

GERMANY

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Executive summary

Definitions

- [1]. German laws pertaining to the categories of people who form the subject of this study use a multitude of terms and definitions. Depending on the area of law and the legal function of these terms – whether they, for instance, refer to criteria for entitlement, a procedural principle, an attribution rule or a ground for exclusion of liability – the concepts they denote sometimes differ and sometimes overlap. Further differentiations are made in specific legal rulings. Since terminology is an important key to understanding the study, section II is devoted to defining the various concepts.

Non-discrimination

- [2]. In March 2009 Germany ratified the UN Convention on the Rights of Persons with Disabilities (CRPD). So far, however, this has not resulted in any specific changes in German legislation, yet. During the ratification process the former German government stated that it did not see any need to take action and that ratification would not result in additional costs for the Federal Republic. The programme of the newly elected government, however, includes a statement of intent to take into account CRPD in any law-making activities and to evolve a plan of action to implement the CRPD but does not formulate any need for further action or name specific planned legislation.
- [3]. The Federal Constitution and the constitutions of the federal states ban discrimination on the grounds of disability. There are also laws stipulating equal treatment in various spheres, including administrative and court proceedings, private law contracts, employment, entitlement to social benefits and military service. The term ‘disabled’ as used in all these laws includes the categories of people who are covered by this study. While special measures favouring these categories of persons are permitted in principle by the federal and state constitutions, they can be found explicitly in laws such as those governing statutory health insurance. Conversely, there are cases where the anti-discrimination principle is in practice only applied to the physically disabled or those who are hearing-impaired, speech-impaired or visually impaired as, for example, in the far-reaching provisions governing accessibility in disabled persons’ equality legislation.
- [4]. The European Commission has stated that the implementation of the concept of ‘reasonable accommodation’ in Germany does not comply with European Union directives. Provisions of this kind are found only in the field of labour law for people with severe disabilities but are omitted from other relevant legislation.

Specific Fundamental Rights

- [5]. The fundamental civil rights of persons with mental disorder or intellectual disability are protected chiefly by the basic rights enshrined in the federal and state constitutions. In particular the right to general freedom to act assumes that all human beings are endowed with an equal natural ability (competence) to act.
- [6]. Persons with mental disorders or intellectual disability are, however, often restricted in exercising these rights. The concept of disability, both in its various legal definitions and as a subject for legal argumentation, plays an important role when it comes to justifying limitations on civil and political rights. The rights of persons with mental disorders and intellectual disability are on the whole more seriously affected than, say, those of persons with physical impairments.

- [7]. Such restrictions apply mainly to family affairs (terminations of pregnancy, capacity to marry, sterilisation, parental custody) as well as areas of civil law dealing with the capacity for free exercise of will, such as testamentary capacity. The appointment of a legal custodian can also have far-reaching consequences for the individual's ability to exercise his/her fundamental rights. Persons for whom a custodian is appointed to manage all their affairs are, for example, legally excluded from active and passive voting rights – a provision that also excludes them from participating in elections to the European parliament.
- [8]. A highly controversial legal provision is so-called 'medical research for the benefit of a group'. With respect to research done for the purpose of helping a group of affected persons, the law allows research to be performed on persons incapable of consent.

Involuntary Placement and Involuntary Treatment

- [9]. Since 2000, the UN committees monitoring adherence to the UN Convention on Torture and the International Covenant on Civil and Political Rights have not specifically addressed the sensitive issues of involuntary placement and involuntary treatment. The European Committee for the Prevention of Torture (CPT) has issued two reports on its visits to facilities where persons with mental disorders or intellectual disability are accommodated.
- [10]. Germany has a number of different but overlapping provisions governing involuntary placement and involuntary treatment. Private law placements are intended to serve the health interests of the individual and are regulated by federal civil law. Public law placements, on the other hand, aim primarily to avert danger both to oneself and to others. Here each of the 16 German federal states has its own laws. While these laws are similar, they differ considerably in some of the details. In addition, there is also a federal regulation on forensic placement in criminal law designed to avert danger to the general public. In all cases involuntary placement is subject to approval by a judge and assumes the existence of a specific danger. There are additional legal criteria and danger thresholds for involuntary treatments and other restrictions on freedom.
- [11]. On the basis of the information available, the authors can merely speculate about what impact the differences in state laws have in practice and what consequences they may have for the rights of those affected. This suggests the need for a major study.
- [12]. One of the reasons why ensuring compliance with legal standards presents a special challenge in this area is that in all probability the vast majority of cases are not brought before the court until after the person has been admitted to an institution. Retrospective legal protection proves to be ineffective because the person in question has already been subject to involuntary placement, involuntary treatment and/or other measures and because in many cases the patient's condition does not permit a proper hearing.

Competence, Capacity and Guardianship

- [13]. This section deals with standard legislation for the whole of Germany, which distinguishes between such concepts as legal capacity, competence in terms of natural ability to act, capacity to contract, capacity to consent and need for custody.
- [14]. An analysis of the legal provisions reveals that the legal capacity of persons with mental disorders or intellectual disability are restricted in various areas of the law. This applies, for instance, to contract law, marriage law, parental custody and testamentary freedom. In comparison with the legal situation before 1992 the introduction of the concept of legal custody – whereby the scope of the custodian's

assignments is clearly laid down in each individual case and is fundamentally limited to a necessary minimum – has resulted in more autonomy for those in custody. Other steps in the same direction include more recently introduced provisions for enduring power of attorney and living wills.

- [15]. The appointment of a custodian has no influence on whether a person's legal capacity to contract. The provisions of German custodianship law do, however, permit a custodian to make a legal declaration on behalf of the person in his/her care if this person is not recognised as capable of consent.
- [16]. While capacity to sue or be sued or to participate in legal proceedings is in principle linked to capacity to contract, the group of persons covered by this study is not affected in proceedings particularly relevant to the affected persons – for example, in custodianship and placement matters.

A general observation

- [17]. In accordance with the Guidelines the present report concentrates on presenting a detailed account of the legal situation. A review of legal reality could not be undertaken within this framework. Readers should therefore bear in mind that fundamental rights problems and gaps in legal protection for the category of persons dealt with here often arise because their impairments often limits the capacity to appeal and restricts access to the law in practice, and because the short-term nature of the measures means that the reactive legal protection accorded by the courts typically fails to be effective. This means that there may be considerable differences between legal provisions and the situation in practice.

1. Definitions

[18]. (NOTE: Numbers in brackets at the beginning of paragraphs relate to the FRA Guidelines (11a)) The English word ‘mental’ as used in the FRA Guidelines can be translated into German in a number of ways that convey different meanings. The following four terms are mainly used in German laws relevant to the category of persons covered by this study:

- *Personen mit einer psychischen Störung* [persons with a psychological disorder]
- *Personen mit einer seelischen Störung* [persons with an emotional disorder],
- *Personen mit einer geistigen Störung oder Geistesstörung* [persons with an intellectual disorder].
- *Personen mit einer geistigen Behinderung* [persons with an intellectual disability].¹

[19]. (11b) These terms are used in German law not only verbatim but also in conjunction with other terms to describe the definitive prerequisites for the relevant legislation and to define other terms such as *psychische Krankheit* [mental illness]. Moreover, whether the persons affected fulfil these prerequisites is established on the basis of various assessment principles in which the terms psychological disorder (*psychische Störung*), emotional disorder (*seelische Störung*) or intellectual disorder (*geistige Störung*) and intellectual disability (*geistige Behinderung*) are used. The authoritative sources for diagnosis are the Tenth Revision of the World Health Organization (WHO) International Classification of Diseases (ICD-10) and the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

[20]. The relevant legal provisions are described below within the framework of the areas of law that are definitive for the above-mentioned persons:

1.1. Definitions in civil, criminal and procedural law

[21]. The *Bürgerliches Gesetzbuch* (BGB) [Civil Code] uses the above terms to describe the criteria for *Geschäftsunfähigkeit* [incapacity to contract], *Zurechnungsfähigkeit* [soundness of mind] and *Betreuung* [legal custodianship]:

- Incapacity to contract
 - ‘Anyone who is in a state of pathological mental impairment that excludes the free exercise of will is incapable of contracting unless the state by its nature is a temporary one’.²
- Soundness of mind
 - A person of full age is not responsible for harm inflicted on another if he or she does so ‘in a state of unconsciousness or in a state of pathological mental impairment precluding free exercise of will’.³
- Legal custodianship
 - The prerequisite for the appointment of a custodian by the Custodianship Court is that ‘a person of full age, by reason of a mental illness or a physical, intellectual or emotional disability cannot in whole or in part take care of his/her affairs’.⁴

¹ In view of these distinctions the English terms have been added in square brackets.

² Art. 104 no. 2 Bürgerliches Gesetzbuch (BGB) [Civil Code].

³ Art. 827 Civil Code.

⁴ Art. 1896 (1) Civil Code.

- [22]. In the context of criminal law one finds relevant concepts in the *Strafgesetzbuch* (StGB) [Criminal Code]. According to the Criminal Code a mental (emotional) disorder is the deciding factor for establishing the *Schuldunfähigkeit* [lack of criminal capacity] or *verminderte Schuldfähigkeit* [diminished responsibility] of an offender. Lack of criminal capacity on account of a mental (emotional) disorder means:
- Anyone who commits a criminal offence does so without guilt if ‘at the time the offence is committed they are incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality’.⁵ If the offender does not lack criminal capacity but his/her capacity to appreciate the unlawfulness of his/her actions or to act in accordance with any such appreciation is substantially diminished at the time the offence is committed for one of the said reasons the sentence may be mitigated.⁶
- [23]. In the context of legal proceedings, these concepts are related to regulations of *Prozess- und Verfahrensfähigkeit* [Capacity to sue or be sued and to engage in administrative proceedings].
- The provisions of civil, social and administrative process law concerning the capacity to sue or be sued in court proceedings as well as to take part in administrative proceedings and to engage in administrative proceedings in public and social law tie in with the capacity to contract under civil law and thus with the terms that are definitive in that context.⁷ If the above-mentioned prerequisites for incapacity to contract are fulfilled, the capacity of any person affected to sue or be sued or to engage in administrative proceedings is ruled out.
- [24]. In administrative, social and tax law proceedings, an ex officio representative may be appointed for a participant who is incapable of engaging in the administrative proceedings himself or herself due to a mental illness or a physical, intellectual or emotional disability.⁸

1.2. Definitions in the context of involuntary placement and involuntary treatment]

- [25]. The laws of the German federal states on the placement of mentally ill people use the terms listed under [18] above in different constellations in provisions concerning the application of their respective laws to define the terms mentally ill persons, mentally ill, or mental illness. However, 14 out of a total of 16 federal state laws contain the terms *psychische Störung* [psychological disorder] and *geistige oder seelische Behinderung* [intellectual and/or emotional disability] and/or *seelische Krankheit und/oder Behinderung oder Störung* [emotional illness and/or disability or disorder].⁹ One

⁵ Art. 20 Strafgesetzbuch (StGB) [Criminal Code].

