to education can actually be realised. “States parties must recognize that individual support and reasonable accommodation are priority matters and should be free of charge at all compulsory levels of education.”¹⁷

Support and promotion measures should take effect **as early as possible** and also cover the child’s environment, because:

“If identified and supported early, young children with disabilities are more likely to transition smoothly into pre-primary and primary inclusive education settings. States parties must ensure coordination between all relevant ministries, authorities and bodies as well as organizations of persons with disabilities and other non-governmental partners.”¹⁸

Exclusions of persons with disabilities from the general education system are to be counteracted. Recommended for this purpose:

“[...] the exclusion of persons with disabilities from the general education system should be prohibited, including through any legislative or regulatory provisions that limit their inclusion on the basis of their impairment or the degree of that impairment, such as by conditioning inclusion on the extent of the potential of the individual or by alleging a disproportionate and undue burden to evade the obligation to provide reasonable accommodation.”¹⁹

Inclusive education is incompatible with institutionalisation in the long term. That is why the states parties need to initiate a **deinstitutionalisation process**.²⁰ To do so, states parties should actively recruit and train teachers with disabilities. This includes critically examining the necessity of all legal and actual barriers that are linked to medical conditions and, if necessary, removing existing barriers.²¹

Teachers, for their part, must be supported²² in their tasks and the **training and further education of teachers** must be promoted in the sense of Art 24

¹⁵ Committee on the Rights of Persons with Disabilities (2016) para 16.

¹⁶ UN Convention on the Rights of the Child/Übereinkommen über die Rechte des Kindes, Austrian Federal Law Gazette 7/1993, Austrian Federal Law Gazette III 56/2016.

¹⁷ Committee on the Rights of Persons with Disabilities (2016) para 17.

¹⁸ Committee on the Rights of Persons with Disabilities (2016) para 67.

¹⁹ Committee on the Rights of Persons with Disabilities (2016) para 18.

²⁰ Committee on the Rights of Persons with Disabilities (2016) para 66.

²¹ Cf Committee on the Rights of Persons with (2016) para 37.

²² Cf Committee on the Rights of Persons with Disabilities (2016) rec 72.

(4) UN CRPD so that they can contribute to the realisation of the inclusive education system.

In this context, the Committee calls for:

“The core content of teacher education must address a basic understanding of human diversity, growth and development, the human rights model of disability and inclusive pedagogy that enables teachers to identify students’ functional abilities (strengths, abilities and learning styles) to ensure their participation in inclusive educational environments. Teacher education should include learning about the use of appropriate augmentative and alternative modes, means and formats of communication such as Braille, large print, accessible multimedia, easy read, plain language, sign language and deaf culture, educational techniques and materials to support persons with disabilities.”²³

Art 24 UN CRPD also has an impact on the **assessment of learners’ performance**. Methods should be used to assess learners’ progress and take into account the obstacles they have to overcome.²⁴

Although the obligations under Art 24 UN CRPD are subject to the **progression proviso** under Art 4 (2) UN CRPD,²⁵ they cannot be ignored by the states parties today. However, the progression proviso takes the pressure off the states parties in that they have to make the adjustments successively within the framework of the resources available to them in each case. Regressions are therefore not justifiable with the progression proviso. The **Committee** addresses this issue several times:

“Progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 24. This is not compatible with sustaining two systems of education: a mainstream education system and a special/segregated education system. [...] Similarly, States parties are encouraged to redefine budgetary allocations for education, including by transferring part of their budgets to the development of inclusive education.”²⁶

“These allocations must prioritize, inter alia, ensuring adequate resources for rendering existing educational settings accessible in a time-bound manner, investing in inclusive teacher education, making available reasonable accommodations, providing accessible transport to school, making available appropri-

²³ Committee on the Rights of Persons with Disabilities (2016) para 71.

²⁴ Cf Committee on the Rights of Persons with Disabilities (2016) rec 74.

²⁵ Regarding progression proviso, refer to Rechtswissenschaftliche Fakultät der Universität Innsbruck (2014) para 108 ff; Krajewski/Bernhard (2012) para 14; Della Fina (2017) 459.

²⁶ Committee on the Rights of Persons with Disabilities (2016) para 40.

ate and accessible text books, teaching and learning materials, providing assistive technologies and sign language, and implementing awareness-raising initiatives to address stigma and discrimination, in particular bullying in educational settings.”²⁷

“The Committee urges States parties to transfer resources from segregated to inclusive environments. States parties should develop a funding model that allocates resources and incentives for inclusive educational environments to provide the necessary support to persons with disabilities. The determination of the most appropriate approach to funding will be informed to a significant degree by the existing educational environment and the requirements of potential learners with disabilities who are affected by it.”²⁸

It follows that special schools are **not compatible with Art 24 UN CRPD in the medium perspective** and that **an inclusive education system must be established**.²⁹

Measures to be **implemented immediately**, according to the Committee, are:³⁰

“(a) Non-discrimination in all aspects of education and encompassing all internationally prohibited grounds of discrimination. States parties must ensure non-exclusion from education for persons with disabilities and eliminate structural disadvantages to achieve effective participation and equality for all persons with disabilities. They must urgently take steps to remove all legal, administrative and other forms of discrimination impeding the right of access to inclusive education. The adoption of affirmative action measures does not constitute a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups;

(b) Reasonable accommodations to ensure non-exclusion from education for persons with disabilities. Failure to provide reasonable accommodation constitutes discrimination on the ground of disability;

(c) Compulsory, free primary education available to all. States parties must take all appropriate measures to guarantee that right, on the basis of inclusion, to all children and youth with disabilities. The Committee urges States parties

²⁷ Committee on the Rights of Persons with Disabilities (2016) para 69.

²⁸ Committee on the Rights of Persons with Disabilities (2016) para 70.

²⁹ Re potential exemptions for people with multiple disabilities eg Della Fina (2017) 452 f, 455 with further proofs; Krajewski/Bernhard (2012) para 21 ff; drafted before the Committee’s General Comment No 4.

³⁰ Committee on the Rights of Persons with Disabilities (2016) para 41.

to ensure access to and completion of quality education for all children and youth to at least 12 years of free, publicly funded, inclusive and equitable quality primary and secondary education, of which at least nine years are compulsory, as well as access to quality education for out-of-school children and youth through a range of modalities, as outlined in the Education 2030 Framework for Action.”

As a means to this end, a **national inclusive education strategy** has to be developed and implemented.³¹ This must contain a clear timetable, sanctions and the core elements mentioned in General Comment No 4.³² Persons with disabilities, including children, are to be involved in the preparation of this education strategy in accordance with Art 4 (3) UN CRPD – at least through their representative institutions/associations.³³

States parties must also provide for independent, effective, accessible, transparent, secure and enforceable **complaints mechanisms** and **legal remedies** to address violations of the right to education under Art 24 UN CRPD. The complaint bodies involved should also have the expertise to be able to recognise disability-specific discrimination.³⁴

It also seems important that the states parties introduce **monitoring instruments** that allow structural, process and outcome-oriented factors as well as changes in the education system to be tracked.³⁵

D. Brief comments on recent developments in Austria

In the coming years, the expansion of the inclusive model regions anchored in the “National Action Plan for Disability 2012-2020”³⁶ will play a key role. It will be important to provide sufficient resources for school and care assistance and to make access to it as low-threshold as possible. The National Action Plan itself mentions the “integration rate at all Austrian schools”³⁷ as an indicator of

³¹ Cf Committee on the Rights of Persons with Disabilities (2016) para 42, 63.

³² See on this in detail Committee on the Rights of Persons with Disabilities (2016) rec 63.

³³ Cf Committee on the Rights of Persons with Disabilities (2016) rec 75; see also in detail Committee on the Rights of Persons with Disabilities (2018).

³⁴ Cf Committee on the Rights of Persons with Disabilities (2016) rec 65.

³⁵ See on this in detail Committee on the Rights of Persons with Disabilities (2016) rec 75.

³⁶ NAP (2012). The NAP was extended until the end of 2021 by Ministerial Council decision of the Bierlein government on 6/11/2019. Cf <https://www.bundestkanzleramt.gv.at/bundestkanzleramt/die-bundesregierung/ministerratsprotokolle/ministerratsprotokolle-der-regierungsperiode-xxvi-2019-regierung-bierlein/beschlussprotokoll-des-18-ministerrates-vom-6-november-2019.html> (30/03/2021). See about fundamental criticism of the implementation of the model regions so far Rechnungshof (2019).

³⁷ NAP (2012) 65.

target achievement. However, this is only meaningful if it is supplemented with a look at how many pupils are “segregated learners” and how these figures develop from 2012. Moreover, in contrast to the inclusive model regions of the NAP, Art 24 UN CRPD not only covers the compulsory school sector but the entire education sector. This must not be forgotten by focussing on the inclusive model regions of the NAP.

Austria’s State Report³⁸ contains numerous measures that have been taken since the last state review to implement Art 24 UN CRPD. If the State Report were the only basis for the state review, Austria should be able to expect praise from the Committee due to the numerous measures it mentions in the report. However, even a quick examination of legal measures mentioned in the State Report shows that much remains to be done structurally. An example of this is enshrining inclusive teaching in teacher training. In the State Report, it says in this regard:

“9. The federal framework law on the introduction of new training for teachers (FLG I No. 124/2013) laid down that inclusive education be included in the new training for all teachers.

10. The Act on the Organisation of University Colleges for Teacher Education 2005 lays down that curricula have to observe the objectives of Art 24 of the UN CRPD.

11. In an amendment to the 2002 Universities Act in 2017, it was specified that curricula have to observe the goals of Art 24 of the UN CRPD.”³⁹

Inclusive teaching is one possible part of educational content in the above-mentioned standards (cf eg § 38 (2) and (2a) of the Higher Education Act [“Hochschulgesetz”]) among others. Mandatory training in inclusive education, on the other hand, would be more in line with Art 24 UN CRPD. Nevertheless, it should be positively emphasised that inclusive teaching is to be offered by the training institutions and that they, in turn, must observe the goals of Art 24 UN CRPD in their curricula.

The shadow report of the Federal Monitoring Committee is less optimistic than the measures listed in the State Report. Among other things, it points out that segregated schools have not only continued to receive financial support, but that new facilities have even been created. In addition, the financial resources for school and care assistance would still be lacking.⁴⁰

³⁸ CRPD/C/AUT/2-3.

³⁹ CRPD/C/AUT/2-3.

⁴⁰ Monitoringausschuss (2020) 17.

Despite numerous positive individual measures, such as the establishment of a university of applied sciences course for sign language interpreting in Tyrol⁴¹, the current state review leads us to expect that the Committee will once again call on Austria to make greater efforts to implement the inclusive education system in the sense of Art 24 UN CRPD. At least in principle, the current federal government in Austria should also agree.⁴² If the basic approval is followed by corresponding measures, there is a good chance that Austria will earn real praise in the next state review. A first impression in this respect is promised by the next National Action Plan, the elaboration or at least publication of which, however, we are still waiting for.

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⁴¹ Cf Land Tirol (2020).

⁴² Cf Republik Österreich (2020) 193 f.

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Entitlement and reality: Outlook on the implementation of Art 24 UN CRPD in Germany

Making the education system in Germany inclusive, as stipulated by the UN CRPD as a frame of reference, requires the interaction of different stakeholders and the interlocking of different legal regulatory systems in accordance with the Convention. The article shows implementation deficits and identifies specific tasks for the future. Implementing these in a planned way at all levels could be a way out of the impasse that the debate about the limits of inclusion has sometimes led into.

A. The legal situation in Germany

Art 24 UN CRPD clearly defines the general human right to education for persons with disabilities. The norm in particular contains the right to non-discriminatory and inclusive education.¹ The concept of education in the Convention is to be understood comprehensively. It includes primary and secondary education, vocational education and training, higher education, and lifelong learning.

The UN CRPD was adopted by the UN General Assembly, signed by Germany on March 30, 2007, and ratified uniformly and unconditionally with the required consent act of 21st December 2008, so became effective 26th March 2009, and enacted as German law.² The UN CRPD as an international treaty retains its character as international law, shares the rank of a law of consent, and is to be qualified as simple federal law within the meaning of Art 59 (2) GG.³

According to the Lindau Agreement and the principle of federal loyalty, the UN CRPD also applies in the Länder, as they have not made any reservations in the ratification process. It follows from the conflict rule “federal law breaks the law of the Länder” that the UN CRPD in principle takes precedence over the laws of the Länder (Art 31 GG).

¹ Bernhard (2016) 287 with further verification.

² Law on the United Nations Convention of 13/12/2006 on the Rights of Persons with Disabilities and on the Optional Protocol of 13/12/2006 to the United Nations Convention on the Rights of Persons with Disabilities (“Gesetz zu dem Übereinkommen der Vereinten Nationen vom 13.12.2006 über die Rechte von Menschen mit Behinderungen sowie zu dem Fakultativprotokoll vom 13.12.2006 zum Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen“) of 21/12/2008, German Federal Law Gazette II p 1419.

³ Banafsche (2015) 72.

As a rule, a directly applicable claim can only be derived from Art 24 UN CRPD as a social right if this would mean that the denial of reasonable accommodation would constitute discrimination in the field of education (Art 24 (2) lit c UN CRPD).

To the extent that federal or state law conflicts with the UN CRPD, the legislative bodies are also obliged to adapt their laws to the guarantee content of the Convention. It is the responsibility of the Federation, Länder, and local governments to make the entire education system inclusive in accordance with the requirements of Article 24 UN CRPD. According to Article 20 (1) of the Basic Law (GG), Germany is a democratic and social Federal State, with the Länder having extensive power to shape its affairs. They shall be assigned the exercise of state powers and the performance of state duties, unless the Basic Law provides or permits otherwise (Art 30 GG). It follows from the competency statute in the Basic Law that education is fundamentally the task of the Länder. In this respect, the organisation of cooperation in educational matters is regularly controlled by the association of all Ministries of Education and Cultural Affairs in the so-called “Kultusministerkonferenz” (KMK). With regard to establishing inclusive education, however, it has largely acted with restraint and, with the exception of a framework decision on inclusive education in the school sector⁴, has largely left implementation to the Länder themselves.

As local authorities are part of the Länder in terms of state organisation law, with the constitutionally guaranteed right of self-administration, they must also comply with the provisions of the UN CRPD. Particularly with regard to school authorities, which are regularly organised at the municipal level, this aspect is important for the consolidation of inclusion processes.

1. Key aspects of the state reviews of Germany

The State Reports serve as an essential instrument for monitoring implementation in the member states in accordance with international law. In the Concluding Observations of the first state review, Germany was recommended to immediately develop a strategy to secure⁵ a high quality, inclusive education system in all the Länder and it was also made clear that Germany would have to make significant further efforts to reach these goals.

This includes, in particular, dismantling the segregated school system and educating children with disabilities according to their decision reached of their own free will and not according to the question of the existence of an impediment.

⁴ Inclusive education of children and young persons with disabilities in schools, KMK resolution of 20/11/2011.

⁵ CRPD Committee (2015) No 46 lit a.

Furthermore, at all levels of ensuring an inclusive education system, there are shortcomings in the provision of adequate provisions and the qualification of professionals.⁶

The second state review, which has now begun, follows on from this. Germany's 2nd/3rd State Report answered the questions of the Committee of Experts from the perspective of the Federal Government. The questions all make it clear that Germany is expected to provide concrete guidelines on the timeline for implementation and the resources available.⁷ Different aspects can be understood as crystallisation points for implementation in an overall view of the questions: This includes, in particular, the development of strategies for raising awareness and targeted qualification, staff training and recruitment (including of persons with disabilities), ensuring complementary services that are outside the education system (eg through personal assistance or assistive technologies), accessibility of educational institutions, as well as reasonable accommodation and its legal enforcement.

2. State of implementation in Germany

The state of implementation in Germany must be assessed in the context of the structures that have evolved and on the basis of the different legal sources that provide a framework for the success of inclusion. In addition to the day-care centre, school, and university laws, this also includes the laws of the Länder on equal opportunities for persons with disabilities. In addition, there are supplementary legal regulations under federal law, especially in social and labour law. It must be taken into account that in the structured system of social law, the responsibility of social service providers for rehabilitation and participation in the field of education is shared.

2.1. Day care and school laws

While in many Länder, day care centres and kindergartens already had their own inclusive entitlement before the UN CRPD came into force and many legal regulations (§ 3 (4) Bremen Act on the Promotion of Children in Day Care Facilities and in Day Care “Bremisches Gesetz zur Förderung von Kindern in Tageseinrichtungen und in Tagespflege”) followed the actual practice, schools are struggling with a uniform inclusive system. Germany has a differentiated special needs education system in which children with disabilities still often

⁶ CRPD Committee (2015) No 46 lit c and d.

⁷ Deutschland (2019) 43 f.

learn in special schools.⁸ The number of pupils with disabilities in special schools has remained stable over the past years, although an increasing number of pupils with special educational needs are learning in mainstream schools. The reforms of the state school laws in the light of the UN CRPD do not follow a uniform line and deal with the human rights requirements in very different ways. Many state school laws have formulated a legal entitlement to access general schooling and special needs education (§§ 33, 34 Bremen School Act “Bremisches Schulgesetz”). Special schools continue to exist in all Länder. In all Länder except Bremen, it is still legally possible to be allocated to these. Only individual state school laws have given schools the mandate to develop into inclusive schools (§ 3 (4) first sentence Bremen School Act) and have thus taken up the development mandate of the UN CRPD in ordinary law.

2.2. Higher Education Laws

Higher education laws of the Länder have also been reformed since the UN CRPD came into force. They contain requirements for inclusion in higher education in very different ways. For example, many contain task descriptions in the general part, which are to be clearly defined by further measures. According to § 4 (6) of the Bremen Higher Education Act (“Bremisches Hochschulgesetz” - BremHG), higher education institutions must ensure that students with disabilities are not disadvantaged in their studies and that they can make use of the offers of the higher education institution independently and without barriers. A mandate to develop into inclusive universities, however, is missing everywhere.

In contrast, the higher education acts oblige higher education institutions to guarantee compensation for disadvantages in the performance of academic achievements as an expression of their constitutionally guaranteed equality of opportunity in examination procedures (§ 31 (1) BremHG).

Hardly any higher education acts oblige higher education institutions to provide adequate provisions (§ 3 (5) Act on Higher Education Institutions of the State of North Rhine-Westphalia [“Gesetz über die Hochschulen des Landes Nordrhein-Westfalen”]) or require higher education institutions to actively engage in the implementation of the UN CRPD by means of university-specific action plans (§ 5 para 8 Thuringian Higher Education Act [“Thüringer Hochschulgesetz”]).

⁸ Powell/Pfahl (2012) 723 f.

By contrast, the creation of disability officers is largely established, but not all universities have this in law (for example, in § 88 of the Hamburg Higher Education Act “Hamburgisches Hochschulgesetz”). Here, the development in practice is partly further than the law.

2.3. Laws on equality for persons with disabilities

Laws on equal opportunities for persons with disabilities now exist at federal level and in all Länder. This requires public authorities to prevent discrimination against persons with disabilities and to ensure the full, effective and equal participation of persons with disabilities in life in society and to enable them to lead a self-determined life (§ 1 (1) sentence 1 Bremisches Behindertengleichstellungsgesetz [“Bremisches Behindertengleichstellungsgesetz”] - BremBGG). In part, public educational institutions are also explicitly required to offer people with and without disabilities joint fields of learning and living (§ 6 Hessian Act on Equality for People with Disabilities [“Hessisches Gesetz zur Gleichstellung von Menschen mit Behinderungen”]).

To put this duty into operation, the laws on equal opportunities for persons with disabilities also provide for the duty to create accessibility. Accessibility as a manifestation of the right to accessibility for the individual (Art 9 UN CRPD) and a general preventive principle to avoid the abstract risk of discrimination for all persons with disabilities is uniformly defined in the disability equality laws. According to this, buildings and other facilities, means of transport, technical commodities, information processing systems, acoustic and visual sources of information and communication facilities as well as other designed areas of life are freely accessible if they can be found, accessed and used by persons with disabilities in the generally customary manner, without particular difficulty and, in principle, without outside assistance (§ 4 BGGs, § 5 BremBGG).

