Staatliche
Koordinierungsstelle
nach Artikel 33
UN-Behindertenrechtskonvention

Forced hospitalization and involuntary treatment in the light of the CRPD

Position paper by the State Coordination Agency established in accordance with article 33 of the CRPD

Specialist Committee on Freedoms, Protective Rights, Women, Partnership and Family and Bioethics

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1. Requirements of the United Nations Convention on the Rights of Persons with Disabilities

Under the United Nations Convention on the Rights of Persons with Disabilities (CRPD) all discrimination on grounds of disability is prohibited, in particular in the exercise of all human rights and fundamental freedoms. Pursuant to article 14, paragraph 1, subparagraph b, of the CRPD, States Parties must ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily and that any deprivation of liberty is in conformity with the law, and that the existence of a disability may in no case justify a deprivation of liberty. Pursuant to article 17 of the CRPD, every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

The State Coordination Agency established in accordance with article 33 of the CRPD has examined the legal rules on forced hospitalization and involuntary treatment.

2. Legal rules on forced hospitalization in Germany

2.1 Forced hospitalization under the law on adult guardianship

Accommodation involving deprivation of liberty (i.e. forced hospitalization) initiated by a court-appointed legal representative (i.e. adult guardian) or *a person acting under a power of attorney* is permitted under section 1906 subsections (1) and (4) of the Civil Code only as long as this is necessary in the best interests of the adult because by reason of the adult's mental illness or mental or psychological disability, there is a danger that he or she will kill himself or herself or cause substantial damage to his or her own health (subsection (1) number 1) or in order to avert the threat of substantial damage to the adult's own health, a medical examination, therapeutic treatment or an operation is necessary, which cannot be carried out without the forced hospitalization and, by reason of the adult's mental illness or mental or psychological disability, he or she cannot recognize the necessity of this hospitalization or cannot act in accordance with this realization (subsection (1), number 2).

2.2 Forced hospitalization under state legislation

All of the *German states* have adopted legislation concerning the *forced hospitalization under public law* of persons who are mentally ill. Under section 8 subsection (1), first sentence, of the Berlin Act for People with Mental Illness[1], cited here as an illustration, persons who are mentally ill can be accommodated against or in the absence of their own will only if and as long as their behaviour due to their illness substantially endangers their own life, their own health to a serious degree or particularly important legal interests of others and this danger cannot

[1] Act of 8 March 1985 (GVBl. p. 586); amended by Act of 17 March 1994 (GVBl. p. 86).

be averted in any other way. A person's unwillingness to be treated may not of itself justify forced hospitalization (section 8 subsection (1), second sentence, of the Berlin Act for People with Mental Illness).

2.3 Evaluation of the legal situation against the background of the CRPD

- Debates in the specialist committee were heated – as they have been amongst professionals in this field – on the compatibility of these provisions with the CRPD. From one perspective, the existence of a *disability in itself* cannot justify deprivation of liberty. It considers, however, that, where, for example, in addition, a substantial danger for that person or for others exists, deprivation of liberty is permissible within strict substantive and procedural limits and subject to strict adherence to the principle of proportionality.

- According to a different view, *any causative connection with a disability* as a reason for forced hospitalization contravenes the CRPD, as pursuant to article 14, paragraph 1, subparagraph b, of the CRPD, the existence of a disability shall *in no case* justify a deprivation of liberty. However, also according to this position, forced hospitalization in connection with a mental or psychological crisis can be justified where another important legal interest is endangered and no other possibility exists, for example, to protect and support the health and self-determination of the individual concerned.

- The Federal Constitutional Court takes the view that the CRPD does not categorically prohibit measures that operate against a person's natural will which are based on a restricted capacity for self-determination as a result of illness. However, it limits the extent to which such measures are permitted[2].

- **The Specialist Committee takes the view that, under the CRPD, accommodation involving deprivation of liberty is not fundamentally unlawful. However, the Federation and the states are called on to review all rules on forced hospitalization for compatibility with the CRPD. As part of this review, they should examine in particular whether the co-existence of Federal and state legislation needs to be retained. In any event, no compelling reason exists in the case of self-endangerment.**

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[2] Decision of 23 March 2011 – Case 2 BvR 882/09 – paragraphs 52 and 53.

