

# **BRK-ALLIANZ – German CRPD ALLIANCE**

**Alliance of German Non-governmental Organizations on the UN Convention  
on the Rights of Persons with Disabilities**

**Joint NGO Submission – UPR regarding the Federal Republic of  
Germany, 16th Session, May 2013**

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### **Preliminary remarks on the submission**

*The German CRPD ALLIANCE<sup>1</sup> was established in January 2012 in order to support the state report examination for Germany on the UN Convention on the Rights of Persons with Disabilities (UN CRPD) and to draft a parallel report. The German CRPD Alliance is working together with the FORUM MENSCHENRECHTE (the German human rights forum) in this UPR process: The German CRPD Alliance is focusing on the UN CRPD. FORUM MENSCHENRECHTE associates itself with the issues of this submission; however, it is also making its own submission which relates to the other conventions on human rights.*

*The German CRPD Alliance is submitting this joint report<sup>2</sup> on the implementation of the UN CRPD in Germany to the office of the High Commission for Human Rights.*

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## **I. General assessment of CRPD implementation and the Action Plan / Human rights perspective**

1. Germany is a State Party to the UN CRPD and the Optional Protocol<sup>3</sup>. A National Action Plan (NAP) to implement the UN CRPD was approved by the Federal Government in June 2011. The first state report<sup>4</sup> was published in August 2011 and referred to the appropriate committee.

2. The UN CRPD is deemed to be binding law in the Federal Republic and in the federal states (“Länder”). It establishes a great need for action because a consistent human rights perspective has not yet been adequately implemented in German policy and legislation concerning persons with disabilities.

3. In its memorandum<sup>5</sup>, the Federal Government qualifies the need for implementation at many points. It maintains, for example, that German law pertaining to the denial of liberty through enforced institutionalisation already fully satisfies the guidelines of the CRPD (Art. 14)<sup>6</sup> and also the German education system already identifies “numerous similarities” with the CRPD (Art. 24). The Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany also took the view that the German legal position in principle satisfies the requirements of the convention<sup>7</sup>. In this respect, the Federal Government is acting considerably less

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<sup>1</sup> A total of 78 organizations which essentially represent the range of associations in Germany working in disability policy have joined forces in this alliance. They primarily come from the field of self-representation associations for disabled persons, self-help for those disabled and social welfare associations. Charitable organizations, professional associations which provide disabled assistance and psychiatry are also represented. Furthermore, professional associations from the general school sector as well as parents’ associations and trade unions are collaborating. A list of these 78 associations is available at [www.brk-allianz.de](http://www.brk-allianz.de)

<sup>2</sup> The statements and demands of the report are supported by the NGOs supporting this report in accordance with their respective area of responsibility and their objective. The NGOs involved have in common the intention of joint reporting from a civil society perspective. Nevertheless, not all NGOs involved can jointly support every assessment and recommendation expressed here.

<sup>3</sup> signed in 2007, ratified in 2008 and which came into force on 26 March 2009

<sup>4</sup> CRPD.C.DEU.1\_en cf. <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/futuresessions.aspx>

<sup>5</sup> The need for implementation is qualified at many points not only in the memorandum, but also in the 1st state report by the Federal Government

<sup>6</sup> Bill of the Federal Government on the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities and on the Optional Protocol of 13 December 2006 on the United Nations Convention on the Rights of Persons with Disabilities, Official Records of Parliament 16/10808, p. 58: “[...] education policy settings of priorities in the individual states of the Federal Republic of Germany indicate numerous similarities today.”

<sup>7</sup> “Educational and legal aspects of implementing the United Nations Convention of 13.12.2006 on the Rights of Persons with Disabilities”, decision by the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany (KMK) of 18.11.2010, p. 2: “The German legal position in principle satisfies the requirements of the Convention.”

firmly domestically than it has done at international level in the run-up to the adoption of the Convention.

4. Structural implementation of the CRPD has been successful with the designation of the German Institute for Human Rights as the monitoring body, the appointment of a coordination mechanism and associated committees and with the political goal to develop an action plan. This does not, however, apply to the implementation of the content which is either not taking place at all or inadequately.

5. The National Action Plan of the Federal Government for implementing the CRPD<sup>8</sup> does not guarantee adequate implementation of the objectives of the CRPD. This is because it releases the Federal States and local authorities from (joint) responsibility, although they would, for example, be centrally responsible in the field of inclusive education in accordance with Art. 24 CRPD. The action plan “For a Child-Oriented Germany 2005-2010”<sup>9</sup> in which federal, state and local authorities had jointly committed themselves to act in concert shows the fact that things can be done differently.

6. The National Action Plan is also disappointing in terms of content. It does list over 200 individual measures. These are, however, often unambitious (new edition of an information leaflet on age-appropriate renovation<sup>10</sup>), in parts do not consider the specific concerns of persons with a disability (law on patients’ rights) or have not been developed explicitly having the Convention in mind (pilot projects on the cooperation of agricultural enterprises with sheltered workshops 2008 – 2011<sup>11</sup>).

7. Last but not least, it lacks binding, time-related components and verifiable objectives to be achieved through the measures. It testifies to less determination if the Federal Government – despite a considerable rise in unemployment amongst persons with severe disabilities<sup>12</sup> – only wants to “sensitize” employers and their willingness to train and employ persons with disabilities merely “should be encouraged”<sup>13</sup> instead of designating specific objectives for employing persons with disabilities in commercial enterprises.

#### **Recommendation:**

- The Federal Government is requested to take specific legislative action immediately to implement the UN CRPD in national law and invoke penalty mechanisms where not implemented.

#### **Translation / Participation of civil society / Awareness-raising**

8. Internationally, the CRPD was negotiated under the slogan “Nothing about us without us!”. The German government, however, only inadequately complies with its obligations to involve persons with disabilities via the organizations representing them<sup>14</sup>.