⁶ Art. 21 Criminal Code.

⁷ Art. 52 Zivilprozeßordnung (ZPO) [Code of Civil Procedure], Art. 62 Verwaltungsgerichtsordnung (VwGO) [Administrative Court Procedures Code], Art. 12 Verwaltungsverfahrensgesetz (VwVfG) [Administrative Procedures Act], Art. 79 Abgabenordnung (AO) [Tax Code], Art. 11 Zehntes Buch Sozialgesetzbuch (SGB X) [Social Code Book X].

⁸ Art. 16 (1) 4 Administrative Procedures Act, Art. 81 (1) 4 Abgabenordnung (AO) [Tax Code], Art. 15 (1) 4 Social Code Book X.

⁹ Germany/Berlin: Gesetz für psychisch Kranke (PsychKG) [Law for the Mentally Ill Berlin]; Mecklenburg-Western Pomerania: Psychischkrankengesetz Mecklenburg-Vorpommern [Mentally Ill Persons Act Mecklenburg-Western Pomerania]; Brandenburg: Brandenburgisches Psychisch-Kranken-Gesetz (PsychKG) [Brandenburg Mentally Ill Persons Act]; Hamburg: Hamburgisches Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten (HmbPsychKG) [Hamburg Law on Assistance and Protective Measures in Cases of Mental Illness]; Lower Saxony: Niedersächsisches Gesetz über Hilfen und Schutzmaßnahmen für psychisch Kranke (NPsychKG) [Lower Saxony Law on Assistance and Protective Measures for the Mentally Ill]; North Rhine-Westphalia: Gesetz über Hilfen und

state law mentions only the placement of *psychisch kranke* [mentally ill] people.¹⁰ Another law that came into force back in 1952 refers to *geisteskranken und geistesschwachen Personen* [mentally sick and mentally deficient persons].¹¹

1.3. Definition of disability in social and equality legislation

- [26]. The term disability was redefined in social law, in Art. 2 (1) 1 of the *Sozialgesetzbuch Neuntes Buch – Rehabilitation und Teilhabe behinderter Menschen* (SGB IX)¹² [Social Code Book IX – Rehabilitation of and Participation by Disabled People] dated 1 July 2001. Following the same wording, it was then redefined in equality law, which extends into all areas of public law, in Art. 3 of the *Behindertengleichstellungsgesetz* (BGG) [Disabled Persons Equality Act] dated 1 May 2002. A person is now defined as disabled if his/her bodily functioning, intellectual capacity or mental health are highly likely to diverge from the state typical for his/her age for a period of longer than six months and his/her participation in the life of society is therefore impaired.
- [27]. The concept of disability is based on the WHO International Classification of Functioning, Disability and Health (ICF). It is no longer primarily geared to deficiencies but to participation in various fields of life. Consequently, according to the *Gemeinsame Empfehlung Begutachtung* [Joint Recommendation on Assessment] agreed between rehabilitation organisations pursuant to the Social Code Book IX, socio-medical assessment of the health problems of disabled people or people at risk of disability is based on the biological/psychological/social approach of the ICF concept.
- [28]. The Social Code Book IX definition of the term disability was adopted verbatim in the Disabled Persons Equality Act and the equality acts of the federal states that were passed subsequent to the federal Equality Act; only the state laws of Berlin and Saxony-Anhalt, which were passed prior to the federal Disabled Persons Equality Act, have a different definition of disability or disabled people.¹³
- [29]. The term disability used, but not defined, in the *Allgemeines Gleichbehandlungsgesetz* (AGG) [General Equal Treatment Act] tallies, according to the explanatory memorandum, with the legal definitions in Art. 2 (1) 1 Social Code Book IX.¹⁴
- [30]. The laws on statutory social insurance and social security as laid down in the social security codes, and the accompanying legal ordinances and directives use the terms listed under [18] in describing the prerequisites for entitlement to benefits and for the assessment of applicants.

Schutzmaßnahmen bei psychischen Krankheiten (PsychKG) [North Rhine-Westphalia: Law on Assistance and Protective Measures in Cases of Mental Illness], Rhineland-Palatinate: Landesgesetz für psychisch kranke Personen (PsychKG Rheinland-Pfalz) [State Law on Mentally Ill Persons Rhineland-Palatinate]; Bavaria: Unterbringungsgesetz (UnterbrG) Bayern [Placement Act Bavaria]; Saxony-Anhalt: Gesetz über Hilfen für psychisch Kranke und Schutzmaßnahmen des Landes Sachsen-Anhalt (PsychKG LSA) [Law on Assistance for the Mentally Ill and Protective Measures of the State of Saxony-Anhalt]; Thuringia: Thüringer Gesetz zur Hilfe und Unterbringung psychisch Kranker (Thür PsychKG) [Thuringia Law on Assistance and Placement of the Mentally Ill], Baden-Württemberg: Unterbringungsgesetz (UBG) Baden-Württemberg [Placement Act Baden-Württemberg]; Saarland: Unterbringungsgesetz (UBG) Saarland [Placement Act Saarland]; Schleswig-Holstein: Psychisch-Kranken-Gesetz (PsychKG) [Schleswig-Holstein Mentally Ill Persons Act]; Bremen: Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten und zur Änderung anderer Gesetze (PsychKG) [Bremen Law on Assistance and Protective Measures in Cases of Mental Illness to Amend Other Laws].

¹⁰ Germany/Saxony: Sächsisches Gesetz über die Hilfen und die Unterbringung bei psychischen Krankheiten (SächsPsychKG) [Saxony Law on Assistance and Placement in Cases of Mental Illness].

¹¹ Germany/Hesse: Hessisches Freiheitsentziehungsgesetz (FrhEntzG HE) [Hesse Deprivation of Liberty Act].

¹² Germany/BGBl. I/1046.

¹³ D. Schiek (2007) *Allgemeines Gleichbehandlungsgesetz (AGG): ein Kommentar aus europäischer Perspektive*, Munich: Sellier, § 1 para 36.

¹⁴ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 16/1780, p. 31.

1.4. Interpretation of the terminology by the courts

- [31]. (11c) In civil law, the authoritative rulings of the *Bundesgerichtshof* (BGH) [Federal Supreme Court of Justice] relate to interpretation of the state that the relevant civil code legislation describes as a prerequisite for incapacity to contract and soundness of mind. The Federal Supreme Court of Justice has ruled that the prerequisite for incapacity to contract – that the free exercise of will be ruled out – is fulfilled if a person is incapable of formulating his/her will freely and uninfluenced by the existing mental disorder and of acting according to an appropriately gained understanding. The Federal Supreme Court of Justice ruling stipulates that account should be taken of whether, after weighing up the pros and cons after objective examination of the viewpoints to be considered, a free decision is possible or whether, on the contrary, it is impossible to speak of a free formulation of will because as a result of the mental disorder the person's will is excessively controlled by the influence of third parties, or the formulation of will is determined by uncontrolled drives and perceptions akin to making mechanical connections between cause and effect.¹⁵
- [32]. Court rulings on criminal responsibility do not relate to definitions of terms but to the court's obligations in respect of establishing lack of criminal capacity and thus grounds for ruling out criminal responsibility for a specific act. In the field of social law the terms listed under [18] are not substantiated by the courts but in the basic legislation or in legislative provisions such as directives for assessing certain prerequisites for benefit.

2. Non-discrimination

2.1. Implementation of United Nations standards

- [33]. (12) The work of the Office of the UN High Commissioner for Human Rights with regard to legal capacity pursuant to Art. 12 of the CRPD will be analysed in the context of the issues dealt with in Chapter 5.
- [34]. (13) CRPD became binding on Germany on 26 March 2009. The ratification process was neither preceded nor followed by specific amendments of relevant legislation concerning the rights of persons with mental disorder and persons with intellectual disability. Since March, several relevant pieces of legislation passed at federal and state level, however, they contain no explicit reference to the Convention.¹⁶
- [35]. The reason behind this is the viewpoint of the federal and state governments in the point of decision on the issue of CRPD ratification that with respect to legislative amendment there was no need for action. In its non-binding explanatory memorandum on the ratification statute to the CRPD the federal government made its position clear.¹⁷ This position was opposed by a number of statements from civil society organisations and the German Institute for Human Rights. For instance, as a part of a campaign by the *Beauftragte der Bundesregierung für die Belange Behinderter Menschen* [Federal

¹⁵ Germany/Bundesgerichtshof/Judgment/case no. Az. V ZR 126/00 (18.05.2001).

¹⁶ See e.g. the CRPD relevant legislation: Germany/Bundesrat/*Bundesrat-Drucksache* 593/09 (19.06.2009), Entwurf Drittes Gesetz zur Änderung des Betreuungsrechts [Draft Third Act Amending the Custodianship Act], which came into force on 01.09.2009; Gesetz zur Reform des Verfahrens in Familiensachen und in Angelegenheiten der freiwilligen Gerichtsbarkeit (FGG-RG) [Law on Procedure in Family Affairs and in Matters of Voluntary Jurisdiction Reform Act], Art. 1 of which includes provisions governing care and placement cases, came into force on 01.09.2009; the Brandenburgisches Psychisch-Kranken-Gesetz (BbgPsychKG) [Brandenburg Mentally Ill Persons Act] came into force on 06.05.2009.

¹⁷ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 16/10808 (08.11.2008).