3. Involuntary treatment

Involuntary treatment against a person's will is possible, at most, as a last resort and only under very strict conditions satisfying, as a minimum, the requirements laid down by the Federal Constitutional Court and Federal Court of Justice.

3.1 Rules under the law on guardianship

The Act to Govern the Giving of Consent under Guardianship Law for Involuntary Medical Treatment (*Gesetz zur Regelung der betreuungsrechtlichen Einwilligung in eine ärztliche Zwangsmaßnahme*)[3] has established an express legal basis by which guardians[4] can give their consent for medical treatment. Pursuant to section 1906 subsection (3) of the Civil Code, a guardian can only consent to treatment of that kind against the adult's own will if

1. the adult cannot recognize the necessity of the medical treatment or cannot act in accordance with this realization because of a mental illness or a mental or psychological disability,

2. previous attempts were made to convince the adult of the necessity of the medical treatment,

3. the involuntary treatment in the context of forced hospitalization in accordance with subsection (1) is necessary in the interests of the adult in order to avert a threat of substantial damage to health,

4. the substantial damage to health cannot be averted by any other measure which is reasonable for that person

5. and the anticipated benefit of the coercive medical treatment considerably outweighs the anticipated adverse effects.

In addition, the guardianship court must approve this consent to the involuntary treatment. If the conditions under which a guardian may consent cease to apply, the guardian must revoke the consent and duly notify the court (section 1906 subsection (3a) of the Civil Code).

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3 Bundesgesetzblatt (Federal Law Gazette), Year 2013, Part I, No. 9, published at Bonn on 25 February 2013.

4 The rules also apply to persons acting under a power of attorney, see section 1906 subsection (5) of the Civil Code.

3.2 Evaluation of the new Act to Govern the Giving of Consent under Guardianship Law for Involuntary Medical Treatment

From this starting point, the Specialist Committee has examined the Act to Govern the Giving of Consent under Guardianship Law for Involuntary Medical Treatment, adopted by the Bundestag on 17 January 2013 and to which the Bundesrat gave its consent on 1 February 2013, and developed its critique. Further, it has addressed the resulting requirements and implications for the institution of legal guardianship and, finally, it discussed necessary improvements for the care system.

The Specialist Committee expressly welcomes the fact that guardians and persons acting under a power of attorney may only give their consent for involuntary treatment that takes place in a closed institution.
Having regard to current policy debates, the Committee calls for any possible extension of involuntary treatment to out-patient health care to be rejected. Given the absence of control mechanisms and the attendant risk of abuse any extension of that kind would be irresponsible. Moreover, the need for such expansion is not evident.

The Specialist Committee also welcomes the fact that consent to treatment against the adult's will in the context of forced hospitalization is permitted only within strict and, under the new law, expressly defined limits.
At the same time, it must be observed that the wording of certain phrases allows an excessive latitude, for example, the requirement of section 1906 subsection (3) number 2 of the Civil Code that 'an attempt is made to convince the adult of the necessity of the medical treatment'. A better wording would be: '... where prior to the involuntary treatment a serious attempt, taking the necessary time and not exerting any pressure, was made to establish the adult's consent on a basis of trust'[5].

Moreover, in any review of the implementation of the new Act, consideration should be given to the following points:

- The judicial discretion to determine that consent orders take immediate effect should be restricted to cases in which the adult's life is endangered or there is a threat of serious and long-lasting harm to his or her health (section 324 of the Act on

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5 Decision of the Federal Constitutional Court of 23 March 2011 – Case 2 BvR 882/09 – paragraph 58.

Proceedings in Family Matters (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*)).

- Also the possibility to order interim measures should be limited to situations of a danger to life and serious long-lasting harm to health (section 331 of the Act on Proceedings in Family Matters).