9. The **translation** of the CRPD into German took place without involving the civil society which means that the official translation<sup>15</sup> contains significant errors and is therefore unsuitable for the task of awareness-raising (Article 8). For example, “inclusion” was translated by “Integration” [‘integration’] and not by the correct term of “Inklusion” [‘inclusion’]. German DPOs<sup>16</sup> therefore developed a

<sup>8</sup> National Action Plan of the Federal Government for implementing the UN Convention on the Rights of Persons with Disabilities “Our path towards an inclusive society” as at: September 2011

<sup>9</sup> National Action Plan “For a Child-Oriented Germany 2005-2010”, available at: <http://www.kindergerechtes-deutschland.de/zur-initiative/nationaler-aktionsplan>

<sup>10</sup> see footnote 7, p. 162

<sup>11</sup> see footnote 7, p. 128

<sup>12</sup> In 2009, 167 000 persons with severe disabilities were unemployed; in 2010, this had risen to 175 000 and in 2011 their number rose to 180 000. This trend is diametrically opposed to the general fall in unemployment figures in Germany since 2009.

<sup>13</sup> see footnote 7, p. 129

<sup>14</sup> participation requirement, in particular in Art. 4, par. 3 CRPD

<sup>15</sup> <http://www.kompre.de/brk/attachments/article/72/BMAS%20-%20Deutsch-abgestimmte%20uebersetzung.pdf>

<sup>16</sup> DPO = Disabled People’s Organizations

“shadow translation”<sup>17</sup> with the correct concepts. The government has since then referred to inclusion, but a binding correction of the incorrect translation is still missing.

**Recommendation:**

- The official translation must be changed in accordance with the guidelines of the “shadow translation”.

10. Persons with disabilities and their associations do collaborate on many committees and have been invited to numerous conferences; however **no involvement at eye level** is taking place. The associations which cooperate on the German Council of Disabled People have made specific proposals as to how good participation in developing the action plan<sup>18</sup> might occur. Despite several reminders, there has never been a response to this, which means that the civil society is at this point still only in a reactive role<sup>19</sup>.

**Recommendation:**

- The Federal Government must, together with persons with disabilities, develop binding participation standards for all areas of policy planning and implementation in order to guarantee comprehensive participation.

## II. Implementing the UN CRPD – General provisions

### “Reasonable accommodation”<sup>20</sup> (Art. 2)

11. The concept of “reasonable accommodation”<sup>21</sup> constitutes a key instrument in the CRPD in order to guarantee non-discrimination and equal opportunities<sup>22</sup>. The state has the guarantor’s obligation for reasonable accommodation which it can also pass on to individuals by rule of law. In German legislation, reasonable accommodation is, however, only occasionally included<sup>23</sup> and often inadequately. There is no general enshrinement of reasonable accommodation as an instrument of law. In addition to this, the refusal of reasonable accommodation in German law has not yet been designated as a form of discrimination.

**Recommendations**

- The concept of reasonable accommodation must be enshrined in national law in accordance with the guidelines of the CRPD. Equality legislation at federal and state level is provided for this.
- Specific regulations must be adopted in the corresponding sectoral laws.
- The refusal of reasonable accommodation must be defined in law as a form of discrimination in the General Act on Equal Treatment (AGG).

<sup>17</sup> [http://www.netzwerk-artikel-3.de/attachments/093\\_schattenubersetzung-endgs.pdf](http://www.netzwerk-artikel-3.de/attachments/093_schattenubersetzung-endgs.pdf)

<sup>18</sup> see <http://www.deutscher-behindertenrat.de/mime/00060491D1274941874.pdf> (p. 50-52)

<sup>19</sup> In addition, many other civil society associations have piped up with comments on the NAP without this involving any changes.

<sup>20</sup> The following details relate to 1) German Council of Disabled People: Demands of the German Council of Disabled People for a National Action Plan on implementing the UN Convention on the Rights of Persons with Disabilities. Berlin, May 2010, p. 10/11 2) Peter Masuch: The UN Convention on the Rights of Persons with Disabilities of 13 December 2006. In: Wolfgang Schütte (ed.): Abschied vom Fürsorgerecht. Von der „Eingliederungshilfe für behinderte Menschen“ zum Recht auf soziale Teilhabe. [Farewell to welfare law. From “integration assistance for disabled persons” to the law on social participation.] LIT Verlag, Berlin 2011, p. 75 3) Valentin Aichele: Barrieren im Einzelfall überwinden: Angemessene Vorkehrungen gesetzlich verankern [Overcoming barriers in individual cases: Enshrining reasonable accommodation in law.] German Institute for Human Rights, item no. 5, Berlin, January 2012 4) Felix Welti: Das Diskriminierungsverbot und die „angemessenen Vorkehrungen“ in der BRK – Stellenwert für die staatliche Verpflichtung zur Umsetzung der in der BRK geregelten Rechte. Rechtsdienst der Lebenshilfe [Prohibition of discrimination and “reasonable accommodation” in the CRPD – importance of state obligation on implementing the rights regulated in the CRPD. Legal service counselling] 1/2012, p. 1-3

<sup>21</sup> “Reasonable accommodation” is designated in CRPD Articles 2; 5 (3); 13 (1); 14 (2); 24 (2c, 5); 27 (1i)

<sup>22</sup> Example: In individual cases, disabled trainees or students need technical assistance, personal assistance such as sign language interpreters, speech-to-text interpreters, communications or mobility assistance. But this reasonable accommodation is only partially funded by the state if the income and assets of those affected and close family is not enough. It is not funded for vocational preparation schemes, studies after vocational training, further study for a master’s or a PhD either.

<sup>23</sup> e.g. in Section 81 of the German Code of Social Law [SGB] IX

## Variety of disability, Non-discrimination (Articles 3 and 5)

12. **Disabled persons with a migrant background**<sup>24</sup> often experience multiple disadvantages: They do not appear in official reports or reliable data are not available<sup>25</sup>. They are inadequately taken into account in legislation<sup>26</sup>. There is hardly any multilingual and easy-to-understand literature on assistance for them; advice centres are not set up interculturally<sup>27</sup>. The number of disabled children with a migrant background is often above-average in schools for children with learning difficulties and they then often go on to work in a “sheltered workshop” (WfbM).

