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DOKUMENTATION

ICSW ExpertInnen-Meeting

UN- Konvention über die Rechte von Menschen mit Behinderungen Deutschland, Österreich und Schweiz im Vergleich

International Convention on the Rights of Persons with Disabilities
State of Implementation from an Austrian, German and Swiss perspective

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UN Convention on the Rights of Persons with Disabilities A comparison between Germany, Austria and Switzerland ICSW Experts' Meeting, Vienna, Nov. 21 – 22, 2011

report for ICSW Europe

1. General remarks

The experts' meeting organized by the Austrian Committee for Social Work (Österreichisches Komitee für Soziale Arbeit, ÖKSA) aimed at exchanging views on the implementation of the UN Convention on the Rights of Persons with Disabilities in Germany, Austria and Switzerland, describing best practices and discussing problem areas.

The meeting was opened by *Michael Chalupka* (ÖKSA), *Dorothee Guggisberg* (SKOS) and *Michael Löher* (German Association for Public and Private Welfare, Deutscher Verein für öffentliche und private Fürsorge). At the beginning, human rights expert *Marianne Schulze* gave a general outline of the UN Convention and its objectives. Then, the approaches toward the Convention in these three countries were presented by representatives of the governmental institutions concerned and by NGOs. *Antje Welke* of the Deutscher Verein summarized the results of the meeting.

2. The UN Convention on the Rights of Persons with Disabilities and its Implementation

The Convention is based on the principles of self-determination, equality of opportunities and participation – against the backdrop of the fact that in many cases, persons with disabilities are excluded from socio-political processes, explained chairwoman of the Austrian monitoring committee *Marianne Schulze*.

In accordance with these basic principles, the UN convention pursues several objectives (Art 3): Respect for inherent dignity of the person is the key element. It deals primarily with self-determination. Further goals are non-discrimination, respect for difference and diversity, and accessibility. The latter must be seen multi-dimensional. Schulze specified six dimensions:

- social accessibility (breaking down prejudices and discrimination)
- communicative accessibility (of people with hearing or seeing impairment)
- intellectual accessibility (easier-reading version)
- structural and physical accessibility
- economic accessibility (compensation of economic disadvantages)
- institutional accessibility („being overlooked“ in documents)

Equality of men and women, as well as observing the rights of children with disabilities are further goals. The Convention provides for a national authority to monitor compliance with the provisions and so-called focal points to be implemented.

The Convention requires the states parties to protect, promote, and comply with the rights established therein (Art 4). The rights must be observed in all following bills. The rights must be considered a cross-sectional matter, i.e., each and any single ministry must consider itself competent for the implementation of the Convention.

Relevant professional groups, like physicians, judges, lawyers and teachers must be instructed on the contents of the Convention. Awareness raising is paramount. Persons with disabilities must be trusted to be able to live a life on equal terms. The accession of the EU as a state party to the Convention has already left traces in the EU strategy on persons with disabilities that was presented lately. During the

preliminary stages, several member states, among them Germany and Austria, have already signalled readiness to discuss the need for implementation on a broader scale by discussing national action plans (NAPs).

According to Schulze, the high number of 106 ratifications within just four years shows that the rights of persons with disabilities are acknowledged throughout the world.

3. Implementation of the Convention in various countries

3.1. Austria

As concerns implementation in Austria, the allocation of competences between the state and the provinces is of special relevance, said *Max Rubisch* of the Federal Ministry of Labour, Social Affairs and Consumer Protection (BMASK). Some important features fall under the competence of the provinces (e.g., building regulations, welfare benefits), others come under the competence of the state (e.g., social security, labour market policy), and there are competences that are shared between the state and the provinces, e.g. in the spheres of education and protection from discrimination.

Focal points concerning the Convention are the BMASK with the Federal Social Office on a federal level, and its nine Offices of the Provincial Governments on a provincial (informal) level.