Daycare providers, schools and universities as public authorities are obliged not to discriminate against persons with disabilities (§ 7 (1) BremBGG). This includes the duty of reasonable accommodation (§ 7 (3) BremBGG). They are obliged to make their buildings freely accessible when renovating, extending or constructing new buildings (§ 8 (1) BGG) and, in part, to take barrier-free accessibility into account when renting the buildings they use. In part, only barrier-free buildings or buildings in which the structural barriers can be removed taking into account the structural conditions are to be rented, insofar as the renting does not place a disproportionate or unreasonable burden on the holder of public authority (§ 8 (4) BremBGG). They are also obliged to make their notices and forms (§ 10 BremBGG) as well as the intranet and internet services (§ 13 BremBGG) freely accessible. In order to remove barriers to access in the

medium term, systematic regulations have been introduced to record barriers in existing buildings (§ 8 (3) BremBGG) and to monitor barriers to digital systems (§ 15 BremBGG). Extending it to all organisational and design processes of public bodies with the inclusion of publicly financed private legal entities follows from the purpose of the law and should be taken into account.

2.4. Social law

Social law as federal law regulates the granting of social benefits, which are granted in the form of services, benefits in kind or cash benefits. In the structured system, benefits for participation in education are to be granted depending on the underlying benefit law. With the Federal Participation Act, the legislator has created a new service user group “Participation in Education” (§ 5 SGB IX) and thereby made clear that this is its own rehabilitation service. For example, (high) school and vocational further training can be funded (§ 112 (2) SGB IX). However, as the benefits are still located in the law on integration assistance, they are generally only granted depending on income and assets.

Especially for the benefits of integration assistance and youth welfare, it is disputed how they relate to the benefits of the school. In determining the entitlement, case law has differentiated according to whether services belong to the pedagogical core area of the school.⁹ In this case, they were generally to be provided by the school and not by social service providers. School aides, integration aides, inclusion aides who provide disability-related assistance in close connection with lessons, but who are also present during lessons, were predominantly not assigned to this core area.¹⁰ Additional teachers required for inclusive teaching, on the other hand, would be part of the core area.

2.5. Labour law

Employees in all education sectors are subject to labour law or civil service law. In the event of a severe disability, the law on persons with severe disabilities of Part 3 of Book IX of the Social Code also applies, irrespective of the employment status. According to this, severely disabled employees may not be disadvantaged because of their severe disability (§ 164 (2) SGB IX). They have a right vis-à-vis their employers to have workplaces equipped and maintained in a way that is suitable for persons with disabilities and to have their workplaces

⁹ BSG 22/3/2012, B 8 SO 30/10 R, BSGE 110, 301.

¹⁰ LSG Nordrhein-Westfalen 5/2/2014, L 9 SO 413/13 B ER; LSG Nordrhein-Westfalen 15/1/2014, L 20 SO 477/13 B ER.

equipped with the necessary technical work aids (§ 164 (4) No 4 and 5 SGB IX).

2.6. Interim results

It should be noted that the legal regulations have developed further in recent years in all areas of education in the light of the UN CRPD. At the same time, it should be noted that while school exclusion rates have decreased nationwide (from 4.9% in 2009 to 4.3% in 2017), there are also significant differences between the Länder. For example, the exclusion rate in Bremen is 1.2% and in Mecklenburg-Western Pomerania 6.0%.

This parallel development is due to the fact that, on the one hand, the legal regulations between the Länder differ considerably in some cases and, on the other hand, that the introduction of inclusion has not been implemented consistently despite improved legal regulations. This is indicated by the fact that even in Bremen, which is already quite far advanced in many areas of regulation, there are considerable implementation problems, which even resulted in an inadmissible complaint by a headmistress against inclusion at a grammar school.¹¹

B. Future tasks

For inclusion in education to succeed, clearly defined guidance is needed. Systematic studies in the individual Länder are required for this. The strongly diverging findings make this need clear.

In addition, there are core tasks that can already be identified now and that play a significant role in determining the framework for systematic further development.

1. Inclusion and participation as a cross-sectional task

Achieving inclusion and participation are cross-sectional tasks for society as a whole. The UN CRPD also takes this approach into account by tailoring the human rights applicable to all to address the tangible barriers faced by persons with disabilities.

In order to take this approach into account, overarching concepts are needed that make all areas of life inclusive and structure the transitions out of them. The neighbourhood development in the respective local authority is particularly

¹¹ VG Bremen 27/06/2018, Az 1 K 762/18; Weser-Kurier of 09/10/2018, 1.

suitable as a role model. Designing them from the beginning so that no one is excluded is an ongoing task. It involves including other dimensions of discrimination and identifying and addressing specific needs at the points where disability meets other characteristics. The concept of universal design (Art 2 UN CRPD) should be used here.

In view of the need for ecological change, temporal acceleration tendencies could arise that should be consciously used. In this respect, every change brought about for ecological reasons must be examined for its suitability to simultaneously remove barriers. It would not be justifiable in human rights terms to maintain them or even to create new ones.

2. Coordination of stakeholders

The contribution has shown that many stakeholders are involved in the success of inclusive education. The rules that apply to them do not always follow uniform systematics; rather, there are always breaks at the interfaces of the systems. Against this background, there is a need for a politically and legally better coordinated division of labour, especially between the Federation and the Länder and between the Länder and the local authorities. There is also an urgent need for institutionalised cooperation between the providers of educational institutions such as day care centres, schools or universities on the one hand and the rehabilitation providers on the other.

In particular, it must be taken into account that the area of education spreads into other phases of life, not only through lifelong learning, but also with regard to the transition into vocational training or employment. It is precisely at this transition that there is a lack of coordination, which is urgently needed in the structured system.

3. Financial and structural security

The legal regulations that have already been enacted in implementation of the UN CRPD require further financial protection. Correctly, research processes of the Federation have been initiated for the education, training and further education of professionals, which had a total volume of 7.98 million euros in 2019.

In addition, there is a need for further supplementary transfers from the federal government to the Länder in order to accelerate implementation. The federal government could bind these transfer services to compliance with certain inclusive standards adopted by the KMK and link them to raising targeted Länder funds of their own.

The process up to now particularly proves that duplicate structures slow down the success of inclusion processes. This is due on the one hand to the problem of the continuing interfaces and on the other hand to the fact that this solution is inevitably more expensive. The example of the Free Hanseatic City of Bremen, however, shows that even the legal abandonment of special systems and the formulation of a specific inclusion development mandate will not lead to success if the entire education system is underfunded and the creation of inclusive schooling has to be organised “on top”.

Especially in view of the persistent shortage of skilled workers and the lack of systematic and needs-based qualification of skilled workers, including multi-professional cooperation, the federal government and the Länder must work together and find joint financing methods, as the legislative competences for the legal framework of these training programmes are distributed differently. The UN CRPD provides the human rights reference framework for this.

C. Outlook

As if under a magnifying glass, the management of the coronavirus pandemic shows that persons with disabilities are structurally disadvantaged. Even if the evaluation of the crisis can only be completed gradually, first studies show that disadvantages have been realised especially for disabled pupils.¹² These findings condense, on the one hand, into the special mandate for action to particularly research the effects of the crisis and to provide targeted proposals that offset the disadvantages caused by the crisis, and, on the other hand, to identify the structural deficiencies overall and to work through future tasks derived from this in a planned manner. The action plans for the implementation of the UN CRPD in the Länder, for example, are a suitable instrument. The potential of an inclusive society unfolds especially in times of crisis. To realise them beyond this is the human rights requirement.

¹² Kugelmeier/Schmolze-Krahn (2020) 1-7.

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Definitions, models, paradigms, and approaches for the implementation of an inclusive education system in Austria according to Article 24 UN CRPD

A. Introduction

In contrast to other countries, Austria lacks the long tradition of political actionism and the associated discussion of the interdisciplinary issue of disability and policy on disability. Even today, the scientific and research-based examination of policy on disability in Austria is under-represented compared to other fields of research. The realisation that policy on disability is a comprehensive, interdisciplinary issue is often lacking or is still not being adequately perceived as such.

In Austria, there is also not the same acceptance and values towards persons with disabilities as is the case in Sweden and other Scandinavian countries, for example. There are various reasons for this:

On the one hand, it is due to Austria's history in dealing with persons with disabilities during the National Socialist era. Here, persons with disabilities were degraded or declared to be a useless cost factor and unworthy of life, so had to be eliminated, which was then also implemented in the concentration camps, where persons with disabilities were gassed or used for gruesome medical experiments and also murdered. A very well-known action of the National Socialists in this respect was Aktion T4 – Tiergartenstrasse 4. This was the address of the central office where these atrocities were planned. In this regard, one of the Austrian memorial sites, the learning and memorial site Schloss Hartheim in Upper Austria¹, should be mentioned. The National Socialist era, with its accompanying atrocities, still has a lasting impact on current policy on disability in Austria.

On the other hand, persons with disabilities were and are perceived as being **outside the norm** in social discourse. This aspect contributed significantly to the fact that persons with disabilities were only able to become politically active very slowly – which was not due to the persons with disabilities, but a consequence of the non-existing understanding of interaction between persons affected by a disability and persons without a disability. For a long time, persons with disabilities did not have the opportunity to establish themselves, organise,

¹ Cf www.schloss-hartheim.at (30/03/2021).

and participate. Persons with disabilities were thus invisible, politically and socially, for a very long period of time. Barriers, not only in the building sector, but also in the minds of the population, still today cause persons with disabilities to be perceived as a marginalised group in society.²

The UN Convention on the Rights of Persons with Disabilities includes the guarantee of the full and equal enjoyment of all human rights and fundamental freedoms for persons with disabilities. This UN Convention was signed by Austria at the United Nations in New York on 30 March 2007, by the then Minister of Social Affairs and later Federal Disability Advocate Dr Erwin Buchinger. Austria subsequently ratified the UN Convention on the Rights of Persons with Disabilities on 26 September 2008 and promulgated it in the Federal Law Gazette on 23 October 2008. This international human rights treaty thus entered into force in Austria with binding effect. According to Art 4 UN CRPD, Austria – thus as a State Party to the United Nations – “undertakes to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination on the basis of disability...”

Art 24 of the UN CRPD describes the human right to education of persons with disabilities and is thus decisive for the implementation of a comprehensively **inclusive** education system in Austria. Art 24 UN CRPD covers inclusive access to the education system, as well as the equipment and design of an inclusive education system. According to Art 24 of the UN CRPD, the right to education guarantees freedom from discrimination, the full participation of persons with disabilities in the education system, equal rights and equal opportunities, as well as accessibility, which in turn refers not only to structural barriers, but also to barriers in thinking, acting and decision-making, or barriers in connection with attitudes and value systems. According to the UN CRPD, education encompasses the entire life cycle, from early childhood education to the primary and secondary school sector, the higher education sector and adult education with the associated continuing education sector, ie so-called **lifelong learning** (Art 24 (5) UN CRPD). The concept of education in the context of the UN CRPD is thus to be seen extremely comprehensively.

Austria is only very hesitantly and partially approaching a comprehensively **inclusive** education system, as would be envisaged by the UN CRPD. Policy on disability and education policy are perceived as separate policy fields and in many cases do not correlate with each other or, as a result, policy on disability is not perceived as an interdisciplinary issue. Austria is currently following the

² Cf Naue (2009) 290; Pelinka (2019).

path of an education system based on three pillars: the pillar of **special** education and thus **special** schooling, the pillar of **integrative** education and the pillar of an **inclusive** education system. The political and social demand for a comprehensively **inclusive** education system and thus for equal opportunities, comprehensive participation and accessibility is still very arduous for all concerned and involved. The constant demand for a comprehensively **inclusive** education system is predominantly the responsibility of those affected and their relatives. People concerned are degraded to supplicants with the constant demand for an inclusive education system. In many cases, this demand for a human right, based on an international treaty that Austria ratified in 2008 – or Austria, for national implementation, has established a National Action Plan as well as a monitoring Committee to supervise the implementation of its objectives – is ultimately based on individual decisions and not on an underlying uniform basis and procedure for all people affected by it.

The situation is further complicated by the different legally regulated responsibilities of the Federation, the Länder, and the local authorities with the associated different legal provisions, which are responsible for the education system in Austria. They make the design of a comprehensively inclusive education system enormously difficult. The scientific, research-guiding thesis is that Austria needs a comprehensively inclusive, equal-opportunity comprehensive education concept.

This contribution to the conference proceedings now deals primarily with the question of whether and how definitions or definitions of terms influence education policy and thus policy on disability in Austria, as well as with the demarcation between an **integrative** education system and an **inclusive** education system in the sense of: **An integrative education system is not the same as an inclusive education system.** In the following, the research-guided and science-based question is pursued as to which paradigm shifts must be implemented in Austria – accompanied by approaches, models and perspectives – in order to be able to establish and guarantee a comprehensively **inclusive** education system. The change of perspective from **having a disability to being hampered** as well as the change of perspectives and paradigms from **special** education to **inclusive** education plays an important role here. The concluding chapter then deals with the synopsis as well as the outlook into the future and thus with the question of how Austria can succeed in moving from a vision of the future to a real perspective of the future in order to realise, comprehensively establish and thus guarantee a comprehensively inclusive education system in all areas of education in accordance with Art 24 UN CRPD.

1. Do definitions and definitions of terms, as well as the general wording in connection with persons with disabilities, influence education policy in Austria?

This article in the conference proceedings is based on the research-guided and science-based thesis that the wording of definitions and definitions of terms in connection with persons with disabilities has a significant influence on education policy in Austria. Words are powerful and have a massive impact on the way individuals think and act, and consequently on the way society thinks and acts. The wording of definitions in relation to persons with disabilities is extremely important as it affects the perception of persons with disabilities in society. Persons with disabilities are noticed in society in a manner corresponding to the wording. “The question of the definition of disability thus has direct consequences for the formulation and implementation of policy on disability aspects.”³ But it is not only definitions and the corresponding wording that are decisive, but according to Dorothea Brozek, an expert in diversity-sensitive language: “[...] language is alive and full of dynamics, just like us humans. An exhaustive list of not-that-way and yes-please terms will not help us on its own. It is our own values, attitudes, and the knowledge that we can always learn that are the basis for a diversity-sensitive language.”⁴

The following example demonstrates very well what words are able to convey: It is a completely different statement and a completely different attitude and value system if people affected by a disability are referred to pejoratively, without using a subject, as “disabled persons” or if people affected by a disability are referred to appreciatively as “persons with disabilities or people with impediments”.

The term “people with SPECIAL needs” will also be subjected to a brief analysis in this regard. This term implies that persons with disabilities have different needs – SPECIAL needs – than persons without disabilities. The movement to live a self-determined life or the philosophy to live a self-determined life respectively also vehemently rejects this terminology for the reasons mentioned above.

Accordingly, definitions, in line with the wording used in connection with persons with disabilities, have a striking influence on education policy and therefore in turn on policy on disability in Austria. A person with disabilities in the perspective as a participating, responsible, self-determined, political subject is able to influence educational policy and policy on disability. However, a person with disabilities, seen from the perspective of society, as a legal object to be

³ Nauc (2009) 284.

⁴ Brozek (2015) 125.

administered by politics and society, whose welfare needs to be cared for and who needs protection, is not. There is an urgent need for a change of perspective and thus a paradigm shift, both with regard to society and the associated policies, as well as with regard to the individual persons with disabilities or impediments. On the one hand, society urgently needs a change of perspective regarding attitudes and values towards persons with disabilities. On the other hand, it is important that persons with disabilities increasingly organise, form, and thus participate in a self-confident manner and that persons with disabilities thus put themselves in a position to effect, push, and further develop something in the various policy fields, and thus also in education policy and policy on disability, as is high time to do so with regard to the implementation of a comprehensively inclusive education system in Austria.⁵ The motto or the demand of persons with disabilities – Nothing about us without us – implies this demand for recognition as a political subject and at the same time points to the political subject status of persons with disabilities, which is still often too weakly developed, still not internalised by society, and in some areas still (completely) missing.⁶

This intensive discussion of terms and definitions shows once again how important and indispensable it is to make people aware of which definitions of disability are applied in legal texts, as well as in general everyday language use. As already mentioned, this discourse expresses the attitude towards persons with disabilities as well as the influence on persons with disabilities:⁷ These different views of disability and thus of persons with disabilities, which manifest themselves in legal texts and in everyday life, are ultimately also reflected in the design and orientation of education policy and policy on disability.

A further complicating factor in this context is that there is no uniform definition of disability or persons with disabilities in legal texts. In Austrian legal texts, there are a variety of definitions of disability and thus of persons with disabilities, which in turn refer to specific areas of life of persons with disabilities, such as school, work, etc. The great commonality here is the medical focus. This reflects the socially deeply anchored understanding of disability, which is still increasingly characterised by a deficit orientation, the deviation from a fixed supposed norm as well as the closely associated reference to the individual and

⁵ Cf Schulze (2011) 11-25.

⁶ Cf Hazibar/Mecheril (2013).

⁷ Cf Naue (2009) 278. See also in this sense: “However, practised inclusion not only includes the legal aspects, the infrastructural aspect, the financial aspect and the organisational aspect, but also the personal willingness, the attitude, and the commitment of the individual – of persons with disabilities and/or who are chronically ill as well as of persons without disabilities ...”, Rieder (2012) 174.

the resulting lack of reference or interaction with society and the associated external environmental influences.

In the following scientific paper, the term disability or persons with disabilities or the definitions in connection with national legal texts such as the Federal Disability Equality Act, the Federal Disability Employment Act and the Compulsory Education Act (“Schulpflichtgesetz”), as well as the international human rights treaty, the UN CRPD, are examined in more detail.

§ 8 of the Compulsory Education Act – school attendance in case of special educational needs – assumes that a disability exists if a special educational need (SPF) exists or has been determined. The definition is static, without reference to the interaction of society and the individual or external environmental influences, and refers exclusively to children and young people who are affected by a disability and who, as a result of this disability, are unable to follow lessons without special educational support: “Upon application or ex officio, the Directorate of Education shall, by decision, determine the special educational needs of a child who, as a result of a disability, is unable to follow the lessons at primary school, secondary school or polytechnic school without special educational support. Disability is understood to be the effect of a not merely temporary physical, mental or psychological functional impediment or impediment of sensory functions which is likely to make participation in lessons difficult. A period of more than six months is considered to be not only temporary. In the course of the determination of special educational needs, it shall be stated which special school is to be considered for attendance by the child or, if the parents or other guardians so request, which general school is to be considered. Taking this determination into account, the Directorate of Education shall determine whether and to what extent the pupil is to be educated according to the curriculum of the special school or another type of school. In making this determination, the aim is to ensure that the pupil receives the best possible support for them.”⁸

The determination of disability is based on the medical model of disability. In addition, the implementation of § 8 of the Compulsory Education Act and the determination of a disability is not carried out according to national uniform guidelines, which is also criticised by the Court of Audit (“Rechnungshof”) in its report. By circular 23/2016, the competent ministry intended – in the opinion of the Court of Audit – a more stringent interpretation of the legal provisions by basing the determination of a disability on a classification according to ICD-10 (International Statistical Classification of Diseases and Related Health

⁸ § 8 (1) Compulsory Education Act.

Problems) and the biopsychosocial approach of the ICF (International Classification of Functioning, Disability and Health).⁹

§ 3 Federal Disability Equality Act defines disability as follows:

“Disability within the meaning of this Federal Act is the effect of a not merely temporary physical, mental or psychological functional impediment or impediment of sensory functions which is likely to make participation in life in society more difficult. A period expected to be of more than six months is considered to be not just temporary.”