### Recommendation:

- The UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Families of 18.12.1990 (ICRMW) must be signed and ratified.

13. Refugees receive basic services in accordance with Sections 3 ff of the Law on Benefits for Asylum Seekers (AsylbLG)<sup>28</sup>. This stipulates that providing for the requirement for food, clothing and accommodation should generally be made in kind, even if many Federal States have in the meantime been granting cash. This principle of benefits in kind results in numerous serious disadvantages particularly for **refugees with a disability**, as state preliminary reception centres and hostels have neither accessible living spaces, sensory assistance, communication support, nursing beds, retaining handrails and auxiliary equipment in the group toilets and washrooms, nor a special food supply.

14. Refugees who come under AsylbLG do not receive any health insurance cover in the first 48 months. Their healthcare is in accordance with Section 4 AsylbLG only limited to acute and painful illnesses, even in the case of chronic, physical and psychological illnesses<sup>29</sup>. Traumatized refugees do not receive adequate psychosocial support such as native-speaker psychotherapy.

### Recommendations:

- The European Reception Directive 2003/9/EC of the Council dated 27 January 2003<sup>30</sup> laying down minimum standards for the reception of applicants for asylum must be implemented.
- AsylbLG must be abolished; access to standard care in medicine and rehabilitation must be guaranteed.
- Accessible, if necessary, supervised housing must be created for refugees with mental illness, a sensory or physical disability.

15. Approx. 10,000 – 120,000 people born intersexed<sup>31</sup> live in the Federal Republic of Germany. The majority of **intersexed people** are made severely disabled due to mutilation and prevented from participation for the rest of their life. This group of people is discriminated against due to their gen-

<sup>24</sup> Approximately 16 million people who have a migrant background lived in Germany in 2009; this corresponds to 19.6 % of the population

<sup>25</sup> cf. for instance the Second integration indicator report of the Commissioner of the Federal Government for Migration, Refugees and Integration of December 2011 or the Report on People with Disabilities by the Federal Government 2009 (p. 63)

<sup>26</sup> for instance Germany has still not signed the UN Convention on the Protection of the Rights of all Migrant Workers (ICRMW)

<sup>27</sup> cf. Results of the “Migration and Disability” symposium held by the BAGFW [Federal Association of Voluntary Welfare Work] of 2 and 3 November 2011: [http://www.bagfw.de/fileadmin/media/Projekte\\_2012/Gemeinsame\\_Erkl%C3%A4rung\\_2012-01-23\\_final.pdf](http://www.bagfw.de/fileadmin/media/Projekte_2012/Gemeinsame_Erkl%C3%A4rung_2012-01-23_final.pdf)

<sup>28</sup> The Federal Constitutional Court decided in July 2012 that the regulations on basic services in the form of cash benefits in accordance with the Law on Benefits for Asylum Seekers are incompatible with the basic right to the guarantee of a subsistence minimum that is in line with human dignity from Art. 1 par. 1 of Germany’s Basic Law (GG) in conjunction with Art. 20 par. 1 GG and must be adapted; cf. [http://www.bundesverfassungsgericht.de/entscheidungen/Is20120718\\_1bvl001010.html](http://www.bundesverfassungsgericht.de/entscheidungen/Is20120718_1bvl001010.html) on this

<sup>29</sup> Other medical services are, in accordance with Section 6 AsylbLG, only provided in individual cases. Rehabilitation measures are comparatively restricted, which means that in practice meeting the costs of necessary equipment such as glasses, hearing aids, walking frames, wheelchairs and incontinence care is mostly refused.

<sup>30</sup> and the amended proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down standards for the reception of applicants for asylum COM(2011) 320 final, dated 1.6.2011

<sup>31</sup> There is no reliable statistical material. It is estimated that for every 500- 2000 people born in Germany an anomaly in sexual differentiation occurs.

der and subjected to inhuman treatment. The UN Committee on CAT 2011 had already established this in its Concluding Observations<sup>32</sup>.

**Recommendation:**

- Make the existence of intersexed people through legal provisions visible and clarify that all existing statutory regulations including sterilization legislation and the ban on cosmetic operations on genitals without the informed consent of the persons affected themselves apply to all persons.

### III. Special rights – Core provisions

#### Accessibility (Article 9)

16. In Germany, the accessibility demanded by the CRPD has so far unjustifiably been realized in a fragmentary way only. Instead of a mandatory statutory obligation in the private sector, the German Equal Opportunities for Disabled People Act has stipulated since 2002 in Section 5 the option of concluding “target agreements to create accessibility” between companies and business organizations on the one hand and associations of disabled persons on the other. The private sector is, however, not obliged to conclude target agreements<sup>33</sup>.

17. The number of accessible homes in Germany is unknown; it is estimated at around 500,000. The anticipated need for accessible homes for 2025 is, however, 2.0 to 2.5 million. Given these circumstances, it is incomprehensible that the Federal Government phased out its participation in the disadvantage compensation “age-appropriate renovation” scheme from Germany’s Reconstruction Loan Corporation (KfW), a public-law institution of federal and state governments, in 2011. It remains imperative to fund accessible (including social) housing and the dismantling of barriers within the scope of modernization measures.

**Recommendations:**

- Government subsidies should in general be tied to the criterion of accessibility.
- Sets of criteria for accessibility must be developed and regularly updated. The variety of different impairments must be considered in the course of this.
- Private entities which provide facilities and services for the public must be obliged by law to provide accessibility.
- The KfW “age-appropriate renovation” incentive scheme must again be provided with additional funding. All incentive schemes for new buildings must also be tied to accessibility and also to reducing barriers in modernization measures.
- Local and long-distance public passenger transport must be committed to accessibility with binding deadlines.