The Federal Disability Advisory Board, one of the BMASK committees, is responsible for co-ordination. This advisory board presided by the social affairs minister consists of representatives of other ministries, all parliament parties, two provinces, the social security authority and the social partners (management and labour). The state's disability ombudsman and organisations of persons with disabilities are also represented.

A monitoring committee whose members are appointed by the social affairs minister, but are not bound by directives and act independently, was established to monitor compliance with the provisions. It is the committee's duty to report to the Federal Disability Advisory Board, collect opinions from the administration, and to make recommendations and give opinions. The committee deals with principal issues of disability policies, e.g., guardianship, participation, or personal assistance.

The State Party Report to be prepared pursuant to Article 35 of the Convention by Austria was submitted in October 2010. Along with the government's perspective, it also contained the points of criticism uttered by the Civil Society. Presumably, the report will be examined at the Geneva committee in 2013.

The National Action Plan (NAP) for disability is to implement the UN Convention and outline the disability strategy until 2020. A first draft has already been issued and should be passed by the government after extensive discussion in 2012.

Any person who thinks that he has been discriminated may sue for damages. But first, conciliation proceedings must be conducted. Persons who feel discriminated are entitled to bring an action. Basically, a person may be represented at the conciliation proceedings by an association. However, this has never happened yet, because representation is subject to requirements that are hard to meet.

3.2. Germany

In Germany, the implementation of the Convention has three cornerstones: the Federal Ministry of Labour and Social Affairs (BMAS) serving as the focal point, the government's commissioner for the disabled to coordinate the Civil Society, and the Deutsches Institut für Menschenrechte (German Institute for Human Rights) serving

as an independent monitoring authority, explained *Barbara Braun* of the Federal Ministry of Labour and Social Affairs.

In the preliminary stages, there was broad participation with workshops, a vision congress, and a measure congress. Most federal states have developed action plans or measure packages of their own subsequently.

A total of 200 measures was resolved on in 12 fields of action. These measures have been partially put into action already. The main point is to close existing gaps between law and practice. The National Action Plan determines the strategy for the next ten years. However, according to Braun, it does not constitute a ready instrument, but should be refined. Other institutions are encouraged to implement the convention in their ranks, too.

A new draft of the Disability Report is to be prepared. It should have a better data basis in order to provide new insights for politics. To raise awareness, a campaign called „Handicapping is curable“ has been launched.

In the following discussion, Kassel University representative *Felix Welti* pointed out that measurable criteria for implementation are still to be developed. Barbara Braun noted that the disability report is indicator-based, but the quality of data differs from field to field.

3.3. Switzerland

Despite initial scepticism, Switzerland intended to ratify the Convention in the legislative period 2007–2011, but has refrained from ratifying so far, reported *Andreas Rieder* of the Eidgenössisches Büro für die Gleichstellung von Menschen mit Behinderungen (Federal Bureau for the Equality of People with Disabilities). Center-right parties tend to disapprove, center-left parties tend to approve of it. The cantons are reserved, they fear to be confronted with excessive expenses.

Currently, the tasks between the Confederation and the cantons are rearranged under the slogan „reorganization and reconstruction“. The implementation of the Convention in a federal system must be considered a challenge. There is resistance from the vocational integration systems on the one hand and from basic financial support systems on the other hand.

According to Rieder, the UN Convention might provide an impetus to reassess existing structures and to take a comprehensive look. Anyhow, Switzerland watches with interest what experience with the Convention is gained in Germany and Austria.

Caroline Hess-Klein of Égalité Handicap described what Swiss handicap organizations think of the UN Convention on the Rights of People with Disabilities. There is a law providing for equality of people with disabilities at the moment, but it is very diversified. According to Hess-Klein, a ratification of the Convention would facilitate jurisdiction in the interest of persons with disabilities. Besides, Switzerland's reputation would suffer if it did not ratify the Convention.

The sphere of equality is often neglected in the Swiss discussion, the main focus lies with the social insurance sphere. For instance, there is no data base for court rulings in cases where the law providing for equality of persons with disabilities is involved.