§ 3 Federal Disability Employment Act defines disability as follows:

“Disability within the meaning of this Federal Act is the effect of a not merely temporary physical, mental or psychological functional impediment or impediment of sensory functions which is likely to make participation in working life more difficult. A period of more than six months is considered to be not temporary.”

§ 2 Federal Disability Employment Act defines beneficiary persons with disabilities as follows:

“(1) Beneficiary persons with disabilities within the meaning of this Federal Act are Austrian citizens with a degree of disability of at least 50%.”

The preamble of the UN CRPD does not define disability, but describes it very comprehensively, as well as what is meant by the term persons with disabilities: “e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others, ...”

Art 1 UN CRPD further states: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

The Federal Disability Equality Act and the Federal Disability Employment Act are based on a very narrow definition of disability and refer to not only temporary physical, mental or psychological functional limitations or sensory functional limitations. A period of more than six months is considered to be not just temporary. § 2 of the Federal Disability Employment Act defines the status

⁹ Cf Rechnungshof (2019).

of beneficially disabled persons. Here, a degree of disability of at least 50% applies in order to belong to the group of benefiting disabled persons. The subject is omitted in the text of the law. These definitions of disability or of persons with disabilities are largely influenced by the medical model of disability, as these definitions refer to functional or sensory impairments in connection with a period of time or a degree of disability.

The federal laws listed above refer exclusively to the disabled person or the disabled individual and their limitations or deficits. While the Federal Disability Equality Act refers to the functional impairment or sensory function impairment that is capable of impeding participation in life in society, the Federal Disability Employment Act refers to the functional impairment or sensory function impairment that is capable of impeding participation in working life. The definitions of disability and of persons with disabilities in the Federal Disability Equality Act and the Federal Disability Employment Act are static definitions, as the interactions between the individual and society or external environmental influences are not included.

The determination of disability according to the Federal Disability Employment Act or the Federal Disability Equality Act is carried out according to the assessment ordinance¹⁰, again according to the medical model of disability. Here, again, only the functional limitations or sensory impairments of the respective person concerned are assessed:

“Disability within the meaning of this Ordinance shall be understood as the effect of a not merely temporary physical, mental or psychological functional impediment or impediment of sensory functions which is likely to make participation in life in society, in particular in general working life, more difficult. A period expected to be of more than six months is considered to be not just temporary.”¹¹

No differentiation is made between disability and chronic illness in the national legal texts.

In Article 1 and in the preamble, the UN CRPD addresses the interactions between the individual and – from the outside – society and external environmental influences. This definition thus follows the social-cultural model of disability and moreover – in contrast to the Federal Disability Equality Act and the Federal Disability Employment Act – does not include a specific period of time or degree of disability, but only refers to long-term physical, mental, intellectual or sensory impediments. The UN CRPD also does not differentiate between disability and chronic illness.

¹⁰ Austrian Federal Law Gazette II 251/2012.

¹¹ § 1 Assessment Ordinance (“Einschätzungsverordnung”), Austrian Federal Law Gazette II 251/2012.

The definition of disability or persons with disabilities in the UN CRPD is not a definition in the strict sense, but describes what is understood by the terms disability and persons with disabilities. The dynamics of this descriptive definition are evident in the reference to the evolution of the understanding of disability. Both the definition in the national Federal Disability Equality Act and the definitions in the preamble and Article 1 of the UN CRPD refer to participation in life in society or equal participation in society, but participation in life in society in the Federal Disability Equality Act is not determined by the social context or the interactions of the individual and society and the associated external environmental influences, but by the prevailing functional impediments or impediments of the sensory functions of the individual who does not conform to the norm. Ursula Naue justifies this medical focus as follows: “If the question is pursued as to where this medical view of the body comes from when it comes to disability, it soon becomes apparent that this is the historical context of the first relevant laws. From the Invalidenentschädigungsgesetz [Invalid Compensation Act] of 1919 to the Kriegsopferversorgungsgesetz [War Victims’ Compensation Act] of 1957, it was the reference to people who became “disabled” as a result of their participation in wars, and where the aim was to reintegrate them into society with the help of rehabilitative measures and financial support (Naue 2008).”¹²

2. An integrative education system is not the same as an inclusive education system

“What is not excluded in the first place does not have to be integrated afterwards!” (Richard von Weizsäcker, German Federal President).

In Austria, policy on disability in general, and education policy along with it, hardly differentiates between integration and inclusion, although there is an important and essential difference between integration and inclusion: “The guiding terms integration and inclusion stand for two models that complement each other and at the same time differ fundamentally.”¹³

Integration means: Incorporation into an existing system. Accordingly, persons with disabilities have to adapt to the respective prevailing system. The focus is on the deficits of persons with disabilities, according to the motto: What is defective and not healed must be healed! Integration is thus predominantly based on the medical model of disability. Moreover, integration is seen as a debt to be paid by the people concerned, who must constantly prove their ability to adapt

¹² Naue (2009) 279.

¹³ Schnitzer (2013).

to a society based on homogeneity. Aspects of welfare, care and administration shape the model of integration. For the education system, integration means that persons with disabilities have to adapt to and thus integrate into a rigid education system.

Inclusion means that people are perceived and understood in their diversity and thus in their differences. The focus here is on the heterogeneous realities of life, with their accompanying potentials. In the model of inclusion, the prevailing structure in each case adapts to the persons with disabilities with their individual requirements and needs, and it is not the affected individuals who have to change and adapt, but barriers and exclusionary structures that have to be removed. Inclusion becomes the responsibility of society, without the need for the individual to demand it.

“It is normal to be different. There is no standard for being human” (Richard von Weizsäcker)

In an inclusive education system, persons with and without disabilities teach and learn in an equal-opportunity, accessible and potential-oriented manner. No one is excluded from the education system. Full participation in the education system with equal opportunities is guaranteed. In the education system, inclusion means that prevailing rigid structures are dissolved in favour of the promotion of the individual. There is a striking difference between education policy that aims to reintegrate what was previously separated, thus creating a juxtaposition of introverted groups in an education system in which persons with disabilities have to adapt to the prevailing system or the predefined norm, and policy that aims to include them, in a system in which all people participate inclusively and comprehensively in the education sector, participate and thus help to shape it, in which no one has to adapt to existing education systems and education structures or has to conform to an artificially prescribed norm, but rather systems and structures adapt to individual requirements and needs. This change of perspective and thus paradigm is explicitly expressed in the UN CRPD, which defines inclusion not only in the education system, but in all areas of human life as a comprehensive human right of persons with disabilities.¹⁴

An inclusive education system thus represents a human right based on international law and a nationally transferred right, as well as a concomitant social self-image. An inclusive education system needs a commitment from society and thus a common basis for what is meant by inclusion in general and in education

¹⁴ Cf Preamble, Art 1 and Art 24 UN CRPD.

policy in particular. Furthermore, in an inclusive education system, it is essential that existing structures and systems are regularly questioned and analysed. But the attitudes, actions, and values of the individuals in a society also play an essential role. These, too, must be constantly and regularly subjected to honest and in-depth scrutiny.

Austria is still very hesitant in implementing a comprehensively inclusive education system. Although individual initiatives, projects, and concepts are being implemented, such as the model regions established in Austria in Tyrol, Styria and Carinthia, there is still no political commitment or continuous political efforts to establish a comprehensively inclusive education system in Austria. In this regard, it should be noted that these trend-setting concepts often do not differentiate and delineate between integration and inclusion, or often describe themselves as inclusive but are, by definition, integrative, and vice versa. However, a comprehensively inclusive education system primarily requires an intensive debate, delimitation and differentiation between integration and inclusion. This is the only way for a comprehensively inclusive education system to emerge, establish itself, and subsequently flourish.

Austria's current State Report, to which Austria committed itself as part of the ratification of the UN CRPD, as well as the Court of Audit in its report from 2019 also criticise the lack of implementation of inclusive concepts in Austrian education policy. In its report, the Court of Audit lists four factors that are crucial for ensuring an inclusive school system: 1. The legal framework that legally regulates the right to education and to joint teaching and makes it legally enforceable. 2. The human and financial resources, as well as 3. a functioning support system in order to be able to guarantee professional support for all those involved, as well as 4. adequate and thus freely accessible infrastructural conditions.¹⁵

These factors in turn help to reassure prejudiced and sceptical parents, guardians, relatives, persons with disabilities themselves and DPOs that children and young persons with disabilities will not be left behind in a comprehensively inclusive education system because absolutely necessary aspects, especially financial ones, cannot be guaranteed. Conversely, parents, guardians and relatives of children and adolescents without disabilities can be assured that their children and adolescents entrusted to the school system will be supported and challenged according to their individual needs, without fears that they might suffer disadvantages due to inclusive education. The learning benefit for all those involved – whether with disabilities or not – in an inclusive education system

¹⁵ Cf Rechnungshof (2019).

consists decisively in the individualisation of the learning units and the learning content, the barrier-free development and further development of the teaching and learning materials and the associated teaching methods as well as the different and diverse educational competences associated with it

In a future comprehensively inclusive Austrian education system, it is essential that sufficient space is available for creative and innovative design and further development, accompanied by appropriate training of teachers, as well as the comprehensive integration of teachers with disabilities into the education system and the comprehensive participation of all those concerned, in the sense of the self-determined-living philosophy, as experts in their own matters.

3. From having a disability to being hampered

Austrian policy on disability and the associated Austrian education system are shaped by the understanding of an individual **having a disability** and thus firmly anchored in the **medical model of disability**. The medical model of disability is characterised by deficit and diagnosis orientation, in the sense of: **What is not healthy must be healed**. Kerstin Hazibar and Paul Mecheril argue in this regard: “If barriers are described from a medical individualistic point of view as a person’s inherent ‘inability’, which the person is not able to overcome due to a physical ‘characteristic’, then the view that education for persons with disabilities takes with regard to access restrictions, focuses on the disabling social conditions which people live in, through which people are hampered and experience themselves as ‘not being normal’”.¹⁶ The medical model of disability is also reflected in the determination and design of **special educational needs** in § 8 of the Austrian Compulsory Education Act. Along with the medical model of disability, it can be stated that there is hardly any differentiation and demarcation between **disabled** and **ill** or **chronically ill**. Disability is often equated with (chronic) illness. A person with disabilities does not necessarily also have to be (chronically) ill. A (chronically) ill person may have a disability or acquire a disability in the course of the illness, but this need not always be the case.

According to Anne Waldschmidt: “To be sick and a patient, means, in the hope of recovery and healing, to submit to an institutional apparatus of power, to subordinate oneself, to exercise patience and passivity, to accept an object status only to be, at least temporarily, precisely not a self-determined subject.”¹⁷ In his academic paper on the subject: “Losing the Plot? Medical and Activist Discourses of Contemporary Genetics and Disability”, Tom Shakespeare even

¹⁶ Hazibar/Mecheril (2013).

¹⁷ Waldschmidt (2012) 24.

goes so far in the argumentation as to state that it is a small step to argue that something that cannot be healed should be prevented.¹⁸

With reference to the previous chapter, it can be stated that Austrian laws, many of which need to be analysed in relation to their historical origins, are very closely linked to the **medical model of disability**. From this, in turn, the Austrian social attitude and values can be derived, in the sense of: **Laws as a reflection of a society**. There is an urgent need for a rethink, a paradigm shift or a change of perspective. This can be achieved raising social awareness through media-support on this very important issue. This is not only a challenge for politics, society and each individual in general, but also for persons with disabilities who join forces, organise themselves and participate socially and politically, as well as sensitise and inform their environment. Here, society itself is called upon to accept this important paradigm and perspective shift without reservation.

The **social-cultural model of disability** moves away from the individual with a functional or sensory impediment and turns to the examination of the social context. This in turn implies the view and approach that persons with disabilities are prevented from participating in society. Disability is seen and understood here as a social construct and thus as a social product. This approach thus places the emphasis of the analysis on the significance of the disabling social context.¹⁹ The understanding of disability according to the UN CRPD is also based on the social-cultural model of disability. This understanding assumes an interaction between persons with disabilities in society and barriers created by attitudes and the environment: “e) Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others, ...”²⁰

The socio-cultural model of disability recognises persons with disabilities as political subjects whose abilities and opportunities to act are ultimately based on the structures of social and political opportunities for participation.

With regard to education policy, Austria needs a comprehensive change in perspective and thus paradigm, away from the **medical model of disability** in the context of **having a disability**, towards the **social-cultural model of disability** in the context of **being hampered** according to the UN Convention on the Rights of Persons with Disabilities. Article 24 of the UN CRPD, which deals

¹⁸ Cf Shakespeare (1999) 669-688.

¹⁹ Cf Naue (2008) 21 and (2009) 278.

²⁰ Preamble of UN CRPD.

comprehensively with education, is also based on a **social-cultural** understanding of disability.

4. From special education to inclusive education

Persons with disabilities are **perceived** in connection with **special structures, special education, special schooling, special cases**.... This is also shown, for example, by the terminology **people with SPECIAL needs**. This concept is perceived very critically by persons with disabilities, and especially by the philosophy to live a self-determined life. This concept can be analysed as follows: All people, whether with disabilities or not, have needs. Every person has the need to eat, drink, sleep, go to the toilet, etc. A person with disabilities therefore has no **SPECIAL** needs. However, the implementation of the needs of persons with disabilities often requires other measures, eg a person who uses a wheelchair needs a disabled toilet to satisfy the need to go to the toilet. However, the need itself is the same for all people – whether with a disability or not. Persons with disabilities are not **SPECIAL**, so they do not need **SPECIAL structures**. These **SPECIAL structures** only inhibit society in dealing **inclusively** with persons with disabilities. **SPECIAL forms** and **SPECIAL structures** have nothing to do with an **inclusive approach and model of disability**. **SPECIAL forms** and **SPECIAL structures** can be traced back to and reconciled with the **medical model of disability** and, consequently, with the **integrative** approach to disability.

In the school system, the **SPECIAL schooling** of persons with disabilities is always justified and thus legitimised with the **protected space theory**. This theory states that

“[...] for children and adolescents who, as school failures in the regular school system, have lost their well-being, their motivation to perform, their joy of learning and their self-esteem, the special school, as a ‘sanctuary’ with individually adapted, needs-based performance requirements and personal assistance, should restore what they have lost or help them to develop a positive concept of self and performance in the reference group of special school pupils without the usual pressure to compete and perform.”²¹

However, this **artificially generated protected space** is not in harmony with the realities of life for persons with disabilities and thus cannot be maintained in the everyday lives of persons with disabilities. Persons with disabilities are thus denied the necessary interaction and engagement with persons without disabilities by the school system. Ultimately, the **protected space thesis** means

²¹ Schumann (2007).

that persons with disabilities are perceived as people who need to be **spared**, protected and preserved from general society and thus from general life. They are thus degraded to needy objects of welfare and administration because of their individual deficits. According to this science-based thesis, persons with disabilities are **integrated** into the general education system, but remain among themselves, without contact and interaction with persons without disabilities. However, no consideration is given to the perspectives of persons with disabilities and the impact on persons with disabilities who have grown up in a sheltered and protective **SPECIAL education system** and have to leave this shelter in their further professional life. This protected space cannot be maintained throughout life, it is artificially generated. From an inclusive approach, this is also not intended and desired.

The **SPECIALNESS** of persons with disabilities, which is always brought to bear and requires **special structures**, contradicts the UN Convention on the Rights of Persons with Disabilities. Persons with disabilities are not **SPECIAL**, so they do not need **special structures**.

In order to implement a comprehensively **inclusive** education system, the Austrian socio-political system as a whole, and the Austrian education system in particular, must turn away from the **SPECIAL** in connection with persons with disabilities, and thus from the view of the deficit-ridden individual.

“Thus, inclusion does not focus on the individual learning deficits of individual children, but on the barriers that prevent boys and girls with different biographies and learning backgrounds from learning the world together and developing themselves in the process.”²²

The right to **inclusive** education for persons with disabilities is questioned mainly when it comes to the cost factor. In many cases, persons with disabilities are still measured and evaluated in terms of the costs they cause.²³

Persons with disabilities lose their **SPECIAL** status in an **inclusive** society and therefore in an **inclusive education system**. They are a natural part of society and therefore part of the general education system which thus grants them comprehensive participation, equal opportunities, and accessibility. Since the time of Austria’s ratification of the UN Convention on the Rights of Persons with Disabilities in 2008, **special education** in Austria has lacked legal legitimacy.

²² Naue (2009).

²³ Cf Naue (2009) 280, 288.

The two completely contrasting theses give rise to an exciting discussion as to whether the Austrian education system, in the sense of a comprehensively **inclusive** education system, should be completely rethought, set up, aligned and designed, or whether the experience and knowledge generated over decades in **special education systems** and thus **special school systems** should be transferred – in modified form – into an inclusive **education system**. If the education system in Austria is to be completely restructured in the future, then a uniform national strategy and uniform approaches with uniform guidelines and clear definitions or definitions of terms or a clear demarcation between **integration** and **inclusion** are required, together with a clear understanding of an **inclusive** education system. Furthermore, a common starting point with a common set of values and commonly agreed approaches to an **inclusive** education system is required.

If the experiences and insights gained in **special education systems** or **special school systems** are transferred to a comprehensively **inclusive** education system in a modified form, one is confronted with fixed or codified structures, strategies and concepts that may contain outdated approaches and thus prevent **inclusive**, creative and innovative ways of thinking or inhibit their emergence. Here, too, agreement must first be reached on a clear common definition of an **inclusive** education system and the associated differentiation from an inclusive education system, combined with a common value system, starting point and conceptualisation, as well as in the clarity of what one wants to transfer and thus retain. There is a danger that old, firmly anchored thought patterns that have nothing to do with **inclusion** will also be transferred. Whichever thesis is ultimately followed, the common basis must always be the UN CRPD.

B. From the vision of the future to the real future perspective for a comprehensively inclusive education system in Austria in accordance with Art 24 UN CRPD – a look at the future

“Disability is a rights issue and not a matter of discretion!” European Commission on UN CRPD

According to Ursula Naue, the UN Convention on the Rights of Persons with Disabilities has two different potentials: On the one hand, the potential to guarantee existing rights and, on the other hand, the potential to contribute in this

way to states actually achieving a paradigm shift with regard to policy on disability. In this context, Naue argues that the significance of the UN CRPD can hardly be overestimated.²⁴

With the ratification of the international human rights treaty of the UN CRPD in 2008, Austria committed itself to fully guaranteeing the human rights formulated and enshrined in the UN CRPD and thus also the enshrined right to a comprehensively inclusive education system. The UN CRPD has the potential to bring about such a change of perspective and thus paradigm.

It is high time for Austria to tear down the coexistence and thus the three pillars of special education and thus special schooling, an integrative as well as an inclusive education system, and turn to one pillar with a comprehensively inclusive education system and thus comply with Article 24 UN CRPD in the future and fully comply with it. This requires an intensive examination of the definitions of integration and inclusion and thus a conscious and clear differentiation between the two terms. Thoughtlessly mixing these two terms prevents a comprehensively inclusive approach to education, because: Integration is not the same thing as inclusion.

In general, great attention should be paid to the wording in connection with persons with disabilities. Education policy and, along with it, policy on disability are massively influenced by the prevailing respective wording. The respective wording conveys emotions, values, and attitudes. A comprehensively inclusive education system requires a change of perspective or paradigm – from the educational object worthy of protection to the self-determined and participatory educational subject of persons with disabilities. The focus must be on persons with disabilities as a natural part of society, and thus as a natural part of the general education system. Policy on disability must be recognised and perceived as a comprehensive interdisciplinary issue. Education policy and policy on disability must work and interact with each other in the sense of cogwheels; this is the only way that inclusion can emerge, be established, and flourish.

Austria is still very hesitant and only partially moving towards an inclusive education system.²⁵ In 2009, the political scientist Ursula Naue argued that Austria had the basis and the possibilities to bring about a paradigm shift towards a comprehensively inclusive education system. However, according to Ursula Naue, there is currently still a certain lack of recognition of the experience gained by other countries that this change is slow and that it can only take place

²⁴ Cf Naue (2009) 290.

