

*Independent Monitoring Committee
for the Implementation of the UN Convention on the
Rights of Persons with Disabilities*

MonitoringAusschuss.at

Report

**of the Independent Monitoring Committee for the
Implementation of the Convention on the Rights of
Persons with Disabilities to the Committee on the
Rights of Persons with Disabilities in preparation of
the dialogue with Austria in September 2013**

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1. Introduction

“The lives of persons with disabilities are presented (...) mainly from the perspective of various burdens, mostly financial but also social. To some extent the lives of persons with disabilities are even shaped by this view. People rightly condemn attitudes narrowing down human existence to one aspect, and it is therefore of utmost importance to flatly reject this limited view of persons who already face various types of social exclusion and their consequences.

As has become manifest (in diverse ways), the public image of impairments – and particularly of persons with disabilities – has been characterised by a high level of ignorance and prejudice, which has little to do with the reality of life of persons with disabilities in general and in particular with their everyday lives in Austria.

A factor almost completely disregarded is (...) the long-overdue re-construction of the image of persons with disabilities based on dignity, equal opportunities and human rights. The role social mechanisms and behavioural barriers of society as a whole play in the social exclusion of persons with disabilities has de facto been ignored. The causes giving rise to a “different”, namely “inferior” assessment of the lives of persons with disabilities have been addressed or analysed insufficiently or not at all.”¹

The Committee prepared this statement in January 2011 in response to the government’s draft amendment of the law on damages. The reductionist profoundly medical image of persons with disabilities expressed in the draft clearly reflects public opinion on impairments and persons with disabilities, respectively. It is also quite symptomatic that this very detailed and highly specialised amendment (triggered by a decision of the Appeal’s Court) was meant to add a piece to the puzzle of social cohesion. While the greater dimension of hidden socio-political challenges is stressed emphatically, no concrete action has de facto been taken.

It therefore seems logical that the government, the National Council and the Federal Assembly ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2008 rather speedily, pointing out that there was “no need for action” and that “the existing legal framework fully complied” with the Convention”.² Only as far as monitoring was concerned, a lacuna was identified. From the perspective of the government and of Parliament, this gap was filled by establishing the Monitoring Committee.³

¹ Opinion on the Act Amending the Law on Damages (Schadenersatzrechtsänderungsgesetz), 17 February 2011. <http://www.monitoringausschuss.at/sym/monitoringausschuss/Stellungnahmen>.

² “The international-law obligations arising from the Convention have already been fulfilled to the greatest extent possible in the Austrian legislation.” 564 of the Addenda of the XXIII. Legislative Period – State Treaty – Documents, p. 2, <http://www.parlament.gv.at/PAKT/VHG/XXIII/I/00564/index.shtml>; Explanatory Notes relating to Section 13 of the Austrian Federal Disability Act (Bundesbehindertengesetz/BBG): “It may be assumed that the substance of the concrete rights of the Convention had already been enshrined in the Austrian Constitution before signing the Convention.” http://www.ris.bka.gv.at/Dokumente/RegV/REGV_COO_2026_100_2_443959/COO_2026_100_2_446922.html.

³ Compare Explanatory Notes relating to Section 13 of the Federal Disability Act.

An overview of the institutional structure of the Committee as well as its thematic priorities is provided in the following. Another section of the report is devoted to the fundamental problems faced in ensuring an accessible and inclusive society in Austria and proposals to solve these.

2. The Committee and other institutions

The Monitoring Committee was established pursuant to Section 13 of the Federal Disability Act (BBG; Federal Law Gazette no. 283/1993 as amended by the Federal Act in Federal Law Gazette I no. 109/2008) with the – explicit – aim of fulfilling the tasks laid down in Article 33(2) CRPD. The Monitoring Committee was set up on 10 December 2008 and adopted its Rules of Procedure on 1 April 2009 (see Annex). The members of the Committee, who are not subject to any instructions, are representatives of non-governmental organisations committed to persons with disabilities, human rights, development cooperation as well as academia. The members are suggested by the Austrian National Council of Disabled Persons (Österreichische Arbeitsgemeinschaft für Rehabilitation/ÖAR)⁴ and appointed by the Federal Minister of Labour, Social Affairs and Consumer Protection. They perform their activities on a pro bono basis.⁵ Other members participating in an advisory capacity are: one representative each of the Federal Ministry of Labour, Social Affairs and Consumer Protection, of the responsible ministry or of the supreme executive body.

The considerations of the government in establishing the Committee were as follows:

Any individual violations of law by the Republic of Austria may be challenged by taking legal remedies, seeking legal redress or having recourse to a court. In addition, there are bodies exercising control functions such as the Austrian Ombudsman Board or the Disability Ombudsman. As Austria has agreed to establish an additional monitoring mechanism, new legislation is required to incorporate it into the existing system. This additional task should be assigned to an existing body, i.e., the Federal Disability Advisory Board. It is the most important consultative body responsible for matters relating to persons with disabilities at federal level. Non-governmental organisations are already strongly represented on the Board.

The establishment of such a Committee itself would practically be “revenue neutral”, causing additional annual costs of a three-figure sum in Euro (reimbursement of travel expenses, etc.). Based on estimates, one qualified employee will be required for the Committee’s day-to-day office administration; the annual expenses calculated on a flat rate basis currently total € 22,252.⁶

In its first statement the Committee drew attention to the fact that the arrangement chosen does not comply with the requirements of the Paris Principles and criticised in particular that the integration of the Committee within a specialised ministry (as well

⁴ An Austria-wide federation, whose members are organisations of persons with disabilities and service providers for persons with disabilities.

⁵ For the chairperson an expense allowance was introduced, which took effect 1 September 2010.

⁶ Explanatory Notes relating to Section 13 of the Federal Disability Act.

as a body of said ministry) was problematic in programmatic and institutional terms; as is the lack of a budget.

In Austria numerous institutions fulfil partial functions of a national human rights institution in accordance with the Paris Principles. The Austrian Ombudsman Board performs essential tasks but has B status.⁷ Other institutions are the Equal Treatment Commission, the Ombud for Equal Treatment, the Data Protection Commission, the Federal Disability Ombudsman, the Legal Protection Officer, the Children's and Youth Ombudsman, the Ombud Office of the Austrian Judiciary and the Patients' Ombud. The confusing set-up has been criticised previously.⁸ The tasks of Article 33(2) CRPD were not assigned to a national human rights institution (NHRI) as there is no NHRI in Austria. Attention should be drawn to the fact that the Data Protection Commission has recently been assessed and found to lack independence.⁹ In general Austria failed to integrate human rights obligations into the mainstream of activities on the one hand and to take measures to monitor and control human rights issues in a bundled way and across different spheres of responsibility, on the other.

The Monitoring Committee¹⁰ has held 50 meetings¹¹ since 10 December 2008, including seven public meetings. A total of more than 1000 persons participated in the public meetings held in Graz, Innsbruck and Vienna. The Committee adopted more than 40 Statements¹², which were submitted to the responsible ministries, to Parliament, partly to the regional governments of the federal provinces and their administrations as well as the Council of Ministers. The Committee also commented on the review procedures for State Parties under the Women's and Children's Rights Convention¹³ and made contributions to studies of the Office of the High Commissioner for Human Rights¹⁴ and to discussions of the CRPD Committee.¹⁵ Members of the Committee participated in numerous discussions and lectures, wrote articles about the importance of the Convention and gave interviews to raise awareness about the Convention.

Despite its scarce resources, the Committee has also made efforts to treat individual cases. Besides the lack of operational capacity, this work is severely hampered by Austria's federal structure.¹⁶ Complainants could be satisfied only in very few cases.

⁷ Report of ICC Sub-Committee on Accreditation:

<http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/SCA-Reports.aspx>; SCA Report 2011.

⁸ Independent Expert of the United Nations in the Field of Cultural Rights, Farida Shaheed, Report on the Mission to Austria, June 2012, A/HRC/20/26/Add.1, paras. 35-42, as well as the recommendations of the Working Group on the Universal Periodic Review, A/HRC/17/8.

⁹ Judgement of the Grand Chamber of the European Court of Justice of 16 October 2012, C-614/10, European Commission v Republic of Austria.

¹⁰ The following persons have thus far served as members or substitute members: Bernadette Feuerstein, Marko Gabriel, Karl Garnitschnig, Irmtraut Karlsson, Ruth Renée Kurz, Edwin Ladinser, Martin Ladstätter, Johanna Mang, Christina Meierschitz, Ursula Naue, Manfred Nowak, Wolfgang Nowak, Erwin Riess, Erich Schmid, Marianne Schulze, Johannes Trimmel, Heinz Trompisch, Gunther Trübswasser, Karin Wagner, Silvia Weissenberg, Florian Wibmer, Anthony Williams, Markus Wolf, and Christina Wurzing. Staff of the bureau: Wolfgang Iser, Waltraud Palank-Ennsman, Sabine Wagner.

¹¹ Reference date: 29 January 2013; all minutes: www.monitoringausschuss.at.

¹² Available for download: www.monitoringausschuss.at.

¹³ See www.monitoringausschuss.at.

¹⁴ See www.monitoringausschuss.at – "Stellungnahmen" (Statements) (English documents).

¹⁵ See www.monitoringausschuss.at – "Stellungnahmen" (Statements) (English documents).

¹⁶ The Committee is explicitly competent only for affairs for which the Federal Republic of Austria has legislative and executive powers. Many matters, which are important for persons with disabilities fall within the purview of the federal provinces of Austria. For more details on the competent bodies in the

The criticism that nothing substantial is done by the Committee cannot be refuted; due to a lack of resources, this situation will not change in the future.

Considering the circumstances, the mere existence of the Committee and the fact that political decision-makers and the media are aware of its existence must be considered a small institutional success. However, it should not blind us to the fact that the Committee has not had a major impact on the actual inclusion of persons with disabilities. According to information provided by self-advocates, the Committee's regular public meetings are perceived as an important achievement, making a crucial contribution to improving the discourse on and awareness of the human rights of persons with disabilities among self-advocates. The participation of persons with disabilities – “empowerment” – has also been strengthened by the initiatives of the Committee.

3. Human rights of persons with disabilities

Austria's approach to human rights is complex. There is no catalogue of human rights developed throughout history and no profound understanding of human rights in society and politics. Those rights that enjoy constitutional status reflect only a part of the human rights catalogue. They date back to an absolutistic emperor (Austrian Basic Law) and a dispute among legal experts (European Convention on Human Rights). It is generally assumed that the European Convention on Human Rights covers all human rights. However, some rights, in particular economic, social and cultural human rights, have not been incorporated. This also became evident in the recent past when the human rights catalogue of the Convention on the Rights of the Child was recognised only partially.¹⁷ All international human rights treaties – except the ECHR – were ratified by Austria with the proviso that in accordance with Article 50 of the Federal Constitution Act the respective treaty was not automatically self-executing (“Erfüllungsvorbehalt”).¹⁸

When it comes to realising human rights, the “legal” aspect is overemphasised and attention is focused on the question of legal implementation. Implementation issues – and particularly the quality of implementation – are belittled as utopian visions of NGO representatives. The situation is aggravated by the fact that human rights are considered a subject-matter which can be worked on in individual steps and which will be finalised in the not too distant future. There is a widespread lack of awareness that compliance with human rights must be questioned constantly. It must be assumed that only very few politicians and civil servants know the basic requirements of a “human rights based approach”. As far as the human rights of persons with disabilities are concerned, the situation is even worse as Austria considers itself a welfare state. Hence, it is difficult to replace “alms” for persons with disabilities with a human rights based approach. Historically, the main responsibility for matters related to persons with disabilities at federal level has rested with the Ministry of Social Affairs. The transfer of this responsibility to the Federal Chancellery, which is competent for human rights in general and cross-cutting issues in particular, has not

federal provinces see: “Federalism“, p. 26.

¹⁷ See also: Criticism of the Committee on the Rights of the Child CRC/C/AUT/CO/3-4.

¹⁸ See also: Report on the Universal Periodic Review, A/HRC/17/8.

succeeded. In many important social spheres the federal provinces are responsible for legislative and administrative tasks relating to disability policy.

a. Austria's State Party Report

It has to be acknowledged that Austria fulfils its reporting obligations in the context of this as well as other Conventions. It is, however, lamentable that substantial parts of Austria's State Party Report consist in presenting Austria's disability policy instead of documenting the implementation of the Convention. A typical example is the information provided on disaster management: "...according to the Federal Ministry of the Interior, Austria has a countrywide civil protection system and one of the most densely woven public supply networks."¹⁹ Fortunately, disaster management in Austria is really well developed, but no information whatsoever is provided on accessibility – in physical or communicative terms. As an inquiry with the competent bodies shows very clearly, there is only little awareness of the different dimensions of accessibility and the shortcomings in implementing accessibility.

b. National Action Plan

Since the ratification of the Convention, the Ministry of Social Affairs has played a leading role in taking measures to implement it. Preparing Austria's State Party Report and, subsequently, the National Action Plan (NAP) are the two most important projects. In both cases, the Ministry of Social Affairs has tried to enable participation. Unlike in previous processes, efforts were visible which – from the perspective of the Ministry – are very progressive compared to past practices. In the opinion of the Committee, the minimum requirements of participation, which the government set itself,²⁰ have not been met. Austria's State Party Report was submitted to the NGOs in an advanced stage of preparation. Their comments were reflected in the final report only to a very limited extent, the criticism that this perceived as inadequate was not understood. In the context of the NAP, preliminary and wrap-up events were held for NGOs but no consultations were held inbetween. The entire process was characterised by a lack of all types of participation. A deadline of barely three weeks was granted for feedback on the draft of the NAP. More than 100 institutions took advantage of this short period to provide often very detailed criticism and to make specific suggestions for improvement. However, the comments were not taken into account, stating that the date for submission to the Council of Ministers had already been set. To enhance transparency and participation, it would, however, have been desirable to publish and incorporate the feedback. The NAP was not submitted to Parliament, whose role in implementing human rights could in principle be strengthened.