Government Commissioner for the Concerns of Persons with Disabilities], 22 associations representing the interests of persons with disabilities in Germany drew up a number of specific recommendations on eight issues covered by the CRPD. The recommendations focussing for example on the right to liberty and security deal primarily with reviewing the implementation and the need for amendments to the statutory provisions governing capacity to act, involuntary placement and involuntary treatment. This applies in particular to people with mental (psychological and emotional) disorders and intellectual disability.

- [36]. In October 2009, the newly elected federal government stated in the coalition agreement that all political decisions directly or indirectly affecting people with disabilities must now be measured by the contents of the CRPD. It also said that it intended to draw up a plan of action to implement the Convention in Germany but does not formulate any need for further action or name specific legislation planned.¹⁸

2.2. National framework conditions for non-discrimination

2.2.1. Non-discrimination and equality rules

2.2.1.1. Constitutional framework

- [37]. (15a) For persons with mental (psychological, intellectual or emotional) disorders or with intellectual disability, all constitutional and statutory non-discrimination rules and equality provisions at federal and state level are applicable since they apply to everyone. Art. 3 (3) of the *Grundgesetz* (GG) [Basic Law] bans discrimination on grounds of gender, parentage, race, language, homeland and origin, faith, or religious or political opinions or disability. The constitutional ban on discrimination on the ground of disability was included in Art. 3 (3) 2 Basic Law in 1994 as part of a constitutional reform. In addition, a number of state constitutions specify that people with disabilities enjoy the special protection of the state and that the state will promote their participation in the life of the community on an equal rights basis. The constitutional standard laid down in Art. 3 (3) Basic Law is primarily a right of defence against the state for persons who are entitled to basic rights, but also has – in connection with the interpretation of, inter alia, blanket provisions – an indirect third-party effect in private law.¹⁹
- [38]. (15b) With regard to the group of persons which are dealt with in this study, the provisions outlined here are solely those relating to non-discrimination and equal rights for people with disabilities. With one exception, the *Soldatinnen- und Soldaten-Gleichbehandlungsgesetz* (SoldGG) [Armed Forces Equal Treatment Act], these laws make no special provision for the categories of people dealt with in this study.

2.2.1.2. Disabled Persons Equality Act

- [39]. The Disabled Persons Equality Act, which came into force on 1 May 2002, deals with the scope of federal legislative competence concerning equal rights for disabled people under public law and constitutes an important part of implementing the ban on discrimination required by Art. 3 (3) 2 Basic Law. The provisions of the Disabled Persons Equality Act apply to all public bodies that implement

¹⁸ Germany/CDU, CSU and FDP/Coalition Agreement/*Wachstum. Bildung. Zusammenhalt*, 17th election period, <http://www.cdu.de> (27.10.2009).

¹⁹ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 16/14008 (08.06.2006).

federal law. The aim of the Act is to ‘eliminate and prevent discrimination against people with disabilities, to ensure that they participate in public life on the basis of equality and to enable them to lead self-determined lives’.²⁰ See Chapter 1 of this study for the concept of disability as used in the Act. The core feature of the Act is to establish comprehensive accessibility as a crucial precondition to enable disabled people to lead self-determined lives.²¹ According to the definition in Art. 4 of the Act, *Barrierefreiheit* [accessibility] is both the elimination of spatial barriers, especially in buildings and transport, and the accessibility and usability of acoustic and visual sources of information, including information technology and communication facilities. Even though this applies also to persons with mental illness, the following regulations on specified obligations and rights of the Disabled Persons Equality Act focus solely on other disabilities than those of the persons dealt with in this study. Further legislation on accessibility (such as building and industrial law) likewise focuses on disabilities other than those relevant here.

- [40]. With regard to people with intellectual disability the old federal government has made it clear in its answer to a minor interpellation that it has no plans to amend the Disabled Persons Equality Act to include a commitment to make official forms and notifications available in language easy to read and to understand. It has, however, noted that evaluation and monitoring of the findings of the *Barrierefreie Informationstechnik-Verordnung* (BITV) [Accessible Information Technology Ordinance] are planned (the ordinance will pay greater heed to the concerns of *lern- und geistig behinderte Menschen* [persons with learning and intellectual disability]).
- [41]. In addition to the accessibility requirement, the Disabled Persons Equality Act further provides certain rights for associations representing the interests of disabled people (including welfare and social associations), in particular the right to negotiate accessibility target agreements with corporations,²² and the right to take representative action (*Prozessstandschaft*) as well as the right to file association suits (i.e. legal action instituted by an association (*Verbandsklage*)) in their organisational capacity.²³
- [42]. Corresponding equal rights legislation passed by the federal states contains comparable provisions for accessibility and particular rights of associations and likewise makes no distinction between categories of disability.

2.2.1.3. General Equal Treatment Act

- [43]. The General Equal Treatment Act²⁴ forms part of the *Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung* [Law Transposing the European Directives on the Principle of Equal Treatment] and came into force on 18 August 2006. The Act’s aim is to prevent or eliminate discrimination, including discrimination on the grounds of disability, and covers, in particular, claims and legal consequences of such discrimination in employment and civil law.²⁵ The civil law ban on discrimination on the ground of disability relates solely, however, to civil law obligations of so-called *Massengeschäfte* [mass business] and to private law insurance.²⁶ Mass business typically arises without regard of person in a large number of cases under comparable conditions or where the regard of person is of subordinate significance on account of the obligation and comparable conditions arise in a large number of cases.²⁷ The Act also deals with the permissibility of differential treatment in such circumstances. In respect of disabilities no distinction is made between categories of impairment. Art. 8 of the Act permits differential treatment at work if,

²⁰ Art. 1 Behindertengleichstellungsgesetz (BGG) [Disabled Persons Equality Act].

²¹ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 16/9283 (27.05.2008) p. 2.

²² Art. 5 *Allgemeines Gleichbehandlungsgesetz* (AGG) [General Equal Treatment Act].

²³ Art. 12, 13 General Equal Treatment Act.

²⁴ Germany/BGBl. I/1897.

²⁵ Art. 1 and 7 General Equal Treatment Act.

²⁶ Art. 19 (1) General Equal Treatment Act.

²⁷ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 16/1780 (08.06.2006).

‘by reason of the nature of the particular occupational activities or of the context in which they are carried out, such grounds constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’.

- [44]. The European Commission has initiated legal proceedings against Germany for inadequate transposition of various European equal treatment directives, specifically with regard to terms and conditions of dismissal, the lack of regulations regarding reasonable accommodation for people with disabilities and the short periods for filing a complaint or an action.²⁸

2.2.1.4. Armed Forces Equal Treatment Act

- [45]. The Armed Forces Equal Treatment Act, like the General Equal Treatment Act, forms part of the Law Transposing the European Directives on the Principle of Equal Treatment and came into force on 18 August 2006. The Armed Forces Equal Treatment Act contains a non-discrimination rule for members of the armed forces with severe disabilities. They may, however, be treated differently on account of their disability if a specific bodily function, intellectual capacity or mental health is a fundamental and decisive requirement for the activity in question.²⁹

2.2.1.5. Social law including law on people with severe disabilities

- [46]. With regard to social law, German social security codes expressly specify that no-one must be put at a disadvantage on account of a disability in respect of claiming social rights or employment advice, vocational training, further training or retraining.³⁰ The regulations make no distinction between different kinds of disability.

- [47]. *Schwerbehindertenrecht* [law on people with severe disabilities], as codified in Part 2 of the Social Code Book IX, includes special procedural regulations to protect and promote people with severe disabilities, the statutory duty to employ people with severe disabilities and their entitlement to, inter alia, workplaces adapted by the employer to make them suitable for the disabled person. The regulations apply to everyone who is severely disabled or equivalent thereto in accordance with Art. 2 (2) and (3) Social Code Book IX. These are people with a degree of disability of more than 50 percent or between 30 and 50 percent if they would be unable without equal rights provisions to find or keep suitable employment.

2.2.1.6. Other equality provisions at federal and state level

- [48]. Owing to the Disabled Persons Equality Act and to corresponding equal rights legislation by the states, federal and state laws and the corresponding ordinances make abundant provisions for equal rights and accessibility. They include, in particular, regulations on equal rights for people with disabilities at work, in administrative and court proceedings, in civil procedure, in elections, in relation to testacy and notarisation and, especially, on matters of construction and transport, communications and information technology. It must, however, be borne in mind that these provisions either make no distinction between the kind of disability or cater solely for people with physical disabilities such as those who have difficulty in walking or are hearing-impaired, speech-impaired or visually impaired. Only a handful of provisions in a few state laws on education and children's and youth welfare distinguish between people with physical, intellectual and in some cases emotional

²⁸ EU/Kommission der europäischen Gemeinschaften/*Vertragsverletzungs-Nr. 2007/2362, Aufforderungsschreiben* (31.01.2008).

²⁹ Art. 18 (1) 2 Soldatinnen- und Soldaten-Gleichbehandlungsgesetz [Armed Forces Equal Treatment Act].

³⁰ Art. 33 c Social Code Book I; Art. 19 a Social Code Book IV.

disabilities. Where federal and state equal rights legislation and ordinances are concerned, then, it must be noted that the treatment differs with regard to the lack of specific provisions for people with intellectual and emotional disabilities as compared with people with physical disabilities.