²⁵ Cf Austria (2019); Rechnungshof (2019) 77-80.

if the attitudes and approaches of both the population and the political decision-makers change.²⁶ This assertion is still valid today, in 2020.

It is essential that Austria commits to a comprehensively inclusive education system in the future and also actively moves towards and develops further in this direction. Practicable ways in this regard are shown, among others, by Scandinavian countries with their systems of personal assistance, as well as by Austria's neighbouring country, Italy and its province of South Tyrol, where special schools were completely abolished as early as the 1970s. Financial, human, structural and infrastructural resources as well as innovative and creative room for manoeuvre are needed so that fears and concerns – predominantly of those affected themselves, parents or guardians and relatives – regarding a comprehensively inclusive education policy in which the weakest members of society would be forgotten or would not be provided with appropriate and sufficient support opportunities or in which non-disabled pupils could not be appropriately supported and challenged, can be refuted and dispelled.

The medical model of disability must be completely replaced by the social-cultural model of disability, and this must be accompanied by a change in values in society. Austrian policy on disability, and thus also education policy, must be implemented in a changed social context and framework in the future.²⁷ This change in values can be forced with the support of sensitisation concepts and models of sensitisation through self-awareness. Laws alone are not enough here. But Austrian laws also need to be analysed with regard to possible changes in wording. Austrian laws are predominantly based on the medical model of disability.

A change of perspective must take place, turning away from the SPECIAL to the self-evident, in the sense of variety and diversity, in which there is no need for any norm. Disability must no longer be an attribution of an individual, but must be understood in the context of external environmental influences and the interaction of the individual with society. It is high time that this change of perspective from being disabled to being impeded is carried out and thus the paradigm shift from the disabled object, which requires administration and welfare protected by society, to the participating, acting and self-determined subject in society can take place.

²⁶ Cf Naue (2009) 286.

²⁷ Cf Naue (2009) 291.

With regard to the implementation of a comprehensively inclusive education system, two theses or approaches and the associated questions need to be thoroughly reconsidered and analysed in Austria: Should a comprehensively inclusive education system be completely rethought and set up with innovative and creative concepts playing a primary role, or should concepts, experiences, and insights gained and generated over decades in special education systems or in the course of special schooling be transferred in modified form to a comprehensively inclusive education system? Positive and negative aspects can be derived from both theses. However, both approaches have one major thing in common, they need a clear definition of what is meant by a comprehensively inclusive future education system and thus a clear demarcation from the model of integration.

Not only in general, but also in particular in the conceptualisation, design, and implementation of a comprehensively inclusive education system in Austria in future, it is essential that persons with disabilities are included in a participatory manner with equal opportunities. In the sense of the movement or philosophy to live a self-determined life, they are always the experts in their own cause. It is of utmost importance and priority not to talk about and make decisions for persons with disabilities, but to work together with persons with disabilities on a comprehensively inclusive education system in Austria, in the sense of the social-cultural model of disability, as persons with disabilities bring important and forward-looking perspectives to the development and implementation process of a comprehensively inclusive education system. The UN CRPD is the foundation and basis of a comprehensively inclusive education system, which must be fully transferred into the national structure.

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Representative Participation of Disabled Persons at Educational Policy-Making Processes in Germany

A. Introduction

Historically, the interests of persons with disabilities have been represented through parent organisations, rehabilitation service providers and post-war care initiatives. With the UN year of 1981, persons with disabilities in Europe motivated by the USA independent movement dating back to early 1960s, opted for strengthening their position through establishing their own organisations or reinforced the existing ones at the local, regional and international levels. As a result, the new wave of disability rights movement calling for paradigm shift has been launched, which in its turn, initiated not only the drafting of domestic anti-discrimination laws but also was the integral part of UN CPRD development at the international level. In fact, the adoption of the UN CPRD brought the representation level of persons with disabilities through their own organizations to a whole new world, thus granting them the explicit and indivisible right to represent their interests in complete range of decision-making processes across the State Party. However, in view of various factors, such as the political structure and resource availability, there might arise significant doubt concerning the comprehensive and all-level application of the representative right to political participation of disabled persons in decentralised policy-making structures.

Therefore, the present chapter¹ aims at assessing the potential impact of the participation concept of UN CPRD upon the multi-level educational policy-making practices at the national level. The chapter contains three substantive sections. The first of these, Section B., highlights the right to political participation. Section C. addresses the structure and resource capacity of DPOs. And finally, section D. elaborates upon the implementation of the participation concept of UN CPRD in three stages of educational policy-making at Federal and Länder-levels of government.

¹ This chapter is a small part of author's Dissertation "The Multi-level Comparative study of the legal and political implementation of the UN Convention on the Rights of Persons with Disabilities in EU Member States", anticipated completion in 2021.

B. The Right to Participation

The right of every individual to participate at government of his country, directly or through freely chosen representatives has found its first international recognition with the article 21 of the Universal Declaration of Human Rights in 1948. Later, it was reaffirmed by the article 25 of the International Covenant on Civil and Political Rights and specified by other human rights instruments². The involvement and consultation of DPOs has been mentioned in the international non-binding instruments, such as the 1975 Declaration on the Rights of Disabled Persons and 1993 UN Standard Rules. The Art 5 of the 1983 ILO Convention No 159 concerning Vocational Rehabilitation and Employment was the first binding legal instrument to envisage representative participation rights of disabled persons in the employment policy-making. The comprehensive participation rights of disabled persons, thus, has been ensured only with the UN CPRD that requires the States Parties to closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations in the development and implementation of legislation and policies to implement the UN CPRD, and in other decision-making processes concerning issues relating to persons with disabilities³. Thereby, the UN CPRD puts clear distinction⁴ between organizations “for:” disabled persons and Organizations “of:” disabled persons, in considering that the latter should be rooted in, committed to and fully respect the principles and rights recognized in the Convention and be led, directed and governed by persons with disabilities⁵. The UN CPRD Committee states also that public authorities should give due consideration and priority⁶ to DPOs in all stages of decision-making processes⁷ across all parts of Federal States without any limitations or exceptions⁸. Obligation to involve and consult the DPOs applies to the full range of legislative, administrative and other measures that may directly or indirectly impact the rights of Disabled persons⁹. Moreover, State Parties are obligated to ensure reasonable accommodation enabling full, meaningful and equal participation of disabled persons through their representative organizations¹⁰.

² Art 5 (c) International Convention on the Elimination of All Forms of Racial Discrimination; Art 7 Convention on the Elimination of All Forms of Discrimination against Women; Arts 12 and 23 (1) Convention on the Rights of the Child.

³ Art 4 (3) CPRD.

⁴ Committee on the Rights of Persons with Disabilities (2018) rec 13 and 14.

⁵ Committee on the Rights of Persons with Disabilities (2018) rec 11.

⁶ Ibid para 23.

⁷ Ibid para 15.

⁸ Ibid para 69.

⁹ Ibid para 18.

¹⁰ Ibid paras 22, 39, 45, 54, 71 and 94 lit e; see also Welti (2005) 335-356.

C. Structure and resource-capacity of DPOs

In Germany, various organizations and associations address disability-issues. These organizations often consist of disability-specific groups of disabled and chronically ill persons, self-advocacy organizations, cross-group social and charitable organizations, as well as emancipatory associations¹¹. Considerable number of disability-specific umbrella self-advocacy organizations operating at the federal level have a federal structure. This means that they are, by and large, represented in the 16 Federal States, whereas others eg cross-disability organizations exist only in some Federal States.

Sustainable functioning of German DPOs partially comes from the membership contributions and donations. They also get financial support that is based, mainly, on service providing logic; the umbrella organizations of disabled persons get partnership and individual funding from medical insurance institutions to conduct disability-specific consultations or projects at the federal and Länder-level. The amount of funding, however, reduces depending on the governmental level and the type of organizations. Subsequent to amendment of the BGG (German Federal Law Gazette I 2561, 2571), the federal and Länder-level DPOs also get governmental funding in carrying out independent participation consulting of persons with disabilities. Besides, the DPOs might get project-specific funding from the employment-related funds of the Federal Ministry of Employment and Social Affairs.

Some Länder-level DPOs might also get funded in the framework of states funds for consulting the affected persons. However, the scope of addressees of these tide funds are either too broad, as it is the case in Hesse¹², or to specific as it is in Thuringia¹³, for being available to all or at least a large number of DPOs. Besides, these sources of funding do not envisage support for reasonable accommodation¹⁴, eg personal assistants for the blind, a sign plain/language translator. This, in fact, constitutes a serious obstacle as the work of the majority of Länder and local level organizations is being carried out with the help of disabled volunteers, who, normally, do not have assistance for their voluntary activities¹⁵.

¹¹ Hlava (2014) rec 3; the list of politically-active organizations can be found on the website of the DBR at: <http://www.deutscher-behindertenrat.de/ID25209> (30/03/2021).

¹² § 1 Richtlinie für die Förderung sozialer Gemeinschaftseinrichtungen und nichtinvestiver sozialer Maßnahmen (Investitions- und Maßnahmenförderungsrichtlinie - IMFR) of 02/05/2011.

¹³ ThürStAnz No 6/2010 p 166.

¹⁴ See the requirements of the CPRD Committee in Committee on the Rights of Persons with Disabilities (2018) rec 46, 71 and 94 lit b).

¹⁵ Actually, a possibility to apply for assistance has been envisaged with the adaption of the Federal Participation Law (BTHG) in 2016. However, the broad formulation of the provision limits the scope of entitlement. See: BTHG § 78 (5) "Beneficiaries who perform voluntary work, are to be provided reimbursement covering reasonable expenses of needed assistance, unless the support

In response to concerns of the UN CPRD Committee expressed in the Concluding Observations on the initial report of Germany, the Federal government introduced funding for political work of Federal DPOs Starting from 2016. However, this funding, in view of Multisectionality of disability-issues cannot be perceived as sufficient for the participation of DPOs at the legislative and administrative processes of the federal government. Federal States, despite their exclusive legislative and administrative responsibilities in a number of disability-related policy fields, did not introduce measures insuring the political participation of DPOs. As a result, the Länder-level DPOs continue to be politically dysfunctional as they, unlike the federal level umbrella DPOs, do not have the necessary level of professionalization¹⁶ to acquire alternative funding. Accordingly, their main funding comes from donations and individual members' contributions of their municipal member organizations, which means that the local-level DPOs are left out of funds. The Länder-level umbrella DPOs also do not get consultation and/or support from their Federal level umbrella organizations during the political participation processes despite the membership contribution paid to them. As a result, the competent functioning of the Länder and municipal level DPOs depends on the cooperation with the experts eg lawyers of the large civil society organizations, including welfare organizations that, among other things, carry out also disability-related work and have conflicting interests in a number of issues. Moreover, the human and financial resources of the Länder-level disability-specific DPOs suffice merely for providing and organizing member consultations, whereas the non-disability-specific DPOs are excluded from the financial support schemes. This highly limits the scope and capacity of political action of the Länder-level DPOs; they reduce their focus and participation to only legislative processes and to policy fields directly¹⁷ concerning disabled persons. Legislative and administrative processes in the policy fields that concern disabled persons indirectly¹⁸ eg education, but

can be reasonably provided free of charge. The necessary support should be provided primarily in the context of family, friendship, neighbourly or similar personal relationships (Leistungsberechtigten Personen, die ein Ehrenamt ausüben, sind angemessene Aufwendungen für eine notwendige Unterstützung zu erstatten, soweit die Unterstützung nicht zumutbar unentgeltlich erbracht werden kann. Die notwendige Unterstützung soll hierbei vorrangig im Rahmen familiärer, freundschaftlicher, nachbarschaftlicher oder ähnlich persönlicher Beziehungen erbracht werden)".

¹⁶ Willems (2000).

¹⁷ According to para 20 of the General Comment No 7, "Examples of issues directly affecting persons with disabilities are deinstitutionalization, social insurance and disability pensions, personal assistance, accessibility requirements and reasonable accommodation policies." Committee on the Rights of Persons with Disabilities (2018).

¹⁸ According to para 20 of the General Comment No 7, "Examples of ... Measures indirectly affecting persons with disabilities might concern constitutional law, electoral rights, access to justice, the appointment of the administrative authorities governing disability-specific policies or public

have essential significance for achieving inclusion of disabled persons in the long-run, are being disregarded despite the fact that they are under the exclusive legislative powers of the Federal States.

D. Implementing the Right to participation in educational policy-making

In accordance with its federal constitutional structure¹⁹, Germany maintains Division of powers between the Federation and the Länder. Accordingly, the Federation and the Länder have exclusive and concurrent legislative powers²⁰. Higher education, for example, falls under the legislative powers of Federation and Länder, whereas vocational education is regulated exclusively by Federation²¹ and school education exclusively by Länder. As a result, there are considerable differences not only between policy fields²² but also between the Länder. This affects the form and degree of participation of State and non-State actors in decision-making processes, which spans from “official” decision-makers in state institutions and German District Association / German Association of Cities and Municipalities to political parties, users of educational institutions, churches, associations and trade unions²³. Nevertheless, the involvement and participation of interest groups in advisory organs, executive and legislative bodies have been subjected to detailed regulations²⁴ both at the federal and Länder-levels, which was aimed more at limiting and filtering the influence of organizations than at insuring plural participation²⁵. Consequently, the consultation and participation rights in decision-making processes and frameworks has been narrowed down through a number of regulations²⁶, which creates “selective cooperation”²⁷ with large governmental and non-governmental organizations. For instance, both the federal and Länder-level common procedural rules of the Ministries ensure early possible (prier and after the draft law development) consultancy and involvement of a number of governmental interests

policies in the field of education, health, work and employment.” Committee on the Rights of Persons with Disabilities (2018).

¹⁹ Art 20 Abs 1 GG.

²⁰ Art 70-74 GG.

²¹ Art 74 Abs 1 No 11 and 12 GG.

²² Von Winter/Willems (2007); von Winter/Willems (2009); Rehder et al (2009); Reutter/Rütters (2007).

²³ Hepp (2011).

²⁴ Weber (1976) 175-185.

²⁵ Schröder (1976) 74.

²⁶ Schröder (1976) 88.

²⁷ Weber (1976) 278.

both at the vertical and horizontal level of governments²⁸. Whereas the involvement and consultancy of non-governmental umbrella organizations starts (officially) after the development of the draft law and includes, by and large, organizations that already have a privileged status through a number of laws: eg welfare organizations. Accordingly, the views expressed by organizations outside of this selective circle eg organizations of disabled persons have no or marginal effect in the development and adaption of draft laws affecting disabled persons directly. And what is more, they might even be excluded from participation in all three stages of the policy-making processes.

1. Participation in Advisory Bodies

Federal, Länder and municipal governments maintain advisory boards/commissions/bodies that play a decisive role in formulating and implementing policy objectives and content that might have both direct and indirect effect on disabled persons. Membership rules to such organs are laid down by the relevant laws. The member organizations of such bodies might differ depending on the policy field and be limited to legally privileged governmental and non-governmental organizations²⁹. The number of members representing the interests of disabled persons (if any) might be in minority or in case of indirect policy fields even non-represented. For example, the Federal ministry of Education and Research, which is responsible for vocational and higher education policies, maintains several advisory boards, but the participation of DPOs is ensured in none of them³⁰.

While the ratification of the UN CPRD induced inclusion of DPOs in Länder-level advisory councils directly affecting disabled persons, they have not been included in the advisory boards concerning policy fields affecting disabled persons indirectly: eg the Thuringian Ministry of education maintains a state school advisory council, which plays an important role in developing and monitoring the implementation of educational laws. Nevertheless, among its 32 members representing various governmental and non-governmental organizations eg representatives of pupils and parents, regular and special education teachers,

²⁸ § 21 GGO (cooperation with Federal Commissioners and coordinators), § 36 (cooperation with Federal States), as well as involvement and participation of the Federal States and municipal umbrella governmental organizations prior to draft law formulation (§ 41) and after the draft law development (§ 47 (1) and (5)), and § 45 (for ministerial participation at the vertical level). The same selective cooperation and involvement provisions exist in, for example, procedural rules of the hessian and Thuringian Ministries.

²⁹ In Germany, the Welfare organizations have privileged legal status through *Bundessozialhilfegesetz* and Social Code books EG SGB VIII, SGB IX and SGB XI; see for example bspw Schmid, S. (1996); Schmid, J./Mansour (2007); Welti (2015).

³⁰ See for example § 44 BAföG; § 12 StipG.

churches, State Youth Welfare Committee and Thuringian District Association / Thuringian Association of Cities and Municipalities, there is no member representing the interests of disabled persons through their organizations³¹. A similar advisory organ is stipulated by the Hessian School Law, which includes the Hessen State Disability Commissioner as one of its members³². While it is positive that at least the Disability Commissioner has been included in the honorary advisory council (2012-2020)³³, it cannot but be mentioned that the Commissioner, in considering the fact that she met the representatives of organizations addressing different disabilities only once in a year in the framework of her “Inclusion Council”, made the effectivity and form of her participation at this Council questionable.

2. Participation in the Executive Policy-Making

The DPOs participate at the policy-making processes of federal executive bodies. Most particularly, they receive and comment on draft laws developed by the federal ministries in line with the § 47 (3) of the Common Procedural Rules of the Federal Ministries (“Gemeinsame Geschäftsordnung der Bundesministerien”). In policy fields affecting disabled persons indirectly, the involvement and consultation of DPOs by the federal level ministries, according to interviewed federal level DPO representatives is very limited or non-existent. The review of the policy-making processes of the federal ministries confirms this statement: for example, the majority of draft law development processes carried out by the Federal Ministry of Education and Research, which is responsible for drafting laws in the field of vocational and higher education, contain no written commentary on/behalf of disabled persons, even from the Federal Disability Commissioner. Only the section enlisting the documents on the Law promoting professional advancement (“Gesetz zur Förderung der beruflichen Aufstiegsfortbildung” - AFBG) contain written commentaries on behalf of disabled persons, but these commentaries were submitted by only welfare organizations³⁴.

Participation of Länder-level interest groups at the executive policy-making is stipulated by the Common procedural rules of the given Länder-Governments

³¹ See § 39 TH ThürSchulG 39; § 7 ThürMitwVo.

³² § 99a HSchG.

³³ The newly regulated and as a consequence remunerated office of the Hessian State Disability Commissioner has been taken over by Rika Esser as of 01.03.2020.

³⁴ For more see the webpage of the Federal Ministry of education and research containing documents on the developed laws: <https://www.bmbf.de/de/gesetze-267.html> (30/04/2021).

(“Allgemeine Geschäftsordnungen der Landesregierungen”)³⁵. As a result, the Länder-level DPOs might be given opportunity to represent the interests of disabled persons in the law-making processes. However, policy-making processes in the executive bodies as a matter of fact are not transparent; the planned or processed draft laws are not communicated in a transparent manner and there is no publicly available information on which interest groups have been invited and why. However, as multi-level and multi actor interviews showed, the involvement of DPOs in the policy fields affecting disabled persons indirectly: eg school education reduces to almost zero or, in the best case, is limited to Disability Commissioner’s (“Beauftragter für Menschen mit Behinderungen”) participation.

3. Participation in Parliamentary Processes

In general, DPOs might participate at the public hearings of the Bundestag as a registered organization.³⁶ However, MPs are principally free to decide whom to invite. In practise, the list of invited experts to the hearings of the parliamentary commissions, does not show significant deviations from the processes carried out by the executive organs of the government.³⁷ Accordingly, in the public hearings of the Bundestag affecting disabled persons indirectly is not ensured even in cases when they address vocational or higher education.³⁸ The Länder-level DPOs might also be invited to submit written opinion or participate at the hearings on a draft-law at the Länder-Parliament³⁹. In practice, however, only selected DPOs are invited to submit written commentaries and/or take part at public hearings on the draft laws directly addressing disabled persons.⁴⁰ And the number of their representatives and the speaking opportunities are in comparison to other invited actors insignificant. In policy fields concerning disabled persons indirectly but that have essential importance for

³⁵ See § 56 Gemeinsame Geschäftsordnung der Staatskanzlei und Ministerien des Landes Hessen – GGO; § 21 (1) Gemeinsame Geschäftsordnung für die Landesregierung sowie für die Ministerien und die Staatskanzlei des Freistaats Thüringen – ThürGGO of 11/06/2019.