¹⁹ Austria's State Party Report, 22.

²⁰ Compare Federal Chancellery (2009), Standards der Öffentlichkeitsbeteiligung. Empfehlungen für die gute Praxis (Standards of Public Participation. Recommendations for Good Practice). Vienna. Decision of the Council of Minister of 2 July 2008. http://www.partizipation.at/standards_oeb.html, English version: http://www.partizipation.at/fileadmin/media_data/Downloads/Standards_OeB/oeb_standards_engl_finale_web.pdf; Recommendations of the European Commission KOM (2002)704.

In many respects the NAP fails to meet the requirements, which a planning instrument of this type has to fulfil.

- The projects do not focus on the requirements of the Convention; the NAP is therefore a mix between pre-Convention disability policy and genuine efforts to meet the requirements of the Convention.
- The social model of disability has not been strengthened sufficiently; opportunities to promote an up-to-date image of persons with disabilities have not been taken advantage of.
- The need of changing the awareness of the majority population (the “other 85%“) has not been recognised.
- The federal provinces, which are an integral part of a state with a federal structure such as Austria, have not been involved adequately and therefore do not assume any responsibilities.
- The financing of the projects has not been guaranteed.
- There are hardly any indicators or similar measuring tools for the objectives.

c. A modern image of persons with disabilities

A practical way to implement the human rights of persons with disabilities is to simply frame persons with disabilities as persons with equal rights. This modern image of persons with disabilities does not yet prevail in Austria. For a major part of the population it is still unimaginable that a person with a disability may assume an office with representative and ceremonial duties. This has many different causes but one reason could be that the image of impairment created by National Socialism has not been rectified. Even though data were collected and awareness of the persecution of persons with disabilities has been raised, various public discussions show very clearly that the “judging” and “devaluing” of persons with disabilities has been addressed insufficiently:

Associative links between impairments (and consequently persons with disabilities) and “damage” must be rejected as a matter of principle and particularly against the background of present-day social exclusion. Considering the fact that “euthanasia” programmes existed barely seven decades ago, which were propagandised by using terms such as “worthlessness” and “nullity” and that thousands of persons with disabilities were consequently murdered,²¹ this connotation of the discussion is dangerous and reprehensible.²²

Against this background, the Committee emphatically welcomes the fact that the NAP announced a reform of the charity campaign “Licht ins Dunkel”.²³ This TV show has also shaped the public image of persons with disabilities for 40 years. To raise awareness and to foster a paradigm shift towards a modern image of persons with disabilities, a radical redesign of “Licht ins Dunkel” is indispensable.

Obsolete images of persons with disabilities and of individual impairments prevail in many areas. Very often institutions are prepared to address this issue. But the

²¹ Speech by Gunther Trübswasser, 3 December 2010, International Day of Persons with Disabilities, Linz/Lentos Museum; <http://www.bizeps.or.at/news.php?nr=11940>.

²² Statement on the Act Amending the Law on Damages.

²³ National Action Plan, page 94; the name of the show means “Light into Darkness”.

personnel department of the Ministry of Justice for example holds a prejudice that blind persons cannot discharge the duties of a judge.

Common images of and about disability can also be found in the German translation of the Convention. The indiscriminate use of “integration“ and “inclusion“ in the German translation (a correct translation into German is possible as there are equivalents of the English terms) illustrates very clearly that there are no appropriate images of and about disability, while out-dated images persist.

4. Thematic areas

The Committee adopted numerous statements. Excerpts from some of these are provided in the following. Any feedback was incorporated into the text unless the responsible body failed to do so.

4.1. Social security

Social model: rehabilitation, General Social Insurance Act

The division of responsibilities for the treatment of patients and for (re)habilitation between the Federal Republic of Austria and the federal provinces is based on a primarily medical approach to impairments and disabilities, focusing on “curing”. Provisions which in accordance with the Convention qualify as early support measures, (re)habilitation and education, partly fall within the purview of the healthcare sector.

Social policy, notably disability policy, is dominated by a welfare approach. The basic understanding that Austria is a welfare state means that policy-makers supposedly do many “good things” – but not on the basis of human rights. Social human rights have not been enshrined in any way in the Austrian Constitution.

Demands

- A fundamental debate concerning the impact of the social model on the General Social Insurance Act and related areas has been called for on several occasions but nobody feels responsible to facilitate it.
- A human rights approach in social policy, particularly disability policy.
- Enshrining social, economic and cultural human rights in the Constitution.

Reaction

Vague promises have been made, and there was a common understanding that a “major overhaul” was needed. However, no concrete proposals have been made regarding the forum where such a discussion could take place.

Assessment Ordinance

The essentials and core provisions of the Assessment Ordinance (“Einschätzungsverordnung”)²⁴, which was substantially amended in 2011, focus on **medical** aspects. The importance of social barriers has not been given adequate attention – neither in the text of the Ordinance nor in the explanatory notes. Due to the fact that the multiple dimensions of impairments and disabilities were taken into consideration only inadequately, the requirements concerning the implementation of the Ordinance do not live up to the standards laid down in the Convention (based on the Ordinance, impairments or disabilities are assessed exclusively by medical experts).

The Assessment Ordinance is based on the ICD – *International Classification of Diseases* – and the translation into German seems to be considerably “more medical” than the English original. The ICF – *International Classification of Functioning* – has not been taken into account.

Reaction

The envisaged evaluation of the Assessment Ordinance is to take into account the social model as well as the ICF.

4.2. Funding

In the past few years a tendency could be observed to replace services previously provided by local authorities under “sovereign administration” by subsidies in “private-sector administration”.

Measures to improve the occupational and social participation of persons with disabilities are usually still regarded as social policy measures in Austria’s legal reality.

Based on the Austrian Constitution, measures to improve the occupational and social participation of persons with disabilities are provided by the Federal Republic of Austria and the federal provinces but also by self-governing bodies or other public or private institutions contracted for this purpose.

Demands

- ➔ Establishing legal entitlements to individual services.
- ➔ Securing financial resources for services to improve full participation, independently from economic developments.

Reaction

None

4.3. Poverty

The at-risk-of-poverty rate of persons with disabilities of 20% is almost **double** the rate of persons without disabilities (11%). **Women with disabilities** have an at-risk-of-poverty rate that is 50% higher than that of men (23% vs. 16%). 11% of all persons with disabilities are manifestly poor, while this applies to merely 4% of all

²⁴ The Assessment Ordinance defines “levels of disability”, which are a prerequisite for access to specific services or rights in the framework of disability policy.

persons without disabilities. Women with disabilities aged between 16 and 64 are affected most significantly by manifest poverty (16%).²⁵

Households with persons in need of care or persons with disabilities have a higher risk of poverty even if benefits, e.g., long-term care allowance or increased family allowance, are available and granted. The at-risk-of-poverty rate of persons of working age with disabilities is about 17%, this means that 124,000 persons are affected.²⁶

If the means-tested guaranteed minimum income is used as a benchmark, the at-risk-of-poverty gap is 16.7% or 149 Euro per month in one-person households,²⁷ this is not enough to protect people effectively against poverty. If persons with disabilities are covered by the means-tested guaranteed minimum income scheme, they are classified as “social cases” – and this reinforces the welfare paradigm. In such a system persons with disabilities have no chance of earning an additional income or saving up money. This implies that persons with disabilities who “work” in sheltered workshops (occupational therapies, etc.) and are usually regarded as not employable or fit for work,²⁸ do not have any chance of escaping the poverty trap.

Demand

→ Establishing a legal entitlement for persons with disabilities to benefits covering their basic living expenses.

Reaction

None.

4.5. Education & awareness raising

Education

Special needs schools and special pedagogical centres currently form an integral part of Austria’s primary education sector. Nearly half of the children with a “need for special pedagogical support” – 27,660 – attended a special needs school in

²⁵ Federal Ministry of Labour, Social Affairs and Consumer Protection, Bericht der Bundesregierung über die Lage der Menschen mit Behinderungen in Österreich 2008 (Report of the Federal Government on the Situation of Persons with Disabilities in Austria 2008), 34.

²⁶ The at-risk-of-poverty rate per se does not indicate the amount by which the income of the person affected is de facto below the at-risk-of-poverty threshold (951 euro for a one-person household per month²⁶). This information is provided by the at-risk-of-poverty gap, which may be interpreted as the difference between the median income of persons at risk of poverty and the at-risk-of-poverty threshold. Hence, the income of households at risk of poverty is 15% on average below the income threshold of 60% of the equivalent median income. In a one-person household this corresponds to an income of 808 euro per month: each month the income is 142.65 euro below the at-risk-of-poverty threshold. Austrian Association for Policy Consulting and Development (ÖGPP) 2008, Zweiter Armuts- und Reichtumsbericht (Second Report on Poverty and Wealth), page 48 et seq. Note: The risk of poverty of families with a family member in need of care and the social protection of women (who traditionally provide the major part of informal care), is highly problematic from a human rights perspective.

http://www.politikberatung.or.at/typo3/fileadmin/02_Studien/5_armut/armutundreichtum2008.pdf.

²⁷ Austrian Association for Policy Consulting and Development (ÖGPP) 2008, Second Report on Poverty and Wealth, page 8.

²⁸ Compare statement of the Monitoring Committee on Occupational Therapy of 24 March 2010.

2010/11.²⁹ The countrywide integration rate of about 52% has remained almost unchanged since 2001, while the number of pupils of compulsory school age decreased in the same period. The number of children attending “integration classes” varies between about 30 and 80%, depending on the federal province. If pupils are found to have a “need for special pedagogical support”, their years of schooling will be reduced by virtue of the law (compared to the regular school system).

Mostly, pupils of primary school age with minor disabilities are integrated into the regular school system, while at secondary level I pupils with more severe impairments predominantly attend special needs schools. According to the law, integration into the school system currently ends after the 9th grade. The right of school attendance of children who enter school later due to impairment or due to a lack of integration opportunities is calculated on the basis of their age instead of the actual number of years of schooling; this causes inequalities.

At the pre-primary level integration efforts are being made, but no inclusion is achieved. This has been reflected clearly in the recent agreement on compulsory nursery attendance, which contains exemptions from compulsory nursery attendance of one year for children with disabilities.

The number of university graduates with disabilities is extremely small. According to the Social Survey 2006 not even 1% of the students define themselves as “disabled”; based on the survey, almost half of the Austrian universities – 14 out of 37 – do not have any students with disabilities.³⁰ Continuing and further education systems are often designed in a way that prevents persons with disabilities from participating on an equal basis with others. The impression is confirmed that the Federal Republic of Austria fails to implement inclusion even in publicly funded education programmes – although the Federal Disability Equality Act (“Bundes-Behindertengleichstellungsgesetz”) (Section 8, Para. 3) stipulates that funded measures must be non-discriminatory.

In accordance with the intent of the legislator, the parents’ preference should be decisive when it comes to choosing between a special needs school or an integration class. According to several studies, in practice the situation is completely different. Greater importance is given to the opinion of experts, while parents are forced to change their mind.³¹ This is an area in which the Committee on the Rights of the Child has identified conflicts with the best interest of the child.³²

Based on estimates, at least 300,000 persons in Austria are functional illiterates, the estimated number of unrecorded cases is considerably higher. It may be assumed that this group includes many persons with disabilities or that persons with disabilities are represented disproportionately in this group.

²⁹ STATISTICS AUSTRIA (STATISTIK AUSTRIA), Schulstatistik: Schülerinnen und Schüler mit sonderpädagogischem Förderbedarf 2010/11 (School Statistics: Pupils with special education needs and pedagogical support 2010/11), prepared on 13 December 2011.
http://www.statistik.at/web_de/statistiken/bildung_und_kultur/formales_bildungswesen/schulen_schulbesuch/029658.html.

³⁰ Studierendensozialerhebung 2006 (Social Survey on Students 2006). The data for 2009 are not yet available.

³¹ Klicpera, Christian; Gasteiger-Klicpera, Barbara. Beratung der Eltern von Kindern mit sonderpädagogischem Förderbedarf (Counselling of Parents of Children with a Need for Special Pedagogical Support).

³² See criticism of the Committee on the Rights of the Child CRC/C/AUT/CO/3-4, para. 44.

Demands

- ➔ A radical structural reform of the Austrian education system based on human rights principles.
- ➔ However, the mere abolition of the system for special pedagogical support, special needs schools as well as special pedagogical centres as such cannot be deemed to meet the requirements of the CRPD.
- ➔ The commitment to the fundamental principle of diversity and the elimination of social barriers are – from the human rights perspective – a clear mandate to remove all social, cultural and socio-economic barriers in the field of education by a reform of primary education.
- ➔ A radical reform of pedagogical training is indispensable to guarantee that all teachers will have the skills to work in inclusive settings. Furthermore, non-discriminatory access to teachers' training must be ensured.