- Courts should be required to appoint a representative for the adult also in cases in which involuntary measures are ordered in the context of forced hospitalization under public law (section 312 or 317 of the Act on Proceedings in Family Matters).

The question was raised in the Specialist Committee how 'an absence of recognition that treatment is necessary' should be distinguished from 'an absence of consent despite the recognition that treatment is necessary'. Some argued that the wording used for 'incapacity to consent' should be linked to a precise definition of the circumstances that can cause such an incapacity e.g. a coma. Others objected that an approach of that kind would shift the guardian's responsibility to reach a qualified decision in a complex individual case towards professional experts and doctors.

It is not evident to a sufficient degree that the requirements of the CRPD were given adequate consideration in the legislative process. In particular, 'supported decision-making' should have been specified as a priority measure that must be implemented before any substitute acts or even involuntary measures may be effected that interfere in the autonomy of the adult.

It is not sufficient simply to establish a legal framework. Adult guardians with a responsibility for health care play a central role in decisions for or against involuntary treatment and must be provided with the relevant frameworks and support structures for an appropriate professional organisation of their activities. At the same time the system of psychiatric care must be significantly improved.

3.3 Involuntary treatment under state legislation

In several judgments[6] the Federal Constitutional Court has declared provisions on medical treatment against the will of the person to be unlawful. These judgments concerned provisions of prison law whose wording is, in part, identical with state legislation on forced hospitalization.

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[6] See decisions of the Federal Constitutional Court of 23 March 2011 – Case 2 BvR 882/09 – paragraphs 1 to 83 and 12 October 2011 – Case 2 BvR 633/11 – paragraphs 1 to 47.

Consequently, steps must be taken at state level to ensure that existing rules on involuntary treatment are reviewed for compatibility with the Constitution. Where new legislation is adopted the requirements of the CRPD and the principles established by the Federal Constitutional Court[7] must be strictly observed.

4. Requirements on the actors in the procedure

Provisions of guardianship law alone do not suffice to ensure implementation of the CRPD requirements. It is principally for the actors involved to achieve this and, for these purposes, an improvement in the framework is necessary.

In light of the CRPD and the stricter legislation on involuntary treatment, judges, guardians and medical and therapeutic professionals are faced with considerable challenges. They must

- as part of their initial training and/or continuing professional development be provided with comprehensive information on the relevant articles of the CRPD, its human rights based approach, and on the importance of self-determination and inclusion;
- under the new provisions of section 1906 of the Civil Code, prior to giving their consent for forced hospitalization and involuntary treatment, determine whether
    - **either** the adult cannot recognize the necessity of the medical treatment or cannot act in accordance with this realization because of a mental illness or a mental or psychological disability,
    - **or** the adult recognizes this but does not agree to the treatment,
- attempt to convince the adult of the necessity of the medical treatment,
- assess whether the involuntary treatment in the context of forced hospitalization is necessary to avert a threat of substantial damage to the adult's health,
- assess whether the substantial damage to health cannot be averted by any other measure which is reasonable for that person,
- assess whether the anticipated benefit of the involuntary treatment considerably outweighs the anticipated adverse effects.

5. Specific requirements of the actors involved

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[7] Decision of the Federal Constitutional Court of 23 March 2011 – Case 2 BvR 882/09 – paragraphs 1 to 83.

5.1 Guardians

- The guardian-client relationship should be constructed in accordance with scientific (social work) methods and procedures to ensure in each complex individual case that the problems and resources of the adult are recorded and the possibilities for communication and support are identified and utilised in full.

- In carrying out the abovementioned procedures, the objective should be ‘supported decision-making’, in order to avoid substitute action being taken.

- The principle of ‘acting by agreement’ established in a contract with the client should be the central means of strengthening the autonomy of individuals at risk of extreme mental states.

- Universal procedures and standards should be developed for the assessment from a professional perspective whether other measures, as an alternative to involuntary treatment, are reasonable for the adult concerned.

- Exercise of high professional standards in the role of guardian relies on a system of initial training and regulated continuing professional development and, in the case of volunteer guardians or persons acting under a power of attorney, the provision of qualified advice and support by guardianship associations.