³⁶ Deutscher Bundestag, § 70 Geschäftsordnung des Deutschen Bundestages, as amended by German Federal Law Gazette I p 197 on 01/03/.

³⁷ Von Winter (2014) 179-210.

³⁸ For more see the webpage of the Federal Ministry of education and research containing documents on the developed laws (Gesetze-BMBF).

³⁹ § 93 (3) Geschäftsordnung des Hessischen Landtags of 27/05/2015 (GVBl p 222); § 79 Geschäftsordnung des Thüringer Landtags, Drucks 6/6789 of 28/02/2019.

⁴⁰ See for example the comments on the Gleichstellungsgesetz (Drucks 18/1152), committee submission AFG 18/18 of 16/11/2009; comments on the Gleichstellungsgesetz (Drucks 19/2184), committee submission SIA 19/43 of 04/11/2015; comments on the Änderung Behinderten-Gleichstellungsgesetz (Drucks 20/178), committee submission SIA/20/1 of 26/04/2019; see also, Thüringer Gesetz zur Inklusion und Gleichstellung von Menschen mit Behinderungen (Drucks 6/6825).

the inclusion of disabled persons, such as the school education is either limited to the Länder Disability Commissioners, as it is in Hesse⁴¹ or is not ensured at all.

This confirms the assumption that the selective interests have more weight in the decision-making processes⁴² than the organizations of disabled persons that have no privileged and comprehensive legal status insuring their participation rights at the decision-making, policy-development and implementation processes. Moreover, in such cases, Federal and Länder-level executive and legislative authorities leading decision-making processes despite their duty to ensure transparency⁴³, do not “inform DPOs of the outcomes of such processes, including an explicit explanation of the findings, considerations and reasoning of decisions on how the views were considered and why⁴⁴”. Besides, such processes that aim at ensuring so called “plural participation” do not only fail in ensuring the involvement of DPOs in indirect policy fields but also prove to be socially selective as they disadvantage groups with weak articulation opportunities⁴⁵: eg for groups that need costly reasonable accommodation to participate. For instance, the DPO interviews both at the federal and Länder-levels, showed that disabled persons participation at the decision-making and policy-development and monitoring frameworks is limited not only because of their non-privileged legal status, but also by the fact of missing measures that provide for the mandatory realization of public hearings prior to the adoption of decisions, and include provisions requiring clear time frames, accessibility of consultations, including an obligation to provide reasonable accommodation⁴⁶. As a consequence, disabled persons included in an advisory and/or monitoring body/working group cannot participate because they do not have assistance during the voluntary work. The access of persons needing sign/easy to understand language translation to such bodies is being denied due to costs. The review of the legislative processes and interviews with DPOs both at the federal and Länder-levels, showed, in addition, that there is no transparent, timely and mainstreamed access to legislative processes of ministries and parliaments both at the federal and Länder-levels. Hence, the DPOs were not informed about and as a consequence could not take action on actual legislative processes carried out in the executive or legislative organs. Besides, the interviewed federal level and especially Länder-level DPO representatives stated that the consultation processes were inaccessibly organized; they did not get assistance support,

⁴¹ Committee submission KPA/19/40 and KPA/19/41 on the draft Drucks 19/3846.

⁴² Von Winter (2014) 179-210.

⁴³ Committee on the Rights of Persons with Disabilities (2018) rec 23, 33 and 43.

⁴⁴ Ibid.

⁴⁵ Holtkamp et al (2006) 255.

⁴⁶ See the requirement of the CPRD Committee in Committee on the Rights of Persons with Disabilities (2018) rec 22 and 94 lit e.

documents were sent one or in the best case two weeks before the written or oral consultations and in an inaccessible formats.

E. Conclusion

Disabled persons have long been invisible in domestic and international legal systems. However, growing human-rights awareness and fast developing digital opportunities for networking and advocacy mobilized disabled persons not only at the local and national⁴⁷ but soon also at the international levels⁴⁸. Their right to participation has not only been stipulated by the law but also became necessary condition for disability-policy legitimation. However, several factors aggravate the full, equal and meaningful participation of disabled persons through their representative organizations. First and foremost, it becomes clear that the filtered and privileging regulations of Federal and Länder-level governments seriously jeopardize the application of the political participation rights of DPOs. This becomes more visible in multi-level comparison.

Second, it might be assumed that source and aim of funding might have a decisive effect on the agenda-setting and identity choice of DPOs acting as human rights objects or as human rights subjects. It might also affect the ability to ensure equal presence at all relevant and in case of education fundamental policy fields, which in fact is seen as precondition for success⁴⁹.

Third, the reasonable accommodation that had to guarantee equal participation at all stages of decision-making processes⁵⁰ is not ensured. Accordingly, DPOs even if included cannot have full and meaningful participation especially at the Länder-level.

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⁴⁷ Köbsell (2006); Degener/von Miquel (2019).

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Working group 3: Implementation of Art 27 UN CRPD in Austria

Art 27 UN CRPD, which was ratified by Austria in 2008 and entered into force on 27 October 2008 (the bank holidays), grants persons with disabilities, among other things, the right to the opportunity to earn their livelihood through work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. Furthermore, the Convention prohibits discrimination on the basis of disability of any kind in relation to employment, specifically mentioning selection, recruitment, and employment conditions and equal pay for work of equal value.

Although Austria has only ratified the UN CRPD subject to legal reservations, and individuals with disabilities are therefore not able to derive any direct claims from the rights enshrined in the Convention, Austria is nevertheless obliged under international law to bring about a legal and de facto situation in conformity with the Convention. In the following, the situation of persons with disabilities in workshops will be used to show that this obligation is still awaiting implementation.

It should be noted first of all that responsibility for policy on disability in general, but also for employment policy for persons with disabilities in Austria, is divided between the Federation and the Länder. While the federal government is responsible for the open labour market and there is therefore a uniform legal and enforcement situation (the Disabled Persons Recruitment Act should be mentioned as a special norm in this context), the Länder are responsible for employment aspects outside the general labour market.

The borderline between the responsibility of the Länder and the Federation is drawn according to the criterion of (in)capacity to work. This category, which originates from the field of social insurance, states that someone whose capacity to work has fallen below half that of a person without an impediment in the same occupation is considered to be incapable of working and is in principle entitled to an invalidity pension. In practice, persons with disabilities, even of younger age, are often diagnosed with incapacity to work very quickly and without a sufficient trial period, which can lead to far-reaching lifelong effects.

In such a case, neither the Public Employment Service nor the Social Ministry Service are authorised to support the person with disabilities in finding a job. In fact, the only option left for the person concerned – which is about 23,000 persons with disabilities throughout Austria – is employment in a day structure or occupational therapy facility, which are the responsibility of the Länder, which is why there are nine different legal framework conditions in detail, following the federal structure of Austria.

What these provincial regulations have in common, however, is that there is no employment relationship, that there is therefore no full insurance in the statutory social security system and that instead of remuneration, only pocket money is paid.

It is in line with the case law of the Supreme Court to consider the legal relationships discussed here as primarily dedicated to the purpose of therapy, where there is no overriding interest of the employer in the employment. In the absence of an explicit provision to the contrary, there is also no provision for full insurance in the statutory social insurance system; after all, persons with disabilities have been included in the statutory accident insurance system since 2011. Instead of being paid for the services rendered, persons with disabilities in the workshops are only entitled to pocket money, which – varying slightly – amounts to around 100 euros per month.

The outlined construction has the effect that persons with disabilities working in day structure or occupational therapy facilities, who to some extent do quite marketable work, usually have to make their livelihood from the (increased) family allowance, from any orphan's pension due, and from transfer payments from disability benefits or social benefits.

In addition to the resulting economic disadvantages, from a human rights perspective it must be noted that these persons with disabilities have the legal status of children for the rest of their lives.

It is evident that the Austrian legal situation regarding the employment of persons with disabilities in day care facilities in no way meets the requirements of the UN CRPD.

In the workshops, there is no question of an open, inclusive environment; apart from supervisors, only persons with disabilities work there, and the specific

place of employment is usually not freely chosen, but depends on the availability of free places. The fact that it is not even possible to make a livelihood from a monthly allowance of perhaps 100 euros needs no further explanation.

In order to bring about at least an approximation to the standards of the UN CRPD, the following measures appear indispensable:

- Revision of the criteria for determining incapacity to work with the introduction of a sufficiently long trial period under realistic working conditions and taking into account existing support structures of a technical and personnel nature.
- Full insurance in the statutory social insurance system for persons with disabilities in day structure facilities; only through independent health and pension insurance is a self-determined and non-discriminatory lifestyle of persons with disabilities made possible.
- Development of an adequate model for payment of remuneration to the employed persons with disabilities.

The measures to be taken are known and could be implemented in a manageable period of time. Of course, implementing the requirements of the UN CRPD would cause additional expenses – which, however, would be significantly minimised by returns from taxes and contributions as well as by the elimination of transfer payments – but this must not be a reason to knowingly and in the long run disregard the vested human rights of 23,000 persons with disabilities in Austria. The Länder and the Federation are called upon to implement Art 27 UN CRPD in this area, as satisfactory results can only be achieved through the interaction of Federal and Länder regulations.

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Care or employment? A Comparison of Post-UN CRPD Sheltered Workshop Policies in East Asia and Germany

Abstract

This paper examines sheltered workshop policies for people with disabilities in Japan, South Korea and Taiwan after the implementation of the UN CRPD, from the perspective of the East Asian “Productive” Welfare Regime. This East Asian “Productive” Welfare Regime points out that social policies in East Asian countries are often only implemented when they are beneficial to economic development. If a social policy increases employers’ burden and hurts economic growth, it will not be implemented. In contrast, due to the requirements of the UN CRPD, for the government to maintain the work rights for people with disabilities, including barrier-free environments and reasonable accommodations, they will cause potential cost increases for employers. The results of the study show that the sheltered workshop policies in Japan, South Korea and Taiwan include characteristics of low wages and difficulties transferring to the open labour workplace, which shows that there is no obvious change after the implementation of the UN CRPD. The government has no intention in allowing employers to bear the increased costs due to the employment of disabled employees, which shows that the argument of the East Asian “Productive” Welfare Regime can influence the sheltered workshop policies in these three East Asian countries.

The author would like to thank all colleagues and assistants who contributed to this study. This work was supported by the research project of Ministry of Science and Technology, Taiwan (Project number: MOST 108-2410-H-031-065-MY2). This paper would not have been possible without these contributions.

A. Introduction

Taiwan, Japan, and South Korea all differ in language and historical developments, however, they are all highly industrialized, politically democratic, and are relatively good in social welfare. These three East Asian countries often learn from each other’s social welfare systems, which can generally be seen in the social and labour policies, which are related to the human rights protecting persons with disabilities (PWDs). However, since Japan actively learns from Western-European countries – such as Germany – Taiwan and South Korea often use them as a model in the implementation of many social welfare systems.

Social policies related to PWDs are no exception. The social security systems of these three countries are largely based on social insurance, which is obvious proof.

In addition, these three countries were also highly politically influenced by the United States after World War II. Their liberal welfare regime focuses on social assistance, personal responsibility, and low taxes, which has shaped the social policies in the three East Asian countries mentioned above through their political and economic influence. Lastly, similar to most East Asian countries, Japan, Taiwan and South Korea are also influenced by Confucianism. This suggests a family-centred society, high respect for elders, and a strong emphasis on education as well.

By combining the social insurance systems of Western Europe, the liberal capitalist economy of the United States, and Confucianism, these three countries have formed their own unique East Asian welfare regime with diversified characteristics. This also applies to sheltered workshops for the disabled as well. The UN CRPD, which has recently been implemented domestically, values universal human rights disability policies and requires the governments to establish institutions that can achieve them. Whether the UN CRPD has the potential to change the disability policies in East Asian countries, is a topic worth exploring. The main purpose of this article is to highlight the important characteristics and reasons behind the sheltered workshop policies for persons with disabilities in Japan, South Korea and Taiwan, and how they responded to the UN CRPD.

B. Sheltered workshop policies for the disabled in the “Productive” East Asian welfare regime amidst the wave of the UN CRPD

1. The “Productive” East Asian Welfare Regime

Newly industrial countries such as Taiwan, Japan, South Korea, Hong Kong and Singapore have high economic growth rates and all have high values in the United Nations Human Development Index (HDI). Many scholars believe that the welfare regimes in East Asian countries are unique and differ from Esping-Andersen’s classification of regimes based on Western countries.¹ He calls it the “East Asian Welfare Regime”.² This “East Asian Welfare Regime” could have contributed to the economic growth, relatively low social expenditures, slow welfare development and the emphasis on filial piety and the collectivity between families. In fact, the social welfare policies of East Asian countries are

¹ Esping-Andersen (1990).

² Jones (1993).

still developing, and their characteristics are also continuing to change over time.

There have been many theories and interpretations of the diversified regime characteristics. Studies on Confucianism and familyism from the cultural perspective,³ productive or developmental welfare regimes from an economic perspective,⁴ and even the political democracy or political institutions that were formed from a political perspective⁵. However, the discussions on the East Asian welfare regime have rarely focused on the disability employment policy. This policy often involves the employers' responsibilities and additional costs for their employees with disabilities in the workplaces. Therefore, it seems quite reasonable to review the disability employment policies in East Asian countries from the perspective of a productive welfare regime.

Western countries' social policies often have the characteristics of confronting against the market economy⁶. However, the social policies of East Asian countries often have the characteristics of supporting or assisting development of the market economy, which Gough (1999) said is "market-compatible". Similar to this argument, Wood and Gough (2006) also mentioned that the characteristics of a productive welfare regime in East Asian countries are mainly aimed at economic development. This means that social policies are therefore only subordinate to economic development. The relationship between the productive welfare regime and social policy in East Asia can be summarized in the following two points. First, governments would try to prevent industries from paying too much for social policies, which would hurt their profits and economic development. Second, if there are any social policies that are conducive to economic development, such as education and the health protection systems, which can provide good human resources for industries, then the governments develop them.

In addition, the developmental welfare regime is also used to describe the East Asian Welfare Regime⁷. This is very close to the productive welfare regime and refers to the social policy that is used by the state to promote economic development. Lee and Ku (2003) studied the characteristics of welfare policies in Japan, South Korea, and Taiwan, and found that Taiwan and South Korea have a „development/accumulation“ orientation structure, forming a developmental welfare regime different from those of Western countries. Japan's welfare regime is a combination of those characteristics and a developmental welfare regime.

³ Jones (1993); Croissant (2004).

⁴ Holliday (2000); Wood/Gough (2006).

⁵ Ramesh (2003).

⁶ Esping-Andersen (1985).

⁷ Lee/Ku (2003).

2. Sheltered workshop policies for the disabled between the UN CRPD and productive welfare regime

Many countries have sheltered workshops for the disabled. Taiwan, Japan, and South Korea are no exceptions. Sheltered workshops are regarded as closed workplaces, and often have characteristics such as low wages, isolation from the community and disabled employees with unqualified abilities. These three countries have implemented the UN CRPD, which was passed by the UN General Assembly in 2006. According to Article 27, which is most directly related to employment in the UN CRPD, the government is responsible for creating united workplaces that are accessible, barrier-free, provides reasonable accommodations and non-discriminatory workplaces⁸. In terms of accessible, barrier-free facilities and reasonable accommodations, sheltered workshops can undoubtedly do better than the open labour market, which is due to the fact that sheltered workshops are tailor-made workplaces for the PWDs. However, due to the low wages, and closed and separated workplaces, these workshops often violate the principles of the UN CRPD, especially anti-discrimination.

From the perspective of the UN CRPD, the best solution in solving the issue with sheltered workshops is to create job opportunities for people with disabilities in the open labour market and provide them with the support they need to work. In addition, the state should also implement an anti-discrimination legislation to avoid the discrimination that PWDs may encounter in the workplace. However, these adjustments to the workplace, such as a basic barrier-free environment and reasonable accommodations, have costs. The labour performed by disabled employees, should be paid for by the employers. However, on the other hand, the anti-discrimination law could limit the employer's capacity in terms of salary and other working conditions. Therefore, if the governments closed sheltered workshops and integrated PWDs into the open labour market, the employers would have to bear many costs.

Japan, South Korea and Taiwan have implemented the UN CRPD. Japan signed the UN CRPD in 2007, but ratified it in 2014, and submitted the first State Party's report in 2016. It takes a long time from the signing of the UN CRPD to its ratification. During these seven years, Japan implemented some important Acts for people with disabilities in preparation of the domestic ratification of the UN CRPD, especially the Act on the Elimination of Discrimination against PWDs (AEDP) in 2013. South Korea signed the UN CRPD in 2008 and it was ratified in the same year. The first initial report was submitted in 2014 and Concluding Observations were received in 2018. Second and third national reports have also been submitted.

⁸ Welti (2017).

	Japan	South Korea	Taiwan
Signed the CRPD	2007	2008	
Ratified the CRPD	2014	2008	2014
Submitted the first State Report	2016	2011	2016
The Concluding Observations from the first State Party's report		2014	2017
		Submitted the combined 2 nd and 3 rd report in 2018	Will submit the 2 nd report in 2020

Table 1: Development of the UN CRPD in Japan, South Korea and Taiwan; source organized by the author in 2020

Compared to Japan and South Korea, Taiwan's experience with the UN CRPD is very different. Taiwan is not a member of the United Nations and therefore cannot sign the UN CRPD or any international conventions form in the UN. In 2014, Taiwan implemented the UN CRPD enforcement law to respond to the disability rights organizations. The Taiwanese government even made its first State Party's report in 2016, and invited experts to Taiwan for a review and made Concluding Observations in 2017. The Taiwanese government will finish the second initial report of the UN CRPD this year.

According to the East Asian productive welfare regime, determining whether a social policy will burden employers and if it will be beneficial to economic development are important considerations for the government prior to implementation. Therefore, this article analyzes the sheltered workshop policies in Taiwan, Japan and South Korea after the implementation of the UN CRPD. It determined whether the government's plan for employers to provide a barrier-free environment, work support and non-discriminatory working conditions, follows that of the UN CRPD or if is continuing the path of a productive welfare regime.

C. Sheltered workshop policies in Japan, South Korea and Taiwan

The statistics of the population and employment rate of the disabled in Japan, South Korea and Taiwan would provide basic background information for understanding the sheltered workshop policies. There are two similarities in the

population and employment rate of the disabled among these three countries. The first similarity is the relatively low appearance ratio of PWDs, which is about 5-6 % in all three countries, compared to about 10 % in Germany. This similarity shows that in these three East Asian countries, obtaining disability status is relatively difficult. This may also be related to the fact that most social benefits for people with disabilities can only be received with a disability certificate⁹. The loose definition of a “disability” and its legal status, may cause an increased financial burden.

The second feature is the relatively low employment rate of the PWDs in these three East Asian countries. It is between 20-40 %, compared to over 60 % in Germany. The possible reason could be due to the relatively high non-labour force for people with disabilities in these three countries¹⁰. This is related to the educational effectiveness and occupational rehabilitation policies provided by these countries for the disabled, and the existence of sheltered workshops which is also often associated with this.

In Japan’s case, there are three types of sheltered workshops for the disabled. Two belong to the labour department and one belongs to the social care department. In the labour department, the workshops can be divided into type A and type B. Type A provides an hourly minimum wage for the PWDs. However, that does not mean that every disabled person can receive a monthly minimum wage. In fact, about 40 % of the disabled in type A successfully transition to the open labour market. In type B workshops, the work is relatively simple but the wage for PWDs is lower than that in type A. There is lots of criticism against type B workshops in Japan because they believe the salary and the type of work is very different compared to ordinary workplaces¹¹. Lastly, sheltered workshops for PWDs in the social care department, provide work opportunities such as rehabilitation or therapy.