Reactions

- Round table of the Federal Ministry of Education on “inclusive education” with the result that model regions could be established for “pilot tests”
- Reply of Minister to questions in Parliament regarding the Convention³³
- Letter of the State Secretariat about access for children with disabilities to the so-called “compulsory pre-school-year”
- The NAP proposes the establishment of “inclusive regions”

Raising awareness, perception of children with disabilities as “damage”, ORF Audience Council

In Austria only minor efforts are made to raise awareness about a modern image of persons with disabilities. Against the background of inadequate measures taken to confront the image of persons with disabilities shaped by National Socialism and of a Christmas-time charity show on TV, it is evident that images and messages conveying a paradigm change are completely lacking. The Committee requested inter alia the Federal Disability Advisory Board to address this shortcoming.

Reaction

None.

As explained in the introduction,³⁴ there was a discussion in the context of the amendment of the law on damages that no damages have to be paid in the event of medical malpractice leading to impairment with assistance needs. In this highly memorable “discussion” an image of persons with disabilities was created, which is neither “dignified” nor “contemporary”. Obviously, there is a lack of contact and experience with persons with disabilities – and consequently there is also no modern image of persons with disabilities.

Reaction

The law was not amended.

³³ Reply to request for information in Parliament, XXIV legislative period, 9730/AB, 16 January 2012.

³⁴ See 1. Introduction.

The Austrian Broadcasting Corporation (ORF), a radio and TV station under public law, has inter alia an Audience Council. When its members were appointed in 2010 representatives of “service organisations” were proposed to represent the interests of persons with disabilities. The Committee suggested to include concrete requirements concerning the representation of persons with disabilities in the next amendment so as to strengthen their representation as self-advocates.

Reaction

According to a letter of the Austrian Federal Chancellery, these considerations should be incorporated into the next amendment of the law.

4.6. Self-determination

Personal assistance, personal budget

The Austrian federal provinces pursue very different approaches to personal assistance schemes: eligibility requirements, minimum and maximum age, the scope of services, type of benefits, the target groups as well as the organisational structures, vary considerably.

As the criteria of the **social assistance** scheme are applied to personal assistance, this means that persons earning higher incomes have financial disadvantages. Social assistance and benefits for persons with disabilities are not granted without a means test covering the income and assets. In many cases procedures for approval of the respective scope of services require the application of **quotas (cap on hours approved)**. Persons requiring a high level of support are de facto excluded from this scheme.

At present there are no regulations in Austria that would meet the comprehensive requirements of the Convention. The financing mechanism “Supplementary Payment to Long-Term-Care Allowance for Personal Assistance (‘Pflegegeldergänzungsleistung für Persönliche Assistenz’) applied in Vienna is currently the most progressive scheme in Austria. But not even this system meets the requirements of the CRPD. Self-advocates explained this very clearly at the Committee’s public meeting in April 2011.³⁵

In March 2011 a motion³⁶ by the five political parties represented in Parliament called for the establishment of nation-wide uniform rules for personal assistance. Unfortunately, the involvement of persons with disabilities was not mentioned as a mandatory requirement. A working group with representatives of the Federal Ministry of Labour, Social Affairs and Consumer Protection (BMAK) and the federal provinces has been set up under the aegis of the BMAK to examine the possibility of introducing “nationwide uniform rules for personal assistance in all spheres of life” as well as of “evaluating the status quo and examining opportunities for further

³⁵ See minutes of 28 April 2011.

<http://www.monitoringausschuss.at/sym/monitoringausschuss/Protokolle> and statement on Personal Assistance; [http://www.monitoringausschuss.at/sym/monitoringausschuss/Oeffentliche Sitzungen](http://www.monitoringausschuss.at/sym/monitoringausschuss/Oeffentliche_Sitzungen).

³⁶ http://www.parlament.gv.at/PAKT/VHG/XXIV/AEA/AEA_00034/index.shtml.

development.” Self-advocates were invited to join the working group only in October 2012.³⁷

Demand

→ Enshrine a legal entitlement to personal assistance for all persons with disabilities.

Reaction

A working group on the further development of the personal assistance scheme has been set up. Self-advocates were allowed to participate only after prolonged pressure. The discussion seems to be poorly planned and not very goal-oriented.

The rules governing partial aspects of the personal budget scheme differ considerably. At present there is no convincing solution, which would enhance the self-determination and autonomy of the persons affected regarding personal budget for acquiring assistance services, technical aids, therapies and the like. The Monitoring Committee discussed this fact at a public meeting with numerous self-advocates and recommended a uniform solution for the whole of Austria – by taking into account the personal assistance and assisted decision-making schemes.³⁸

Demand

→ Enshrine a legal entitlement to a personal budget for all persons with disabilities.

Reaction

None.

Legal guardianship, involuntary treatment

Based on estimates, about 60,000 persons in Austria have a legal guardian. The number of legal guardianships has increased significantly over the past years. The projected changes in the population's age structure will lead to an increased need for assistance in decision-making processes. In November 2011 the Committee held a public meeting in the Ministry of Justice – hosted by the Ministry. Self-advocates made ample use of the opportunity to comment; Michael Bach explained the British Columbia Model of supported decision-making. The discussion confirmed the following facts:

Information on and training programmes for legal guardians are available but apparently they do not always reach the persons affected, i.e., legal guardians as well as the persons under guardianship. Based on the feedback received from persons who have a guardian, the control mechanisms seem to fail in individual cases.

As a rule a legal guardian is responsible for all matters affecting the respective person instead of appointing legal guardians who are only in charge of individual or several areas as foreseen in the law. Reviews of full guardianships to find out whether a reduction to partial guardianship would be possible are conducted only

³⁷ BIZEPS-INFO <http://www.bizeps.or.at/news.php?nr=13544>.

³⁸ See minutes of 26 April 2012 and statement on Personal Budget http://www.monitoringausschuss.at/sym/monitoringausschuss/Oeffentliche_Sitzungen.

very rarely. The control mechanisms of the court are described as “too vague”. Therefore, the existing control mechanisms are perceived as being applied inadequately or not at all.

Even an only theoretically possible interference in personal and highly personal affairs creates conflicting interests and consequently a lot of tension. According to the law, a legal guardian has the duty to find out and take into account the wishes of the person affected. However, in many cases this does not work in practice.

Demands

- ➔ Initiate a broad discussion and awareness-raising process based on the highest standards of participation.
- ➔ Develop pilot projects to implement new decision-making models by involving NGOs; a legal basis has to be created for this, if necessary.

Reaction

A pilot project on assisted decision-making was announced for autumn 2012.

In summer 2009 an amendment of the Act on Involuntary Commitment (“Unterbringungsgesetz”) was reviewed, which prompted the Committee to highlight the importance of the social model, the significance of self-determination as well as compliance with the Convention (Articles 15 to 17).

Demand

- ➔ Comprehensive amendment of the law on involuntary commitment based on the Convention (particularly self-determination, social model and Articles 15 to 17 CRPD).

Reaction

The proposals of the Committee were not taken into account.

4.7. Participation

Persons with disabilities are eligible to vote in Austria but face obstacles in exercising their right to vote, in particular with regard to the full accessibility of the electoral process (accessible polling stations, assistance in polling booths, accessibility of the election programmes). The Committee complained about the lack of accessibility in the election of the Austrian students’ union in 2009.

Upon adoption of the Budget Supplement Act (“Budgetbegleitgesetz”) in 2009 and shortly after its formal establishment, the Committee criticised the inadequate participation of persons with disabilities within the definition of Article 4(3) CRPD. Since then the Committee has repeatedly called for ensuring of the effective and equal participation of persons with disabilities in political processes. In view of the fact that the federal government adopted Standards of Public Participation,³⁹ the severe difficulties faced by the administration in implementing this principle are surprising. In the recent past a very rudimentary understanding of involvement and participation could be observed, especially in the NAP process.⁴⁰

³⁹ Standards of Public Participation, compare footnote 19.

⁴⁰ See above: Chapter 3, b) National Action Plan.

Demands

- Implementation of Article 4(3) CRPD
- Effective implementation of the Standards of Public Participation

Reaction

No fundamental insights; declarations of intent and promises, lack of basic understanding of what participation could and should be.

4.8. Equality

Federal Disability Equality Act, arbitration

Arbitration is presented as a huge success but the number of cases of arbitration is small based on the number of persons with disabilities. Moreover, the expectation that most problems caused by actual barriers will be “solved” by arbitration is highly problematic.

While the Federal Disability Equality Act (“Bundes-Behindertengleichstellungsgesetz/ BGStG”) only provides for individual action, the CRPD also requires State Parties to take action to ensure accessibility.

Demands

- Establish an obligation to remove and prevent barriers in the Disability Equality Act
- Enshrine mandatory accessibility in the Trade, Commerce and Industry Regulation Act (“Gewerbeordnung”)
- Harmonisation and mandatory, uniform and enforceable accessibility standards in the Building Codes of the federal provinces

Employment

Support measures, in particular ongoing assistance (e.g., clearing schemes, job coaching, vocational training assistance scheme, mentoring or supported employment) assisting persons with disabilities to find and/or retain a job, are not provided countrywide and sufficiently.

The situation of persons with learning difficulties is particularly severe as 59% of the pupils who received education based on the Syllabus for Special Pedagogical Needs are not supported in the framework of labour market policy programmes after leaving school.

In 2011 all employers obliged to employ persons with disabilities (“Einstellungspflicht”) registered a total of 102,793 mandatory positions for employees with disabilities. Out of this total, 66,748 jobs were held by the group of persons with disabilities qualifying for special support under the Austrian law, i.e., “favoured persons with disabilities” (“begünstigte Behinderte”). 36,045 mandatory positions were vacant. The obligation to employ persons with disabilities was met in 64.93% of all cases. Thus the compliance rate dropped slightly compared to previous

years (no less than 66% in 2008). Public employers at federal level fully complied with this requirement. In several ministries the quota was even exceeded. In their capacity as employers, several federal provinces failed to comply with this obligation.

As of December 2012, the number of “persons with health-related job placement difficulties” (Public Employment Service) was 15.3% in the total of **unemployed persons**. In 2012, one third of all “favoured persons with disabilities” (including drawing pensions during a limited period due to incapacity to work) were not active. Due to their low educational level and inadequate employment opportunities (see also Statement of the Monitoring Committee on Inclusive Education of 10 June 2010⁴¹), persons with health-related job placement difficulties are unemployed for considerably longer periods and have more problems in finding jobs. Persons with disabilities who are classified as not fit for work and are employed by segregated institutions are excluded from the unemployment statistics.

At present about 19,000 persons with disabilities work in a sheltered sector segregated from the labour market: in day centres, especially in so-called occupational therapies, sheltered workshops or are engaged in “ability-oriented activities”. Legal safeguards for persons with disabilities are not only inadequate and insufficient but are also governed by different rules in the nine federal provinces of Austria. The persons affected do not receive any pay (based on collective agreements) for their work but “pocket money”, partly less than 10 Euro per week.

Older persons with disabilities (aged 45+) increasingly face unemployment. It is getting more difficult for this group of persons to access gainful activity and to remain active in the labour market even though subsidies are granted for their employment.

As there is no bilingual education, the **hard of hearing and deaf** have only very few opportunities in the labour market. In many cases they depend on simple, not very communicative jobs, mostly involving a lot of routine. They hardly find jobs commensurate with their actual skills and talents.

There is no legal claim to **personal assistance in the workplace**; currently only about 400 persons with disabilities benefit from this service.

The so-called “**aid trap**” poses another obstacle for persons with disabilities. This means that often they do not have any financial incentive to take up paid employment on the basis of collective agreements but may even face a considerable financial risk in the long run. Most transfers (orphans’ pensions, higher family allowance, etc.) are no longer granted if specific income thresholds are exceeded. As a result, the available net income may even decrease if a person starts working. Moreover, there is no guarantee that benefits whose payment had been discontinued will be re-granted if employment is terminated.

In connection with the planned support of persons with disabilities at work, recent judgements of the Appeal’s Court (OGH) seem to be counterproductive and in breach of the Convention as they declare the concept “employee” within the meaning of Section 1151 of the Austrian General Civil Code (ABGB) inapplicable to

⁴¹ Statement on Inclusive Education

http://www.monitoringausschuss.at/cms/monitoringausschuss/attachments/5/7/1/CH0914/CMS1322123068495/stellungnahme_inklusive_bildung_beschlossen.doc.

predominantly “therapeutic” work relationships with non-profit employers even if full insurance coverage, an employment contract and a pay slip are available.⁴²

Demands

- ➔ Implement inclusive education in all spheres of life for all persons
- ➔ Incorporate the right to work for all persons in the Constitution
- ➔ Ensure full accessibility in the workplace
- ➔ Strengthen legal protection in cases of discrimination in employment and occupation (enforceable claim to remove barriers, more support in legal proceedings)
- ➔ Equal opportunities and sustainable access to employment relationships protected under social insurance law (see also Government Agreement 2008, page 184). In day centres social insurance coverage (including health and pension insurance) has to be ensured immediately for persons with disabilities.
- ➔ Disability assessment procedures have to be based on an integrated, multidisciplinary (bio-psycho-social) approach.