#### Equal recognition before the law (Article 12)

18. In German guardianship law, the legal guardian is obligated to the wishes, subjective welfare and the rehabilitation of the person he or she is responsible for<sup>34</sup>. At the same time, the guardian in his/her set of tasks represents the person in court and out of court (Section 1902 BGB). Germany’s guardianship law does contain elements of support, but is characterized by the principle of “substituted decision-making”. Implementing Art. 12 par. 3 UN CRPD, the State Parties consequently must take appropriate measures to provide access to support for persons with disabilities, which they may

<sup>32</sup> cf. Point 20 of the Concluding Remarks on this at [http://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/PDF-Dateien/Pakte\\_Konventionen/CAT/cat\\_state\\_report\\_germany\\_5\\_2009\\_cobs\\_2011\\_de.pdf](http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/CAT/cat_state_report_germany_5_2009_cobs_2011_de.pdf)

<sup>33</sup> Their number has therefore remained low and a comprehensive improvement in accessibility was not achieved as a result.

<sup>34</sup> section 1901 paragraphs 2-4 of the German Civil Code [BGB]

require when exercising their legal capacity (“supported decision-making”); further legal changes are therefore required<sup>35</sup>.

19. The **regulations on legal incapacity in German civil law** assume that persons may permanently be in a “mental state excluding them from the free exercise of will”. These persons are excluded from participating in legal affairs, their declarations of intent are null and void (Sections 104 f. BGB). This is in contrast to the concept of capacity in Art. 12 paragraphs 2 and 3 UN CRPD, which requires the question of capacity for the free exercise of will to be examined on a case-by-case basis and the necessary support to create legal capacity to be provided where necessary.

#### **Recommendations:**

- German guardianship law must be developed in accordance with the concept of “supported decision-making”. Access to supported decision-making must be made available to persons with disabilities without interfering with their right to self-determination.
- The regulations on legal incapacity in German civil law must be correspondingly adapted. This is also necessary because these regulations should not only serve to protect the person, but also to protect general legal affairs.

#### **Liberty and security of the person (Article 14) / Protecting the integrity of the person (Article 17)**

20. The hospitalization of persons against their expressed will exists in Germany on the legal basis of various laws. In hospitalization under public law, which is regulated in different ways in the federal states, hospitalization is set up to protect persons against danger to themselves or others. In hospitalization subject to private law in accordance with BGB, hospitalization to protect the person hospitalized from harm to themselves is possible<sup>36</sup>.

21. Legal practice in many cases does not comply with regulations. Hospitalization is carried out too quickly and without thorough examination as to whether all other options for assistance had been adequately explored. In some hospitalization proceedings, the persons being hospitalized are only seen by the judge when they have already been provisionally hospitalized and have also already received pharmaceutical treatment.

22. A revision of the legal provisions according to Article 14 UN CRPD must ensure that hospitalization is only carried out as an **exception** if all other options for assistance and support have been examined and have not proven to be adequate. Legislators, service providers and government agencies must guarantee that in all regions of Germany adequate facilities are available locally, complying with proper professional standards, in order to prevent hospitalization.

23. Treatments against the expressed will of a person with mental illness / a person with a disability (enforced treatments or medication) are contrary to Article 17 UN CRPD. The Federal Constitutional Court and the Federal Court of Justice set down clear principles on this in 2011/12<sup>37</sup>. Accordingly, the statutory requirements on the basis of which treatment against a person’s declared will may be possible must still be created.

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<sup>35</sup> Further development of the custody law in particular is therefore also necessary because the number of forms of custody is steadily rising (1,200,000 at the end of 2005; 1,300,000 at the end of 2010. Source: Federal Office of Justice, Assessment: Deinert in [http://www.bdb-ev.de/220\\_Basisinformationen.php-3Fakten.pdf](http://www.bdb-ev.de/220_Basisinformationen.php-3Fakten.pdf)

<sup>36</sup> In Germany in 2005, there were 193,373 cases of compulsory treatment; in 2009, there were already 236,377 cases of compulsory treatment. The total number has been continually increasing since 1992. Source: Federal Office of Justice, Special survey “Procedures in accordance with custody law 1998 – 2005”

<sup>37</sup> Federal Constitutional Court, decisions dated 23.03.2011 (file ref. 2 BvR 882/09) and dated 12.10.2011 (file ref. 2 BvR 633/11) as well as Federal Court of Justice, decisions dated 20.06.2012, file ref. XII ZB 99/12 and file ref. XII ZB 130/12

**Recommendations:**

- The right to hospitalize someone in accordance with guardianship law must be thoroughly revised so that the existence of a disability shall in no case justify a deprivation of liberty and also incidentally the prerequisites of Article 14 UN CRPD must be taken into account.
- The hospitalization laws of the federal states<sup>38</sup> must be thoroughly revised according to Article 14 of the UN CRPD.
- The legitimacy of and prerequisites for compulsory treatments are in urgent need of revision by the legislators in the federal and state governments in accordance with the highest German courts and Article 17 UN CRPD.
- Criteria for all new statutory regulations must be jointly developed with mental health associations and persons with disabilities.

**Violence against women and girls with disabilities (Article 16)**

24. According to a study by the Federal Government women with a disability are two to three times more likely to be victims of sexual violence than women in the general population (more than every 2nd woman). At approx. 74%, they are also more than twice as likely to be victims of physical and psychological violence. In institutions for the disabled, the prevailing violence was, amongst other things, provoked via structures, i.e. via a lack of single rooms, non-lockable washing and toilet facilities, etc.<sup>39</sup>

25. In German law, there is an unequal sentence for sex offences where sexual assault is concerned. The minimum sentence for sexual assault is one year for persons “capable of resistance”. If persons designated as “incapable of resistance” are victims of sexual assault, the minimum sentence is, however, only six months.

26. The German Protection against Violence Act does not adequately protect women with a disability, who require assistance and/or care. There is no clear regulation for the quick and simple assumption of costs for a carer, if the caring partner exercises domestic violence and reference is made to a joint household<sup>40</sup>.

27. Exercises to increase self-confidence which also serve to prevent violence are enshrined in Germany’s Rehabilitation Act within the context of rehabilitation sport since the act came into force in 2001. These courses are not yet being offered, however, which means that women and girls with a disability cannot redeem their legal entitlement.