There are also three types of sheltered workshops in South Korea. The first type is for the highly employable PWDs who are unable to enter competitive workplaces due to barrier-free factors and social restrictions. The employees in this type receive minimum wage. The second type offers occupational rehabilitation and training for PWDs with relatively low employability. The purpose of this type of workshop is to improve their employability, such as their work attitude and work skills. The third type is “Job Adjustment” training facilities, which are those facilities that provide job adaptation and training for people with severe impairments¹². Of the three types of sheltered workshops, only the disabled in the first workshop can receive the minimum wage. In fact, in the

⁹ Chou (2018b).

¹⁰ Chou (2018b).

¹¹ Chou (2018b).

¹² Jeong (2019).

2014 UN Concluding Observations, it specifically pointed out South Korea's problem of excluding persons with disabilities from the minimum wage and that it should be improved.

Compared to Japan and South Korea, Taiwan has only one type of sheltered workshop, which is employment. The disabled in these workshops have social insurance, but the wages they receive are lower than the minimum wage, according to law. Only a small number of the disabled can receive minimum wage. Most employees with disabilities stay in sheltered workshops for a long time because of the difficulties in transferring to the open labour market.¹³ In Taiwan, like Japan, there are sheltered workshops for PWDs in the social care department, which provide work opportunities such as rehabilitation or therapy. Because this type of sheltered workshop belongs to social care, compensation for the PWDs work is not salaried and it is lower than the salary of the employed sheltered workshop. The Concluding Observation of the IRC points out that the Taiwanese government should assist people with disabilities in their transition from segregated employment to the open labour market. It is also suggested that Taiwan gradually closes sheltered workshops in their current situation.

D. Comparison

There are some similar features in the sheltered workshop policies of these three East Asian countries. Here is a simple comparison between these similar features and Germany's sheltered workshops.

Common features of sheltered workshops policies in Japan, South Korea and Taiwan	Sheltered workshop policy in Germany
Most PWDs are paid less than minimum wage, even with the disability allowance, which is harder for independent living.	Most PWDs have minimum economic guarantees.
Most workshops are small and are in densely populated communities.	Most workshops are large and are in less populated communities.
It is still difficult to evaluate the impact of the UN CRPD on sheltered workshop policies.	It is still difficult to evaluate the impact of the UN CRPD on sheltered workshop policies.

Table 2: Comparison between East Asia and Germany; source organized by the author in 2020

¹³ Chou/Lai (2009).

The first similar feature is that most PWDs in the sheltered workshops of these three countries are often paid less than the minimum wage. Although Japan's type A sheltered workshops sometimes meet the minimum wage and South Korea has a type with a minimum wage design, those only make up a small percentage of wages in the sheltered workshops in these countries. Even with the social allowance for the disabled, most people with disabilities still have difficulty living on their own. This situation is not the same with the disabled in Germany's sheltered workshops, because of the economic minimum guarantees.

The second similar feature is that most of the sheltered workshops located in these three countries are in densely populated communities. This is based on the field observations of various scholars over many years. Compared to Germany, which has a relatively large geographical area, Taiwan, Japan, and South Korean territories are smaller and more densely populated. In addition, the sizes of the sheltered workshops in these three countries are much smaller than those in Germany. In Germany, there are a minimum 120 people with disabilities in every sheltered workshop. However, on the other hand, there are only about an average of 20 PWDs in each workshop in South Korea, about 14 in Taiwan, and about 20 in Japan. Therefore, it is easier to find locations in urban communities to set up workshops. Evidently, the situation on the isolated workshops is less criticized in the East Asian countries than in German communities.

The third similar feature is that it is still difficult to evaluate the impact of the UN CRPD on sheltered workshops for PWDs in these three countries. Although the South Korean government has been introducing some positive measures over the past few years, including promoting opportunities for PWDs in the open labour market, the UN CRPD's requirements are difficult to attain. There are requirements like non-discriminatory treatment in the workplace and PWDs receiving the same minimum wage as others, even in an employment-type workshop. The percentage of the disabled employees who actually leave the sheltered workshop and enter the open labour market is still considerably low in South Korea. In addition, the rule, which excludes employees with disabilities to receive the minimum wage, still has not been improved.

In Taiwan's case, there is no plan to close the workshops. The Taiwanese government is working hard to assist with the manufacturing orders of workshops and wants to increase the wage level for the disabled by increasing the profits. However, the effect of such efforts could actually be very limited due to the small number of the workshops in Taiwan. It means that they could receive more manufacturing orders than their production capacities, which can result in giving the orders to other privately owned factories to fulfil the manufacturing contracts. This could then reduce the significance of the existing sheltered

workshops and work rehabilitation for PWDs and they will disappear completely.

Although these three East Asian countries have taken some measures after implementing the UN CRPD, the overall sheltered workplace policy does not seem to have changed much. This is especially true for the situation with low wages and that disabled employees do not have access to the open labour market. However, the obvious effects of these measures on promoting opportunities for PWDs in the open labour market and the guarantee of suitable working conditions, still need to be observed. This means that a change in the sheltered workshop policies needs to be considered as well.

Germany also seems to face a very similar situation. The Concluding Observations to Germany's first UN CRPD State Report clearly indicated that Germany should close its sheltered workshops. Although Germany implemented the "Rehabilitation Law" in 2017, which makes newly established sheltered workshops smaller, closer to the communities, and more likely to connect with the open labour market, the previously established sheltered workshops and their underlying issues, seem to have no obvious solution for the time being¹⁴.

E. Conclusion

The main approach to improve sheltered workshop policies is to not only close the workshops, but to create more job opportunities in the open labour market. According to the UN CRPD, these methods include the formulation and enforcement of anti-discrimination laws, the creation of barrier-free workplaces and reasonable accommodations. If these methods, which may increase costs for employers in hiring PWDs, are not actually implemented, and the government has no intention in solving these cost problems, closing sheltered workshops may only lead to worse conditions. For example, there may be more PWDs transferred into social care.

The sheltered workshop policies for the disabled in the three East Asian countries before and after the implementation of the UN CRPD, have not really differed for the most part. The main reason seems to be that the cost of creating job opportunities in the open labour market has not yet been resolved. Due to this, the argument of the East Asian productive welfare regime could have contributed to the ineffectiveness of the sheltered workshop policy improvements in Japan, South Korea and Taiwan.

Through the previous analysis, we can see the similarities and differences of the sheltered workshop policies between the three East Asian countries and Germany. The similarities are presented in the low wages for the disabled and the

¹⁴ Chou (2018a).

difficulty of transitioning from workshops to the open labour market. Due to these similarities, these four countries face the same requirements from the Concluding Observations of the UN CRPD Review Committee – to close the workshops. The differences between the sheltered workshop policies in the four countries are seen particularly in the distance of the workshops' locations to the communities and the size of the workshops. These may also be the factors that determine whether the disabled in the sheltered workshops have contacts within the communities.

Finally, there is an important point that should be taken seriously. According to the recent research experiences of the author, directly changing sheltered workshops from employment promotion policies to social care policies may always be a possible option for these three East Asian countries. If any country really ends the employment-type sheltered workshops, in order to escape from the UN CRPD's criticism – low wages and discrimination towards the disabled – we should pay special attention to the possible impact of such a policy change. Employment discrimination against PWDs would not have disappeared with such a policy change, but only be hidden in the social care system.

In conclusion, if persons with disabilities retreat from the employment area, the impact will definitely negatively affect the ability to work hard and create an employment environment with accessibility, no discrimination and reasonable accommodations.

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The UN Convention on the Rights of Persons with disabilities in the EU legal framework and the development of EU disability policies after 2020

What is coming is better than what is gone?

A. Introduction

The year 2020 not only marks the tenth anniversary of the ratification of the UN Convention on the Rights of Persons with Disabilities (UN CRPD or simply “the UN Convention”)¹ by the European Union (EU), it is also the concluding year of the European Disability Strategy 2010-2020 (EDS),² which should be soon replaced by a new Strategy post-2020. With this in mind, this window of time presents a clear opportunity in which to take a stock of what has been done by the EU thus far and to look to the future, at what needs to be completed, improved, or changed. In line with this ambitious aspiration, and in an attempt to further the academic debate on the EU action to protect and promote the rights of persons with disabilities, this contribution investigates the role played by the UN CRPD in the shaping of current EU disability policies and investigates whether the UN Convention will continue to be a major driver in this area.³ The term “disability policies” is here used to cover a broad and cross-cutting range of hard and soft law measures to ensure equality for people with disabilities and respect for their rights.⁴

After these introductory remarks, this contribution is divided in four main sections, followed by some Concluding Observations. Section B. begins by providing an overview of the development of disability policies in the EU legal framework and recalls, on foot of the copious scholarship on the topic,⁵ their drivers and core milestones. It then reconstructs, in a critical fashion, their main trajectory, highlighting that disability has changed “from an obscure area of policy-making within the [EU] to an area that is now placed firmly on the EU policy-

* This contribution elaborates and widens the speech given at the conference “Die Umsetzung der UN-Behindertenrechtskonvention in Österreich und Deutschland” held in Innsbruck on 13th February 2020. This contribution was finalised in June 2020.

¹ UN Convention on the Rights of Persons with Disabilities, 13 December 2006, in force 03 May 2008, UN Doc A/RES/61/106, Annex I.

² Commission, “European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe” COM (2010) 636 final.

³ Ferri/Broderick (2020); see also Waddington (2018b) 339-361.

⁴ On the use of the term policy/policies see Traustadóttir (2008) 84.

⁵ Among many others see Waddington (2005); Quinn/Flynn (2012) 23-48; Sturm/Waldschmidt/Karačić/Dins (2017) 159-176; Anišić (2010) 231.

making agenda”.⁶ Section C. focuses on the status of UN CRPD in the EU legal order, and discusses its role as normative standard in the case law of the Court of Justice of the EU (CJEU), presenting a reflection on which advancement we might expect in future decisions. Section D. focuses on the UN CRPD as a benchmark for EU policies and analyses whether progresses have been achieved vis-à-vis the obligation laid out in the UN Convention. It also identifies the areas in which the EU has been most successful thus far, and what challenges remain. It then reflects on the key issues that the forthcoming new European strategy will have to consider. It takes into account that the forthcoming Conference on the Future of Europe should discuss among the core EU priorities that of “social fairness and equality”.⁷ Section D. offers some brief concluding remarks tying these different strands together.

B. Milestones, Drivers and Trajectories of EU Disability Policies

1. The Drivers

Until the late nineties, the former European Community (EC) had addressed disability issues through soft law documents and by means of programmes aimed at supporting Member States’ actions, in particular with regard to vocational training and employment.⁸ In 1999, with the entry into force of the Treaty of Amsterdam, the then EC acquired a clear competence to combat discrimination on the ground *inter alia* of disability, by virtue of Article 13 of the Treaty on the European Community – EC (now Article 19 of the Treaty on the Functioning of the European Union – TFEU). Notably, the Treaty of Amsterdam also included a declaration stating that the European institutions must take account of the needs of persons with disabilities in drawing up harmonization measures under the former Article 95 EC (now Article 114 TFEU), which was meant to foster the use of internal market legislation to protect and promote the rights of persons with disabilities.⁹ This constitutional innovation represented an important driver in the advancement of pan-EU disability policies, and prompted the adoption of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive).¹⁰

⁶ O’Mahony/Quinlivan (2020).

⁷ See at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_89 (30/03/2021).

⁸ Waddington (2005).

⁹ See *inter alia* Ferri/Broderick (2019) chapter 10.

¹⁰ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

In 2000, the proclamation of the Charter shed a new light on the rights of persons with disabilities, by virtue not only of Article 21 CFR, which prohibits discrimination on several grounds including disability, but also of Article 26 CFR. The latter provision affirms that “the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”. In spite of the slightly outdated language, which makes reference to integration rather than inclusion,¹¹ Article 26 of the Charter can be considered reflective of the “social-contextual model of disability”,¹² insofar as it focuses on participation in society and the need to ensure the independence of persons with disabilities within their communities. Article 26 CFR has been qualified by the CJEU¹³, in line with the Explanations to the Charter and with what scholars had contended,¹⁴ as a principle rather than a right. This means that Article 26 is intended to guide the EU institutions when they legislate, but that it does not oblige them to act and is not directly enforceable.¹⁵

As noted elsewhere,¹⁶ at the time of its proclamation, the Charter per se, did not stimulate the development of EU disability policies. Its initial lack of binding force was certainly one of the reasons for which the Charter cannot be identified as a driver of EU-level action. However, even when the Charter acquired the same legal status as the Treaties, in 2009, following the entry into force of the Treaty of Lisbon, it did not display a significant influence on EU-level action in relation to disability, and played a minor role in CJEU case law on disability.¹⁷ On the whole, the fact that the Charter was never intended to expand the scope of EU competences and the reach of EU law¹⁸ can also be considered an important factor when looking at the minor role that the Charter has played in the development of disability policies. The Charter has, nonetheless, increased the visibility of disability rights within the EU legal framework,

¹¹ A clear distinction between the terms is drawn (with reference to the educational context, but) by the UN Committee on the Rights of Persons with Disabilities, General Comment No 4 on the right to education 26 August 2016, Committee on the Rights of Persons with Disabilities (2016) para 11. Notably the European Pillar on Social Rights (Communication from the European Commission, “Establishing a European Pillar of Social Rights” COM (2017) 250 final, and European Commission, “Commission Recommendation of 26 April 2017 on the European Pillar of Social Rights”, C(2017) 2600 final) has used a language that is more consistent with that of the UN Convention by referring to “Inclusion of people with disabilities”.

¹² The “social-contextual model” has been considered the most refined elaboration of the “pure” social model (Broderick (2015) 77).

¹³ CJEU, Case C-356/12 Wolfgang Glatzel v Freistaat Bayern EU:C:2014:350, para 78.

¹⁴ O’Brien (2014) 709, 713.

¹⁵ Lock (2019) 1201.

¹⁶ Ferri/Broderick (2020).

¹⁷ Ferri (2020a).

¹⁸ Article 51 (2) CFR.

and placed disability firmly within the pantheon of fundamental rights. In that regard, it is certainly an important milestone.

The Treaty of Lisbon, which entered into force in December 2009, did not inject many references to disability into the EU's constitutional framework. Article 19 TFEU remains the main legal basis for the adoption of EU non-discrimination and equality legislation, and the core provision explicitly related to the rights of persons with disabilities. However, this Treaty has indeed placed a major emphasis on the protection of human rights, and included among its own objectives that of combating social exclusion and discrimination, and promoting social justice.¹⁹ It has introduced two cross-cutting clauses that allow the EU to mainstream social considerations (broadly conceived) in its internal market legislation. In particular, Article 9 TFEU states that “[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”. In addition, Article 10 TFEU requires that, “in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on [inter alia] disability [...]”, allowing the EU to integrate the equality considerations into all EU actions. However, the Treaty of Lisbon has neither altered the limited scope of EU social policy *per se* nor the Union's competence in this domain.

Almost at the same time as the entry into force of the Treaty of Lisbon, the EU (alongside its Member States) ratified the UN CRPD by virtue of the Council Decision 2010/48/EC of 26 November 2009.²⁰ The UN CRPD can be considered the major driver in the development of EU disability policies in the last ten years.²¹ In fact, almost simultaneously to the ratification of the UN Convention, the European Disability Strategy 2010-2020 (EDS or “Strategy”)²² was adopted with the express aim to implement the UN Convention. Moreover, in order to ensure compliance with the wide-ranging obligations provided for in the UN CRPD, disability has become more visible in the EU legal framework and in EU legislation. Furthermore, as it will be discussed in section C., the UN CRPD has become a normative standard within CJEU case law. In that regard, the ratification of the UN CRPD has not only prompted a quantitative shift, in the sense that disability has in fact become more visible in case law of the CJEU, but has provoked a substantive change in the Luxembourg Court's approach

¹⁹ See Articles 2 and 3 TEU.

²⁰ Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.

²¹ In this Ferri/Broderick (2020). See also Lawson (2017) 61-66.

²² Commission, “European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe” COM (2010) 636 final.

to disability, which is now informed (albeit more formally than substantially) by the social-contextual understanding purported by the UN Convention, ie by the view that disability is an interactive process between people with impairments and societal barriers.

2. The Main Milestones

The earliest EU actions on disability date back to the 1970s, and, as noted above, were primarily aimed at supporting EU Member States in enacting social integration and rehabilitation measures for persons with disabilities. O'Mahony and Quinlivan suggest that a recommendation adopted in 1986 in the area of employment²³ can be considered the first wide-ranging policy initiative on disability.²⁴ However, the very first policy plan was released in 1996 with the adoption of the European Community Disability Strategy 1996,²⁵ which focused on realising equality of opportunities, even though the EU's role was confined to supporting co-operation among its Member States, mostly through the identification and exchange of good practices.

The Employment Equality Directive represents the first legislative intervention aimed to address disability discrimination, and can be considered the very first milestone in the development of the EU action on disability as it “opened the door” to further legislative and policy interventions. It bans direct and indirect discrimination, as well as, instruction to discriminate²⁶ and harassment on various grounds (sexual orientation, religious belief, age and disability), but only in the area of employment. The CJEU has interpreted the prohibition of discrimination purported by the Directive broadly, and in 2008, in the case of *Coleman*,²⁷ it expressly interpreted it to encompass the ban of discrimination by association with someone who is a person with a disability. Notably, for the purpose of this analysis, the Employment Equality Directive obliges Member States to ensure that reasonable accommodation is provided to workers with disabilities (unless this would result in a disproportionate burden being imposed

²³ Council Recommendation (EEC) 86/379 on the employment of disabled people in the Community [1986] OJ L225/43.

²⁴ O'Mahony/Quinlivan (2020).

²⁵ Commission, “Communication of the Commission on Equality of Opportunity for People with Disabilities: A New European Community Disability Strategy 30 July 1996” COM (96) 406 final.

²⁶ The Fundamental Rights Agency of the EU has highlighted that the prohibition of the instruction to discriminate is intended to cover situations in which there is an expressed preference or an encouragement to treat individuals less favourably due to one of the protected European Union Agency for Fundamental Rights (2011) 40.

²⁷ CJEU, Case C 303/06, *Coleman v Attridge Law and Steve Law*, ECLI:EU:C:2008:415. On this decision see Waddington (2009) 665.

on the employer). Guidance on the meaning of “reasonable accommodation” is given in Recital 20 of the Preamble, which refers to “effective and practical measures to adapt the workplace to the disability”. Specific examples are provided in that recital, such as, “adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources”, suggesting that reasonable accommodation can take the form of either technical, material or organisational measures. Interestingly, Recital 17 of the Preamble provides that the Directive does not require an employer to recruit, promote or maintain in employment or training an individual “who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training”, but this is “without prejudice to the obligation to provide reasonable accommodation for people with disabilities”. The Preamble to the Employment Equality Directive also gives some guidance on what might constitute a disproportionate burden for the employer. In particular, recital 21 of the Preamble requires that financial and other costs, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance must be factored in when evaluating whether an accommodation entails a disproportionate burden. Moreover, it is worth recalling that the Directive, by virtue of its Article 7, allows (but not obliges) Member States to adopt positive action to enhance employment opportunities for people with disabilities onto the labour market.²⁸ Following the approval of the Employment Equality Directive, disability issues have become increasingly mainstreamed across various strands of EU legislation, and in soft law documents.²⁹ A major policy plan, was released in 2003, the EU Disability Action Plan 2003-2010,³⁰ which was explicitly aimed at enhancing equal opportunities for people with disabilities and fostering their full inclusion into society. However, another major milestone occurred in 2010, prompted by the ratification of the UN CRPD, which, as noted above, represents the most significant diver of EU disability policies to date. This milestone is the adoption of the EDS, which represents a wide-ranging policy plan geared towards the full implementation of the UN Convention at the EU level. On the basis of the roadmap traced by the EDS, a number of legislative pieces have

²⁸ On the Directive see *inter alia* Hosking (2006) 667.