2.2.1.7. Jurisprudence

- [49]. (15c) According to the *Bundesverfassungsgericht* (BVerfG) [Federal Constitutional Court], the refusal of a right does not constitute a breach of the discrimination ban insofar as someone by virtue of his or her disability lacks certain intellectual or physical capabilities that are an indispensable precondition for exercising this right. Putting disabled people at a legal disadvantage is thus only permissible if compelling reasons exist and the disadvantageous effects are indispensable for taking disability-related specifics into account.³¹
- [50]. The *Bundesverwaltungsgericht* (BVerwG) [Federal Supreme Administrative Court] has stated, along the line of Federal Constitutional Court case law, in a ruling on the issue of accessibility that the state has a margin of appreciation with regard to what is feasible financially, in terms of manpower, objectively and organisationally in implementing its duty to assist disabled people in accordance with Art. 3 (3) 2 Basic Law. This means that a person with disabilities is only entitled to such measures as those who are under an obligation to provide them can reasonably be expected to provide and that are financially feasible.³²

2.2.2. Preferential treatment arrangements

- [51]. (16a, b, c) The Basic Law contains no preferential treatment arrangement in respect of persons with disabilities. In federal law, there is only one provision that governs favourable treatment exclusively and explicitly for the people covered by this study. It states that under the statutory health insurance ‘insured persons who are unable “due to severe mental illness” to make independent use of medical or medically prescribed services are entitled to socio-therapy if hospital treatment can thereby be avoided or reduced or if hospital treatment is necessary but impracticable’.³³ The medical conditions in accordance with ICD-10 and the disabilities that characterise them and as a rule require socio-therapeutic treatment are specified in the *Soziotherapie-Richtlinie* [Socio-therapy Guideline] drawn up by the *Gemeinsamer Bundesausschuss* (G-BA) [Joint Federal Committee]. Where the preconditions for treatment exist, entitlement to socio-therapy is limited to 120 hours per case over a period of three years and the requisite coordination of prescribed medical services along with instructions and encouragement to make use of them.
- [52]. Art. 27 (1) 3 Social Code Book V states that the special needs of the mentally ill (*psychisch Kranke*) must in particular be taken into consideration in providing medication and medical rehabilitation. According to *Bundessozialgericht* (BSG) [Federal Supreme Social Court], however, this is merely an interpretation and its consequence must be that full use must also be made of statutory possibilities in the case of mental illness (*psychische Krankheiten*) and that the services provided must not lag behind those provided for the physically ill.³⁴
- [53]. In the law on people with severe disabilities Art. 81 (4) 1 (2) and (3) Social Code Book IX expressly states – by using the terms preferential treatment and easements – that people with severe disabilities are entitled to advantageous special treatment by their employer.

³¹ H. Jarass in: Jarass/Pieroth (2009) *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 10th ed., Munich: Beck, Art. 3 para 149.

³² Germany/Bundesverwaltungsgericht/Judgment/case no. 9 C 1.05 (01.05.2006).

³³ Art. 37 a Social Code Book V.

³⁴ K. Höfler in: *Kassler Kommentar* (2009) – *Sozialversicherungsrecht Vol. 1*, , Munich: Beck, § 27 SGB V para 66.

2.2.3. Inclusion of mental disorders in the notion of disability

- [54]. (17) The concept of disability is not defined in the General Equal Treatment Act but according to the explanatory memorandum to the Act it corresponds to the statutory definition in Art. 2 (1) 1 Social Code Book IX and Art. 3 of the Disabled Persons Equality Act.³⁵ This states that the disabled include people whose ‘intellectual capacity or emotional health’ is highly likely to diverge from the state typical for their age for a period of longer than six months and whose participation in social life is therefore impaired. People with psychological, emotional or intellectual disorders or an intellectual disability are therefore covered by the disability concept of the General Equal Treatment Act. Yet the Act neither makes special provisions for them nor includes a specific mention of them.
- [55]. (18) With regard to discrimination the General Equal Treatment Act covers in addition to labour law civil law contracts in the areas of social protection, including social security and healthcare, social advantages, education and goods and services. Private law contracts with doctors and hospitals are covered. The civil law part of the Act also contains a wide range of justifications, such as averting risks or preventing damage (Art. 20 (1) 1 General Equal Treatment Act). Organisations representing the disabled have criticised this as potentially undermining the ban on discrimination on grounds of a disability.

2.2.4. Reasonable Accommodation

- [56]. (19) The European Commission initiated on 31 January 2008 legal proceedings against Germany for breach of treaty obligations, noting in the summons that among others Germany was in breach of its duty to include regulations on ‘reasonable accommodation’ in accordance with Art. 5 of the directive 2000/78/EC, because Art. 81 (4) and (5) Social Code Book IX made such provision only in relation to the severely disabled and people equated with them.³⁶
- [57]. In its submission to the European Commission the federal government expressed the opinion that the directive requires not general measures that apply uniformly to all people with disabilities but measures relating to the individual case that are suitable and necessary to enable a specific person to gain employment. It also noted that under German law the Social Code Book IX provides such a differentiated system of employers’ obligations and state-run services to offset disproportionate burdens.³⁷

2.2.5. Equality Body

- [58]. (20) The *Antidiskriminierungsstelle des Bundes* [Federal Anti-Discrimination Agency] is competent to deal with all cases of discrimination on the grounds stated in Art. 1 of the General Equal Treatment Act, including disability.³⁸ Subject to the consent of the people concerned, the Federal Anti-Discrimination Agency is obliged to immediately pass their submission to the Federal Government Commissioner for the Concerns of Persons with Disabilities for further processing. According to the Anti-Discrimination Agency a total of 872 cases of discrimination on grounds of disability were registered by mid-September 2009. Of the 195 instances in which a distinction between categories of disability was possible on the basis of the submissions made by the people concerned, discrimination on grounds of intellectual disability was involved in 26 cases. Case details are not published by the Anti-Discrimination Agency.

³⁵ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 16/1780 (08.06.2006) p. 31.

³⁶ EU/Kommission der europäischen Gemeinschaften/*Vertragsverletzungs-Nr. 2007/2362, Aufforderungsschreiben* (31.1.2008), p. 6.

³⁷ Germany/Deutscher Bundestag/*Rechtsausschuss/Ausschussdrucksache* 16(6)247 (21.07.2008).

³⁸ Art. 27 (1) General Equal Treatment Act.

3. Specific fundamental rights

- [59]. (21a) The specific fundamental rights dealt with in this Chapter mainly concern rights recognised by the International Covenant on Civil and Political Rights. In accordance with the Basic Law all natural persons are entitled to enjoy these rights irrespective of age, abilities or incapacity to contract.³⁹
- [60]. Under German law, however, certain legal provisos may justify an encroachment on these fundamental rights. The fundamental rights of persons with mental (intellectual, emotional or psychological) disorders or intellectual disability outlined in this Chapter can be restricted chiefly in cases where incapacity to contract is established, when a legal custodian is appointed, when the *Betreuungsgericht* [Custodianship Court] orders a reservation of consent or in cases of involuntary treatment or involuntary placement.

3.1. The right to life

- [61]. (22a) The right to life is enshrined in Art. 2 (2) 1 Basic Law. The right to life of the unborn child is addressed mainly by legislation on abortions performed because of a supposed later disability.⁴⁰ The entitlement to enjoy fundamental rights is granted to unborn life from nidation onwards solely by Art. 1 (1) and Art. 2 (2) 1 Basic Law. A termination of pregnancy is exempt from punishment if the narrow criteria defined in particular by Art. 218 a (1) and (2) of the Criminal Code apply. Art. 218a (1) Criminal Code declares a termination of pregnancy within the first twelve weeks after conception to be exempt from liability if the woman has attended an obligatory counselling session prior to the termination. According to Art. 218 (2) termination of pregnancy at any point is not unlawful if the life of the woman is in danger or if there is a danger that she will suffer grave impairment of her physical or mental health. Art. 218a (2) Criminal Code thus allows termination of pregnancy, if prenatal diagnosis gives cause to believe that the child will be disabled. After protracted discussion on how to deal with so-called late abortions a law was passed in May 2009 making it obligatory for a pregnant woman to attend counselling prior to abortion in these cases as well.⁴¹
- [62]. (22b) Concerning this point the Federal Supreme Court of Justice has stated that if the criteria defined by Art. 218 a (2) Criminal Code apply, a termination of pregnancy is legally permitted, since in formulating the statutory definitions legislators have already weighed up the right to life of the child versus the rights of the mother as they are required to do. In its ruling on the legal protection of unborn life, the Federal Constitutional Court made however an exception in stipulating the legislator's obligation to regularly monitor the situation, for example through the periodic issuing of government reports, stating as reasons for its decision the high status of the object protected by law, the type of threat to which it is subject and the changes in social conditions and attitudes currently taking place in this sphere.⁴²

³⁹ H. Jarras in: Jarass/Pieroth (2009) *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 10th ed., Munich: Beck, Art. 19 para 10.

⁴⁰ F. Welti (2005) *Behinderung und Rehabilitation im sozialen Rechtsstaat : Freiheit, Gleichheit und Teilhabe behinderter Menschen*, Tübingen: Mohr, p. 441.

⁴¹ Germany/Deutscher Bundestag/Bundesrats-Drucksache 447/09. The law amending the Pregnancy Conflicts Act will come into force on 01.1.2010.

⁴² Germany/Bundesverfassungsgericht/Judgment/case no. 2 BvF 2/90 and 4,5/92 (28.05.1993).

3.2. Freedom from torture and inhuman treatment

- [63]. (23a) Freedom from torture and inhuman treatment is guaranteed by the principle of human dignity and the basic right to freedom and physical integrity pursuant to Art. 1 (1) in connection with Art. 2 (1) and (2) Basic Law. These rules intend to prevent medical or scientific experiments being carried out on living persons against his or her will. For historical reasons, the social opposition in Germany to the involvement of a person without his or her free consent in any sort of scientific research is immense.
- [64]. There is an exceptional regulation which formulates restricted conditions under which medical research in the form of clinical testing of drugs and medical products may be performed on a person who is not capable of giving his or her consent, whether of full or minor age, may be conducted.⁴³ Still, these regulations are highly controversial.
- [65]. The law also stipulates that carrying out clinical trials is not permitted if the person affected has been placed in an institution by a court order or by the order of a public authority. Persons with mental (psychological, emotional or intellectual) disorders or intellectual disability who have been placed in an institution in accordance with the provisions outlined in Chapter 4 of this study are, in most federal states, expressly protected from medical research measures by propitiatory provisions.
- [66]. Organisations representing the interests of these persons have stated, however, that account should be taken of the fact that in practice a violation of these provisions can be proven only with difficulty since because of their state of health those affected are as a rule unable to take action against such violations.

