




U N I K A S S E L
V E R S I T Ä T

**Application of the CRPD in German
Jurisprudence**

Prof. Dr. Felix Welte
International Symposium
Taiwan University, Taipei
March 22nd 2019



Application of CRPD in German Jurisprudence

- ***CRPD in the German legal system***
 - *Ratification*
 - *Self Executive Norms*
 - *Application of German Law in line with CRPD*
 - *Interaction with German Basic Law*
 - *Interaction with EU Law*
- ***Application in Examples***
- ***Outlook***

CRPD in the German legal system

- *CRPD Ratification*
 - *Germany ratified the CRPD in 2008*
 - *Bundesregierung (Federal Government) proposed ratification with memorandum (BT-Drucksache 16/10808) 8/11/2008*
 - *According to Art 59 Grundgesetz (Basic Law) Bundestag (Federal Parliament) and Bundesrat (Representation of the Federal States) had to consent to the ratification and did without any reservation*
 - *It was promulgated (Bundesgesetzblatt II 2008, S. 1420)*
 - *Three months after deposition of the instrument of ratification it went into force on 26th March 2009 (Art. 45 CRPD)*

CRPD in the German legal system

- *Implementation*
 - *Focal Point on the national level is the Federal Ministry of Labour and Social Affairs (BMAS)*
 - *Independent Monitoring mechanism is the German Institute for Human Rights (DIM)*
 - *Federal States have own focal points*



BMAS
Berlin



CRPD in the German legal system

■ **Status of CRPD**

- *The affirmative law in the ratification process transforms the treaty into national law.*
- *The CRPD has the status of national federal law.*
- *It is only self-executing and gives individual rights only in case the treaty is designed to this effect.*
- *In other cases the treaty has to be fulfilled by amending the national law or by interpreting it.*
- *The national authorities and courts have to interpret the treaty in order to find out, how far it is self-executive.*

Application of CRPD in German Jurisprudence

- *CRPD in the German legal system – Self-Executive norms?*
 - *The Bundessozialgericht (BSG, Federal Social Court) judged, that the prohibition of disability discrimination in Art 5 CRPD is self-executive (BSG 6/3/2012, B 1 LR 10/11 R)*
 - *The BSG also judged, that the prohibition of disability discrimination in Art 3 Section 3 Sentence 2 Grundgesetz (Basic Law, Constitution) which is in power since 1994) has the some content as Art 5 CRPD.*
 - *So it is normally not necessary to use Art 5 CRPD.*
 - *But through this it is acknowledged, that Art 3 Grundgesetz contains the requirement of reasonable accommodation.*
 - *No other article has been acknowledged by a court as self-executing up to now.*

CRPD in the German legal system



Bundessozialgericht, Kassel

CRPD in the German legal system

- **Interaction with German Laws**
 - *German Law refers to Human Rights (Art. 1 Sec. 2 GG), the European unification and peace in the world (Preamble) and to International Law (Art. 24 GG).*
 - *Bundesverfassungsgericht (Federal Constitutional Court) has judged, that domestic law has to be interpreted in line with binding international law as far as possible in the framework of the constitution and of regular legal interpretation (BVerfG 14/10/2004, 2 BvR 1481/04 „Görgülü“), first in the context of the European Convention of Human Rights (ECHR).*

CRPD in the German legal system



Bundesverfassungsgericht, Karlsruhe

CRPD in the German legal system

- **Interaction with German Basic Law**
 - *German Constitutional Law shall be interpreted in line with international Human Rights Conventions, as far as there is no contradiction and as far as the interpretation follows regular interpretation standards.*
 - *Bundesverfassungsgericht judges the basic rights of the constitution mostly in line with the human rights of the European Convention of Human Rights.*
 - *Other human rights conventions (ICPPR, ICECSR, ICERD, CEDAW, CRC, CRPD) are referenced, but not very often.*