- A decisive factor in ensuring that matters with and for clients are dealt with in a professionally qualified manner is a time budget that is adequate, in professional and quantitative terms, for provision of personal attention and appropriate remuneration that covers the costs.

- Volunteer guardians and persons acting under a power of attorney must be able to turn in each individual case to reliable and accessible advisory services which, in the interests of the adults concerned, ensure that knowledge transfer takes place between volunteer and professional guardians.

- Research should be carried out in model projects on the possibilities that can be achieved in professionally qualified guardianship work and their consequences in terms of averting involuntary measures.

5.2 Doctors and nursing teams

- Patients often reject treatment with psychotropic drugs because of their side effects. Doctors must ensure that greater use is made of psychotherapy and other treatment methods, e.g. treatment with naturopathic medication, talking in-depth to nursing staff, physical exercise and other activities such as singing, art therapy, Snoezelen, etc.

- To establish trust and a relaxed atmosphere on wards, patients must be given time and spaces created in which they can calm down. In addition, greater tolerance must be shown towards patients. Where situations escalate nonetheless, a ‘soft room’ is essential. Soteria wards must be reintroduced in all psychiatric hospitals.

- Staff working in social psychiatry must have the necessary skills to facilitate de-escalation. To ensure that they develop these skills, training and continuing professional development must be offered and supervision must be carried out regularly, involving input from individuals who have experienced psychiatric treatment.

5.3 Judges and judicial officers

- The legal training of judges must include the law on guardianship and related areas of law.

- Continuing professional development courses including topics such as the consequences of mental illnesses and the treatment options available and information on professionally qualified adult guardianship activities must be made compulsory for judges dealing with matters of adult guardianship.

5.4 Court-appointed representatives in adult guardianship proceedings

- The position of court-appointed representatives (of the adult concerned) in adult guardianship and forced hospitalization proceedings must be further clarified.

- Court-appointed representatives must have a knowledge of the law in order to support clients in the proceedings and, in addition, the skills to interact with their clients in a professionally qualified manner and to assess their concerns not only from a legal perspective.

6. Evaluation and development of social psychiatry services

It is assumed that the primary consideration motivating the conduct of all actors involved is the avoidance of forced hospitalization. For that reason, social psychiatry services must be improved. With a view to avoiding involuntary treatment, the following measures are called for:

- promotion of greater public understanding of mental illnesses;
- qualitative and quantitative improvements in the services available to individuals experiencing mental crisis (improved staffing ratio, working conditions, time available for clients);
- 24-hour access to crisis services and, in this connection, the possibility of medical treatment from a psychiatrist or doctor in the social psychiatry service;
- immediate availability of psychotherapy treatment at times of mental crisis;
- provision of sociotherapy in all parts of the country;
- needs-based provision of psychiatric services in the community;
- research and development of alternatives to treatment with psychotropic drugs;
- promotion and scientific evaluation of strategies to avoid involuntary measures (e.g. the ReduFix project).

In addition, the following measures should be taken:

- judicial statistics should be expanded to include involuntary treatment;
- hospital statistics should be analysed to investigate the implementation and (documented) results of involuntary measures and the prevention of such measures in a psychiatric context;
- the practical implementation of the new Act to Govern the Giving of Consent under Guardianship Law for Involuntary Medical Treatment should be evaluated.

7. Avoidance of involuntary measures outside of the psychiatric context

Given current discussions on the extent to which involuntary medical treatment is permitted, the Technical Committee on Freedoms, Protective Rights, Women, Partnership and Family and Bioethics and the Advisory Group on Inclusion reporting to the State Coordination Agency established under article 33 of the CRPD have focused primarily on this issue. However, the extent to which measures involving a deprivation of liberty are permitted when carried out in

institutions, in particular in the case of individuals with learning disabilities, or in the homes of older people in need of care also requires further discussion. In those cases, too, there is a need to raise awareness, improve levels of qualification and to promote and support projects that help prevent unnecessary interferences in personal autonomy.