3.3. Freedom from exploitation

- [67]. (24a) The Basic law does not explicitly address a right to freedom from exploitation. By Art. 2 (1) (personal freedom) in connection with Art. 1 (1) (human dignity) Basic Law, individuals are protected from exploitation which would impede their self-fulfilment or affect their personal dignity. With regard to relations between private persons, the relevant provisions for protection, including those relating to employment, as well as the definitive provisions of criminal law apply to all persons normally subject to German law and hence also to persons with mental (psychological, emotional or intellectual) disorders or disabilities. These include the provisions of Art. 138 Civil Code on the prevention of exploitation through usurious transactions as well as the provisions on a minimum wage outlined in the *Mindestarbeitsbedingungengesetz* [Minimum Working Conditions Act] and the *Arbeitnehmerentendegesetz* [Employee Secondment Act].
- [68]. Special legal provision is made for people employed in workshops for the disabled. Here Art. 138 (2) Social Code Book IX stipulates an entitlement to payment for work done. Although the payment also includes a performance-related component, total payment is nevertheless below a level commensurate with the work performed.⁴⁴
- [69]. Art. 179 of the Criminal Code makes sexual abuse of a person incapable of resisting on account of a mental or physical illness or an addiction a punishable offence. It stipulates terms of imprisonment of between six months and ten years.

⁴³ Art. 40 (1) to (4) and Art. 41 (2) Arzneimittelgesetz (AMG) [Medicament Act], Art. 20 and 21 Medizinproduktegesetz (MPG) [Medicinal Product Act].

⁴⁴ J. Castendiek / G. Hoffmann (2009) *Das Recht der behinderten Menschen*, 3rd. ed., Baden-Baden: Nomos, p. 209.

3.4. The right to liberty and security

- [70]. (25a) The right to liberty and security is guaranteed by Art. 2 and Art. 104 Basic Law. The rights to personal freedom provided for in Art. 2 Basic Law, which include the common freedom to act and, as the Federal Constitutional Court expressly stated in a landmark decision in 1981, the ‘freedom to be ill’, are encroached on to a considerable degree by the appointment of a legal custodian or by involuntary placement and involuntary treatment. Here readers are referred to Chapters 4 (para. [93] - [153]) and 5 (para. [174], [175], [193]) of this study.

3.5. The right to fair trial

- [71]. (26a) Art. 19 (4) and Art. 101 Basic Law guarantee recourse to the courts and the right to a lawful judge, respectively, both of which also applies to the groups of persons who are covered by this study. Art. 103 (1) Basic Law gives them a constitutional right to a legal hearing and stipulates that they must be heard in any legal proceedings concerning them and their statements taken into account in arriving at a decision. The right to a legal hearing also comprises the right to appropriate legal aid as far as is necessary. The procedural regulations concerning placement matters laid down in Art. 312 ff of the *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (FamFG) [Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction] contain special provisions for the benefit of the persons affected. On this point see Chapter 4 (para. [111] - [115]; [122] - [129]; [132] - [135]; [146] - [153]) below.
- [72]. (26b) Mentally ill persons and persons in legal custodianship are recognised by the courts to be deemed competent of conducting legal proceedings, at least with respect to proceedings in which decisions are taken about their mental illness or their custodianship. Further information on the right to fair trial of people with mental (psychological, emotional or intellectual) disorders or intellectual disability is contained in Chapters 4 (para. [111] - [115]; [120] - [129]; [132] - [135]; [146] - [153]) and 5 (para. [164] - [167]; [170]; [171]; [179]; [191]; [193] - [195]) of this study.

3.6. The right to privacy

- [73]. (27a) The right to privacy is protected by Art. 2 (1) together with Art. 1 (1) Basic Law. In this respect, the Federal Constitutional Court has ruled that the *Recht auf informationelle Selbstbestimmung* [right to self-determination with respect to information] and hence also the protection of personal privacy and the right to self-determination and personal dignity, including the right to access one’s own confidential medical records, are covered by Art. 2 (1) together with Art. 1 (1) Basic Law.⁴⁵ The relevant laws on data protection thus stipulate the right of the person affected to be given information. Access to medical records can also be granted to a custodian if the scope of custodianship extends to health care. On this point readers are referred Chapter 5 (para. [181] and [182]) of this study.
- [74]. (27b) The European Court of Human Rights ruled in response to a complaint brought against Germany that any treatment with drugs against the will of the patient constituted an encroachment on the right to privacy (Art. 8 ECHR).⁴⁶

⁴⁵ H. Jarass in: Jarass / Pieroth (2009), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 10th ed, Munich: Beck, Art. 2 para 41.

⁴⁶ European Court for Human Rights/Judgment/appl. No. 61603/00 (16.06.2005) - Storck vs Germany.

3.7. The right to marry and to found a family

- [75]. (28a) Art. 6 Basic Law guarantees the right to marry and to found a family, and it provides for the state to respect and protect family life. However, Art. 1304 Civil Code stipulates that incapacity to contract can have legal consequences for *Ehegeschäftsfähigkeit* [capacity to marry]. It states that anyone who is incapable of contracting pursuant to Art. 104 (2) Civil Code may not enter into a marriage. The registrar must of his/her own accord establish whether incapacity to contract as defined by Art. 104 (2) Civil Code exists and where necessary request an expert appraisal.⁴⁷
- [76]. (28b) In line with the ruling of the Federal Constitutional Court, however, the application of Art. 1304 Civil Code can no longer be considered if an examination of the provisions of Art. 104 (2) Civil Code (which must be carried out first) establishes the *partielle Geschäftsfähigkeit* [partial capacity to contract] of the person affected with respect to entering into a marriage. On partial capacity to contract, readers should refer to Chapter 5 (para. [173] and [182]) of this study.

3.8. The right to have children

3.8.1. Sterilisation

- [77]. (29a) Next to the right to marry and to found a family, Art. 6 Basic Law also provides for the right to have and to raise children. On statutory level, special provisions protecting the freedom of disabled persons to reproduce were introduced into the Civil Code in 1992, in order to restrict the sterilisation of persons with disabilities. These provisions, i. e. Art. 1631 c and Art. 1905 Civil Code, prohibit the sterilisation of minors and permit sterilisation of persons of full age exclusively under the conditions laid down in Art. 1905 (1) Civil Code, i.e. only if the following five conditions are served: 1.) sterilisation does not run counter to the will of the person being cared for, 2.) the person being cared for will remain permanently incapable of consent, 3.) it can be assumed that without sterilisation a pregnancy would result, 4.) as a result of pregnancy a danger to the life of the pregnant woman or a danger of grave impairment of the woman's physical or mental health is to be expected, which cannot reasonably be averted in any other way, and 5.) the pregnancy cannot be prevented by other acceptable means. The approval of the Custodianship Court is additionally required.
- [78]. The law states that in order for a decision to be taken about consent to sterilisation a special custodian must be appointed.⁴⁸ While this special custodian can, if the criteria named apply, give consent on behalf of the person being cared for if he/she is not legally capable of consent, the custodian is nonetheless bound to respect the will of the person being cared for irrespective of the latter's capacity for understanding. This ban on forced sterilisation can be inferred from Art. 1905 (1) 1 Civil Code, according to which at the point in time at which a medical intervention is to be performed only the natural will of the person under custodianship is authoritative. In addition, pursuant to Art. 1905 (1) 2 Civil Code the custodian may only give consent on behalf of the person being cared for if the latter is deemed permanently incapable of consenting with respect to sterilisation. If any one of the criteria defined in Art. 1905 Civil Code does not apply, sterilisation must not be carried out.

⁴⁷ G. Bruder Müller in: Palandt (2008), *Bürgerliches Gesetzbuch: Kommentar*, 67th ed. Munich: Beck, § 1304 para 4.

⁴⁸ Art. 1899 (2) Civil Code.

3.8.2. Parental custody

- [79]. Art. 1673 (1) Civil Code states that the parental custody of a parent is suspended if he/she is incapable of contracting pursuant to Art. 104 (2) Civil Code. Partial capacity to contract suffices if it relates wholly or partially to parental custody.⁴⁹ However, Art. 1666 Civil Code states that the *Familiengericht* [Family Court] must, in the event that disabled parents are unable, or able only to a limited extent, to exercise their rights and obligations as the legal custodians of their children, take all measures necessary to prevent the child's welfare being endangered. Through the amendment of the provisions of Art. 1696 (2) Civil Code as part of the *Gesetz zur Reform des Verfahrens in Familiensachen und in Angelegenheiten der freiwilligen Gerichtsbarkeit* (FGG-RG) [Law on Procedure in Family Affairs and in Matters of Voluntary Jurisdiction Reform Act], legislators expressly stipulated that the Family Court is obliged to revoke measures taken to protect the child if a danger to the child's welfare no longer exists or when the necessity of the measure no longer applies.
- [80]. (29b) The Federal Constitutional Court has ruled that the fact that parents diagnosed as intellectually disabled cannot organise the running of their households themselves and cannot foster their children in a manner deemed appropriate does not in itself justify removing the child from the family. The ruling states that all suitable and necessary forms of help must be offered before the right of custody is fully or partially withdrawn and/or the child is separated from its parents.⁵⁰

3.9. The right to property

- [81]. (30a, b) Art. 14 Basic Law guarantees the right to own property and the right of inheritance. A restriction of the right to own property guaranteed by Art. 14 Basic Law may apply if the scope of custodianship extends to care of assets. Here readers are referred to Chapter 5 (para. [181] - [185]) of this study.
- [82]. The Federal Constitutional Court has ruled that the right of inheritance guaranteed by Art. 14 (1) 1 Basic Law, the determining element of which is testamentary freedom, guarantees the right of inheritance as a legal institution and an individual right. According to the Federal Constitutional Court, however, the guarantee of testamentary freedom afforded by constitutional law protects only self-determined and self-responsible declarations of final will. The individual must therefore possess the capacity for the understanding and competence required to write a will. According to established case law of the Federal Constitutional Court, it is the task of the legislator to decide the substance and limitations of inheritance law and to specify more precisely the principle of self-determination on which the testamentary freedom enshrined in the Basic Law is founded.
- [83]. A restriction of this kind exists pursuant to Art. 2229 (4) Civil Code, according to which persons who on account of pathological mental disturbance, mental deficiency or a derangement of the senses who are incapable of recognising the importance of a declaration of will they have made and of acting in accordance with this realisation may not make a will. For further information on testamentary incapacity the reader is referred to [173].