On the implementation of the Directive in the Member States with regard to disability provisions see Hießl/Boot (2013) 119-134.

²⁹ For an overview of disability in EU legislation see Arsenjeva (2017).

³⁰ Commission, Equal Opportunities for People with Disabilities: A European Action Plan, COM (2003) 650 final.

been adopted. As it will be discussed further in section D., those include the Web Accessibility Directive³¹ and the European Accessibility Act.³² One of the latest developments, which is relevant within the field of EU disability policies, is the proclamation of the European Pillar of Social Rights (EPSR or “Pillar”) in 2017.³³ The Pillar – a soft law document laying down twenty principles “essential for fair and well-functioning labour markets and welfare systems in 21st century Europe” –³⁴ is not a disability-specific instrument but its three overarching themes – equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion – are very relevant to people with disabilities.³⁵ Moreover, the Pillar includes a few explicit references to disability. In particular, chapter I of the Pillar, on equal opportunities and access to the labour market, reaffirms the right to equal treatment and non-discrimination, *inter alia*, on the ground of disability in employment and access to services (Principle 3). Chapter III, on social protection and inclusion, encompasses a provision (Principle 17) on the inclusion of people with disabilities, stating that “[p]eople with disabilities have the right to income support that ensures living in dignity, services that enable them to participate in the labour market and in society, and a work environment adapted to their needs”. This Principle tallies with the more general Principle 10, which states the right of all workers to a high level of protection of their health and safety at work, and provides that workers have a “right to a working environment adapted to their professional needs and which enables them to prolong their participation in the labour market”. The Pillar also includes general formulations, which seems particularly important in a disability context. For example, Principle 5, which provides for the right to secure and adaptable employment, could be considered as encompassing reasonable accommodations. Principle 6, which provides that workers have the right to fair wages that provide for a decent standard of living, is also relevant with regard to people with disabilities, especially those working in sheltered employment who often receive a contribution for their work below minimum standards. Finally, Principle 9 on the work-life balance is relevant with regard to caregivers of children with disabilities. Due to its non-binding legal nature, the effects of the Pillar are quite uncertain, and it is not clear whether it will be the driver for the development of future disability policies, but as noted by Vanhegen and Hendrickx “can provide

³¹ Directive (EU) 2016/2102 of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies [2016] OJ L327/1.

³² Directive (EU) 2019/882 on the accessibility requirements for products and services [2019] OJ L151/70.

³³ European Pillar of Social Rights (note 11). On the Pillar see Hendrickx (2018) 3-6.

³⁴ *Ibid.*

³⁵ *Ibid.*

an impetus to further integrate a disability perspective in future hard and soft law approaches in the field of EU social and employment policy”.³⁶

The next milestone, yet to come, will certainly be the new disability strategy post-2020, which will be key to enhance the protection and promotion of the rights provided for in the UN Convention, and to address the post-pandemic context.

3. The Trajectory: The Emergence of Disability Rights within the EU Legal Framework

Up to the early 2000, Traustadóttir identifies “two strong threads” in EU disability policies: first, a focus on employment and related issues, but, secondly “a movement toward a more general rights-based approach” to disability.³⁷ The latter “thread” has become the main trajectory in the last ten years, and is destined to continue, given the importance that the UN CRPD has acquired at the EU level. This trajectory towards a rights-based approach to disability has been largely influenced by disabled people organizations (DPOs), which have been key in the development of EU disability policies.³⁸ As noted by Sturm et al DPOs’ influence of EU policies has been fostered by the ratification of the UN CRPD, as European policy makers have become more aware of disability rights.³⁹ The European Disability Forum (EDF), an “independent non-governmental organisation (NGO) that brings together representative organisations of persons with disabilities from across Europe”,⁴⁰ has interacted effectively with all EU institutions, in particular the Commission and the European Parliament, in order to promote the implementation of the UN CRPD at the EU level, supporting a disability rights agenda. Notably, EDF is also part of the EU framework that monitors the implementation of the Convention.⁴¹ In that position, it seems it is best placed to influence the way in which disability rights are protected and promoted at the EU level.

³⁶ Vanhegen/Hendrickx (2020).

³⁷ Traustadóttir (2008) 85. On the rights based approach see also Lawson (2005) 269-287.

³⁸ Ibid at p 86.

³⁹ Sturm et al (2017).

⁴⁰ See at [http://www.edf-feph.org/about-\(15/06/2020\)](http://www.edf-feph.org/about-(15/06/2020)).

⁴¹ The EU framework was launched in 2013, based on a proposal by the Commission supported by the Council of the EU. In 2017 the Framework was revised by the Council (with the Commission ceasing to be part of the framework). It is currently composed of the European Ombudsman, the EU Agency for Fundamental Rights, the European Parliament and the European Disability Forum. On the framework, see Hoefmans (2020).

C. The UN CRPD as a Normative Standard in CJEU Case Law: Status quo and future perspectives

Having recalled, in the previous section, the development of EU disability policies, this section focuses on the influence of the UN CRPD on CJEU case law. It does not engage in a detailed discussion of the content of CJEU's decisions, which have been extensively commented upon by scholars, nor does it delve into an analysis of the meaning of disability for the purpose of EU non-discrimination law. Rather, it carves out the role of the UN CRPD as a normative standard in the Court's decisions, and reflects on the role that the Convention might play in future decisions.

Further to its ratification, the UN CRPD has become an integral part of the EU legal framework, and, in hierarchical terms, exists below the Treaties but above secondary EU law.⁴² The latter point implies that provisions of regulations and directives, as far as possible, have to be interpreted in a manner that is consistent with the UN Convention. However, even though the UN Convention is superior to secondary legislation within the hierarchy of EU law sources, this does not automatically mean that directives or regulations can be declared invalid if they breach a provision of the UN CRPD.⁴³ It has been consistently highlighted that the validity of EU secondary law can only be assessed vis-à-vis an international provision if the latter is capable of displaying direct effect.⁴⁴ In general, to determine whether a provision displays direct effect, the Court has examined whether the Parties to the agreement have established the effect of its provisions in their internal legal order.⁴⁵ If not, the CJEU has considered whether an agreement includes provisions that contains a clear and sufficiently precise obligations, which are not subject, in their implementation or effect, to the adoption of any subsequent measure. In *Z v A Government Department*, the Court found that “without there being any need to examine the nature and broad logic of the UN Convention, it must be held that the provisions of the Convention are not, as regards their content, provisions that are unconditional

⁴² Joined cases C-335/11 and C-337/11, *HK Danmark*, acting on behalf of *Jette Ring v Dansk almennyttigt Boligselskab (C-335/11)* and *HK Danmark*, acting on behalf of *Lone Skouboe Werge v Dansk Arbejdsgiverforening*, acting on behalf of *Pro Display A/S*, in liquidation (C-337/11), EU:C:2013:222, para 32.

⁴³ *Waddington* (2018a) 131-152.

⁴⁴ *Inter alia* Joined Cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v Council of the European Union and Commission of the European Communities* EU:C:2008:476, para 108.

⁴⁵ *Ibid.*

and sufficiently precise [...], and that they therefore do not have direct effect in European Union law”⁴⁶. This finding was reiterated by the Court in *Glatzel*.⁴⁷ Thus far, the CJEU has consistently attempted to interpret secondary law, in particular (albeit not exclusively) the Employment Equality Directive, in line and in compliance with the Convention. The first case in which the Court interpreted the Employment Equality Directive in light of the UN CRPD was *HK Danmark*,⁴⁸ but adopted a similar interpretive approach in *Z v A Government Department*,⁴⁹ in *Kaltoft*,⁵⁰ in *Glatzel* and in all subsequent cases related to disability discrimination.⁵¹ In all these decisions, the most important issue on which the UN CRPD has served as a normative standard is the definition of “disability”. Since *HK Danmark* the Court has moved away from the medical model of disability, supported in *Chacon Navas*,⁵² to embrace, albeit a bit reluctantly,⁵³ the social contextual model of disability. In the latter case, the Court held that “if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of “disability” within the meaning of Directive 2000/78”⁵⁴. The same definition is reiterated in subsequent case law as exemplified by *Nobel Plásticos Ibérica SA*,⁵⁵ in which the CJEU stated that “the state of health of a worker categorised as being particularly susceptible to occupational risks, within the meaning of national law, which prevents that worker from carrying out certain jobs on the ground that such jobs would entail a risk to his or her own health or to other persons, only falls within the concept of ‘disability:’, within the meaning of that directive, where that state of health leads to a limitation of capacity arising as a result of, inter alia, long-term physical, mental or psychological impairments, which, in interaction with various barriers, may hinder the

⁴⁶ Case C-363/12, *Z v A Government Department and The Board of management of a community school* EU:C:2014:159, para 90.

⁴⁷ *Glatzel*, para 69.

⁴⁸ *Ibid.*

⁴⁹ *Z v A Government Department*.

⁵⁰ Case C-354/13 *FOA acting on behalf of Karsten Kaltoft v Municipality of Billund* EU:C:2014:2463, Paras 35-36.

⁵¹ See, for example, Case C-406/15, *Milkova*, EU:C:2017:198; Case C-395/15 *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal*, EU:C:2016:917; Case C-270/16, *Carlos Enrique Ruiz Conejero v Ferroservicios Auxiliares SA and Ministerio Fiscal*, EU:C:2017:788.

⁵² Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades* EU:C:2006:456.

⁵³ N. Betsh (2013) 135.

⁵⁴ *HK Danmark*, para 41.

⁵⁵ Case C-397/18 *DW v Nobel Plásticos Ibérica SA* EU:C:2019:703.

full and effective participation of the person concerned in their professional life on an equal basis with other workers”. Among the CJEU decisions, *Kaltoft* deserves to be mentioned in that the CJEU recognised that obesity can fall within the scope of disability.

The “paradigm shift” that occurred following *HK Danmark* is, however, considered to be more formal than substantial. *Waddington and Broderick* suggest that by necessitating that an individual experiences a limitation related to their impairment, the Court “seems to exclude from the definition of disability individuals who are disabled by socially-created barriers, such as false assumptions and prejudices about an individual’s ability, and possibly even barriers in the physical environment”.⁵⁶ The difficulty to fully adhere to the UN CRPD was particularly visible in *Daouidi*.⁵⁷ In this case, the CJEU focused on the meaning of meaning of a “long-term” limitation,⁵⁸ and stated that the assessment of whether a limitation is long-term is factual in nature and, in practice, entails a medical diagnosis.⁵⁹ It is evident that the Court is attempting to use the UN Convention as a main normative standard to offer a univocal interpretation of disability within EU law, but also to clarify the contours of the prohibition of discrimination on the ground of disability. However, the Luxembourg judges still need to better grasp the role of social barriers in creating a disability, and need to better carve out the content of equality of opportunities for disabled people in an inclusive society.

Since, the role of the UN CRPD as normative standard is destined to grow in the future, there is room for the Court to address these issues further. An important opportunity in this regard could be offered by a recent preliminary ruling raised by a Bulgarian administrative court in case C-824/19.⁶⁰ This national court has asked the CJEU to deliberate on whether, in light of the UN CRPD, it is permissible for a person without the ability to see to be able to work as a court assessor and participate in criminal proceedings, or whether “the specific disability of a permanently blind person a characteristic which constitutes a genuine and determining requirement of the activity of a court assessor, the existence of which justifies a difference of treatment and does not constitute discrimination based on the characteristic of ‘disability’”.⁶¹ Along these lines, another question raised by a Lithuanian tribunal,⁶² could prompt the CJEU to reflect on the meaning of disability in light of the UN Convention (albeit in this

⁵⁶ See *Waddington/Broderick* (2018) 58.

⁵⁷ Case C395/15 *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal (Daouidi v Bootes Plus SL)* EU:C:2016:917. For a full account of the case see *Ferri* (2019) 69.

⁵⁸ *Daouidi v Bootes Plus SL*, Paras 48-53.

⁵⁹ *Ibid* paras 55-59.

⁶⁰ Request for preliminary ruling Case C-824/19 *Komisija za zaščita ot diskriminatsia*.

⁶¹ *Ibid*.

⁶² Request for preliminary ruling Case C-795/19 *Tartu Vangla*.

reference the UN CRPD is not cited as normative standard). In particular the Lithuanian court asks the Luxembourg judges whether the Employment Equality Directive must be interpreted as precluding provisions of national law which provide that “impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer and that the use of corrective aids to assess compliance with the requirements is not permitted”. In answering this question, the Court will inevitably have to consider the meaning of disability and what is the role that stigma and prejudice play in this kind of provisions.⁶³

D. The UN CRPD as Benchmark for EU Disability Policies

In section B., the UN CRPD was identified as a major driver of EU disability policies, insofar as it has prompted the adoption of the most comprehensive disability policy plan to date (the EDS), and the mainstreaming of disability across the whole spectrum of EU legislation. The UN CRPD has also informed the actual content of EU disability policies, and has become a benchmark for those. This means that their efficacy and appropriateness is assessed vis-à-vis the obligation laid out in the Convention.

1. The Influence of the UN CRPD on the European Disability Strategy

The EDS was, as recalled above, adopted within the same context as the ratification of the UN CRPD and was intended to support its implementation. This Strategy identifies eight main areas for the EU action (accessibility, participation, equality, employment, education and training, social protection, health, and external action).⁶⁴ For each area, key EU actions, including the enactment

⁶³ Another important case that might have opened up further discussion on the role of the UNCRPD as normative standard was the request for a preliminary ruling from the Tribunal d'Instance de Sens in Case C-562/18. This request focused on whether Article 21 CFR and Article 39(2) CFR in conjunction with the UNCRPD allow the right to vote for the European Parliament to be withdrawn because a person has been placed under a guardianship measure due to his or her mental disability (Request for a preliminary ruling from the Tribunal d'Instance de Sens (France) lodged on 30 August 2018 — Case C-562/18). However this request was subsequently retired by national court (see cancellation order of the president of the CJEU EU:C:2019:506).

⁶⁴ Commission, “European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe” COM (2010) 636 final. For a full analysis Hosking (2013) 73-98. For an assessment of the EDS and account of the reaction to it see Anglmayer (2017).

of new legislation or the use of policy instruments, have been identified.⁶⁵ As noted in the EDS itself, these areas “were selected on the basis of their potential to contribute to the overall objectives of the Strategy and of the UN Convention”.

The first three areas mirror three general principles of the UN CRPD (outlined in Article 3 UN CRPD and intended to guide States Parties in implementing the Convention). In particular, it is worth mentioning that equality and non-discrimination have been described as “leitmotif” of the UN CRPD,⁶⁶ as they cut across all civil and political rights, and the Convention as whole is underpinned by the model of “inclusive equality”, in that it aims to address socioeconomic disadvantages, to combat stigma, stereotyping, and recognise intersectionality, to reaffirm the role of people with disabilities as members of the society and to make space for difference as a matter of human dignity.⁶⁷ The principle of participation and inclusion of people with disabilities in society tallies with this understanding of equality and is also a core feature of the UN Convention. The UN CRPD Committee has stated that full and effective participation requires “engaging with all persons, including persons with disabilities, to provide for a sense of belonging to and being part of society” and, furthermore, that it represents a “transformative tool for social change, and promote agency and empowerment of individuals”.⁶⁸ Ensuring participation of persons with disabilities is particularly important in fostering awareness-raising and promoting respect for their rights and dignity.⁶⁹ Accessibility is also a general principle of the UN CRPD, firmly embedded within the whole text of the Convention. Article 9 UN CRPD, which is the core provision, requires States Parties to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.

The other areas identified in the EDS – ie employment, education and training, social protection, health, and external action – all correspond to specific provisions of the UN CRPD. With regard to employment, it is notable that the Strategy emphasises the role active labour market policies and accessibility of workplaces, in line with Article 27 UN CRPD. With regard to education, which is an area in which the EU has only supporting competence, the EU aims to “provide

⁶⁵ The EDS was complemented by a “list of actions” which constituted the operational implementation plan (SEC(2010) 1324).

⁶⁶ Arnardóttir (2009) 41.

⁶⁷ Committee on the Rights of Persons with Disabilities (2018a) para 11.

⁶⁸ Committee on the Rights of Persons with Disabilities (2018b) para 27 and para 33.

⁶⁹ *Ibid* para 76.

timely support for inclusive education and personalised learning”,⁷⁰ which are at the core of Article 24 UN CRPD. In the area of social protection, which is covered in the Convention under Article 28, the Strategy aims to promote decent living conditions and fight poverty, by supporting national measures “to ensure the quality and sustainability of social protection systems for people with disabilities, notably through policy exchange and mutual learning”.⁷¹ Health is another area in which the EU merely possesses a supporting competence, but the Strategy identifies a number of issues on which the European action can complement national policies, and namely “developments for equal access to healthcare, including quality health and rehabilitation”. The emphasis on rehabilitation is in line not only with Article 25 UN CRPD (on the right to health), but also with Article 26 UN CRPD (which focuses on rehabilitation). The area of external action tallies with what provided for in Article 32 UN CRPD, which recognises “the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives” of the Convention, and obliges Parties to “undertake appropriate and effective measures” in order to mainstream disability issues in international cooperation. Notably the EDS also identifies general instruments to support the EU (and Member States) actions, which area also evidently inspired by the UN CRPD. Notably, the recognition of awareness raising as an essential tool to “foster greater knowledge among people with disabilities of their rights and how to exercise them” reflects the obligations included in Article 8 UN CRPD. In a similar vein, the highlighted importance of data collection is in line with what prescribed by Article 31 UN CRPD, which obliges Parties to “undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect” to the UN CRPD. Finally, the EDS refers to the implementation and monitoring system required by Article 33 UN CRPD.⁷² In that regard, it is worth recalling that Article 33(1) requires governmental focal points to be designated and provides that governmental coordination mechanisms could be established where necessary to ensure consistency in the implementation of the Convention across the various levels of public administration. Furthermore, Article 33(2) requires Parties to the Convention to establish a framework (including independent bodies) to monitor the implementation of the UN CRPD.

⁷⁰ Commission, “European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe” COM (2010) 636 final.

⁷¹ Ibid.

⁷² See Hoefmans (2012) 35-58.

2. Lights and Shadows in current EU Disability Policies

The comprehensive scope of the EDS and its ambition of “transposing” the UN CRPD into the EU legal framework have not led to steady advancements in the protection and promotion of disability rights. The mid-term progress of the EDS was somewhat less impressive than one would have hoped. In 2015, in its Concluding Observation on the EU Initial Report on the implementation of the UN Convention, the UN CRPD Committee praised the EU only in relation to the area of external action, while it had identified a number of critical issues in all other fields singled out by the Strategy.⁷³ The Commission’s first progress report on the EDS, which was released in February 2017, while suggested that significant improvement had been achieved across all eight thematic priorities, reported also that people with disabilities surveyed during the study found their situation was still challenging, and the majority of people expressed dissatisfaction with the achievements of first five years of the EDS.⁷⁴ These data tallied with findings from a 2015 report of Inclusion Europe which highlighted the extreme poverty, discrimination and social exclusion faced in particular by persons with intellectual disabilities.⁷⁵ Kopycińska, among others, reported that the number of people with disabilities in the labour market had remained significantly and worryingly low.⁷⁶

Five years later the release of UN CRPD Committee’s Concluding Observations, an assessment of the outcomes of the Strategy is certainly bittersweet. A number of initiatives included in the EDS plan have been in fact adopted thus far, but, in many respects, the EU is still lagging behind. As already noted by the UN CRPD Committee, an area in which the EU has certainly made further progress, which might be positively assessed vis-à-vis the Convention is that of external action, with disability issues being successfully mainstreamed in development cooperation.⁷⁷ Another area in which the EU has been seemingly quite successful (at least in adopting legislation) is that of accessibility. The European

⁷³ Committee on the Rights of Persons with Disabilities (2015).