Reaction

Introduction of accident insurance
Setting up of a working group

4.9. Multiple discrimination

Multiple and aggravated forms of discrimination are not recognised in Austria. The effects of anti-discrimination provisions covering individual grounds of discrimination are divergent, there is no uniform protection level.⁴³

Women

The Monitoring Committee submitted comprehensive comments on the situation of women and girls with disabilities to the CEDAW Committee.⁴⁴

Demand

- ➔ Implement the CEDAW recommendations

Children

The Monitoring Committee submitted comprehensive comments on the situation of children with disabilities to the CRC Committee.⁴⁵

⁴² OGH 9ObA105/09w, 8ObA48/09f of 29 October 2009 and 18 February 2010.

⁴³ See also Universal Periodic Review, A/HRC/17/8.

⁴⁴ See CEDAW Statement, 12 April 2012,

<http://www.monitoringausschuss.at/sym/monitoringausschuss/Stellungnahmen> and forthcoming CEDAW recommendations, February 2013.

⁴⁵ See implementation of the Convention on the Rights of the Child in Austria (Third Periodic Report in accordance with Article 44 CRC) for children and young people with disabilities, <http://www.monitoringausschuss.at/sym/monitoringausschuss/Stellungnahmen> and the criticism of the Committee on the Rights of the Child CRC/C/AUT/CO/3-4.

In Austria infants with suspected impairments or disabilities wait up to six months for a standardised diagnosis – as defined by the World Health Organisation. According to a survey of 2003, the capital city, Vienna, is at least three developmental-sociopaediatric outpatient clinics short.

Between the age of one and five years, which is of great importance from a developmental-psychological perspective, children wait up to 2.5 years for therapy. There is evidence that children of socially more competent parents are turned away more frequently as the authorities seem to assume that they will opt for alternative and consequently privately paid therapies. But on the other hand, this does not imply that socio-economically disadvantaged families have guaranteed access.

Demand

→ Implement the CRC recommendations

Asylum seekers & foreign nationals

In spring 2012 public attention was drawn to the barriers faced by persons with disabilities in attaining Austrian citizenship. An amendment of the Citizenship Act was announced for autumn 2012.

4.10. Assisting technologies

The existing social insurance catalogues of technical aids for persons with disabilities cover mainly devices related to medical rehabilitation measures (e.g. suction apparatuses, bandages, prostheses, etc.). They have not been harmonised across Austria and do not reflect state-of-the-art technology.

Access to assisting technologies (AT) in Austria has been severely hampered by the fact that the financing of AT is split between local authorities (Federal Republic of Austria and the federal provinces) on the one hand and the social insurance institutions (pension, health, accident insurance institutions, regional social insurance institutions) on the other hand. The situation is aggravated by the fact that a specific institution often pays the aids required only partly and that, therefore, several bodies have to be contacted. Many persons with disabilities also depend on donations (e.g. from the charity-campaign “Licht ins Dunkel”). Due to lengthy procurement procedures, devices are sometimes not available immediately. Recent austerity measures have led to a deterioration of the situation, as it will often depend on the competent institution whether a specific aid will be approved; this practice leads to unequal treatment.

The number of persons trained in AT and supported communication (SC) is insufficient and the training of specialists is inadequate. There is a lack of structured assistance and ongoing support of persons using AT (e.g., maintenance of AT, education and training of personal assistants and family members to select the right AT and replace old AT).

Demands

→ Develop more AT

- ➔ Ensure the supply with AT and SC (legal entitlement)
- ➔ Finance of AT and SC (reducing bureaucracy, one-stop shop)
- ➔ Personnel trained in the use of AT and SC

Reaction

None.

4.11. Protection against violence

87.7% of women with disabilities interviewed for a study conducted in 1996 responded to the question whether they had been sexually harassed. About 62.3% of this group stated to have been sexually harassed once or several times in their lives. 89.2% of the women answered affirmatively to the question on sexual violence, approximately 64% of the women stated that they experienced sexual violence once or several times in their lives. This is more than every second woman. Based on this result, women with disabilities are affected by sexual violence to a considerably greater extent than women without disabilities. According to a comparable study, 34% of women without disabilities had experienced sexual violence.

A dramatic form of gender-based violence is forced sterilisation.

It is also interesting to note that Austria is considered an international role model in the protection against domestic violence but that the needs of women and men with disabilities are only inadequately taken into account in the respective legislation.

Based on a public meeting held in October 2010, the Committee adopted comprehensive recommendations to improve anti-violence measures.⁴⁶

Demands

- ➔ Utilize the preventive function of education to enable persons to set and recognise personal boundaries.
- ➔ The rights of patients with disabilities have to be strengthened in healthcare, which must explicitly include sexual and reproductive medicine.
- ➔ Greater importance must be attached to preventing violence and abuse, particularly in highly sensitive areas, e.g. psychiatry.
- ➔ Accessible and inclusive anti-violence regulations.
- ➔ Research the causes of violence and prevention of violence among persons with disabilities, especially in areas facilitating violence due to structural factors.
- ➔ Strengthen violence prevention effort, by establishing a basic standard to separate the responsibilities of funding bodies and evaluators.
- ➔ No barriers to legal aid (Article 13 CRPD); proactive measures must be taken to ensure not only physical accessibility but also social accessibility.
- ➔ Accessibility of courts but also of police stations as well as shelters.

⁴⁶ See minutes of 28 October 2010, <http://www.monitoringausschuss.at/sym/monitoringausschuss/Protokolle> and statement on Violence and Abuse of 24 February 2011, http://www.monitoringausschuss.at/sym/monitoringausschuss/Oeffentliche_Sitzungen.

Reaction

The question of which institution was competent for implementing Article 16(3) of the CRPD was finally clarified, by assigning it to the Austrian Ombudsman Board in the process of establishing the NPM (National Preventive Mechanism under the Optional Protocol of the Convention against Torture).⁴⁷

4.12. Procurement law, semi-governmental as well as private entities

Procurement law is inadequately linked to non-discrimination obligations. Compliance with the basic principles of the CRPD is not ensured or at least ensured only inadequately.⁴⁸

The privatisation of public services should not relieve the state of its human rights obligations. Support services must be guaranteed, and the requirements of the Convention have to be met by both governmental and non-governmental entities. Adequate, generally available, equal and accessible social insurance services must be made obtainable.

Equal access to medical devices, medication and similar third-party services must be ensured. Moreover, access to healthcare measures has to be provided at affordable cost for all persons with disabilities. In accordance with the principles of equity and proportionality, special attention has to be paid to the needs of economically disadvantaged persons.

Reaction

None.

4.13. Cooperation, research & statistics

Development cooperation

The Federal Ministry for European and International Affairs (BMeiA) is responsible for coordination (coherence) in the field of development policy in the framework of Austria's public development aid and strategic focus of the Austrian Development Cooperation. The Federal Ministry of Finance represents Austria's development and foreign policy interests in multilateral development banks and is responsible for the work of the Austrian Development Bank ("Österreichische Entwicklungsbank"). Capital contributions, contributions to the funds of international financial institutions as well as contributions to the development cooperation of the European Union are financed from the budget of the Ministry of Finance. The federal provinces have their own development cooperation initiatives.

The three-year programme of the Austrian Development Cooperation does not reflect any efforts regarding the inclusion of persons with disabilities. In the three-year programme 2010-2012, for example, persons with disabilities are not mentioned

⁴⁷ Federal Law Gazette I no. 1/2012, Reform of the Austrian Ombudsman Board.

⁴⁸ Statement on Procurement Law,

<http://www.monitoringausschuss.at/sym/monitoringausschuss/Stellungnahmen>.

explicitly. General references are made to “disadvantaged groups” and “social inclusion”. As far as the practical implementation of accessible and inclusive development cooperation programmes or the documentation of such measures is concerned, individual projects are listed but no reference is made to the complete portfolio of projects and measures supported in the framework of the Austrian Development Cooperation.

Demands

- Participation of persons with disabilities in planning in Austria (Federal Republic of Austria, federal provinces) but also locally in partner countries
- Comprehensive implementation of the twin-track approach, i.e., specific projects to promote persons with disabilities as well as general involvement of persons with disabilities in all measures taken in the context of the Austrian Development Cooperation and humanitarian action (Federal Republic of Austria, federal provinces)
- Fulfilling the quota for the Austrian Development Cooperation of 0.7% of the gross domestic product in accordance with international commitments; taking into account persons with disabilities in existing programmes.

Reaction

Parliamentary motion on including the rights of persons with disabilities in development cooperation

Science & research

In a letter to the Federal Ministry of Science and Research in 2009 the Committee emphatically urged the implementation of the requirements of the Convention in this area.

Reaction

None.

Statistics & data, indicators

In various statements the Committee stressed the need to collect data and statistics on the situation of persons with disabilities as well as to facilitate the implementation of the Convention. Important issues deserving closer attention are the collection of data and statistics on barriers that persons with disabilities have to overcome in their daily lives, the involvement of society at large and, last but not least, attitudinal barriers.

The use of indicators for monitoring compliance with human rights obligations is not yet a common practice in Austria but initial efforts, especially with regard to the integration of ethnic minorities, are underway.

5. Basic problems

5.1. Cross-cutting issue “accessibility”

A legal basis for the obligation of creating an accessible environment in the Austrian law are the equality principle enshrined in the Constitution as well as provisions implementing it contained in ordinary laws.

The Austrian Constitution (**Article 7, para. 1 of the Federal Constitution Act**) establishes inter alia the right of the individual not to be discriminated against on grounds of an existing disability.⁴⁹ Furthermore, the Article enshrines the aspiration of the state, which requires the Republic and its entities (expressly, the Federal Republic of Austria, the federal provinces and municipalities) to guarantee the equal treatment of persons with and without disabilities “in all spheres of daily life”⁵⁰ – consequently, this implies the implementation of comprehensive accessibility. The Federal Disability Equality Act (“Bundes-Behindertengleichstellungsgesetz”) and other legal acts contain more detailed provisions as to when denial of accessibility constitutes discrimination (see below).

Problems:

There is generally low **awareness** that the basic principles of the CRPD are **cross-cutting in nature**. Usually and traditionally the issue of “disability” and consequently “accessibility” have been regarded as exclusive responsibilities of the Ministry of Social Affairs. Nation-wide there is a lack of awareness of the public sector – as well as of private providers of publicly available services – that they have a legal obligation to ensure accessibility. This does not only apply to less common aspects of accessibility but also to their duty of ensuring (and implementing), the accessibility of buildings. There is no sense of responsibility for establishing accessible environments on the one hand, and on the other hand there is no common understanding of the concept of accessibility. Existing standards on the accessibility of buildings⁵¹ are neither legally binding nor are the bodies responsible for planning and implementing them sufficiently familiar with them.

The **legal implementation** of the obligation to ensure accessibility is problematic. The Federal Disability Equality Act and other provisions stipulating the prohibition of discrimination enshrined in the Constitution (Article 7, para. 1 of the Federal Constitution Act) include requirements to create accessibility. Nevertheless, they fail to implement the holistic approach of the clause in the Constitution adequately and to further develop it as enshrined in the Convention.⁵² The provisions of ordinary laws on accessibility requirements are fragmentary, not very concrete and refer almost exclusively to physical (or at best communicative) barriers. In most cases they are not enforceable. There is a lack of uniform rules and/or clear (and binding)

⁴⁹ See Art. 7, para. 1, clause 3 of the Federal Constitution Act.

⁵⁰ See Art. 7, para. 1, clause 4 of the Federal Constitution Act.

⁵¹ Reference is also made to Ö-NORM B 1600 “Barrierefreies Bauen - Planungsgrundlagen“ (“Accessible constructing – Planning Principles”).

⁵² The Amendment of the Electoral Code of the National Council 1998 should be mentioned as an example, which, however, was merely an attempt to establish real and comprehensive accessibility for persons with disabilities exercising their right to vote.

regulations on the establishment and implementation of accessibility and (this is very important) the elimination of existing barriers.

There is no **uniform national concept** for achieving comprehensive accessibility. The **National Action Plan on Disability 2012-2020**⁵³ prepared by the Federal Ministry of Labour, Social Affairs and Consumer Protection has the aim of implementing the CRPD. The NAP process has shown that there is awareness of this need for a uniform and comprehensive concept but unfortunately the NAP failed to pave the way for it – and this is particularly due to the lack of involvement of the federal provinces and the reluctant attitude of the other ministries.

Proposed recommendations:

- ➔ Introduce a **uniform national concept** for establishing comprehensive accessibility by **involving all local authorities and ministries**. The definition of clear common objectives and a uniform implementation strategy are prerequisites for ensuring comprehensive accessibility at all levels and throughout Austria.
- ➔ Establish **awareness-raising programmes for all federal provinces and all ministries** – comprehensive accessibility has to be understood as a mandate of all ministries, offices and authorities.
- ➔ **Legislative measures** to eliminate existing barriers. Furthermore, the Monitoring Committee points out that compliance with existing laws/norms has to be monitored to a greater extent – this is the only way to ensure effectiveness.
- ➔ Measures against the lack of **technical know-how** concerning accessibility of buildings of the bodies responsible for planning and construction.⁵⁴ The accessibility of buildings should be a compulsory subject in relevant training programmes.

5.2. Federalism

Austria has a federal structure, i.e., it is a **Federal Republic** consisting of nine federal provinces. There is a division of legislative and executive responsibilities between the Federal Republic and the federal provinces. Municipalities also enjoy some autonomy.⁵⁵ Numerous issues, which are vital to persons with disabilities, fall within the (legislative and/or executive) **competence of the federal provinces**. Examples are care facilities, the so-called “poverty relief system“, the building law per se as well as subsidies for modifications of buildings, maternity, infant and youth welfare, sanatoriums and nursing homes, nurseries and after-school centres, the external organisation of the public compulsory school system, etc.⁵⁶

⁵³ Download from:

http://www.bmask.gv.at/cms/site/attachments/2/4/2/CH2092/CMS1313493090455/nap_web.pdf.