3.10. The right to vote

- [84]. (31a) Art. 38 (1) Basic Law guarantees the right to vote. It stipulates that members of the *Deutscher Bundestag* [German parliament] shall be elected in general, direct, free, equal and secret elections.

⁴⁹ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1673 para 2.

⁵⁰ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1666 a para 2.

Details are regulated by the *Bundeswahlgesetz* (BWahlG) [Federal Election Act] and subordinated legislation. According to the Federal Election Act, persons for whom a custodian is appointed to manage all their affairs not just by temporary order are excluded from the right to vote.⁵¹ The scope of such custodians need not extend to postal and telecommunications and sterilisation, however. Also excluded from voting in elections to the German parliament, according to the Federal Election Act, are those persons who are in a psychiatric hospital on account of a placement order in line with the provisions of the Criminal Code.⁵² Art. 6a (1) 2 and 3 of the *Europawahlgesetz* (EuWG) [European Elections Act] contains provisions corresponding with those of the Federal Election Act.

4. Involuntary placement and involuntary treatment

- [85]. (32) The findings of the Report on Compulsory Admission and Involuntary Treatment of Mentally Ill Patients – Legislation and Practice in EU Member-States (2002), as well as the principles enshrined in the Council of Europe Recommendation (2004) 10 by the Committee of Ministers to member-states concerning the protection of human rights and of the dignity of persons with mental disorders have been analysed and evaluated and used as a basis for this study. On the current situation with respect to these issues in Germany and possible changes or developments readers are referred to Subchapters 4.2 till 4.4 below.

4.1. Findings and recommendations of international and European human rights institutions

- [86]. (33) In the framework of the State reporting procedure to the UN Convention on Torture Germany presented a report to the UN Committee against Torture (CAT) in 2003.⁵³ This report does not mention the issues of involuntary placement and involuntary treatment, nor does the CAT address these issues in its ‘constructive dialogue’ with the German delegation. It therefore did not make any statement on the subject of involuntary placement and involuntary treatment in its ‘Concluding observations’ on Germany’s state party report.⁵⁴
- [87]. The German government did take up the issues of placement and custodianship in its state party report to the UN Human Rights Committee (HRC) of 2002 in the section dealing with Art. 9 of the International Covenant on Civil and Political Rights.⁵⁵ However, the report on involuntary placement is limited to a sober account of the current legal situation. The government report neither addresses shortcomings with respect to guaranteeing rights nor does it deal with specific problems in practice. The HRC did not specifically ask the German government about involuntary placement and

⁵¹ Art. 13 no. 2 Bundeswahlgesetz (BWahlG) [Federal Election Act]; available at: <http://www.gesetze-im-internet.de/bwahlg/> (23.11.2009).

⁵² Art. 13 no. 3 Federal Election Act.

⁵³ United Nations/Committee against Torture/*Third periodic reports of States parties due in 1999*, Addendum, Germany UN Doc. CAT/C/49/Add.4 (2003) (08.06.2003).

⁵⁴ United Nations/Committee against Torture/*Summary Records*, available at: <http://www2.ohchr.org/english/bodies/cat/cats32> (01.10.2009).

⁵⁵ United Nations/Human Rights Committee/*Fifth Periodic Report Germany*, UN Doc. CCPR/C/DEU/2002/5 (04.12.2002).

involuntary treatment in practice in Germany. Neither in the HRC's 'constructive dialogue' nor in its 'Concluding observations' is this subject mentioned.⁵⁶

- [88]. In this context we want to note that Germany signed and ratified the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. This protocol came into force in Germany on 03.01.2009.⁵⁷ The national prevention mechanism is currently being put in place at the federal and at the state levels.⁵⁸
- [89]. (34) In 2000 and 2005 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) made a total of five visits to various psychiatric institutions in Germany. All in all, the committee was largely satisfied with the legal provisions in the federal states as well as with the practice in the psychiatric institutions it visited.⁵⁹
- [90]. It did, however, find some irregularities. It discovered, for example, that inmates were not sufficiently informed about their placement status. In some cases there was no individual written confirmation of the legal admission to the institutions by persons who had been admitted involuntarily, and in some cases there was no written confirmation for persons admitted voluntarily. The German federal government responded constructively to both CPT reports.⁶⁰
- [91]. It stated that it had taken the CPT's proposals as an opportunity to investigate conditions in various institutions and to bring them into line. The federal government insisted emphatically that involuntary measures were carried out only where absolutely necessary and in strict compliance with the regulations.
- [92]. The 2005 CPT inspection included one repeat visit to an institution it had already visited in 2000. On its second visit the CPT reported an improvement in the treatment of patients.

4.2. Legal framework

4.2.1. Involuntary placement

- [93]. (35, 38, 41) Under German law there are three kinds of involuntary placement, which will be described below. The aim of placement under private law is to prevent the person being cared for from killing him/herself or inflicting grave damage on his/her health. Placement under public law serves to avert danger to third parties as well as to prevent the person from endangering his/her own life or health. The forensic placement following a ruling under criminal law aims at preventing danger to the general public.

4.2.1.1. Placement under private law

- [94]. The criteria for private law placement of a person of full age by a custodian or by a person with powers of attorney that involves deprivation of liberty as well as placement for the purpose of

⁵⁶ United Nations/Human Rights Committee/*Concluding Observations Germany*, UN Doc. CCPR/CO/80/DEU (26.02.2004).

⁵⁷ Germany/BGBl 2008 II/854.

⁵⁸ <http://www.antifolterstelle.de/> (24.10.2009).

⁵⁹ Council of Europe/CPT <http://www.cpt.coe.int/documents/deu/2003-20-inf-eng.pdf> (01.10.2009) and <http://www.cpt.coe.int/documents/deu/2007-18-inf-eng.pdf> (01.10.2009).

⁶⁰ Council of Europe/CPT <http://www.cpt.coe.int/documents/deu/2003-21-inf-eng.pdf> (01.10.2009) and <http://www.cpt.coe.int/documents/deu/2007-19-inf-eng.pdf> (01.10.2009).

administering necessary medical treatment are defined by Art. 1906 of the Civil Code. Involuntary treatment of a patient who is incapable of consent requires in addition the approval of the custodian assigned to take care of his/her health or of the person to whom he/she has granted power of attorney. The provisions of Art. 1906 Civil Code were introduced into the Civil Code by the *Betreuungsgesetz* (BtG) [Custodianship Act] of 12.09.1990, which came into force on 01.01.1992. The procedure for placement matters covered by Art. 1906 (1) to (3) Civil Code is regulated by Art. 312 ff. of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction. This law took effect on 01.09.2009 as Art. 1 of the FGG-RG [Law on Procedure in Family Affairs and in Matters of Voluntary Jurisdiction Reform Act]. The main previous provisions of the *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit* (FGG) [Law on Matters of Voluntary Jurisdiction] concerning placement for persons of full age were integrated into the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction.

- [95]. Placement of children involving deprivation of liberty is governed by Art. 1631 b Civil Code. These provisions have been in force since 01.01.1964 and were last amended by the Law on Procedure in Family Affairs and in Matters of Voluntary Jurisdiction Reform Act. For minors held incapable of consent involuntary treatment requires the consent either of both parents (in cases of joint custody) or of the parent granted custody (in cases of single custody).⁶¹ If the minor has a legal guardian, placement is governed by Art. 1800 Civil Code and in the case of *Ergänzungspflegschaft* [supplementary curatorship] by Art. 1915 Civil Code. Owing to the amendments effected by the Law on Procedure in Family Affairs and in Matters of Voluntary Jurisdiction Reform Act, the placement of minors according to the provisions of the Civil Code is now regulated according to the procedures for parent and child cases stipulated by Art. 151 (6) of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction. These mainly concern the responsibilities of the Family Court. However, pursuant to Art. 167 (1) 1 the placement provisions for persons of full age apply to the placement of minors as well.

4.2.1.2. Placement under public law

- [96]. As well as placement under private law there is also placement under public law. Here the criteria are defined by the laws of each federal state regulating the placement of the mentally ill. These laws apply exclusively in the federal state in which they were passed. State laws cover the placement of minors and persons of full age as well as most measures connected with the imprisonment of offenders who are considered mentally ill or addicts. As with placement under private law, placement procedure for persons of full age is governed by the provisions of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction. For minors the provisions for parent and child cases pursuant to Art. 151 (7) as well as the provisions for placement pursuant to Art. 167 (1) 1 of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction apply.
- [97]. Between 1985 and 2007 the German federal states passed the following laws governing treatment of the person considered mentally ill:
- *Gesetz für psychisch Kranke* (PsychKG) Berlin [Law for the Mentally Ill Berlin] of 08.03.1985, amended on 17.03.1994;
 - *Psychischkrankengesetz Mecklenburg-Vorpommern* [Mentally Ill Persons Act Mecklenburg-Western Pomerania] of 13.04.2000;
 - *Brandenburgisches Psychisch-Kranken-Gesetz* (BbgPsychKG) [Brandenburg Mentally Ill Persons Act] – the law originally came into effect in 1996. It was subsequently revised and passed in an amended version on 05 May 2009;

⁶¹ Art. 1626, 1629 Civil Code.