**Recommendations:**

- The Federal Government should examine the unequal sentence for sexual offences.
- The Federal Government should invest more in prevention, revise the Protection against Violence Act and include the situation of women with a disability.

**Independent living with assistance (Article 19)**

<sup>38</sup> For example mental health laws (PsychKGs)

<sup>39</sup> Federal Ministry of Family Affairs, Senior Citizens, Women and Youth (BMFSFJ) (2012): Lebenssituation und Belastungen von Frauen mit Beeinträchtigungen und Behinderungen in Deutschland [Living situation of and pressures on women with impairments and disabilities in Germany]

<sup>40</sup> The Protection against Violence Act does not intervene in institutions for the disabled either since the possibility of expulsion does not apply if the person perpetrating the violence lives in the same facility.



28. Many persons with disabilities in Germany are not free to choose their place of residence, type of housing and receive the necessary support. They cannot put their right to self-determination into practice for various reasons<sup>41</sup>.

29. For example, persons with disabilities must therefore, to some extent against their declared will, live in in-patient facilities because the necessary assistance and support services as well as nursing services are provided more cost-effectively here than in their own home. The Federal Government has so far shown no inclination to abolish this permitted cost comparison in accordance with Section 13 SGB XII, although (legal) experts have repeatedly pointed out the incompatibility of this standard with the CRPD<sup>42</sup>.

30. Disabled people who require a high level of support and their partners and family members must utilize their own income and assets in order to finance the assistance necessary. In this way, entire families are forced to live in poverty<sup>43</sup>. Reliable old-age provision cannot be built up.

31. The fact that care should on request be provided by a carer of the same gender is not protected by law in Germany either. According to the Long-Term Care Insurance Act, this request must only be fulfilled "as far as possible".<sup>44</sup> This regulation does not take adequate account of the protection of the privacy of the person with disabilities and his/her individual rights<sup>45</sup>.

32. An existing statutory requirement in Germany which could enable persons with disabilities to lead a more independent life is the "Personal Budget"<sup>46</sup>. But there are often problems in realizing the Personal Budget: Sometimes, the responsible authorities refuse; often those affected cannot grasp the complex subject matter without expert advice and support. But the latter is not guaranteed.

33. With Art. 19 CRPD, the State Parties guarantee the necessary support services including personal assistance in the community. In Germany, there is, however, a lack of the appropriate infrastructure particularly in rural areas<sup>47</sup>.

#### **Recommendations:**

- Ensure that persons with disabilities are freely able to choose their place of residence and type of housing regardless of the issue of cost for their assistance.
- Provide persons with disabilities with disability-related support services without discrimination against themselves or their family members.
- Guarantee the rights of persons with disabilities to caregivers of their own gender.
- Enable persons with disabilities to use their Personal Budget and reduce existing implementation problems<sup>48</sup>.

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<sup>41</sup> This is partly because the laws do not comply with the CRPD guidelines; legal guidelines are only being inadequately implemented or infrastructural conditions prevent this and there are no state activities to alter this situation.

<sup>42</sup> - e.g. at the hearing before the Committee on Labour and Social Affairs of the German Federal Parliament on 17.10.2011;

- see also the publication by the monitoring body dated May 2012: [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/positionen\\_6\\_die\\_un\\_behindertenrechtskonvention.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/positionen_6_die_un_behindertenrechtskonvention.pdf)

<sup>43</sup> cf. also Point 54 f on this

<sup>44</sup> Section 2 of the German Code of Social Law XI: ... "Wünsche der Pflegebedürftigen nach gleichgeschlechtlicher Pflege haben nach Möglichkeit Berücksichtigung zu finden." [...] "If the person who needs care requests care by someone of the same gender, this must be taken into consideration as far as possible."

<sup>45</sup> With Art.19 CRPD, the State Parties have also committed themselves to the provision of personal assistance. Personal assistance means, amongst other things, being freely able to choose the assistance person.

<sup>46</sup> This theoretically enables services from a single source, which would be helpful to those affected regarding the variety of cost-bearers and competence wrangling associated with this.

<sup>47</sup> This fact is not mentioned in the German state report on the CRPD; there are no corresponding measures in the action plan on implementing the CRPD.

<sup>48</sup> The additional advice on offer to be financed separately from the Personal Budget is part of this.

### Respect for home and the family (Article 23)

34. There are approx. 390,000 families in the Federal Republic<sup>49</sup> in which mothers or fathers with a disability live together with minor children<sup>50</sup>. Usually they have to struggle for a long time to be supported by parental assistance<sup>51</sup> or supported parenting<sup>52</sup>. To some extent, the unclear legal situation and prejudice against persons with disabilities mean that, in the case of parents with disabilities, children are more likely to be taken out of the family than the necessary support being granted to the parents<sup>53</sup>.

35. Another problem for parents with disabilities in Germany is that compensation for disadvantages such as motor vehicle assistance or adapting housing are only approved in exceptional cases if the person affected is not employed.

#### Recommendation:

- Ensure that parents with disabilities are supported by parental assistance/supported parenting and the granting of compensation for disadvantages.

36. The particularly serious permitted intervention of the sterilization of a person “unable to give their consent” by represented consent of a guardian in accordance with Section 1905 BGB is incompatible with Art. 23 c) CRPD. This regulation obliges the State Parties to take effective and appropriate measures to guarantee that persons with disabilities, including children, retain their fertility on an equal basis with others. In Germany, sterilizations for persons “unable to give their consent” were approved on average in 100 cases and refused on average in 23 cases per year between 2002 and 2010<sup>54</sup>.

#### Recommendation:

- Section 1905 BGB should be deleted without substitution.

### Inclusive school education (Article 24)

37. Germany is a long way from inclusive school education. The education acts do provide for the mutual learning of pupils with and without a disability<sup>55</sup> as an option, but this is the exception in practice: Only 29 per cent of pupils with a disability attended a mainstream school in 2010. The rates of integration in the federal states range from 6 to 40 per cent<sup>56</sup>, whereby the majority is found at primary level. Integration in secondary school is extremely unequal: While “Hauptschule”, secondary schools (secondary modern schools) “shoulder” the biggest share at 39 per cent, “Gymnasien” (academic stream schools) practically keep themselves out of integration with only 5 per cent<sup>57</sup>.