Rolf Maegli noted in the discussion that there is some development in Switzerland indeed, but the political system proves a hindrance to changes. For direct democracy and federalism can impede changes. It was interposed that there are impeding factors in Germany and Austria, too. For instance, in Germany cooperation between the federal government and communities is prohibited.

4. Presentation of „Best Practice“ Examples Obstacles for Implementation in the Three Countries A Glimpse into the Future

The second day dealt with best practices and enlarged upon the topics and problems that had been presented the day before.

4.1. Austria

Disability ombudsman *Erwin Buchinger* mentioned that Austria had been the first country in the world to ratify the Convention. Since then, at least a change of opinion can be noted, it begins to become common practice to involve or consult with associations of disabled persons in law making, even at a provincial level.

Buchinger called the fact that agreement with the objectives of the Convention hardly extends beyond experts and persons concerned a weak point. Thus, a Eurobarometer special survey conducted in 2008 showed that the broad public had little idea as to the aims of the Convention.

According to Buchinger, the disability rights movement must exert pressure to further its goals. However, those organisations do not always act in concert. Buchinger recommended starting to substantiate those claims that have a better chance to meet with broader acceptance, even though those claims may not be the most important ones.

Basically, the law on equality is implemented comprehensively at federal level, but in most provinces only rudimentarily, e.g., for employees of the provinces.

As far as (physical) accessibility is concerned, Austria has drawn up a plan by stages relatively quickly, but has extended deadlines lately. Vienna is the only province to have issued mandatory guidelines stating deadlines to prepare a plan by stages.

Austria is one of five countries in the world where persons with disabilities enjoy the full right to vote and to stand for election, irrespective of the degree of disability. However, de facto there are only few representatives that are disabled. Nor are all poll sites accessible.

It was further commended that personal assistance on the job is governed by uniform rules and standard administrative practice. However, regulations on personal assistance in other spheres of life vary greatly from province to province, and are partly insufficient.

Buchinger criticised that in guardianship cases there is no assistance with decision-making, but decisions are made for the disabled. This procedure is rejected by the Convention.

As far as the labour market is concerned, the disability ombudsman mentioned an exemplary integration project in Vorarlberg, where over a period of ten years disabled persons working at sheltered workshops have been integrated into the first labour market successfully. Generally, some small progress has been made: for instance, when an enterprise hires severely disabled persons, this is taken into account when the compensation levy is computed. And an occupational accident insurance has been introduced for persons occupied in sheltered workshops. Buchinger considers the current division of competencies between the job centres, the Federal Social Office and the provinces unsatisfactory.

As concerns the field of education, disabled persons are legally entitled to be integrated into regular school, but only up to grade eight. There is no legal title to receive secondary education beyond this. In the province of Styria, where 82 percent

of pupils with need for assistance attend regular school, integration goes quite well. The Western provinces show considerably lower rates.

The discussion primarily dealt with matters of education policy. According to Buchinger studies show that integrative school types obtain at least equal results, but more often even better results for pupils with and without disabilities. In disability rights movements, most organisations argue in favour of the integrative model. Organisations of people with impaired hearing or vision constitute an exception, because they have very good institutions of their own. Counselling about school enrollment is to be had at the special education centre, which – with the exception of Styria – is a special needs school at the same time. So there is the problem that counsellors first want to fill up their own institution.

The German and Swiss participants showed also an interest in the Austrian conciliation proceedings (see above), which Buchinger explained with some examples. *Max Rubisch* added that the success of the proceedings is primarily due to the fact that executive officers fear negative publicity, and not so much imminent lawsuits.

4.2. Germany

Germany ratified the UN Convention in December 2008. It ranks with simple federal law at a domestic level since March 26, 2009. *Klaus Lachwitz*, President of Inclusion International and long-term managing director of Lebenshilfe Deutschland criticised that the consequences are hardly ever discussed, e.g. compatibility with law of equal rank and the relationship between the Convention and the Code of Social Law (chapters I-XII).