⁷⁴ Commission Staff Working Document – Progress Report on the implementation of the European Disability Strategy (2010 -2020) SWD(2017) 29 final.

⁷⁵ See https://inclusion-europe.eu/wp-content/uploads/2015/03/SocInc_EUPovertyReport.pdf (30/03/2021).

⁷⁶ Kopycińska (2015) 9.

⁷⁷ Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission, “The New European Consensus on Development: Our World, Our Dignity, Our Future” [2017] OJ C210/1.

Accessibility Act⁷⁸ and a Directive on Web Accessibility⁷⁹ requires a set of goods and services as well as public websites to be accessible. However, both those instruments are very geared towards the realization of the internal market and fall somewhat short of the provisions laid down in the UN CRPD. Namely, their material scope (even combined) is still too narrow to fulfil the wide-ranging obligations of Article 9 UN CRPD. Accessibility obligations have also been included in the Public Procurement Directives,⁸⁰ and, in substance, require public authorities to embed accessibility into the technical specifications of tenders and award criteria. While this is an important step, it will be up to Member States to make those provisions effective “on the ground”. Advancements have also been made in relation to the accessibility of printed material for people with visual impairments, with the view of increasing their participation in cultural life. Further to the ratification of the WIPO Marrakesh Treaty,⁸¹ Directive 2017/1564/EU⁸² was in fact adopted to amend the InfoSoc Directive,⁸³ together with Regulation 2017/1563/EU.⁸⁴ Put simply, the Directive allows people with visual impairments to create an accessible copy of a work to which they have lawful access for their exclusive use, and certain authorized entities to make accessible copies and communicate, make available, distribute or lend them to people with disabilities for their exclusive use and not for profit. The Regulation allows for the distribution or communication to third countries that are Parties to the Marrakesh Treaties of accessible copies made in any Member State, and the importation of, and access to, accessible works made in those third countries.⁸⁵

⁷⁸ Directive 2019/882/EU of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services [2019] OJ L151/70.

⁷⁹ Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies [2016] OJ L327/1.

⁸⁰ Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014 No L94/65; Council Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ 2014 No L94/243.

⁸¹ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, VIP/DC/8 REV (2013). See Helfer et al (2020) 332-340.

⁸² Directive 2017/1564/EU on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2017] OJ L242/6.

⁸³ Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).

⁸⁴ Regulation 2017/1563/EU on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled [2017] OJ L242/1.

⁸⁵ On this issue see C Sganga (2020).

Aside from the progress in accessibility legislation, little has been done in order to support the full participation of persons with disabilities in society. In 2016, the Commission had launched a pilot of the European Disability Card to facilitate travelling across the EU in a group of eight EU countries: Belgium, Cyprus, Estonia, Finland, Italy, Malta, Romania, and Slovenia.⁸⁶ This card allows persons with disabilities from another Member States to access certain discounts for culture, leisure, sport, and transport under the same conditions as the nationals with disabilities of that country. However, the card has been evaluated a “promising idea with little practical use”,⁸⁷ and it is not yet clear whether it will be further extended to all the EU.

Even though, as noted above, disability issues have been successfully mainstreamed across EU legislation, a major set back has been seen in the area of equality, where the proposal for a horizontal non-discrimination directive⁸⁸ to tackle discrimination outside the labour market, launched in 2008, has not yet been adopted, and is unlikely to be passed in the current COVID-19 and post-Brexit turmoil. This directive would extend protection against discrimination on the ground *inter alia* of disability to the fields of social protection, including social security, healthcare and social housing; education; and access to, and supply of, goods and services, including housing, areas that are all covered by the UN CRPD, and would be an important step in enhancing equality for people with disabilities. In its 2018 report, the EU Agency for Fundamental Rights recommended that the EU legislator should continue to work towards the adoption of that directive,⁸⁹ but there has been no further advancement as yet. On the whole, the latest developments in EU disability policies align with the trajectory highlighted above, in that they are underpinned by a disability rights agenda, even though much remains to be done to fully implement the UN CRPD. The two rationales of the EU disability action identified by Phillips,⁹⁰ on the basis of Quinn’s analysis – on the one hand, a human rights agenda, with a focus on equality and non-discrimination, and an economic rationale in which equality itself is conceived of as a productive factor within the internal market⁹¹ are slowly converging (embodying the ideal of the “social market economy”, purported by Article 3 (3) TEU).⁹² However, the converging balance

⁸⁶ See at <https://ec.europa.eu/social/main.jsp?catId=1139> (30/03/2021).

⁸⁷ See at <https://enl.eu/news/european-disability-card-promising-idea-little-practical-use/> (30/03/2021).

⁸⁸ Commission, “Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation” COM (2008) 426 final.

⁸⁹ European Union Agency for Fundamental Rights (2018).

⁹⁰ Phillips (2012) 208-219.

⁹¹ See in that regard also Quinn (2005) 279-304.

⁹² See Ferri (2020b).

of human rights and economic rationales determines that, if assessed vis-à-vis the UN CRPD, the EU still lags behind the ideal purported by the Convention.

3. What is coming is better than what is gone?

As this EDS will expire soon, the European Commission is currently assessing the extent to which the Strategy, has effectively implemented the UN CRPD, allowing the Commission to better target future actions.

EDF, in its capacity as member of the framework for monitoring the UN CRPD, has highlighted that “[m]ore ambitious policies should be adopted or implemented”.⁹³ In that regard, EDF suggests the scope of application of the European Accessibility Act should be extended and that EU legislation prohibiting discrimination on grounds of disability in all areas of life should be adopted.⁹⁴ EDF also calls for some procedural innovations, highlighting the need for the new strategy to be implemented and monitored in conjunction with people with disabilities.⁹⁵ Interestingly, both EDF and the Fundamental Rights Agency make reference to the need for the new strategy to tally with the EPSR. As noted above, the Pillar specifically recognises the right of people with disabilities to inclusion under principle 17, which should foster alongside the new strategy initiatives aimed at enhancing participation of people with disabilities in European society. Employment and accessibility remain core priority areas that the new Strategy will have to address. The Fundamental Rights Agency also calls for a more robust EU action in relation to Deinstitutionalisation and community living. The European Parliament, from his side, has strongly urged the Commission “to mainstream disability in its migration and refugee policies and to ensure that all EU funding directed towards tackling this humanitarian crisis is disability inclusive”.⁹⁶

In January 2020, the Commission, in its Communication on a “Strong Social Europe for Just Transitions”,⁹⁷ which paves the way for an Action Plan to implement the European Pillar of Social Rights, renewed its commitment to pursue the implementation of the UN CRPD and to present “a strengthened strategy for disability in 2021, building on the results of the ongoing evaluation of the European Strategy for Disability 2010-2020”. It seems clear that the UN Convention will remain the benchmark for EU disability policies, and the new strategy post-2020 will be in continuity with the disability rights trajectory that

⁹³ European Disability Strategy post-2020: contribution from the EU CRPD Monitoring Framework, 20 January 2020, https://fra.europa.eu/sites/default/files/fra_uploads/contribution-eu-framework-post-2020-disability-strategy_en.pdf (30/03/2021).

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Commission, “Strong Social Europe for Just Transitions” COM(2020) 14 final.

has been visible in the past ten years. The Communication also makes evident the attempt to merge human rights and economic rationales under the slogan “[a]n economy that works for people is an economy that works for people with disabilities”.⁹⁸ This seems to further enhance the ideal of the “social market economy”, purported by Article 3 (3) TEU.⁹⁹

Moreover, to support the implementation of the EPSR and, more generally, the new EU political direction, the Commission has launched a broad consultation process,¹⁰⁰ which will last until November 2020, and eventually fit into the Conference on the Future of Europe. The Conference was presented by the Commission as “a major pan-European democratic exercise” and a “new public forum for an open, inclusive, transparent and structured debate with citizens around a number of key priorities and challenges”.¹⁰¹ The Conference should revolve around the Commission’s six political priorities, which include inter alia “an economy that works for people, social fairness and equality”.¹⁰² In that connection, the Conference should offer an important opportunity to engage with disability issues and should be used to support a robust participatory design of the new strategy. It is worth noting that the Commission stressed that all Europeans “should be given an equal opportunity to engage”, and that “particular attention should be paid to ensuring gender equality, the representation of minorities and persons with disabilities”. This is in line with what also highlighted by the European Parliament in its resolution released on 15 January 2020.¹⁰³

On the whole, it seems that the new strategy post-2020 will tally with the implementation of the EPSR. It also appears that its adoption will be supported by a participatory process. It remains to be seen, however, how and to what extent the strategy will complement other initiatives included in the Commission’s policy priorities and that are under discussion, such as for example the “Green Paper on Ageing”, or the “European Child Guarantee”, whose ambitions to respectively enhance healthy ageing in the community and to fight child poverty and enhance access to services are clear, but whose content are fairly vague.

⁹⁸ Ibid.

⁹⁹ See Ferri (2020b).

¹⁰⁰ See at <https://ec.europa.eu/social/main.jsp?catId=1487> (30/03/2021).

¹⁰¹ Commission, “Shaping the Conference on the Future of Europe” COM(2020) 27 final.

¹⁰² See also Commission, “A Union that strives for more”, COM(2020) 37 final.

¹⁰³ European Parliament resolution of 15 January 2020 on the European Parliament’s position on the Conference on the Future of Europe (2019/2990(RSP)).

E. Concluding Remarks

This contribution has endeavoured to highlight that in the past ten years the EU has moved towards an inclusive European society, in which the participation of disabled people figures prominently. The UN CRPD has been a major driver of EU disability policies and has reinforced their disability rights trajectory. In the last ten years, the Convention has played a twofold role of normative standard in case law and policy benchmark. The excursus provided by this contribution has also attempted to show that the new Strategy will place itself in continuation with the trajectory of the last few years. However, it seems that the Commission is moving more and more towards the convergence of human rights and economic rationales.

This scenario is however becoming blurred. 2020 is not like any other year. It will primarily be remembered in history books because of the COVID-19 crisis, which has changed (if not forever, for a long time) the way in which we live, work and study, and has provoked an unparalleled global economic crisis. In this respect, the new Strategy will have to take into account that the impact of the COVID-19 outbreak on persons with disabilities has been heavy. National responses to the COVID-19 outbreak have “left behind” people with disabilities. Cluster in institutions and nursing homes have made it evident that in the pandemic scenario community services are of utmost importance to protect the right to health of people with disabilities. Containment measures have also had a detrimental effect on people with disabilities.¹⁰⁴ The Commissioner Dalli, speaking at the Disability Intergroup of the European Parliament, on 30 April 2020, has clearly affirmed that the strategy post-2020 “will take into account the challenges arising from the COVID crisis and its devastating economic and social consequences”.¹⁰⁵ She also claimed that the Commission will strive to prevent further inequalities for persons with disabilities.¹⁰⁶ Indeed, it remains to be seen the extent to which the future of EU disability policies will be able to counter the drastic and lasting effects of this pandemic on the rights of persons with disabilities, in particular on their socio-economic rights.

¹⁰⁴ Meeting of the Disability Intergroup: “Impact of COVID-19 outbreak to persons with disabilities” at <http://www.edf-feph.org/recent-news-disability-intergroup> (15/06/2020).

¹⁰⁵ https://ec.europa.eu/commission/commissioners/2019-2024/dalli/announcements/speech-commissioner-dalli-impact-coronavirus-outbreak-persons-disabilities_en (30/03/2021).

¹⁰⁶ Ibid.

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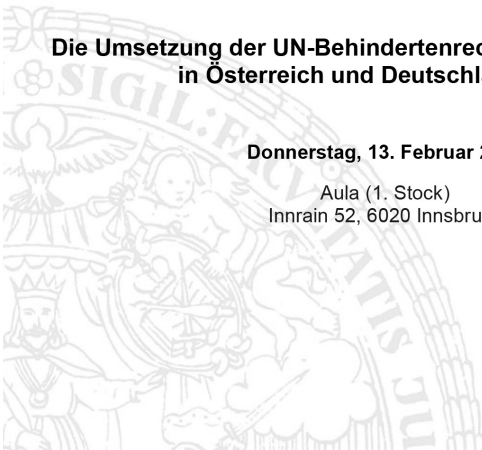
Einladung

zur Tagung

Die Umsetzung der UN-Behindertenrechtskonvention in Österreich und Deutschland

Donnerstag, 13. Februar 2020

Aula (1. Stock)
Innrain 52, 6020 Innsbruck



Programm:

Donnerstag, 13. Februar 2020, Aula

9:00-9:50 Begrüßung und Einführung

- Dekan, Christian Markl (5 Minuten)
- Einblicke in die UN-BRK und ihre Umsetzung in Österreich und Deutschland – Michael Ganner, Universität Innsbruck und Felix Welti, Universität Kassel

9:50-13:00 Die aktuellen Staatenberichte

9:50-10:20 Die Staatenberichtsprüfung und der CRPD-Ausschuss – Valentin Aichele, Monitoring-Stelle beim Deutschen Institut für Menschenrechte, Berlin

10:20-10:50 Kaffeepause

10:50-11:15 Der Staatenbericht 2019 für Österreich – Max Rubisch,

Bundesministerium Arbeit, Soziales, Gesundheit und Konsumentenschutz, Wien

11:15-11:40 Die erste und die zweite Staatenprüfungen Österreichs zur Umsetzung der UN-BRK sowie Bezüge zu anderen Staatenprüfungen Österreichs – Volker Schönwiese und Petra Flieger

11:40-11:55 Der Staatenbericht 2019 für Deutschland – Entstehung und Erarbeitung, Torsten Einstmann, Referatsleiter beim Bundesministerium für Arbeit und Soziales, Berlin

11:55-12:10 Demokratie braucht Inklusion – Staatenbericht und Partizipation, Jürgen Dusel, Beauftragter der Bundesregierung für die Belange von Menschen mit Behinderungen, Berlin

12:10-12:25 Ja zur UN-BRK heißt ja zum Diskriminierungsschutz. Die aktive Rolle der Zivilgesellschaft bei der Umsetzung der Konvention, Verena Bentele, Präsidentin des Sozialverbands VdK, Berlin

12:25-13:00 Diskussion im Plenum

13:00-14:00 Mittagspause

14:00-15:45 Themenblöcke in parallelen Arbeitsgruppen**AG 1: Rechtssubjektivität und Zugang zum Recht (Artt. 12, 13 UN-BRK)**

Chair: Michael Ganner & Volker Lipp

Kurzer Impulsvortrag zum Umsetzungsstand der UN-BRK Vorgaben in Ö und D

- Veränderungsbedarf und -möglichkeiten
- Zusammenfassung wesentlicher Ergebnisse

AG 2: Recht auf Bildung (Art. 24 UN-BRK)

Chair: Caroline Voithofer & Elisabeth Rieder & Lilit Grigoryan

Kurzer Impulsvortrag zum Umsetzungsstand der UN-BRK in Ö und D ua mit Arne Frankenstein

- Veränderungsbedarf und -möglichkeiten
- Zusammenfassung wesentlicher Ergebnisse

AG 3: Recht auf Arbeit (Art. 27 UN-BRK)

Chair: Felix Welti & Hansjörg Hofer & Theresa Hammer

- Kurzer Impulsvortrag zum Umsetzungsstand der UN-BRK Vorgaben in Ö und D – u.a. mit Jürgen Dusel, Beauftragter der Bundesregierung für Menschen mit Behinderungen, Berlin
- Veränderungsbedarf und -möglichkeiten
- Zusammenfassung wesentlicher Ergebnisse

15:45-16:15 Kaffeepause

16:15-17:00 Präsentation und Diskussion der Ergebnisse der Arbeitsgruppen im Plenum

17:00-17:15 Care or Employment? Comparison of sheltered workshop policies in Germany and East Asian after the UNCRPD – Yi-Chun Chou, Soochow University, Taipeh, Taiwan

17:15-18:30 Vortrag und Diskussion: UN-CRPD in the European Union – Delia Ferri, Maynooth University, Ireland

18:30 Gemeinsamer Ausklang**Veranstaltende:**

Leopold-Franzens-Universität Innsbruck und Universität Kassel, vertreten durch Michael Ganner, Elisabeth Rieder, Caroline Voithofer und Felix Welti
E-Mail: Tatjana.Ulasik@uibk.ac.at

Tagungsziel:

Die Veranstaltung soll die vorgelegten zweiten Staatenberichte von Österreich und Deutschland zur UN-Behindertenrechtskonvention beleuchten. Sie soll auch zum besseren Verständnis über faktische und rechtliche Probleme bei der Umsetzung der Rechte, die sich aus der Konvention ergeben, beitragen.

Zielgruppe:

PraktikerInnen, SelbstvertreterInnen und WissenschaftlerInnen sowie andere an der Umsetzung der UN-Behindertenrechtskonvention Interessierte.

Anmeldung

zur Tagung ‚Die Umsetzung der UN-Behindertenrechtskonvention in Österreich und Deutschland‘

Name/Vorname

Telefonnummer

E-Mail

Anmeldung bitte bis **1. 2. 2020** per Email an: Tatjana.Ulasik@uibk.ac.at

mit Bekanntgabe, an welcher Arbeitsgruppe Sie teilnehmen möchten:

- AG 1: Rechtssubjektivität und Zugang zum Recht (Artt. 12, 13 UN-BRK)
- AG 2: Recht auf Bildung (Art. 24 UN-BRK)
- AG 3: Recht auf Arbeit (Art. 27 UN-BRK)

Achtung: Die TeilnehmerInnenzahl ist mit 100 begrenzt.

Während der Veranstaltung stehen **GebärdendolmetscherInnen** zur Verfügung. Wir bitten um Bekanntgabe der Vortragsreihen, für die Sie eine Übersetzung wünschen. Die Vortragsräume werden mit induktiven Höranlagen ausgestattet.

Wir bemühen uns die Veranstaltung bestmöglich barrierefrei zu gestalten. Daher bitten wir Sie, uns im Vorfeld bis 1.2.2020 zu informieren, wenn Sie Unterstützung benötigen per Email an: Tatjana.Ulasik@uibk.ac.at oder per Tel. +43/512-507-81209

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The series „Innsbrucker Beiträge zur Rechtsstatsachenforschung“ („Innsbruck' contributions to empirical legal studies“) aims at analysing the interconnections of law in the books and law in action with a special focus on the functioning of law. Volume 12 includes the collection of articles presented at the conference on “The implementation of the UN Convention on the Rights of Persons with Disabilities in Austria and Germany”, which took place on 13th February 2020 in Innsbruck. The reasons for the conference were the almost simultaneous second state reviews of Austria and Germany on the UN CRPD.

Michael Ganner (Innsbruck) and *Felix Welti* (Kassel) examine the state of implementation in Austria and Germany. *Max Rubisch* (Vienna), *Valentin Aichele* (Berlin) and *Petra Flieger/Volker Schönwiese* (Absam/Innsbruck) dedicate their contributions on the state examinations. The papers by *Flieger/Schönwiese* and *Verena Bentele* (Berlin) show the importance of self-advocacy and NGOs. *Michael Ganner* (Innsbruck) and *Volker Lipp/Lena Baltzer/Maximilian Bresch/Pablo Hesse/René Schröder* (Göttingen) shed light on the state of implementation with regard to legal subjectivity and access to justice (Arts 12, 13 UN CRPD). The right to education (Art 24 UN CRPD) is addressed by *Caroline Voithofer* (Innsbruck), *Arne Frankenstein* (Bremen), *Elisabeth Rieder* (Innsbruck) and *Lilit Grigoryan* (Kassel/Cologne). The right to work (Art 27 UN CRPD) is discussed by *Hansjörg Hofer* (Vienna) for Austria and *Yi-Chun Chou* (Taipei/Taiwan) for Japan, South Korea and Taiwan. *Delia Ferri* (Maynooth/Ireland) shows the influences of the UN CRPD in the European Union.

ISBN 978-3-99106-037-6



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