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49 According to Statistical Yearbook 2010 (figures dated 31.12.2007), Federal Statistical Office 2010, p. 234 and Lebenslagen behindertter Frauen in Deutschland - Auswertung des Mikrozensus 2005 [Circumstances of disabled women in Germany – Analysis of the 2005 micro census], BMFSFJ 2009, p. 57

<sup>50</sup> Chronically ill parents without a severely disabled person identity card are not included in this figure.

<sup>51</sup> See also [www.elternassistenz.de](http://www.elternassistenz.de)

<sup>34</sup> See also <http://www.elternassistenz.de/004.php>

<sup>52</sup> Youth and welfare agencies shift the responsibility to each other. Clear statutory regulations are lacking.

<sup>53</sup> See also <http://www.elternassistenz.de/004.php>

<sup>54</sup> cf. Statistics on the approvals and refusals by the Federal Ministry of Justice:

[http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Betreuungsverfahren\\_1992\\_2010.pdf?\\_\\_blob=publicationFile](http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Betreuungsverfahren_1992_2010.pdf?__blob=publicationFile)

<sup>55</sup> The term “pupil with a disability” means the terminology used in German school legislation “pupil with special educational needs”.

<sup>56</sup> Federal education report “Education in Germany 2010; An indicator-based report with an analysis concerning perspectives of the education system in the context of demographic change, Autorengruppe Bildungsberichterstattung on behalf of the KMK, table D 2-7web

<sup>57</sup> Prof. em. Dr. Klaus Klemm, University of Duisburg-Essen, Educational research and planning, lecture: “A school for everyone: the education system and inclusion” Tutzing Evangelical Academy, 21.5.2011

38. The overwhelming majority, precisely 380 000 pupils with a disability, attended a school for children with learning difficulties in Germany in 2010. In some federal states, pupils may also be assigned to this type of school against the will of their parents.<sup>58</sup> The 2010 Federal education report points out that amongst the EU countries Germany has the highest proportion of pupils - almost 50% taught in schools for children with learning difficulties<sup>59 60</sup>. The proportion of children from socially disadvantaged families and those with a migrant background is above-average there and the proportion of boys is remarkably high.<sup>61</sup>

39. Access to mainstream school is considerably more difficult for disabled pupils in Germany and often has to be fought for in court. Almost all federal states have a legal proviso: A disabled child must only be admitted to mainstream school if the necessary personnel, organizational and practical conditions exist<sup>62</sup> - and these are often lacking. Reasonable accommodation, compensation for disadvantages and accessible teaching and learning resources are not adequately provided at mainstream schools. Assistance is often granted in a restrictive and unrelated way; sign language interpreting, school and communication assistance are thus made impossible.

40. Mainstream schools are barely prepared for inclusion. They are rarely accessible. An education of diversity catering to all pupils is rarely practised there. Instead, the German school system (including the consciousness of many teachers) is deep-rooted in the thinking of homogeneous learning groups, is shaped by educational standards, fixation on the curriculum, marks-based formats for assessments and school reports and strong orientation towards school-leaving qualifications. This hinders inclusive school structures.

41. Change processes must be initiated. The resources required for this at mainstream schools (in particular personnel) are inadequate. Multi-professional teams, including special educational needs teaching staff, are certainly not standard in mainstream schools. Consistently compulsory training programmes on inclusion are lacking<sup>63</sup>. Furthermore there is a lack of independent counselling services for parents and their children through associations and/or these are not systematically being funded. Instead, special schools often provide advice themselves.

42. There has so far been a lack of a structured overall concept including a binding timeframe from the federal and state governments, further research and the adequate participation of civil society for the necessary, profound change processes. The action plan of the Federal Government<sup>64</sup> certainly does not provide an overall concept. The will of the federal states to act varies widely. The inclusion debate often only acts as lip service; the urgent obligation to act is qualified<sup>65</sup>. This is evident, amongst other things, in the still incorrect official German translation of the English term "inclusion" by "integration" in Art. 24 CRPD.

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<sup>58</sup> cf. e.g. Section 59 par. 5 of the law on schools in Lower Saxony (Niedersächsisches Schulgesetz)

<sup>59</sup> Education in Germany 2010; An indicator-based report with an analysis concerning perspectives of the education system in the context of demographic change, Autorengruppe Bildungsberichterstattung on behalf of the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany, p. 6

<sup>60</sup> Federal education report 2010, p. 71

<sup>61</sup> Justin J.W. Powell, Lisa Pfahl, Berlin Social Science Research Centre: „Sonderschule behindert Chancengleichheit“ [“Special school hinders equal opportunity”] 2008

<sup>62</sup> This is what is missing. Reasonable accommodation, compensation for disadvantages and accessible teaching and learning resources are not adequately provided at mainstream schools. Assistance is often granted in a restrictive and unrelated way; sign language interpreting, school and communication assistance are thus made impossible.

<sup>63</sup> More action is currently being taken to implement school inclusion in a cost-effective way by lowering existing integration standards, scaling down the integration of severely disabled pupils and substantially cutting “beacon schools”. Instead of the necessary investment, financial resources are only being “switched”; model school projects are being applied instead of proceeding comprehensively and sustainably.