⁵⁴ With the support of the Austrian National Council of Disabled Persons (the umbrella organisation of Austria's disability associations), the Advisory Board for Architecture (set up within the Federal Chancellery) developed a catalogue of recommendations for standards ensuring the accessibility of buildings; so far it has received little attention (Recommendation No. 2 of the Advisory Board for Architecture, <http://www.bka.gv.at/DocView.axd?CobId=44031>). The target group of these concrete recommendations are public bodies of the Federal Republic, the federal provinces, the cities and municipalities, the architects and construction companies responsible for planning and building, the economic and social partners as well as private building contractors and builders.

⁵⁵ Compare Art 2 10 et seq. & 116, 118 of the Federal Constitution Act (B-VG).

⁵⁶ See Article 12 et seq. of the Federal Constitution Act (B-VG).

Problems:

The Monitoring Committee is concerned about the **strong fragmentation** of the disability issue and the resulting different conditions in the individual federal provinces. Moreover, the individual competent bodies have **different ideas** of how disability policy should be implemented – this can lead to **enormous differences** between the federal provinces. The federal province of Vienna, for example, adopted Funding Guidelines⁵⁷ (which would be worthwhile discussing) providing for an earmarked personal budget, which can be spent by the recipient on “leisure assistance” based on largely independent decisions. As opposed to that, the federal province of Salzburg does not fund personal leisure assistance.⁵⁸

The federal provinces are also divided on educational matters. Furthermore, there are considerable differences between the federal provinces regarding early childhood development schemes or financial support for technical aids. The regulations of the federal provinces regarding the accessibility of buildings also differ markedly; this results in major differences in the accessible design of the available infrastructure. Moreover, the regulations prohibiting discrimination against persons with disabilities vary significantly in the different federal provinces. Hence, there is no standard level of protection. All these factors lead to **inequality** (depending on the federal state in which the persons have their residence) and great **legal uncertainty**.

There seems to be a lack of **communication between the Federal Republic and the federal provinces** concerning the coordination of issues related to disability policy. In many cases discussions are considered impossible by resorting to the “argument” of federalism. Another strategy used in this context is to claim that another entity is responsible. Moreover, new developments are blocked by authorities limiting themselves strictly to their own sphere of responsibility as well as by a lack of innovative solutions. This problem has been manifest in the drafting process and outcome of the **National Action Plan on Disability 2012-2020**. As the Monitoring Committee pointed out in its statement, the “mechanism of involving the federal provinces [...] seems to be inadequately developed. In view of the challenges posed by Austria’s federal system, the NAP faces a risk of piecemeal implementation. According to the Committee, re-negotiation with the federal provinces seems indispensable.”⁵⁹

In accordance with Section 13, Para. 8 of the Federal Disability Act, the federal provinces are responsible for setting up monitoring bodies in accordance with Article 33(2) CRPD. They meet this obligation only in a hesitant or incomplete way or take no action at all.⁶⁰

⁵⁷ Funding Guidelines of the Fonds Soziales Wien “Specific Funding Guidelines for the Supplement to the Long-Term Care Allowance for Personal Assistance for Persons with Disabilities”; entry into force 1 July 2011; download from: http://www.fsw.at/downloads/foerderwesen_anerkennung/foerderrichtlinien/spezifisch/FRL_PGE-fuer-PA.pdf.

⁵⁸ However, it should be noted that the regulations of the federal province of Vienna do not include an enforceable legal right to personal assistance for leisure activities. Moreover, persons with intellectual or sensory impairments as well as children with disabilities and old persons are not eligible for funding.

⁵⁹ Statement of the Monitoring Committee: Draft National Action Plan on Persons with Disabilities 2012-2020“ of 16 February 2012, p. 4.

⁶⁰ To date (December 2012), the Monitoring Committee could not identify any monitoring bodies in the federal provinces complying with Article 33(2) of the Convention.

Proposed recommendations:

- Creating a **forum comprising all federal provinces and all ministries** to discuss, develop and plan (possibly also) creative solutions in disability-relevant matters. The composition of the forum must ensure participatory structures, involving persons with disabilities.
- **Harmonising** disability affairs throughout Austria's federal territory.
- Implementing **Article 33(2)** CRPD at the level of the federal provinces.

5.3. Social model

Problems:

The Monitoring Committee is concerned about the fact that in important and relevant documents about Austria's disability policy a **paradigm shift is conjured up**, which has not taken place in reality. The Report of the Federal Government on the Situation of Persons with Disabilities (2008/2009) states for example: "The Convention makes a decisive contribution to promoting a paradigm shift at international level, which has already been initiated in Austria".⁶¹ Austria's State Party Report alleges "the issues of equality, inclusion and accessibility of public life [...] have gained in importance and therefore led to a paradigm shift in disability policy."⁶²

Undoubtedly, there are early signs that efforts are made to do justice to the social model and thus implement the Convention. But on the one hand, these attempts are too feeble. On the other hand, they are based on the aforementioned 'adjustments' that are not possible. Examples from almost all areas can be provided: the school system, education and training, employment as well as institutionalisation – these are just some areas of Austria's disability policy, which have to be reconceptualised and restructured. In the context of the social model, minor adjustments regarding de-institutionalisation are impossible, and so are slight modifications of the special needs school system. It is obvious that extensive **awareness-raising measures** are a prerequisite for any radical **reorientation**. Cooperation with research entities, in particular in the context of disability studies, is absolutely indispensable.

Proposed recommendations:

- Awareness-raising campaign
- Reform of the charity campaign "Licht ins Dunkel" – to create a modern image of persons with disabilities
- Exchanges based on disability studies
- Promotion of disability studies
- Comprehensive training measures on the Convention in line with Article 4(1) of the CRPD

⁶¹ Report of the Federal Government, p. 73.

⁶² State Party Report, 2.

5.4. Participation

In the Austrian context it is essential not to confuse or equate *participation* with *information* or *consultation*. Participation – in terms of **cooperation**, partnership and control by *all* groups involved – must be clearly distinguished from **consultation** (in the sense of inquiring but not necessarily acting accordingly) and especially from **information** (meaning action and merely reporting that action has been taken).⁶³ Apparently, the *Standards of Public Participation*⁶⁴ are hardly known and not applied very widely.

Problems:

In the process of implementing the Convention, participation is *intensively discussed*, but *hardly any or no action* is taken based on it. This problematic development could be observed in the **drafting process of the National Action Plan**. While the Minister for Social Affairs stressed on 23 July 2012 that “...besides involving all responsible ministries, great importance has been attached to the participation of organisations for persons with disabilities” and that “...persons affected were actively involved in developing the NAP”⁶⁵, the actual situation⁶⁶ was different. As a result, the Monitoring Committee as well as numerous disability organisations in Austria stated in their comments on the draft NAP that it had not been prepared on the basis of cooperation but rather in the vein of information. It seems questionable that democratically relevant concepts such as participation are used to play politics while the requirements of the Convention are not satisfied in any way.

Proposed recommendations:

- ➔ Implementing consultation and cooperation according to the **Standards of Public Participation**⁶⁷
- ➔ To facilitate real exchange, participatory processes **have to be initiated in time** to reduce time constraints and to allow all stakeholders an in-depth analysis of the subject-matter.
- ➔ **Trainings** for all (present) decision-makers in Austrian disability policy. The respective concepts and models must be generally known to facilitate a meaningful implementation.
- ➔ Promoting groups of self-advocates, also with a view to making participation possible.

⁶³ Compare for example Arnstein’s “ladder of citizen participation” (quoted in Kersting 2008, 15 et seq.).

⁶⁴ Standards of Public Participation, compare footnote 19.

⁶⁵ Hundstorfer: Federal government adopts comprehensive Action Plan for Persons with Disabilities. Available: http://www.bmask.gv.at/cms/site/index_presseaussendung.html?doc=CMS1343121364906 (downloaded on 15 December 2012).

⁶⁶ An event held in February 2011, in which disability organisations were after all involved, was followed by another event in February 2012 informing on the draft of the National Action Plan. Between these two events, the Ministry of Social Affairs prepared the draft without involving any persons with disabilities and their organisations. Similarly, the final version of the National Action Plan was drawn up (presented in July 2012) without involving persons with disabilities and their organisations.

⁶⁷ Standards of Public Participation, compare footnote 19.

5.5. Awareness-raising

Awareness-raising measures have to aim at several levels. They have to address the general population in the same way as decision-makers in politics, administration as well as in the judicial system. The media play a crucial role in promoting and conveying awareness-raising measures.

Notions of disability *have evolved over the centuries* and are firmly implanted in the minds of many people. Furthermore, many events in the context of National Socialism have had the effect that “disability” has not been discussed much. Many deep-rooted negative ideas persisted for a long time while hardly any counterarguments were voiced. This was obviously due to the fact that persons with disabilities were for a long time deemed “unfit” to talk about their own situation.

Awareness-raising has to bring about a **change of concrete activities and practices**. It is simply not enough that somebody understands, for example, that persons with disabilities need to have accessibility to shops, but premises must really become effectively accessible. Awareness-raising measures must not be limited to an attitude like ‘yes but on the other hand...’. They have to entail concrete changes.

Problems:

Despite intensive efforts of disability organisations to change the negative image of disability, characterised by fear and prejudice, in Austria disability is still largely regarded as a ‘disease’ that has to be ‘cured’. In addition, a kind of helper syndrome vis-à-vis persons with disabilities prevails in society. The presentation of this subject in the media is another important reasons why the image of disability hardly changes. The negative highlight is the annual TV charity-show “Licht ins Dunkel”.

In the Austrian society persons with disabilities are still *tolerated* instead of being *accepted*. Usually this becomes apparent when measures deemed necessary are rejected as being too expensive. In many discussions in Austria the **cost argument** seems to be more important than the legal entitlement (based on human rights). There is a pressing need to re-design the image of persons with disabilities in Austria – not only in the context of a demographically changing society.

Proposed recommendations:

→ **Broad-based media campaigns** presenting disability and persons with disabilities based on the social model. The texts, illustrations and images as well as views (outsiders’ view of persons with disabilities versus self-perception) have to be adjusted to fit the new approach.

In response to the demands of persons with disabilities and their organisations, charity campaigns such as “Licht ins Dunkel” do not only have to re-design the image of persons with disabilities but also have to replace ‘reports about’ with ‘reports by’ persons with disabilities. They must not be the ‘object’ of reports but should report themselves about their life situations. More relevant **training programmes** should be offered.

Initiatives such as bidok⁶⁸ – an online portal for academic texts concerning disability studies – have to be supported and further developed. This digital full text library includes academic papers, contributions to magazines and books, reports, lectures as well as reviews. These texts were written by taking into account the social model of disability and the approaches presented in disability studies.

5.6. Monitoring Committee

The formal organisation of the Committee – a sub-body of the advisory board of a ministry – does not conform to the Paris Principles. Without a constitutional basis, comprehensive tasks, an effective interface to the responsibilities of the federal provinces, guaranteed independence by placing it under the purview of Parliament as well as an adequate and independently managed budget, a committee of this type cannot satisfy the legitimate requirements of various institutions and individuals. A fundamental change is indispensable.

Proposed recommendation:

→ Establish the Committee as an independent institution with adequate budget resources, which is only responsible to Parliament; to ensure that the Committee is in permanent contact with all levels of the legislative and administrative powers of the Federal Republic and of the federal provinces.

⁶⁸ Available under: <http://bidok.uibk.ac.at/>.

6. Conclusions

More than four years after ratification, some bodies are aware of the fact that the Convention requires changes to be made. There is a lack of involvement of all stakeholders (particularly to reflect Austria's federal structure and social partnership) in processes to initiate the profound changes, which are necessary in the wake of the paradigm shift. Moreover, there is no clear vision of the direction in which we should be heading. There is still no clear delimitation of spheres of responsibility, while obsolete scopes of authority are upheld, which do not support the implementation of the paradigm shift.

In various situations it has become clear that many responsible persons are not yet willing to implement the Convention. They are predominantly of the opinion that the present path will ultimately lead to success.

Efforts are made – particularly in the educational sector and in social policy – to remedy the presumably most serious deficiencies by amending individual provisions, but the result is only a hotchpotch. Pilot tests are important and necessary but they also have a time window. There have been plenty of pilot projects focusing on key life situations, and the stakeholders know how things work.

But this is the window of opportunity to change over from pilot-projects to the “autopilot mode”. This means that the implementation of human rights does not have to be “tested” but must be the supreme guiding principle in all socio-political areas so as to implement self-determination, inclusion, accessibility and participation as cross-cutting issues. Along this path, concrete steps accompanied by awareness-raising measures will be necessary; to ensure validity, indicators will be indispensable.

It is of paramount importance that the implementation of human rights will not be hampered by the obsolete structures of federalism.

By way of conclusion it should be noted that – apart from some exceptions – the ratification of the Convention has not led to any clearly visible changes in the practice of disability policy.