- *Hamburgisches Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten* (HmbPsychKG) [Hamburg Law on Assistance and Protective Measures in Cases of Mental Illness] of 27.09.1995;
- *Niedersächsisches Gesetz über Hilfen und Schutzmaßnahmen für psychisch Kranke* (NPsychKG) [Lower Saxony Law on Assistance and Protective Measures for the Mentally Ill] of 16.06.1997;
- *Nordrhein-Westfalen: Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten* (PsychKG) [North Rhine-Westphalia: Law on Assistance and Protective Measures in Cases of Mental Illness] of 17.12.1999, amended on 05.04.2005;
- *Landesgesetz für psychisch kranke Personen* (PsychKG Rheinland-Pfalz) [State Law on Mentally Ill Persons Rhineland-Palatinate] of 17.11.1995;
- *Unterbringungsgesetz (UnterbrG) Bayern* [Placement Act Bavaria] of 02.12.1991;
- *Gesetz über Hilfen für psychisch Kranke und Schutzmaßnahmen des Landes Sachsen-Anhalt* (PsychKG LSA) [Law on Assistance for the Mentally Ill and Protective Measures of the State of Saxony-Anhalt] of 30.01.1992;
- *Thüringer Gesetz zur Hilfe und Unterbringung psychisch Kranker* (Thür PsychKG) [Thuringia Law on Assistance and Placement of the Mentally Ill] of 02.02.1994;
- *Unterbringungsgesetz (UBG) Baden-Württemberg* [Placement Act Baden-Württemberg] of 05.04.1992;
- *Unterbringungsgesetz (UBG) Saarland* [Placement Act Saarland] of 11.11.1992, amended on 21.11.2007;
- *Schleswig-Holstein Psychisch-Kranken-Gesetz* (PsychKG) [Schleswig-Holstein Mentally Ill Persons Act] of 14.01.2000;
- *Bremen Gesetz über Hilfen und Schutzmaßnahmen bei psychischen Krankheiten und zur Änderung anderer Gesetze* (PsychKG) [Bremen Law on Assistance and Protective Measures in Cases of Mental Illness to Amend Other Laws] of 19.12.2000, amended on 28.06.2005;
- *Sächsisches Gesetz über die Hilfen und die Unterbringung bei psychischen Krankheiten* (SächsPsychKG) [Saxony Law on Assistance and Placement in Cases of Mental Illness] of 10.10.2007;
- *Hessisches Freiheitsentziehungsgesetz* (FrhEntzG HE) [Hesse Deprivation of Liberty Act] of 19.05.1952.

[98]. The Brandenburg Mentally Ill Persons Act of 1996 was recently revised, it came into force on 06.05.2009. The explanation given was that the aim was to chiefly reflect new legal findings, to offer more legal security and clarity and to bring it up to date; a new version. In addition, the legislators expressly emphasised in the bill that in the ten years it had been in force the original law had proved its worth and that the main principles on which its provisions were based should therefore continue to be adhered to.⁶² However, a reference to CRPD or some substantial reflections on the consequences which CRPD might have on the bill and related practices was not achieved.

[99]. The exception among the state laws on account of its age is the Hesse Deprivation of Liberty Act of 1952. In response to a *Kleine Anfrage* [minor parliamentary question] about whether the Act needed to be reformed to reflect the CRPD, the Hesse minister for social affairs, was of the opinion that Art.

⁶² Germany/Landtag Brandenburg/*Drucksache* 4/6975
http://www.parldok.brandenburg.de/parladoku/w4/drs/ab_6900/6975.pdf. (01.10.2009).

14 (1) CRPD does not cover deprivation of liberty to prevent danger to oneself or others.⁶³ In addition, the Hesse government expressed its belief that no provision of the Hesse Deprivation of Liberty Act needed to be repealed or reformed on account of the CRPD.⁶⁴

4.2.1.3. Placement following a ruling under criminal law

- [100]. The German Criminal Code states that the court responsible for criminal proceedings orders the placement in a psychiatric hospital of persons who have committed a criminal offence if the criteria defined in Art. 63 Criminal Code apply or, pursuant to Art. 64 Criminal Code, placement in an institution for withdrawal treatment as part of the execution of disciplinary measures. Court orders of measures of this kind for juveniles and young adults are governed by the provisions of the *Jugendgerichtsgesetz* (JGG) [Juvenile Court Act].⁶⁵ Placement on account of a ruling under criminal law is governed pursuant to Art. 138 (1) of the *Strafvollzugsgesetz* (StVollzG) [Prison Act] by state laws, insofar as federal law does not specify otherwise. Most of the state laws governing the placement of persons considered to be mentally ill contain specific provisions for placement procedures in cases of placement following a ruling under criminal law.

4.2.2. Involuntary treatment

4.2.2.1. Under private law

- [101]. (36, 37) Art. 1906 (1) 1 Civil Code defines the criteria for placement. Art. 1906 (1) Civil Code governs placement of a person under custodianship for the purpose of necessary medical treatment that cannot be carried out without placement.
- [102]. The law, however, expressly refrains from regulating involuntary treatment. Therefore in addition to court approval of placement by the Custodianship Court involuntary treatment – i.e. administering medical treatment against the will of the patient – also requires the consent of his/her legal representative. This is based on a ruling by the Federal Supreme Court of Justice stating that since medical examinations, therapeutic treatment and medical interventions interfere in a person's fundamental right to physical integrity, the consent of the holder of fundamental rights is required.⁶⁶ Where a person of full age is unable to grasp the significance or control the course of events, the custodian assigned to take care of his/her health or the person to whom he/she has granted power of attorney has the authority to give consent to medical examinations, therapeutic treatments and medical interventions. Pursuant to Art. 1901 a Civil Code, in force since 01.09.2009, this does not apply if the patient has, while still in possession of the capacity for consent, made a *Patientenverfügung* [living will] laying down in writing whether, in the event of he/she being incapable of consent, he/she would consent to or refuse particular medical examinations, therapeutic treatments or medical intervention not directly imminent at the time the living will was made. In such a case, the living will might hinder the envisaged treatment. The custodian or attorney must determine with respect to involuntary treatment whether such provisions apply to the current life and treatment situation. Insofar as this is the case, the custodian or attorney must act in accordance with the will of the patient. If a living will regulating such matters exists, no involuntary treatment may be carried out.

⁶³ Germany/Hessischer Landtag/*Drucksache* 17/233 (30.07.2008), <http://starweb.hessen.de/cache/DRS/17/3/00233.pdf> (01.10.2009).

⁶⁴ Germany/Hessischer Landtag/*Drucksache* 17/233 (30.07.2008), <http://starweb.hessen.de/cache/DRS/17/3/00233.pdf> (01.10.2009).

⁶⁵ Art. 7 *Jugendgerichtsgesetz* (JGG) [Juvenile Court Act].

⁶⁶ Germany/Bundesgerichtshof/Decision/case no. XII ZB 236/05 (01.02.2006).

- [103]. Where there is reason to fear that the patient might die as a result of the medical procedure or suffer grave long-term damage to his/her health, Art. 1904 (1) Civil Code requires not only the consent of the custodian to involuntary treatment but also the approval of the Custodianship Court. Court approval is not, however, required if it would be dangerous to postpone treatment or if the custodian or attorney and the doctor administering the treatment agree that in giving, refusing or revoking consent the custodian or attorney is acting in accordance with the ascertained will of the patient. On ascertaining the will of a person being cared for readers are referred to Subchapter 5.2.3.1 below.
- [104]. In the opinion of the Federal Supreme Court of Justice, even in cases where the custodian gives consent, a placement order against the will of a person incapable of insight should take account of the fact that, the right to personal liberty includes even for a mentally ill person the ‘freedom to be ill’ within certain limits.⁶⁷ The Federal Supreme Court of Justice further states that, in keeping with the rulings of the Federal Constitutional Court on placement under public law, this ‘freedom to be ill’ should also be taken into account in cases of placement under civil law in which the court examines whether the order is proportionate. Accordingly, potential danger to the person’s health must always be grave enough to justify the infringement of liberty entailed by the intended placement measure. If placement entailing deprivation of liberty also involves permissible involuntary treatment the Federal Supreme Court of Justice stipulates that more rigorous standards must be applied in examining the proportionality of the measures than with placement alone; hence the balanced consideration of legally protected values required by the principle of proportionality must include consideration of the medical intervention and consequences thereof entailed in the involuntary treatment. With respect to the treatment of mental illness the therapeutic benefits of a medical procedure that can only be carried out under coercion must be carefully considered.⁶⁸
- [105]. The Federal Supreme Court of Justice states further that approval of placement for the purpose of carrying out medical procedures must also take into account that Art. 1906 Civil Code only covers those measures that limit the personal freedom of movement of the person affected to a particular living space for more than just a short period. The Federal Supreme Court of Justice makes it clear that this narrow definition of placement not only applies to the approvability and necessity of the placement but also to the extent of permissibility of involuntary medical treatment. Thus, the only reasonable interpretation of Art. 1906 (1) 2 Civil Code accordingly is that in connection with a lawful placement, the person affected must tolerate the necessary medical procedures to which the custodian has given his/her consent in the interests of the person’s well-being and for the purpose of which the person affected has been subjected to involuntary placement, involving deprivation of liberty with the consent of the custodian and the approval of the court, irrespective of his/her natural will to the contrary.⁶⁹
- [106]. However, the Federal Supreme Court of Justice also states expressly that on the other hand, a narrow interpretation of placement involving deprivation of liberty leads to constraints on the potential involuntary treatment of the person affected. This is based on the circumstance that above and beyond placement involving deprivation of liberty, the law does not give the custodian any further powers of coercion which might permit him/her to give consent to necessary medical treatment against the will of the person affected.⁷⁰

⁶⁷ Germany/Bundesgerichtshof/Decision/case no. XII ZB 236/05 (01.02.2006).

⁶⁸ Germany/Bundesgerichtshof/Decision/case no. XII ZB 236/05 (01.02.2006).

⁶⁹ Germany/Bundesgerichtshof/Decision/case no. XII ZB 236/05 (01.02.2006); for a different view see Germany/Oberlandesgericht Celle/Decision/case no. 17 W 37/05 (10.08.2005).

⁷⁰ Cf. G. Müller, Comment on Germany/Bundesgerichtshof/Decision/case no. XII ZB 185/07(23.01.2008), beck-online, LMK 2008, 267404.

4.2.2.2. Under public law

- [107]. With the exception of the Hesse Deprivation of Liberty Act all the relevant laws of the German federal states stipulate criteria for treatment and for involuntary treatment. In addition all the state laws stipulate that medical procedures and interventions constituting considerable danger to life and health require the consent of the patient and, in cases where he/she is found incapable of consent, the consent of his/her legal representative. Most state laws require the consent of the patient or of his/her legal representative for all medical procedures. Some state laws expressly state that unwillingness to be treated is on its own not a sufficient ground for placement.

4.2.3. Aftercare provisions

- [108]. (39) Most of the state laws governing placement of a person considered to be mentally ill contain provisions detailing the kinds of help to be provided, including aftercare or follow-up assistance designed to facilitate and promote the reintegration of persons considered to be mentally ill in the community following placement and to avoid repeat placement. These laws generally list the aims of the various kinds of assistance without relating them to specific cases.