<sup>64</sup> National Action Plan of the Federal Government for implementing the UN Convention on the Rights of Persons with Disabilities “Our path towards an inclusive society” 2011

<sup>65</sup> So alleges the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany: “Germany’s legal position in principle meets the requirements of the Convention.”, Source: Decision by the KMK dated 18.11.2010, p. 2, available at [http://www.kmk.org/fileadmin/veroeffentlichungen\\_beschluesse/2010/2010\\_11\\_18-Behindertenrechtkonvention.pdf](http://www.kmk.org/fileadmin/veroeffentlichungen_beschluesse/2010/2010_11_18-Behindertenrechtkonvention.pdf)

**Recommendations:**

- The human right to inclusive education must be recognized; legal and resource provisos must be eliminated.
- High-quality inclusion at mainstream schools to be remodelled in an accessible way must be implemented and practical, personnel, financial and organizational resources must be guaranteed; the right to “Reasonable accommodation” must be ensured.
- A coordinated, targeted overall approach including a binding timeframe<sup>66</sup> for implementing all the measures of the federal and state governments must be guaranteed.

**Health (Article 25)**

43. Access to outpatient medical care is characterized by a variety of barriers for persons with a disability or mental illness. These range from structural barriers and a lack of guidance to unresolved communication problems and hostile attitudes. Lack of knowledge and shortcomings with regard to practical expertise on how to act regarding certain groups of disabled persons constitute a significant barrier.

44. Even in hospital, persons with a disability, in particular with what is known as a “mental” disability, dementia or most severe multiple disability, are not adequately provided for. The necessary assistance and support for persons with disabilities is only guaranteed in exceptional cases during a hospital stay.

45. In the case of people needing care, mistakes in care continually occur such as pressure sores and contractures which would have been avoidable with adequate staffing in terms of quantity and quality and consistent compliance with care standards.

46. Persons with disabilities are exposed to particularly high financial charges due to personal contributions and extra payments, whereby dispensing with health services is enforced in the case of the reduced economic capacity of disabled persons.

**Recommendations:**

- Individually tailored care with increased consideration of often limited economic capacity must be ensured.
- All barriers to access to health care (attitude, knowledge, powers to act, communication skills, on-site and communication barriers, etc.) must be dismantled. Appropriate criteria must be developed for certification procedures.
- The issues of disability and the increased requirements necessary as a result must be systematically integrated into the basic and advanced training of all health-care professionals.
- Assistance in hospital must be ensured.
- Mistakes in care must be combated through increased monitoring and sanctions in respect of those responsible.

**Work and Employment (Article 27)**

47. The unemployment rate of persons with a disability was at 14.8 per cent almost twice that of persons without a disability in 2010<sup>67</sup> and the trend continues to be negative: a total of 167 000 severely disabled persons were unemployed in 2009; this was already 175 000 in 2010<sup>68</sup>. Hardly anything is being done to counter this; the statutory employment obligation rate for employers has re-

<sup>66</sup> On this, cf. the decision by the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany (KMK) dated 20.10.2011 concerning the “inclusive education of children and young people with disabilities in schools”, p. 16

<sup>67</sup> Federal Employment Office, Labour Market 2010. Official information. 58th year. Special edition 2. p. 54, 153

<sup>68</sup> In 2011, their number continued to rise to 180 000. This trend is diametrically opposed to the general fall in unemployment figures in Germany since 2009. This shows that persons with a disability are at a distinct disadvantage on the German labour market.

mained unfulfilled for years. Despite a statutory obligation, more than 37 000 companies did not employ a single severely disabled person in 2010 without being sanctioned for this.

48. The regulations of the German Workplace Ordinance on accessibility are inadequate. They only apply in businesses which already employ disabled persons<sup>69</sup>. Furthermore, integration offices are not obliged to assume the full costs for the disability-appropriate provision of workplaces in accordance with Section 27 of the German ordinance on equal opportunities for severely disabled persons (SchwbAV). Disabled persons are not entitled to this benefit. The refusal of this reasonable accommodation has not been grounds for discrimination so far.

49. Germany has high-quality offers of occupational rehabilitation (CRPD Art. 26, 27), but there are considerable obstacles regarding the actual access to these offers. The number of professionally recognized rehabilitants fell in particular for the reintegration sector when the Code of Social Law II (SGB II) came into force because the recognition procedure became considerably more complicated with SGB II and the authorities lack the consulting expertise required<sup>70</sup>. Occupational action must aim for sustainability in how it is provided through the work of vocational training centres, for example<sup>71</sup>. Instead of training and further education or placement in sustainable employment with social insurance, rapid placement in low-paid unstable employment scenarios prevails in the SGB-II sector for disabled persons.

50. Persons with a disability who cannot work on the primary labour market are as a rule only left with employment in a sheltered workshop. 280,000 people are currently employed in these workshops. An increase to 300,000 is expected in the next few years. A lack of options and a lack of support and considerably stressful working conditions in employment mean that persons with a disability or chronic illnesses retire early.

#### **Recommendations:**

- The growing unemployment amongst severely disabled persons must be counteracted and the obligation of employers to employ people must be firmly implemented and supported.
- The Workplace Ordinance must generally define the accessibility of workplaces – no matter whether disabled persons are already employed or not.
- Access to qualified rehabilitation must be improved, in particular in the SGB II sector.
- The choice between sheltered workshop employment and employment on the general labour market should be made more feasible – by guaranteeing the support/assistance required and the same social insurance protection, also in day centres for persons who require a high level of support.

#### **Adequate standard of living / Poverty (Article 28)**

51. Disability in Germany also means poverty and discrimination. There are many reasons for this: Persons with disabilities participate in working life less often than persons without disabilities<sup>72</sup>. While 76.5 per cent of persons without a disability aged between 15 and 65 years work, the figure is only approximately half for persons with disabilities.<sup>73</sup> Women with disabilities are more affected by poverty than men with disabilities: according to the 2005 micro-census, 32.4% of disabled women had a monthly net income of less than 700 euro. The same was true for 12.8% of disabled men<sup>74</sup>.

<sup>69</sup> This has a discriminatory effect in application situations because employers may fear costs for modifications or the need for assistance through recruiting disabled persons.

<sup>70</sup> The allocation practice of the authorities, which in many cases results in a difficult “marathon of measures” for those affected, must also be viewed critically.

<sup>71</sup> Instead of training and further education or placement in sustainable employment with social insurance, rapid placement in low-paid unstable employment scenarios prevails in the SGB-II sector for the advancement of disabled persons.