7. Annex

7.1. Rules of Procedure

(unofficial translation)

- a) Based on § 13 of the Federal Disability Act (FDA; Federal Law Gazette No. 283/1993 as revised in Federal Law Gazette No. 109/2008) and in line with the duties and responsibilities of the Federal Disability Council in accordance with § 8 Sec 2 Para 4 FDA,*
- b) For the purpose of domestic implementation and monitoring of the Convention in the Rights of Persons with Disabilities (ratified by Federal Law Gazette III No. 155/2008) and in accordance with its Article 33 Para 2 and 3 (hereinafter Convention),*
- c) In the spirit of the Paris Principles (Resolution of the General Assembly of the United Nations No. 48/134 including Annex) and the involvement of civil society in the independent monitoring of human rights, their promotion and protection, prescribed therein,*
- d) Based on the general principles: individual autonomy of persons with disabilities, equality and non-discrimination, inclusion, full and effective participation in society, respect for the difference of human beings, equality of opportunity, accessibility, and equality between men and women as well as the advancement of children with disabilities (Article 3 Convention),*
The Monitoring Committee establishes its

Rules of Procedure:

Members of the Committee

§ 1. (1) The members (substitute members) of the Committee, appointed by the Minister for Labour, Social and Consumer Affairs with due regard to the proposals by the Austrian National Council for Disabled Persons (ÖAR), are:

- a. Four representatives of disabled people's organizations (and one substitute member each)
- b. One representative of a non-governmental organization in the field of human rights (and one substitute member)
- c. One representative of a non-governmental organization in the field of international development (and one substitute member)
- d. One representative of academia (and one substitute member).

(2) A representative of the Ministry for Labour, Social and Consumer Affairs (BMASK) and of the department or the highest level of the administration concerned, participate in an advisory capacity.

(3) The members of the Committee are independent and not bound by any directives or orders.

(4) Membership in the Committee is an unpaid honorary office. The members and substitute members are to receive reimbursement for their travel and sojourn expenses in accordance with the rules set out for lay judges and jury members in the 1975 *Expenses Claim Act*. This includes also personal assistance as well as interpretation services, particularly for sign languages.

(5) The members and substitute members are appointed for a period of four years. Following the discharge of the mandate the old Committee has to continue its office until the new Committee convenes. The time elapsed during the continuation of the office by the old Committee shall count toward the term of office of the new Committee.

(6) The members and substitute members of the Committee are bound by the same level of confidentiality as the representative who discharges his or her mandate toward the Committee.

Duties & responsibilities

§ 2. (1) The Committee monitors the domestic implementation of the Convention on the Rights of Persons with Disabilities.

(2) The Committee promotes and protects the human rights of persons with disabilities.

(3) The Committee advises the legislature, the government, the administration – particularly the BMASK – and the judiciary.

(4) The Committee compiles reports to the legislature, the government, the administration – particularly the BMASK – and the judiciary.

(5) The Committee issues recommendations on all questions related to the promotion, implementation and monitoring of the Convention (Art. 33 Para. 2 Convention).

(6) The Committee assesses the legal and administrative rules in force as well as corresponding practice and issues recommendations for amendments.

(7) The Committee compiles statements on draft legislation and decrees.

(8) The Committee recommends new legislative and administrative rules.

(9) The Committee examines data and statistics.

(10) The Committee contributes to the awareness raising and sensitisation of the public, also through public relations work.

(11) The Committee collaborates with schools, universities, other educational institutions, medical, social and other relevant institutions.

(12) The Committee cooperates with institutions, agencies and bodies nationally and internationally, foremost with representatives of civil society, particularly with persons with disabilities and their representative organizations, to include them in the monitoring process.

(13) The Committee cooperates in particular with the focal points and coordination mechanism established in accordance with Art. 33 Para. 1 of the Convention.

(14) The Committee cooperates with the independent authorities, which are to effectively monitor all facilities and programmes designed to serve persons with disabilities in order to prevent the occurrence of all forms of exploitation, violence and abuse (Art. 16 Para. 3 Convention).

(15) Based on the unlimited application of the Convention for all parts of the State (*Länder*) – Art. 4 Para. 5 Convention – the Committee cooperates in particular with the “authorities of the *Länder* that are to be established or named” in accordance with § 13 Para. 8 BBG.

(16) The Committee cooperates with agencies related to the Convention abroad, in particular with other monitoring committees under Art. 33 Para. 2 of the Convention as well as the Committee on the Rights of Persons with Disabilities (Art. 34 Convention), to which it will report as required.

(17) The Committee advises and supports individuals and groups who want to file a communication with the Committee on the Rights of Persons with Disabilities established in line with Art. 34 of the Convention.

(18) The Committee deals with complaints, which can also be submitted informally, by the complainants or their representatives (including representative organizations) on asserted violations of the Convention; the Committee can also inquire into the presumption of a violation of the Convention ex-officio.

- a. Based on a complaint or a presumption the Committee can request further information from the authority or institution in question as well as a statement from the administrative bodies (§ 13 Para 2 Sub 2 BBG).
- b. For this purpose the Committee may seek the consent of the concerned person or their representative in compliance with data security regulations.
- c. The Committee can, in line with data protection, seek the expertise of experts and civil society organizations, particularly organizations which represent persons with disabilities.
- d. The Committee can invite the complainant or her/his representative to a dialogue.
- e. The Committee examines the complaint or presumption, can make a statement within reasonable time, and makes a recommendation in case of a violation.

(19) The Committee informs the public as necessary in all matters related to monitoring.

Competences

§ 3. In discharging their mandate committee members have, if necessary, also as a delegation as well as in cooperation with experts, particularly

- a. unlimited access to all relevant institutions and authorities necessary to discharge the mandate;
- b. an unlimited right to inspect files, the content of which is naturally covered by public confidentiality (§ 1 Para 6);
- c. the possibility to request statements from administrative bodies (§ 13 Para 2 Sub 2 BBG);
- d. the possibility to request data and statistics (Art 31 Convention).

Chairperson and Rapporteur

§ 4. (1) Following the appointment of the new Committee, the Federal Ministry for Labour, Social and Consumer Affairs shall call a constituting meeting. The eligible members shall elect a chairperson and a deputy with simple majority for the term of office. The chairperson (her/his deputy) can be removed with a two third majority vote.

(2) The members entitled to do so elect with single majority a rapporteur and a deputy. The rapporteur (her/his deputy) can be removed with a simple majority.

Meetings of the Committee

§ 5. (1) Meetings of the Committee are to be convened when necessary, at least four times a year. The dates are determined by the chairperson in coordination with the members and the Ministry for Labour, Social and Consumer Affairs. The Committee must also be convened when one third of the members submits a written request stating the purpose.

(2) The invitation should be sent to the members together with the agenda two weeks ahead of the meeting. If individual cases are to be discussed, the relevant information shall be added to the agenda.

(3) The venue, the documents and the communication of the Committee are accessible.

(4) On decision of the Committee the meetings are public, foremost to ensure the inclusion of representatives of civil society, particularly persons with disabilities and their representative organizations in the monitoring process.

Quorums

§ 6. (1) When all members have been duly invited, the Committee has a quorum if at least half of the members entitled to vote are present. If all members have been duly invited, the Committee also has the necessary quorum, if, 30 minutes after the set starting time for the meeting, less than half of the members are present. The Committee adopts its decisions with a simple majority of the votes cast. In case of a tie of votes, the vote of the chairperson shall decide.

(2) An amendment of the rules of procedure requires the approval of two thirds of all members entitled to vote.

(3) If necessary, a decision can also be made by circular resolution, which is to be noted in the minutes of the next meeting.

(4) If a decision is not unanimous, members of the Committee or substitute members entitled to vote have permission to demand that their vote and the explanation of their objection be noted in the minutes. If the decision is made in circular procedure, this has to be noted in the minutes of the subsequent meeting.
[amendment 05 12 2010]

Experts and working groups

§ 7. (1) On suggestion by the chairperson or a minimum three eligible members, experts can be added to the meetings or other business of the Committee in an advisory capacity. Experts are eligible for the same reimbursement as the members (§ 1 Para 3).

(2) The Committee may form working groups as needed.

Annual Report

§ 8. The Committee reports on its activities at least once annually to the Federal Disability Council. The chairperson or a member of the Committee eligible to vote named by her/him may participate in the meetings of the Federal Disability Council in an advisory capacity.

External Representation

§ 9. (1) The representative of the Committee is the chairperson and in case of her/his unavailability, her/his deputy.

(2) For official correspondence the letterhead „Independent Monitoring Committee for the Implementation of the UN Convention on the Rights of Persons with Disabilities“ shall be used.

Secretariat

§ 10. (1) The secretariat of the Committee is run by the Ministry for Labour, Social and Consumer Affairs. The Ministry for Labour, Social and Consumer Affairs supports the Committee in discharging its mandate.

(2) The head of the department in the Ministry for Labour, Social and Consumer Affairs or one of her/his deputies participates in the deliberations of the Committee. The Ministry for Labour, Social and Consumer Affairs supports the rapporteur in drawing up the minutes and the meeting's results.

(3) In lieu of an independent budget, accrued expenditures are covered by the Ministry for Labour, Social and Consumer Affairs after seeking agreement and the Ministry provides direct support by providing necessary resources respectively.

(4) Minutes are compiled for every meeting by staff of the Ministry for Labour, Social and Consumer Affairs, which is signed by the rapporteur and the chairperson. The members and deputy members are to receive a copy of the minutes.

(5) The Ministry for Labour, Social and Consumer Affairs undertakes to archive complaints, measures taken and statements issued.

Federal Social Agency

§ 11. The Federal Social Agency (*Bundessozialamt, BSB*) and – also in its capacity of serving people concerned in regional centers – its *Länder* offices support the Committee in discharging its mandate. As a general rule the communication between the Committee and the Federal Social Agency is to be facilitated by the secretariat of the Committee. In compliance with § 13 Para 7 BBG, particularly with a view to the pertinent information possibilities of the Federal Social Agency,

- a. the Federal Social Agency receives complaints on the Committee's behalf and pro-actively provides counselling on possible provision of support and specified referrals respectively;
- b. insofar possible, the Federal Social Agency alerts the Committee to Convention related issues, particularly potential structural problems;
- c. supports research in individual cases and provides information related to its mandate.

Accessible Formats

§ 12. The rules of procedure are to be made available in accessible formats, this includes in particular Braille, sign languages, easy-read and auditive forms.

7.2. Statement Independent Decision-Making

NOW I'M GOING TO DECIDE! – Independent Decision Making

“I feel discriminated against when I have to go to the authorities for something and the civil servant talks to me as if I was an idiot. I point that out to them very frequently and say: please come down from your high horse; I'm not from Mars or Jupiter, I'm Mr. Weissenbacher.”¹

“Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices...”²

I Introduction

“Why are persons with disabilities described as persons with special needs? They are normal persons too and have normal needs.”³ This comment by a participant at the public meeting of the Monitoring Committee on 17 November 2011 in Vienna on the theme of supported decision-making summarises the Convention on the Rights of People with Disabilities in a pithy way, and gets to the heart of an essential insight: all persons have needs, including the multifaceted need for various forms of support.

The decision-making processes of persons in positions of power is often characterised by the consultation of a team of advisors. Some persons find it befitting to obtain the support of a style advisor when selecting their clothes. Whereas this type of artificially created heteronomy is considered a status symbol,⁴ the heteronomy of persons with disabilities is the result of a structure in which third parties ultimately exercise power over the decision-making and thus frequently over the lives of persons with disabilities.

According to estimates, around 60,000 persons in Austria have a legal guardian.⁵ The number of guardianship orders cannot be precisely determined. However, it has risen considerably in recent years: the forecasted change in the age structure of society will lead to an increase in the need for support in decision-making.⁶

¹Vienna People First, interview with Thomas Weissenbacher, Freak Radio, 11 July 2007, see: <http://www.freak-online.at/>, <http://www.freak-radio.at/cgi-bin/freak.cgi?id=fn00104&p=a&t=4>, In memory of Thomas Weissenbacher, 1945 - 2011.

² Preamble of the Convention, letter n.

³ See minutes of the public meeting, p.13 and the basis for discussion: all documents at www.monitoringausschuss.at.

⁴ For the 'reality' behind all decision-making processes, see also: Council of Europe, 19.

⁵ For estimates see e.g. [http://www.irks.at/downloads/SWKennzahlen final.pdf](http://www.irks.at/downloads/SWKennzahlen%20final.pdf), http://www.parlament.gv.at/PAKT/VHG/XXII/I/I_01420/fnameorig_061458.html, and the survey of the Institute for Legal and Criminal Sociology, 2009.

⁶ On the issue of age-related guardianship see i.a. the exploration of the problem by the Ombudsman's Office, <http://volksanwaltschaft.gv.at/downloads/2e9p7/PB33-Hauptteil.pdf>.

Guardianship is effectively the determination of a person's will by a third person. This heteronomy creates a conflict with the human right of self-determination which ultimately cannot be resolved.

"People with disabilities are responsible for themselves, they can think clearly; some of them need help in expressing their thoughts."⁷ The Convention thus recognises a person's **right to exercise** their legal capacity, where necessary in combination with support measures.⁸ The goal of the Convention is to realise self-determination in its entirety in order to ensure equal opportunities for persons with disabilities in all areas of life. Alongside removal of barriers⁹, ensuring support and assistance¹⁰ – **also** in decision-making – are particular opportunities to overcome possible barriers. A desire for support is, as mentioned at the beginning, a 'normal' – human – need, which everyone has. It should therefore be possible for everyone to enjoy this equally and take advantage of it according to their needs.