CRPD in the German legal system

- **Interaction with German Basic Law**
 - *Bundesverfassungsgericht takes in account and references the jurisprudence of the European Court of Human Rights (ECHR) as an interpretation aid.*
 - *According to Art 19 and 46 ECHR the courts' jurisprudence is binding and mandatory.*
 - *The UN-Committees like the CRPD-committee (Art. 34 CRPD) have a lower status in the jurisprudence of the BVerfG.*

CRPD in the German legal system

- *„Statements of committees or comparable treaty institutions are despite of their significant importance neither for international nor for national courts binding. The same is to be said about Reports (Art. 39 CRPD), Guidelines (Art. 35 CRPD) and Recommendations (Art. 36 CRPD) of the CRPD committee. The committee has no mandate for a mandatory interpretation. It also does not have the competence for the further development of treaties (...). National courts shall as part of an international-law-friendly interpretation take the views of treaty organs in account; they do not have to comply with them.“*

(Bundesverfassungsgericht, 29/1/2019, 2 BvC 62/14, RN 65).

CRPD in the German legal system



European Court of Human Rights, Strasbourg

CRPD in the German legal system



United Nations, Genève

CRPD in the German legal system

- **Interaction with EU Law**

- *The European Union has ratified the CRPD in 2010*
- *The European Court of Justice (ECJ) takes the CRPD in account when interpreting the EU law*
- *The jurisprudence of the ECJ is binding for all German courts when interpreting law in line with the EU obligations.*
- *Especially the Council Directive 2000/78/EC establishing a general framework for Equal Treatment in Employment and Occupation is relevant for German labour and social law.*

CRPD in the German legal system



European Court of Justice, Luxembourg

Implementation in examples

■ **Concept of Disability**

- *The Bundesarbeitsgericht (Federal Labour Court) judged, that a person with symptomless HIV falls in the scope of the prohibition of discrimination according to § 1 General Equality Law (Allgemeines Gleichbehandlungsgesetz - AGG), because the health condition in interaction with the employers' reaction constitutes a disability (BAG 19/12/2013, 6 AZR 190/12). In consequence the dismissal of the worker had to be reviewed again.*
- *The Bundesarbeitsgericht followed the European Court of Justices' jurisprudence.*

CRPD in the German legal system



Bundesarbeitsgericht, Erfurt

Implementation in examples

- **Concept of Disability**

- *With the amendment of the Social Code (Federal Participation Law - Bundesteilhabgesetz, in force since 2018) and the Federal Disability Equal Treatment Law (BGG, in force since 2016) the definition of disability has been renewed, with reference to CRPD and ICF:*

“Persons with disabilities are Persons, who have physical, mental, intellectual or sensory impairments, which in interaction with attitudinal and environmental barriers can hinder their equal participation in society most likely for more than six months.” (§ 2 Sec. 1 Sentence 1 SGB IX, § 3 BGG).

CRPD in the German legal system



**Gesetz
zur Stärkung der Teilhabe
und Selbstbestimmung von Menschen mit Behinderungen
(Bundesteilhabegesetz – BTHG)**

Vom 23. Dezember 2016

Deutscher Bundestag, Berlin

Implementation in examples

- ***Prohibition of Discrimination (Art. 5 CRPD)***
 - *Discrimination because of Disability is prohibited*
 - According to Art. 3 GG (directed to the state)
 - In special for administration and public bodies according to the Disability Equal Treatment Law (Behindertengleichstellungsgesetz - BGG)
 - For private Employers and Providers of Services and Goods according to the General Equal Treatment Law (Allgemeines Gleichbehandlungsgesetz - AGG)
 - It is disputed, if this includes the obligation to reasonable accommodation.

Implementation in examples

- ***Prohibition of Discrimination (Art. 5 CRPD)***
 - *Reasonable accommodation*
 - The BVerfG judged in 1997, that discrimination in Art. 3 GG can be seen in „*an exclusion from expression and development possibilities by public authorities, if it is not compensated properly by a disability-related support.*“ (BVerfG, 8/10/1997, 1 BvR 9/97).
 - Reasonable accommodation is mentioned explicitly in § 7 BGG since 2016.
 - Reasonable accommodation is not yet mentioned in the AGG; *Eichenhofer* analysed, the law cannot be interpreted in a sense that includes the obligation.