<sup>72</sup> cf. also Point 47 regarding the data on unemployment

<sup>73</sup> Federal Statistical Office: Status and trend of employment in Germany in 2010

<sup>74</sup> cf. Federal Statistical Office on this, Economics and Statistics 2/2007, p.199

52. In addition to this, programmes enabling participation in community life are means-tested.<sup>75</sup> So, for persons who require assistance services, 40 and more per cent of their adjusted income is confiscated. Persons with disabilities in full in-patient facilities are only left with pocket money of 100.98 euro per month.<sup>76</sup> Persons on income support who are employed in a sheltered workshop are left with only 46.75 euro per month from the workshop payment plus 25 % of the workshop payment exceeding this amount.<sup>77</sup> The means-testing for participation benefits only grants persons with disabilities protected assets of 2,600 euro. Persons with disabilities are as a result permanently restricted in their opportunity for economic development and set at a low level throughout their lives<sup>78</sup>.

#### **Recommendation:**

- Compensation for disadvantages must in the light of the UN CRPD be granted without reference to means through the creation of a “Law on Social Participation” which also includes the introduction of Federal participation funding.

#### **Exclusion from the right to vote (Article 29)**

53. According to Section 13 No. 2 of the Federal Electoral Act (BWG), a person for whom a guardian is not only appointed by an interim order to manage *all their affairs* is excluded from the active and passive right to vote in Germany<sup>79</sup>.

54. This generalized exclusion from the right to vote is arbitrary because there is no connection between the arrangement of legal guardianship and the right to vote as regards content. The capacity to participate in an election is not examined in the guardianship procedure. It sometimes happens that courts arrange legal guardianships<sup>80</sup> *for all their affairs* in order to facilitate comprehensive legal freedom to act for family members although the legitimacy of “total guardianship” is at least questionable. The automatic loss of the right to vote is as a result often neither known nor desired on the part of the persons concerned.

55. In addition, unjustified deletions from electoral registers take place occasionally by the elective offices responsible because guardianship courts incorrectly report legal guardianships for individually designated sectors as “total guardianship”<sup>81</sup>.

56. With its exclusion from the right to vote Germany is violating existing international-law obligations. With its resolution “Rights of persons with disabilities: Participation in political and public life”<sup>82</sup>, the Human Rights Council asserted the enshrined right to participation in political and public life<sup>83</sup>. The Council established that the exclusion or restriction of the political rights of persons with a

<sup>75</sup> SGB XII Section 19 par. 3 in conjunction with Section 85 par. 1 (Income commitment) and Section 90 par. 1 (Asset commitment)

<sup>76</sup> Necessary living expenses in facilities in accordance with Section 27b SGB XII

<sup>77</sup> Income for employees of a sheltered workshop (WfbM) in accordance with Section 82 par. 3 p. 2 SGB XII

<sup>78</sup> This restriction breaches Art. 28 par. 1 UN CRPD according to which the State Parties must guarantee continuous improvement of living conditions and breaches the non-discrimination provisions embodied in Art. 5 par. 2 UN CRPD.

<sup>79</sup> According to the 2nd clause of the provision, this also applies if the responsibilities do not cover the areas of postal and telephone monitoring subject to specific custody law regulations in accordance with Section 1896 par. 4 BGB as well as sterilization in accordance with Section 1905 BGB. The exclusion from the right to vote also extends to participation in European, state and local elections as a result of identical provisions in applicable laws.

<sup>80</sup> Since 1992, law reform guardianship has worked without the precondition of incapacitation and is called “rechtliche Betreuung”.

<sup>81</sup> Germany’s legal statistics do not contain any information as to how many people are affected by a “total mentorship” with the result of exclusion from the right to vote.

<sup>82</sup> Human Rights Council, Resolution A/HRC/19/L9/Rev. 1 of 20.03.2012; Rights of Persons with disabilities: Participation in political and public life; available on the Internet at [www.ohchr.org](http://www.ohchr.org).

<sup>83</sup> in Art. 21 of the Universal Declaration of Human Rights, in Art. 25 of the UN International Covenant on Civil and Political Rights as well as – with explicit reference to persons with disabilities – in Art. 29 CRPD on 20.03.2012.

disability on the basis of their disability constitutes discrimination which contravenes the CRPD.<sup>84</sup> Germany expressly agreed to the resolution of the UN Human Rights Council.

57. The European Court of Human Rights (ECHR) in a decision dated 20.05.2010<sup>85</sup> classified the indiscriminate deprivation of the right to vote, which is only based on a partial guardianship arranged due to a mental or psychological disability without a formal and personalized assessment taking place, as an infringement of Art. 3 of the 1st Additional Protocol to the European Convention on Human Rights.

58. The generalizing criterion of “total guardianship” for the automatic exclusion of the right to vote is, contrary to the view of the Federal Government<sup>86</sup>, not appropriate; it in fact contravenes the principle of equal participation in political life: Any persons not affected by “total guardianship” in Germany are not excluded from the right to vote. Also, anyone who appoints an authorized representative through a *power of attorney* for the case of a later need for support need not fear any exclusion from the right to vote.

59. Persons who have committed an offence in a state of absence of culpability and are housed in a psychiatric hospital are also excluded from the right to vote<sup>87</sup>. This general exclusion of mentally handicapped persons from the right to vote is also discriminatory, as offenders without disabilities may normally vote.

**Recommendation:**

- The exclusions from the right to vote in Section 13 Nos. 2 and 3 of the Federal Electoral Act and the identical regulations in the laws on state and local elections and in European election law must be deleted without substitution.

Berlin, 27 September 2012

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<sup>84</sup> In the original text: “...noting that the exclusion or restriction of political rights of persons with disabilities on the basis of disability constitutes discrimination contrary to the Convention on the Rights of Persons with Disabilities.”

<sup>85</sup> Kiss./Hungary, Application No. 38832/06.

<sup>86</sup> German Federal Parliament, Plenary Protocol of 19.10.2011, p. 15637

<sup>87</sup> Section 13 par.3 of the Federal Electoral Act