II Outline of the problem

The law on guardianship is an important milestone as a step out of the complete lack of rights enshrined in the old Incapacitation Regulations. The 2006 amendment is "not bad"¹¹; it includes for example the establishment of a maximum number of 25 guardianship orders per person. However, its intentions were counteracted by the 2009 amendment.

In the practical implementation, two factors in particular need to be understood: „Guardianship is a difficult and extensive subject"¹² and "there are good and poor guardians."¹³

With regard to the latter issue, it should be noted that criticism of a system is not automatically criticism of individual persons, and that questions asked about practical problems are necessarily based on individual cases which, insofar as they are negative, do not have to be generally understood as – personal and unobjective – criticism of *all* persons of a certain grouping. In spite of all good intentions the inherent tension of the guardianship institute cannot be easily resolved.

Moreover, the pressure which is exerted upon persons with disabilities in a performance-orientated society which strives to achieve homogeneity is also considerable: the expectations made of them on the part of society are – unconsciously – moulded by norms which are directed towards an ostensible 'normalisation'. In the tension, which is thus created, relying on third persons and thus heteronomy is structurally unavoidable in many cases.¹⁴

⁷ Minutes of the public meeting, page 13.

⁸ Cf. Art. 12 of the Convention.

⁹ For details on the six dimensions of accessibility, see: statement of the Committee on subsidies, March 2012.

¹⁰ See also: equal opportunities via the realisation of human rights – assistance in decision-making, iFamZ September 2011, page 269.

¹¹ Minutes of the public meeting, page 10.

¹² Minutes of the public meeting, page 6.

¹³ Minutes of the public meeting, page 7.

¹⁴ See also minutes of the public meeting, page 9.

The warning issued by a self-advocate at the public meeting should be taken to heart: “People should deal with this issue (guardianship) in a sensible way”.¹⁵

The following section provides an outline of the problem – on the basis of some of the areas touched upon by guardianship – without claiming to be complete.

1. Order, appointment and termination

Information:

Although information about guardianship and training courses is available, this information often does not appear to reach those affected – both guardians themselves and those persons who have a guardian.¹⁶

It is important for all those involved that the information is understandable, and that accessible communication used if necessary, particularly for consultations in court.¹⁷

Co-determination:

People with disabilities must have the opportunity to jointly decide on who is going to be their guardian.

Conflict management:

There should be easier access to opportunities for solving conflicts with guardians.

Trial period:

The possibility of a trial period should be created for all phases of guardianship: for example directly after the appointment, in cases where the extent of the guardianship is to be limited, and for the transition period towards the end of the guardianship order. *“Sometimes the opinions about the necessity of a guardianship vary; in that case I try it out by setting a trial period in agreement with those affected”*, said a judge.¹⁸

Extent of a guardianship:

- The scope of guardianship orders is often set too broadly by judges.
- Too little use is made of the possibility of guardianship orders for **partial areas**.
- Extensive guardianship orders are seldom examined with regard to their possible reduction to partial areas.¹⁹

¹⁵ Minutes of the public meeting, page 6.

¹⁶ Minutes of the public meeting, page 8 ff.

¹⁷ Minutes of the public meeting, page 8.

¹⁸ Minutes of the public meeting, page 7.

¹⁹ Minutes of the public meeting, page 9.

Termination:

Official examinations about whether to terminate a guardianship order seem to be rare. Information about the possibility of ending a guardianship does not appear to reach those who would be potentially interested in doing so.

Asset management:

The mandate to invest a person's assets in as meaningful a way as possible can be misunderstood; the regulations on **payment and the reimbursement of expenses** can also lead to guardians having more (self-) interest in increasing the assets of the ward than in the person's quality of life.²⁰

Monitoring possibilities:

*"There is no independent monitoring facility for those affected."*²¹ The main motive for the appointment of lawyers and notaries are the **supervisory facilities** which are offered by the disciplinary regulations of their respective professional bodies.²² The majority of the complaints are related to guardians from these professions. This has a wide range of reasons, which are largely of a structural nature. Alternative monitoring possibilities are either not sufficiently well-known or the threshold is too high for potential users.

Change of guardians:

A frequent **change of guardians** is problematic, because it creates discontinuity and makes it necessary to build up a relationship again and again.

2. The role of the court

Information:

Information about guardianship is often described as meagre and hard to understand. Particularly in consultations with judges there is often a lack of understandable explanations and information in **accessible communication**.²³ The short periods of time during which judges are available is also perceived as problematic.²⁴

There is no **information in accessible language** on ways of lifting guardianship orders, the removal of guardians, or about how to complain (lodge an appeal) in the case of unsatisfactory decisions.²⁵

²⁰ Minutes of the public meeting, page 7.

²¹ Statement by Vienna People First.

²² Minutes of the public meeting, page 12.

²³ Minutes of the public meeting, page 8.

²⁴ Statement Gruber et al.

²⁵ Minutes of the public meeting, page 7.

Errors and risks:

Thinking in terms of liability leads to the fact that persons with disabilities are allowed to **make mistakes much more rarely**: one gains the impression that the slightest mistakes will lead to an extension of guardianship or make it much more difficult to revoke.

There is a lot of criticism of the lack of opportunities to take **risks**. In the descriptions offered, the paternalistic element of 'knowing what is best for you' is clearly present.

Supervisory function of the court:

The supervisory mechanisms of courts are described as "too vague".²⁶

There is a sense that courts do not apply the supervisory powers or do not fully exploit them.²⁷

3. The role of expert witnesses

In the course of the discussion, it was not possible to adequately consider how expert's reports are drawn up and the effects, which they have. There seems to be some scope for improvements here too, above all with regard to the realisation of the biopsychosocial model in the drafting of reports, and with respect to the multi-disciplinary composition of review boards.

The Committee has commented in more detail on the question of basic human rights in relation to expert's reports in its statement on the Decree on assessing impairments.²⁸

4. Relationship with and contact to guardians

As an instrument of control, guardianship is also a form of exercising power. The relationship between ward and guardian is inevitably characterised by dependence, and can ultimately only be described as an intrinsically imbalanced situation. The possibility of interventions in personal and extremely personal matters creates contradicting interests and thus in many cases tensions:

*"My guardian orders me around and tells me off. He shouts at me, but I haven't done anything. [...] The way he treats me hurts me deeply."*²⁹

And: *"My guardian knows too much about my life; that isn't pleasant because it's not a good situation. I'd like to have a different guardian. That's difficult, because I'm scared."*³⁰

*"When I have an appointment with my guardian I don't feel happy. I'm afraid..."*³¹

²⁶ Minutes of the public meeting, page 10.

²⁷ Minutes of the public meeting, page 4.

²⁸ Statement of the Committee on the Decree on assessing impairments, 3 February 2010.

²⁹ Minutes of the public meeting, page 5.

³⁰ Minutes of the public meeting, page 5.

“We don’t think it’s good if we have parents or relatives as guardians. Parents or other relatives have their own ideas about how we should live. It’s difficult to contradict your own mother or father. It’s hard for us to say to our relatives that they are doing their work badly.”³² “It shouldn’t be allowed for parents to be the guardians of their children.”³³

The appointment of support persons – workshop staff and other persons linked to an institution – against the legal provisions is also highly problematic.³⁴ *“Those guardians then represent the wishes of the institution or facility rather than our wishes.”³⁵*

The law provides for an **obligation of the guardian to determine the wishes** of their ward. This lays down that before the guardian makes decisions, s/he has to “provide the ward with the necessary information in good time and to subsequently ask them about their wishes”, and to do so “on her/his own initiative, without having to be asked”.³⁶

Self-advocates have a clear wish to try out new forms of support, also in decision-making.³⁷ Guidance and support from a guardian is particularly missed in the transitional phase from comprehensive guardianship to partial guardianship, but also when changing to an alternative form of decision-making.³⁸ There also seem to be opportunities for improvements in the mobility and flexibility (in terms of time) of guardians.³⁹

Considerations about alternative forms of support or a change of guardians should, if possible, be accompanied by advice from peers – experts in the same field.⁴⁰

5. Areas of life

Housing

With regard to decisions about where to live, the law limits the decision-making power of guardians “as far as the person is capable of insights and making reasoned decisions”.⁴¹

Work

“My guardian meddles in my work too much, but sometimes it’s good when I have a more serious problem.”⁴²

³¹ See anonymous statement.

³² Minutes of the public meeting, page 4.

³³ Statement by the Network of Self-Advocates.

³⁴ Minutes of the public meeting, page 10.

³⁵ Statement by the Network of Self-Advocates.

³⁶ Cf. Barth/Ganner, Handbuch des Sachwalterrechts, 93.

³⁷ Minutes of the public meeting, page 4.

³⁸ Minutes of the public meeting, page 4.

³⁹ Minutes of the public meeting, page 5.

⁴⁰ Minutes of the public meeting, page 7.

⁴¹ Section 284a (1) Austrian Civil Code.

⁴² Anonymous statement.

Money, saving and pensions, and financial security

“My guardian says I have to save.”⁴³

The present regulations create the impression that the preservation and increasing of the ward's assets is in the interests of the guardian. In the current system, the provision of incorrect information about the actual level of the ward's assets seems hard to curb. It is noteworthy that self-advocates are also in favour of an allowance being granted to guardians for the support they provide in this sense.

“It's a nuisance that I have to call her because of every little amount, but unfortunately there's no other way to do it because that's how she arranged it with the bank. I have to call the guardian first so that she writes an e-mail to the bank. The bank won't give me any money without the permission of my guardian.”⁴⁴

“I can withdraw a certain amount per week and that's fine with me.”⁴⁵

Models such as that of the Vienna debt counselling service, in which clients have a fixed amount on their own account, which they can freely dispose of, should be discussed.⁴⁶

Leisure time and other issues

“My guardian wants to organise my leisure time, but I don't want that. If I don't want something I just don't want it. At the weekend I want to have some peace and relaxation.”⁴⁷

“My guardian puts my name down for sports events. He doesn't tell me that he's done it and occasionally I don't want to go. I don't feel like it. It was difficult to cancel my registration for the event. Sometimes I have to go whether I like it or not. My guardian is my sports coach. My guardian has put my name down for cross-country skiing but I couldn't be bothered. It took a long time until I said no. It definitely took three years. But now he's grasped it.. He tells me what I have to do and doesn't listen to me.”⁴⁸

“My guardian should support me when I want to go on holiday.”⁴⁹

Education and further education

By pointing out existing opportunities, guardians can play a supporting role in the question of access to education and training programmes, which aim to preserve or also to develop abilities.

Medical care including preventive medicine

It is significant that there was no feedback on this point. In the interests of human rights, there is a need to consider that in the field of the medical care of persons with

⁴³ Anonymous statement.

⁴⁴ Anonymous statement.

⁴⁵ Anonymous statement.

⁴⁶ Briefing with the head of the Vienna debt counselling service, Alexander Maly.

⁴⁷ Anonymous statement.

⁴⁸ Anonymous statement.

⁴⁹ Statement by Vienna People First.

learning difficulties in general, and also in the case of persons who have a guardian, many things happen which run counter to the right to a maximum level of health care provision. On the one hand, access to **preventive check-ups** such as those in the areas of gynaecology, urology and dental care should be ensured.⁵⁰ On the other hand, guardians play an important role in **protecting their wards from abuse**. Dental treatment is said to have occasionally been carried out with full anaesthetic due to perturbed patients, and a decayed tooth was once used as an excuse to remove all of a patient's teeth.

Sexuality

There have apparently been cases in which persons with disabilities have been given contraceptives, which were described to them as medicines with a completely different effect. The ramifications of the supposition that persons with disabilities are somehow asexual, and the tendency to solve the 'problem of sexuality' 'simply' by means of sterilisation still has to be opposed in the strongest terms in spite of the existing regulations⁵¹.

Private and extremely personal matters

*"My guardian does not want me to marry, but just to receive a blessing. She hasn't got anything against a blessing, which could be organised as beautifully as a wedding, but it isn't the same. I would really like a blessing too, with all the trimmings. I'm not allowed to marry although I have been together with my boyfriend for many years now."*⁵²

The Human Rights Commissioner of the Council of Europe recently stated that it makes little sense to give persons the right to marry and have a family when a third party has to make the relevant decisions.⁵³

Protection of people's physical and mental integrity and protection from all forms of violence also fall into this category. During the public meeting it was criticised that in the course of recent discussions about violence and abuse in institutions, there was no mention of persons with guardians who had notified the authorities about incidences of violence.⁵⁴ Although there have been no investigations about this, given the basic tendencies in dealing with violence⁵⁵ it can be assumed that too few guardians have given thought to the possible effects of violence on their clients.

Participation in political processes

For persons whose right to exercise their legal capacity is restricted, full participation in political processes is often not ensured.⁵⁶

⁵⁰ See in particular the comprehensive Pomona study, e.g. at: http://www.pomonaproject.org/action1_2004_frep_14_en.pdf, <http://bidok.uibk.ac.at/library/brehmer-pomona.html#id2921077>.

⁵¹ Section 283 (1) of the Austrian Civil Code.

⁵² Anonymous statement.

⁵³ Report of the Council of Europe, page 8.

⁵⁴ Minutes of the public meeting, page 11.

⁵⁵ See the statement of the committee on violence and abuse, 24 February 2011.