Generally, it can be assumed that the principle „more recent law prevails over earlier law“ applies (*lex posterior rule*). But new laws must be measured up to the Convention, as was laid down in the latest coalition agreement. However, this is not a legal, but just a political statement.

Lachwitz called the monitoring authority an exemplary institution, for it encourages discussion that might lead to the correction of existing faults by the legislator. And Lachwitz also commended the Advisory Board for Integration.

Some laws have already put into effect the fundamental idea of the Convention: e.g., in Book IX of the Code of Social Law, persons with disabilities are not seen as objects of care any more, but as subjects of participation.

As concerns inclusive education, Lachwitz criticised that in Hessen, for instance, a child can be put into a regular school only if the school's personnel and material preconditions are met. It is still unclear whether such course of action is compatible with the Convention.

Art 12 of the Convention, which deals with equal recognition before the law, means that all persons are granted full legal capacity. The consequence for practice is: Many persons need help and guidance to make decisions. The Convention obliges the states to ensure such support. Thus, it is a matter of supported decisionmaking instead of legal representation.

The Convention does not provide for any exceptions even with the right to vote (Art 29). However, if a person is taken care of in all matters, the right to vote is withdrawn automatically in Germany, criticised Lachwitz.

In Art 14, concerning the liberty and security of the person, the Convention takes up a clear position: The existence of a disability shall in no case justify a deprivation of liberty. However, this aspect is hardly discussed in Germany. Nobody knows how

many persons are fixed at times. Lachwitz demanded that data must be gathered on this.

Art 19, concerning living independently and being included in the community, is related to this. No person may be placed in supervised housing against his will any more. Nevertheless, supervised living is often preferred for cost reasons.

As concerns social rights of persons with disabilities, the states are called upon to establish corresponding support services, including personal assistance. It must be possible for persons with disabilities to use all service facilities in the communities. This is the focus of the current discussion about accessible organisation of social space in Germany.

The discussion mainly centered on inclusive labour market. *Peter Gitschmann* (Hamburg) considers sheltered workshops a „gilded cage“, for hardly any person manages to get out from there. Apart from that, workshops are very expensive. So payment of a wage subsidy and providing assistance instead of employment in a workshop are under consideration. Hamburg intends to encourage these plans.

4.3. Switzerland

Rolf Maegli, Director of the Stiftung für Schwerbehinderte Luzern (Luzern Foundation for the Severely Disabled), spoke on challenges of the UN Convention for the running of residential houses for people with severe mental disabilities. These houses were created under pressure from parent associations. The aim is to get away from care in a purely institutional setting by creating a „living place“ for persons with disabilities instead. The basic principle is not only to attend to these persons, but also to create development opportunities. The persons working for the Foundation try to understand people and answer to their needs instead of squeezing them into a predetermined organizational framework.

Maegli described the daily routine at the institution by means of a sequence of pictures: Various structure days are offered. The inhabitants may choose what they want to do, but this choice is binding then.

Closeness and distance, not least in relation to the staff, are important issues for people living together in the institution. According to Maegli, the staff adopted a reserved attitude for a long time, but the inhabitants have emotional needs that need to be taken into consideration.

Corresponding occurrences and measures restricting freedom in consequence of posing a risk to self or others are documented in a violence report form and evaluated statistically. In this context, the question of proportionality and appropriateness is crucial: The imposed restrictions on freedom must be justified in any case.

The freedom of choice that the persons concerned have is severely limited by the fact that the Luzern Foundation is the only such institution in the canton. The only alternative would be living with their parents, who, as a rule, are not up to the task. But future inhabitants may get a first glimpse and decide whether they want to live in the institution or not.

Maegli answered the question what would change if Switzerland ratified the Convention by stating that personal assistance would probably mean that fewer people came to the institution. However, independent living might also mean isolation – the institution provides living in groups, so the inhabitants do not feel lonely.