Implementation in examples



- ***Prohibition of Discrimination (Art. 5 CRPD)***

- *„Viagra“ as Non-Discrimination?*

- The German public Health Insurance does not cover Viagra and similar drugs according to § 34 Abs. 1 S. 7 SGB V
- An insured person, suffering from multiple sclerosis, applied for Viagra from his health insurance, claiming that it is necessary because of disability.
- The Federal Social Court (Bundessozialgericht) judged, there is no discrimination, because the drug is given to no insured person, not regarding if disabled or non-disabled: BSG, 6/3/2012, B 1 KR 10/11 R.



Implementation in examples

- ***Prohibition of Discrimination (Art. 5 CRPD)***
 - *Indirect Discrimination in Minimum Benefit*
 - Adult disabled persons living in a household with other persons got 291 € instead of 359 € as social assistance in cash, because they were not considered as the person responsible for the household (§ 28 SGB XII).
 - The Federal Social Court (Bundessozialgericht) judged, it would be indirect discrimination to see disabled persons as not able to be responsible for a household (BSG, 23/7/2014, B 8 SO 14/13 R).

Implementation in examples

- ***Prohibition of Discrimination (Art. 5 CRPD)***
 - *Equal protection of workers and civil servants?*
 - The Bulgarian laws give disabled workers special protection against dismissal (similar to German law). There is no such protection for civil servants in Bulgaria (in Germany there are also some differences in the protection level).
 - A Bulgarian court asked the Court of Justice of the European Union (ECJ), if the Bulgarian law is in line with Art. 7 Directive 2000/78/EC and Art. 5 CRPD.
 - The ECJ answered that positive action is, according to Art. 7 Dir. 2000/78/EC and Art. 5 sec. 4 CRPD falls into the scope of EU-law and has to be carried out equally (ECJ 9/3/2017, C-406/15, Milkova)

Implementation in examples



- ***Equal recognition before the law (Art. 12 CRPD)***
 - *Fixation of mentally disabled patients?*
 - According to the Law of Bavaria and Baden-Württemberg patients, who were placed in psychiatric institutions, could be fixed, if a psychiatrist saw the need to do so.
 - The Federal Constitutional Court (BVerfG) judged, that the fixation, as a strong restriction of freedom, has to be directed by a judge according to Art. 104 Abs. 2 GG
 - The BVerfG pointed out, that a restriction of freedom, under this circumstances, can be justified and is not in contradiction to the CRPD, despite the CRPD committee is opposed to any fixation of disabled persons (BVerfG 24/7/2018, 2 BvR 309/15, 2 BvR 502/16).

Implementation in examples

▪ **Equal recognition before the law (Art. 12 CRPD)**

▪ *Fixation of mentally disabled patients?*

„Regarding the danger for life and health of the patient or third persons the general characterization of fixation as torture or humiliating or inhuman treatment seems to go too far. (...) The (CRPD-)committee, which is opposed also to other measures like sedation or isolation, gives – like according to forced medical treatment – no answer to the question, what in such situations according to its understanding of the treaty text should happen with persons, who are not in reach for conversation and are a danger for themselves or for other persons. (...) a clear legal foundation, procedural provisions and the strict compliance to proportionality secure, that Germany complies to Art. 12 Sec. 4 and Art. 15 CRPD.“ (BVerfG, 24/7/2018, 2 BvR 309/15, 2 BvR 502/16, Rz 92).

Implementation in examples



- **Access to Justice (Art. 13 CRPD)**
 - *Accessible Documents for blind claimants?*
 - According to § 191a Law of the Courts (Gerichtsverfassungsgesetz) and the Accessibility Regulation (Zugänglichmachungsverordnung) blind claimants have a right to obtain accessible documents of their lawsuit.
 - The blind claimant applied for getting the documents in Braille. The court of first instance (Landgericht Dresden, following Federal Court - Bundesgerichtshof) denied and said, there is no need for accessible documents as far as the claimant has a lawyer and the subject-matter is clear enough to be mediated by the lawyer
 - The Federal Constitutional Court (BVerfG) judged, the decision of the Bundesgerichtshof was in line with the prohibition of discrimination and of Art 13 CRPD (BVerfG 10/1072014, 1 BvR 856/13).