⁵⁶ See the latest study of the High Commission for Human Rights on political participation, and the study of the EU Agency for Fundamental Rights.

Austria recognises the full right to participation in elections.⁵⁷ At the same time, it is clear that more accessible information is needed on the political participation of persons with disabilities, particularly those with learning difficulties. A relevant event organised by the Democracy Workshop of Parliament seems to be an example of good practice.⁵⁸

6. Other fields

“There is a percentage clause. That means that when a self-advocate has a lot of money, the guardian gets a part of the money. The percentage clause should be abolished.”⁵⁹

The court fees for guardianship orders are experienced as an unreasonable burden – also due to recent rises – and there were demands for their abolition.⁶⁰

III. ‘Life supporters’

During the public meeting, self-advocates called for the introduction of so-called life supporters.⁶¹ It is indicative for the thought that self-advocates have put into this that they are calling for life supporters to “receive decent payment” and that they “should receive support” in the fulfilment of their tasks.⁶²

The realisation of self-determination – as the core element of exercising legal capacity – has to become the focus of attention: supporting or assisting persons with disabilities is a **means and not a goal in itself**. In the Convention, the significance of assistance and support is helpfully defined in more detail in the article on equal participation in political life and elections.⁶³ In order to guarantee the free expression of their will at elections, voters can, at their request, be supported by a person of their choice. The element of self-determination is emphasised several times here: “free will”, “at their request” and “person of their choice” are three explicit wordings for the manifestation of the **freedom to make decisions**. The option of support is mentioned, but it is clearly formulated as a possibility and not as a necessity.

⁵⁷ See Artikel 26 of the federal constitution, and also the Constitutional Office of the Federal Chancellery’s “Working group on the examination of the Austrian legislation with regard to provisions which disadvantage persons with disabilities” p. 40-41.

<http://www.bizeps.or.at/info/bka/texte/gesamt.doc>, and the recent study of the EU Agency for Fundamental Rights http://fra.europa.eu/fraWebsite/attachments/Report-vote-disability_DE.pdf.

⁵⁸ See e.g. Natalia Postek, Politische Teilhabe von Menschen mit Lernschwierigkeiten am Beispiel der Demokratiewerkstatt in Wien, 2.6 Beispiele politischer Teilhabe <http://bidok.uibk.ac.at/library/postek-teilhabe-dipl.html>; on the fundamental issue of political participation see the recent resolution of the UN Human Rights Council, March 2012, HRC/RES/19/11.

⁵⁹ Statement by the Network, see also minutes of the public meeting, page 4.

⁶⁰ Minutes of the public meeting, page 4.

⁶¹ Statement by the Austrian Network of Self-Advocates.

⁶² Statement by the Austrian Network of Self-Advocates, page 5; see also: minutes of the public meeting, page 4.

⁶³ Article 29 (a) (iii): guaranteeing the expression of free will by persons with disabilities as voters and, at their request, allowing them to receive support in voting by a person of their choice.

The social and socio-political environment plays an important role in the realisation of equal legal capacity. “Full and effective participation and inclusion in society”⁶⁴ is a basic principle of the Convention. People are characterised by participation in public life, interaction with third parties, a natural involvement in their social surroundings and in the structure of society. The way persons see themselves, their quality of life and many other factors are determined by the possibility to achieve self-realisation in a social context.⁶⁵

Learning **social skills** and the establishment of **(more) natural interaction with persons with disabilities** require above all a shared everyday life, something which does not yet exist in Austria yet. As an important element of self-determination and the realisation of opportunities for participation, the circle of persons with whom social relationships can be developed – and of course practised – has to be extended.⁶⁶ Sharing everyday school life is a key element on the path towards a more natural relationship to persons with disabilities.⁶⁷

The possibility to make mistakes and take risks must – in the interests of equal opportunities for persons with disabilities – become a matter of course. The ‘dignity of risk’ describes the difference between “human dignity in risk and inhuman indignity in security.”⁶⁸

In economics, having opportunities to act and *the chance to realise such opportunities* are recognised as key factors in a good and successful life. The significance of these factors is particularly great for persons with disabilities,⁶⁹ especially because equal opportunities for persons with disabilities are largely limited by social mechanisms. The “attitude-related barriers”⁷⁰ which – in the form of prejudices and discriminating omissions – lead to the social exclusion of persons with disabilities, are an important obstacle in the realisation of opportunities for participation. These external conditions, which have such a decisive influence on the possibilities available to persons with disabilities, can be influenced by the government.⁷¹

IV. Some thoughts for the continuing debate

The label of incompetence

For many persons with a guardian, the label of incompetence becomes a self-fulfilling prophecy in which they primarily learn helplessness and dependence.⁷² Even for

⁶⁴ Cf. Article 3 of the Convention and Article 1: Purpose.

⁶⁵ On this and the following section, see statement of the Committee on “results-oriented impact assessment” of 5 January 2012.

⁶⁶ On the concept of social capital see in particular: Bourdieu; on the link between Sen’s opportunities of self-realisation and Bourdieu see Bowman.

⁶⁷ Statement of the Committee on Inclusive Education, June 2010.

⁶⁸ On the dignity of risk for persons with learning difficulties, see: Robert Perske, Dignity of Risk, for references in the context of psychosocial impairments in general, see Pat Deagan.

⁶⁹ For this see the recent WHO/World Bank World Report on People with Disabilities, ‘Capabilities Approach’, p. 11 see also (<http://www.bizeps.or.at/news.php?nr=12808>); See the basis for discussion of the committee for the public meeting on 17 November 2011 on supported decision-making: www.monitoringausschuss.at, and Kim Hopper, Rethinking Social Recovery.

⁷⁰ See PP (e) and Article 1 of the Convention.

⁷¹ See WHO/World Bank, World Report, p. 13.

⁷² Report of the Council of Europe, page 8 ff.

persons who only have a guardian in certain areas of life, this can spill over into other aspects.⁷³ “The sad truth is that most Europeans with intellectual and/or psychosocial disabilities who would like to have such support are instead asked to give up their legal capacity.”⁷⁴ Even the most committed guardian cannot compensate for the inherent loss of rights.⁷⁵

The ethos of empowerment

A normative view of mankind which is characterised by the three pillars of self-determination, social justice and democratic participation forms the foundations of deliberations which comply with the Convention.⁷⁶ An ethos is required which encourages and promotes persons to the maximum extent in the realisation of their own self-determination and – where necessary – supports them.⁷⁷ The following model of the ‘Legal Empowerment of the Poor’ created by the Commission of the United Nations provides a helpful illustration:⁷⁸

The Concept of Legal Empowerment



© Commission on the Legal Empowerment of the Poor
© Translation for German Statement: Kiss Me I'm Polish, LLC

Self-determination and assistance

The first fundamental principle of the Convention is self-determination.⁷⁹ The Convention prohibits discrimination in any form, and particularly discrimination which *results* in persons being treated differently.⁸⁰ “Citing ‘disability’ as the reason for revoking a person’s legal capacity – for example by appointing a guardian – contradicts the right to equal recognition before the law.”⁸¹ Article 19 on living independently and Article 29, which provides for support at elections, describe **clear**

⁷³ Report of the Council of Europe, page 9.

⁷⁴ Report of the Council of Europe, page 11.

⁷⁵ Report of the Council of Europe, page 11.

⁷⁶ Staub-Bernasconi, Soziale Arbeit, p. 248.

⁷⁷ On the ethos of empowerment: see Staub-Bernasconi, p. 247; on empowerment see also: Report of the Council of Europe, page 11.

⁷⁸ Commission on the Legal Empowerment of the Poor, p.27.

⁷⁹ Cf. Article 3 of the Convention and Preamble letter n.

⁸⁰ Definition of discrimination, Article 2; see also Report of the Council of Europe, page 12.

⁸¹ Article 12 of the Convention: Office of the High Commissioner for Human Rights, Monitoring of the CRPD – Guidance for Human Rights Monitors, Professional Training Series No. 17; see also Report of the Council of Europe, page 14.

alternatives to guardianship based on assistance and support.⁸² The latter should also be understood as elements of “reasonable accommodation”.^{83 84} According to the Convention, persons with psychosocial impairments, persons with learning difficulties, and also persons who require a high degree of support are protected by the Convention and their equal right to legal capacity should therefore be realised.

Twin-track processes

The Convention proposes twin-track measures: specific programmes for persons with disabilities, and alongside this general programmes which are designed to be accessible. In the context of supported decision-making, two obligations have to be fulfilled in parallel:⁸⁵

1. Quick, practicable solutions for the problems which arise in the everyday work of guardians, particularly information about changes in and the reduction of the extent of guardianship, the possibility of trial periods, the right to have a say, the separation of guardians’ payment from the assets of the ward, mechanisms for conflict resolution, training in accessible communication for judges etc.
2. An in-depth discussion on alternatives to guardianship providing supported decision-making with the participation of persons with disabilities and their peers. The following models⁸⁶ which were presented by the Canadian expert Michael Bach at the public meeting should **certainly** be given consideration:
 - a. Person-centered planning
 - b. An independent ombudsman
 - c. Supported communication
 - d. Support for representation
 - e. Support in the formation of networks
 - f. Administrative support

Participation: minimum specifications

As already mentioned several times, the participation of persons with disabilities is an obligation on the part of the state and society.⁸⁷ Establishing what needs to change together with persons with disabilities is of key importance;⁸⁸ the meeting of the committee represents a beginning. As specified by the Convention and Arnstein’s ladder of participation, an increase in the quality of participation is undoubtedly required.⁸⁹

The following description can serve as a negative example: “We were at a conference about persons with learning difficulties. And it was about what the eggheads want to do so that things are better for us. There were politicians there and

⁸² Cf. in particular Art 12/3, but also Art 2, 4/1/g, h & i, 7/3, 9/2/e & f, 16/2, 19, 20/b & d, 23/2, 24/2/d& e, 24/4, 26/3, 27/1/ 28/2/a & c, 29/a/ii, 29/a/iii, 32 of the Convention.

⁸³ Article 2 (definition of reasonable accommodation), Article 5 (3) on guaranteeing it.

⁸⁴ Report of the Council of Europe, page 12.

⁸⁵ See also Report of the Council of Europe, page 12.

⁸⁶ For more details see Bach/Kerzner, 72 ff.

⁸⁷ Statement of the Committee on Participation of 19 April 2010,

⁸⁸ See also Report of the Council of Europe, page 18.

⁸⁹ See i.a. Arnstein.

persons from the uni. They gave lectures. We didn't understand a word, and our support persons didn't understand much either. We were really angry. If they want to do something for us, they should speak in a way that we can follow it."⁹⁰

The minimum specifications for participative processes are:

- Multi-dimensional accessibility
- Accessible communication; particularly for persons with severe disabilities who communicate via body language etc. and persons who require a high degree of support (in terms of communication): Easy read versions, explanations, supported communication⁹¹
- Sufficient time
- Sufficient information

Cross-sectional issue: supported decision-making

The realisation of supported decision-making requires a paradigm shift in society as a whole, which above all has to include the reduction of the stigma attached to disabilities.⁹² The development of supported decision-making thus goes beyond the historical responsibility of the Ministry of Justice; it is therefore absolutely necessary to clarify who is going to have the overall lead of the process in future.

"You don't help people by doing for them what they can do themselves", said Abraham Lincoln, as quoted at the beginning of an information brochure of the Federal Ministry of Justice on guardianship.⁹³ This motto should also apply to the discussion about new models of supported decision-making. An important point was made by the Council of Europe's Human Rights Commissioner: "One of them is to ensure that our new systems are truly support systems and not substituted decision-making under a new name."⁹⁴

V. Necessary steps

Against the background of what has been said until now, it is essential to initiate a broad discussion and awareness-raising process based on the highest standards of participation. The necessity of this discussion process does not, however, relieve the state of its responsibility to take a leading role in the process.

The first indispensable steps which, in the view of the committee, are the responsibility of the state and not civil society, include:

- The institutionalisation of the maximum possible level of participation of affected persons and civil society organisations in accompanying the process in every phase
- The initiation of an active process to clarify the respective tasks of the bodies which (according to the constitution) are responsible for the implementation of

⁹⁰WIBS, Gleichstellungsbuch.

⁹¹See e.g. Wilken, Unterstützte Kommunikation.

⁹²On the reduction of stigma, e.g. Amering/Schmolke, Recovery – Das Ende der Unheilbarkeit, 75.

⁹³Federal Ministry of Justice, Sachwalterschaft: Wissenswertes für Betroffene, Angehörige und Interessierte: http://www.justiz.gv.at/internet/file/2c948485246bff6f0124b96dd98b412f.de.0/sw-broschüre_2010_a4.pdf.

⁹⁴Report of the Council of Europe, p. 20.

supported decision-making (Ministry of Justice, Ministry of Labour, Social Affairs and Consumer Protection, plus the provinces)

- A comprehensive evaluation of existing best-practice models in an international context (e.g., Canada) and the development of implementation models for the specific situation in Austria
- The development of project plans for pilot projects to implement new decision-making models with the involvement of non-profit organisations; if necessary including the creation of a legal basis
- The consideration in this context of the creation of transitional regulations (new legislation for new cases, old legislation for old cases) so that the judiciary and enforcement authorities are not overburdened.
- Clarification of the timelines set in the National Action Plan to replace the current guardians system with mechanisms for supporting decision-making which are in line with the Convention, including interim evaluations of existing projects.

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