Germain Weber (University of Vienna) called Maegli's deliberations a „courageous presentation of the inclusion topic“, particularly as it touched on a crucial area which

deliberations on inclusion had to match. According to Weber, the problem is that many institutions do not have the professional knowledge to find the optimal solution. *Peter Gitschmann* referred to the fact that in Hamburg institutions have been closed and their former inhabitants are now taken care of in their own flats. As a rule, this type of housing is not more expensive than living in an institution. Small residential communities have also collective advantages. Gitschmann conceded that this type of housing certainly asks a lot of other tenants, but it works.

Renate Hackl (Upper Austria) remarked that persons whose behaviour stands out in any way can hardly be permanently attended to in an integrative type of living. However, many of these persons want to stay in the region where they grew up. They want to have the possibility to retreat and yet live together with persons in a comparable situation. Due to night shifts and the required comprehensive attendance, integrative types of living are not cheaper than big institutions. But this picture is changed if this attendance is not needed.

5. Results of the Meeting

Based on the executive summary delivered by *Antje Welke*, the following results of the meeting may be recorded:

In contrast with Switzerland, Germany and Austria have already ratified the Convention. In both of the latter countries, the focal point lies with the Ministry of Social Affairs, to which in Austria the independent Monitoring Committee is attached. In Germany, the Deutsches Institut für Menschenrechte acts as the monitoring authority. In Germany, a shadow report on these topics will be prepared by the Civil Society, in Austria it has already been prepared. Federalism has turned out to be a problem when implementing the Convention in all these countries, as is the fact that social security systems cover different fields of competence.

In Austria as well as in Germany, the Convention is still discussed nearly exclusively in bodies of experts, with only one exception: inclusive education is interesting for broader sections of the population, too. Consequently, to raise awareness, experts in Austria want to start with topics that are expected to meet with a broad consensus in the population.

In Austria any person who thinks that he has been discriminated may sue for damages – not for an injunction or elimination of a barrier. But first, conciliation proceedings must be conducted. These conciliatory proceedings commonly used in Austria are also considered an interesting instrument by German and Swiss participants, not least due to the high settlement rates (48%, in case of barriers 60%) reached in these proceedings.

Article 12 of the Convention on legal capacity is relevant for all of the three countries. Although they use different terms (Sachwalterschaft, Vormundschaft, Stellvertretung), the approach is similar. Whether the current practice is consistent with the Convention is a question still to be sorted out, because the Convention grants all persons with disabilities full legal capacity and capacity to act. Thus, it aims at assisting in decision-making, not just at providing legal representation.

Independent living (art. 19) concerns the right to choose one's residence, being a classic liberty right. In Germany, this right is currently limited by the incremental costs clause (Mehrkostenvorbehalt, para 13, Social Act XII), but at the same time, inclusive social community is given a good deal of thought, too. In Austria, the instrument of personal assistance is applied on the job according to uniform rules and administration practices, but regulated differently and partly inadequately in other spheres of life in each province.

As far as work is concerned, the main point at issue in Germany and in Austria is to acquire access to the common labour market. The Austrian province of Vorarlberg, where there has been an integration to the regular labour market for ten years, was held up as best practice.

Access to suffrage is comprehensive in Austria, but deficient in Germany, for there is no suffrage if a person is taken care of in all matters. As concerns statistics, there is a strong wish for internationally uniform indicators.

There are different approaches concerning individual enforceability of the Convention. In Austria, new treaties are generally concluded as non-self-executing treaties, the Convention on the Rights of Persons with disabilities is used as an interpretation help only. In Germany, there are no precedents in such cases yet, the majority of experts presumes that in cases of discrimination there is an individual enforceability if the norm is concrete enough.

The participants from Switzerland stated during the closing feedback session that they intend to intensify information showing what is to be achieved abroad and to still the fear of the Convention that is shown by some Swiss agents. The participants welcomed the size of the meeting (27 participants). The open discussion culture even on stiff subjects was universally appreciated.

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