Implementation in examples



- **Access to Justice (Art. 13 CRPD)**
 - *Online-communication instead of court hearing?*
 - According to Law of the Courts (Gerichtsverfassungsgesetz) and Law of the Social Courts (Sozialgerichtsgesetz) legal proceedings normally include a court hearing
 - An autistic claimant asked for replacing the court hearing by online-communication, which he can carry out from home
 - The Saxonian Social court of second instance (Landessozialgericht Sachsen, following Bundessozialgericht) denied
 - BVerfG saw the decision in line with the prohibition of discrimination and Art 13 CRPD. It pointed out, the claimant could decide to have a lawyer. Transparency, immediacy and efficiency of the procedure have also constitutional status (BVerfG 27/11/2018, 1 BvR 957/18).

Implementation in examples

- ***Independent Living in the Community (Art. 19 CRPD)***
 - ***Restrictions for Residence of disabled foreigners***
 - According to Foreigners Law (Aufenthaltsgesetz), the residence for a specific category of foreigners can only be restricted, if they are not able to earn their living.
 - A disabled claimant saw this as discrimination. He said he was only because of disability unable to earn his living.
 - The Administrative court of second instance of Lower Saxonia (Oberverwaltungsgericht Niedersachsen) denied. It pointed out, that the restriction applies for disabled as well as for non-disabled foreigners (OVG Niedersachsen, 2372/2015, 8 PA 13/15).

Implementation in examples

- ***Independent Living in the Community (Art. 19 CRPD)***
 - ***Restrictions for living outside particular living arrangements***
 - According to § 13 SGB XII, the social assistance can restrict payments for living in a freely chosen household, if a particular living arrangement is cheaper and if it is reasonable.
 - The CRPD committee has criticized this law.
 - A disabled claimant wanted to leave the parental household to move into an inclusive project. She applied for a Personal Budget. This gives more freedom of choice, but shall normally not exceed the cost of the regular benefit in kind. The local authorities approved to give a budget amounting to the regular costs of an institutional living. She claimed to be entitled to a higher budget, arguing that Art 19 CRPD obliges the authorities to make independent living possible.



Implementation in examples

- ***Independent Living in the Community (Art. 19 CRPD)***
 - ***Restrictions for living outside particular living arrangements***
 - The social court of second instance (Landessozialgericht Baden-Württemberg) judged, that the local authority had to reassess the case, because it had not examined the alternatives properly.
 - But the court said, that Art. 19 CRPD is no basis for financial claims (LSG Baden-Württemberg, 22/2/2018, L 7 SO 3516/14).
 - Critical Review: Frankenstein, www.reha-recht.de, Beiträge A 25-A 27-2018



Implementation in examples

- **Independent Living in the Community (Art. 19 CRPD)**
 - **Restrictions for living outside particular living arrangements**

“Art 19 CRPD is not a social security law, but is limited to a dimension of a defensive law. (...) it constitutes only a duty of the states parties not to hinder persons with disabilities to freely chose their place of residence and form of residence. (...) The assumption, that this would be linked to a duty of the states parties to eliminate every factual – especially financial – barrier for this choice – in other words: to give social benefits according to the wishes of the persons concerned – is not least unlikely, regarding that the CRPD is addressed to all members of the UN and so mostly to states, to whom the welfare state (...) in a comparable amount to Germany is alien.” (LSG Baden-Württemberg, 22/2/2018, L 7 SO 3516/14).

Implementation in examples



- ***Right to Education (Art. 24 CRPD)***
 - ***Restrictions for inclusion in regular schools***
 - The parents of the 12-year old claimant – living with Trisomy 21 with an IQ of 55 – applied for the right to attend a regular school. After two years of attending several regular schools the authorities said, that the claimant had to attend a special school. Attending regular school would be unbearable for him and for the other children.
 - The parents and the claimant said, that compulsory schooling in special schools was discriminative and not in line with Art 24 CRPD
 - The administrative court of second instance (Verwaltungsgerichtshof Baden-Württemberg) said, that Art 24 is non self-executive and not unlimited.

Implementation in examples

- **Right to Education (Art. 24 CRPD)**

- **Restrictions for inclusion in regular schools**

“Moreover when interpreting Art 3 Abs 3 Satz 2 GG international law-friendly it is to consider, that also the regulations of CRPD regarding Inklusion resp. Integration in the educational sector are not unlimited. So says Art. 7 CRPD, that in all cases regarding children with disabilities the best interests of the child shall be a primary consideration. It is possible that a child even when getting all support cannot bring their their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential (Art. 24 Abs. 1 Satz 2 lit b CRPD). In such case an inclusive schooling would be in contradiction to the sense of the CRPD. Moreover the rights of other children can be limits like Art. 13 CESCR and Art. 18 and 19 CRC.” (VGH Baden-Württemberg, 21/11/2012, 9 S 1833/12).

Implementation in examples



- ***Right to Education (Art. 24 CRPD)***
 - ***Support for inclusion in regular schools***
 - The parents of the 13-year old claimant – living with Trisomy 21 – let their child attend a regular school. The claimant was supported by assistants financed by the social assistance authorities. These said, the assistance would be in responsibility of the school authorities. If the school authorities could not support regular schooling, they should send the claimant to a special school.
 - The parents and the claimant said, that compulsory schooling in special schools was discriminative and not in line with Art 24 CRPD.
 - The social court of second instance (Landessozialgericht Baden-Württemberg) said, that Art 24 CRPD prohibited the view of the social assistance authority.

Implementation in examples

- **Right to Work (Art. 27 CRPD)**
 - **Recognition as equal to severely disabled**
 - Special rights in working life (protection from dismissal, external support by Integration Office) depend from being recognised as severely disabled or being equal to this status
 - Being severely disabled requires a degree of disability of 50. It is possible to apply for being equal to a severely disabled with a degree of 30, when you are facing disadvantages in working life because of disability
 - The applicant, suffering from colitis ulcerosa, applied for being equal with severely disabled persons. She had work in public administration on contract basis. For becoming a civil servant (special status) she did not meet the health preconditions and could have been only been accepted, if she was severely disabled.



Implementation in examples

- **Right to Work (Art. 27 CRPD)**
 - **Recognition as equal to severely disabled**
 - The Federal Employment Agency denied her application, because she already had work.
 - Her claim was successful. Federal Social Court (Bundessozialgericht) said, that Art 27 CRPD also protects career advancement for persons with disabilities on an equal basis (Art. 27 Abs. 1 lit. e CRPD) (BSG 6/8/2014. B 11 AL 5/14 R).



Implementation in examples

- ***Right to Work (Art. 27 CRPD)***
 - ***Restricted Access to Sheltered Workshop***
 - Working in a sheltered workshop requires the capacity for a minimum of economically viable work.
 - The applicant has an atypic autism. She cannot speak and communicates through facilitated communication. For this, she needs an assistant. After school she applied for training in a sheltered workshop, financed by the Federal Employment Agency. The training should include the costs of a personal assistant.
 - The Federal Agency denied. The sheltered workshop had a personnel key of 1:6, so 1:1-assistance was not possible.
 - Her claim was not successful at the Lower-Saxonian social court of second instance (LSG Niedersachsen-Bremen 23/09/2014, L 7 AL 56/12).



Implementation in examples

- **Right to Work (Art. 27 CRPD)**
 - **Restricted Access to Sheltered Workshop**



“Article 27 CRPD is not sufficiently precise to give a direct claim for certain services. Moreover Art 27 CRPD does not lead to an interpretation of SGB III, SGB IX and Werkstattverordnung which could justify the claimants claim. Her claim fails not because of a lack of legal regulations, but because the sheltered workshop is not able to supply personnel structures (...)”

(LSG Niedersachsen-Bremen 23/09/2014, L 7 AL 56/12).

- Slightly different in a similar case: LSG Sachsen-Anhalt, 27/11/2014, L AL 41/14 B ER)

Implementation in examples

- ***Right to Vote (Art. 29 CRPD)***
 - ***No Voting Right for Persons under full Guardianship***
 - Persons under guardianship in all concerns had no voting right for federal parliament (Bundestag) and states parliaments (Landtage) (§ 13 Nr. 2 Federal Voting Law - BWahlG).
 - With CRPD a debate started about changing this restriction, which, in 2014, excluded 81.000 disabled persons from voting.
 - Several states (Schleswig-Holstein, Nordrhein-Westfalen) changed their voting laws.
 - The Bavarian Constitutional Court said, the exclusion is in line with the constitution. Art. 29 CRPD did not lead to a different result (Bayerischer VerfGH 31/10/2018, Vf 16-VII-17).



Implementation in examples

- ***Right to Vote (Art. 29 CRPD)***
 - ***No Voting Right for Persons under full Guardianship***
 - After a claim of disabled (non-)voters, BVerfG said, that § 13 Nr. 2 BWahlG was in contradiction to the prohibition of discrimination according to Art. 3 GG (BVerfG 29/1/2019, 2 BvC 62/14)
 - It said, that there might be reasons to exclude persons from voting, if they cannot participate in the democratic discourse.
 - But the concrete linking of voting exclusion to full guardianship was seen as discriminating. Because of the subsidiarity of legal guardianship to other support e.g. on basis of personal authorisation, there was no fair regulation of the excluded category of persons.



Implementation in examples

- ***Right to Vote (Art. 29 CRPD)***
 - ***No Voting Right for Persons under full Guardianship***
 - After a claim of disabled (non-)voters, BVerfG said, that § 13 Nr. 2 BWahlG was in contradiction to the prohibition of discrimination according to Art. 3 GG (BVerfG 29/1/2019, 2 BvC 62/14)
 - It said, that there might be reasons to exclude persons from voting, if they cannot participate in the democratic discourse.
 - But the concrete linking of voting exclusion to full guardianship was seen as discriminating. Because of the subsidiarity of legal guardianship to other support e.g. on basis of personal authorisation, there was no fair regulation of the excluded category of persons.



Implementation in examples

- **Right to Vote (Art. 29 CRPD)**

- **No Voting Right for Persons under full Guardianship**

“(..) the regulations of CRPD, even when directed on securing and strengthening autonomy of persons with disabilities, do not principally restrict measures against the natural will, which are linked to an impairment-caused restriction of the ability to self-determination (...). Nothing else can be right for disability-specific voting rights restrictions, if they are linked to the inability to participate in the democratic discourse and the inability to a self-determined vote. They do not violate Art 12 CRPD if the requirements of Abs. 4 are met, this means the regulation is proportional and tailored to the person’s circumstances, apply for the shortest time possible, and are subject to regular review and there are provisions against misuse.”
(BVerfG 29/1/2019, 2 BvC 62/14, RN 74)



Outlook

- CRPD has reached German legislation and jurisprudence.
- There are more references to CRPD than to many other international treaties
 - In the Juris data base there are 147 court decisions referencing CRPD
 - In comparison: 107 Childrens Rights Convention (CRC), 91 Civil Pact (CCPR), 58 Social Pact (CESCR), which have been in force much longer
- The constitutional court has clarified that
 - CRPD (mostly) is non self-executive
 - It can be and must be used for interpreting German law, including the constitutional prohibition of discrimination
 - Taking in account CRPD and the statements of the CRPD committee does not mean, they are binding

Outlook

- CRPD implementation will – like implementation of other treaties, of ECHR and of EU law – internationalize German jurisprudence and open it for new ideas especially of non-discrimination legal doctrines like reasonable accommodation
- But this process cannot be described as subordination of national law but as a dialogue
- Especially through EU-Law and through the ECHR there is a process of regionalization and localization of human rights cultures to be observed