4.2.4. Involuntary treatment of children

- [109]. (40) As with persons of full age, medical examinations, therapeutic treatment or a medical intervention performed on a minor require the consent of the minor as a holder of basic rights or of his/her legal representative. Legal representatives of minors are as a rule their parents who in principle hold joint custody.⁷¹ The Federal Supreme Court of Justice has ruled that in the case of interventions for which there is only a relative indication and which may have serious consequences for their future life plans, minors have a right to exercise a 'right of veto' against consent by their legal representatives if they possess sufficient powers of judgment.⁷² Whether this applies must be examined in each individual case. The right of the parents to enforce their instructions, if need be with the help of a public authority, can, according to the rulings of the Federal Supreme Court of Justice, be inferred from the law governing care and custody, in particular from Art. 1631 (3) Civil Code.⁷³ This is a major difference from the right of the custodian, who has no powers of coercion with respect to the person for whom he/she is caring. Readers are referred to the comments in Subchapter 4.2.2 above.

4.3. Criteria and definitions

4.3.1. Examination of proportionality

- [110]. (44) According to the rulings of the Federal Constitutional Court on placement under public law, which were adopted by the Federal Supreme Court of Justice for placement under civil law, deprivation of liberty always requires a prior rigorous examination of the proportionality of the act. Accordingly, persons may not be deprived of liberty in cases of less import, and mentally ill persons have 'the freedom to be ill' within certain limits.⁷⁴ On this point readers are referred to

⁷¹ Art. 1626, 1629 Civil Code.

⁷² U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed, Art. 1626 para 12.

⁷³ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed, Art. 1626 para 4.

⁷⁴ Germany/Bundesgerichtshof/Judgment/case no. XII ZB 236/05 (01.02.2006).

Subchapter 4.2.2 above. Hence in all cases of placement and involuntary treatment under private or public law an examination of proportionality is legally required. Some state laws regulating the placement of persons considered to be mentally ill contain explicit provisions whereby the persons concerned should be given help that is specifically designed to avoid placement.

4.3.2. Right to a legal hearing

- [111]. (45) Germany's Basic Law accords everyone the right to a legal hearing, so that it is a constitutional requirement for the opinion and the will of anyone affected to be taken into account in decisions regarding placement (Art. 103 (1) Basic Law). This goes beyond the obligation to merely take note of these; rather the opinion of the person affected must play a role in the judge's consideration of the case⁷⁵. In addition, in line with established Federal Constitutional Court case law, Art. 104 (1) 1 Basic Law stipulates that the personal freedoms guaranteed by Art. 2 (2) 2 Basic Law may be restricted only by law and only in compliance with the procedures prescribed therein. Accordingly, Art. 104 (1) Basic Law takes up the legal caveat already contained in Art. 2 (2) 3 Basic Law and extends it to include all limitations on freedom, for by requiring not only a formal law but also adherence to the procedures prescribed in that law it elevates it to the status of a constitutional requirement, adherence to which is ensured via legal redress in the form of a constitutional complaint.⁷⁶ The Federal Constitutional Court has ruled that a compulsory criterion for the exercise of rule of law is that decisions relating to the deprivation of personal liberty are based on the judge having sufficient clarification of the facts of the case as well as a prior hearing of the person affected that in reality provides a sufficient basis commensurate with the importance of the guarantee of liberty.⁷⁷ The purpose of the hearing in placement proceedings is thus – above and beyond according the person affected the right to a legal hearing – to allow the judge to obtain a personal impression of the person affected and of the nature of his/her illness, so as to put the judge in a position to gain a clear and comprehensive picture of the person's personality and thus to meet his/her obligation to supplement the medical appraisal with control by the court. The personal impression obtained by the presiding judge should thus, according to the Federal Constitutional Court, be at the heart of the *Amtsermittlungsverfahren* [official investigation procedure] and is one of the most important procedural principles of placement law.⁷⁸ For placement procedures under the Civil Code and the state laws on the placement of persons that are considered to be mentally ill the hearing of that person is regulated by Art. 319 of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction.
- [112]. In the legally exceptional cases described below where placement is carried out without the approval of the court (which are in practice representing the vast majority of cases in many regions, see below), approval, including a hearing of the person affected, must be obtained thereafter without undue delay. The state laws governing placement of persons found mentally ill include the corresponding provisions of the Civil Code, Art. 1906 (2) 2 and Art. 1631 b 2. Some state laws expressly specify a timeframe of one or two days in which the hearing of the person affected must take place and court approval obtained retrospectively.
- [113]. The many examples provided by case law clearly show that the judge's obligation to hear the person affected and to gain a personal impression before the decision is made is often contravened.

⁷⁵ H. Jarass in: Jarass / Pieroth (2009): *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 10th ed., Munich: Beck, Art. 103 para 11.

⁷⁶ H. Jarass in: Jarass / Pieroth (2009): *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 10th ed., Munich: Beck, Art. 104 para 1.

⁷⁷ H. Jarass in: Jarass / Pieroth (2009): *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 10th ed., Munich: Beck, Art. 104 para 15.

⁷⁸ H. Jarass in: Jarass / Pieroth (2009): *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, 10th ed., Munich: Beck, Art. 104 para 18.

- [114]. Organisations representing the interests of the persons concerned have complained that temporary placements of persons considered to be mentally ill that take place at weekends or on public holidays in accordance with the relevant state laws in many cases have already come to an end before the patient can be heard or the judge's approval obtained.
- [115]. Involuntary treatment generally requires the consent of the patient or if he/she is incapable of consent of his/her legal representative. On this point readers are referred to Subchapters 4.2.2 and 4.4.4.

4.3.3. Danger thresholds

- [116]. (46) The legal provisions for placement specify various danger thresholds, but these are not always clearly defined.
- [117]. Under private law placement is only ordered if there is a danger that the person affected will kill him/herself or do serious damage to his/her health. Art. 1906 Civil Code does not contain any further stipulations, such as specifying the nature or immediacy of the danger.
- [118]. For public law placements the federal states have made similar basic provisions, but these differ in some of the details. Fundamentally, all the relevant state laws use the police law definitions of danger thresholds, which are also used in other areas to authorise direct coercion measures. Generally the state laws require that there be a considerable and immediate or present danger to life and limb. But here too there are some differences: Hesse, for example, does not use the wording 'considerable' while the laws of five other states do not use the words 'immediate' or 'present' with respect to the danger. Moreover, in the eleven federal states whose laws require the danger to be immediate or present, the definitions of the terms differ. Half of these states avoid giving an express definition in their law on mental illness, so that here the ordinary police criteria apply, namely, whether an event likely to cause damage is imminent. In other words a specific prognosis is required. However, since it is difficult in practice to make such prognoses, half of the federal states have gone over to defining the terms 'immediate' or 'present' in their laws on the person considered mentally ill, thus expanding on the police definition mentioned above to include a further element: in accordance with the new definitions a danger is considered to be immediate or present not only if a specific event likely to cause damage is imminent but also if an event of this kind 'while not predictable, may on account of the special circumstances of the individual case be expected at any time'.⁷⁹
- [119]. This new tendency to order placement on the basis of an unpredictable damaging event that may be expected at any time carries certain risks. Potentially combining a diagnosis of illness with a prediction of danger may result in a shift in the intervention threshold away from a concrete danger and towards an abstract danger. It has yet to be seen to what extent courts will in practice infer an abstract risk of damage that may occur at any time from a particular diagnosis without thoroughly examining the actual level of danger in the individual case.

4.4. Assessment, decision procedures and duration

4.4.1. Assessment

- [120]. (47, 48) Art. 321 of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction stipulates that prior to the placement of a person of full age the evidence in the form of an

⁷⁹ Art. 8 (3) Brandenburg Mentally Ill Persons Act. Identical stipulations are made by the laws of Bremen, Hamburg, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein and Thuringia.

expert appraisal of the necessity of the measure must be formally heard. The expert should be a trained psychiatrist, or at least a doctor with experience in the field of psychiatry. In placement procedures involving minors, in keeping with the procedural regulations for parent and child cases,⁸⁰ the expert should be a child and youth psychiatrist and/or psychotherapist. According to the provisions of the Civil Code the expert appraisal in cases of placement can, pursuant to Art. 167 (6) 2 of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction, also be carried out by a psychotherapist, psychologist, educator or social worker who has worked as a counsellor in a home for children and young people. Art. 167 in combination with Art. 321 of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction also requires that an expert appraisal be obtained in cases of placement of minors.

- [121]. Reports from legal practice⁸¹ indicate that in many cases, the experts asked to provide appraisals do not possess a sufficient level of professional competence. Standards stipulating the medical qualifications of experts called to provide reports to the courts have for practical reasons deliberately not been established because it is feared that in large, less densely populated states there would never be enough experts available. For this reason ‘doctors with experience in psychiatry’ in some states are allowed to provide expert appraisals; in some cases this may be a General practitioner or even a dentist. In the majority of the appraisals the key information providing the basis for a decision on deprivation of liberty has not been provided by a specially trained or experienced psychologist. What is more, the appraisals are often provided by people who do not know the person affected well enough.

4.4.2. Competent authorities

- [122]. (49) The Civil Code and state laws regulating the placement of the mentally ill stipulate that decisions on involuntary placement of persons of full age must be taken by the Custodianship Court as outlined in Art. 312 (1) and (3) of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction together with the provisions of Art. 23 c of the *Gerichtsverfassungsgesetz* (GVG) [Court Constitution Code] introduced into the law by the Law on Procedure in Family Affairs and in Matters of Voluntary Jurisdiction Reform Act. As a result of the amendments made by this Act the Family Court is responsible for decisions on the placement of minors. Unlike the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction, the predeceasing Law on Matters of Voluntary Jurisdiction contained standard provisions governing the placement of both persons of full age and minors, and stipulated that decisions about placement matters should be taken in all cases by the Guardianship Court. The court can also order or approve temporary placement via a provisional order.⁸²
- [123]. Without the approval of the court responsible, placement under private law is only permissible pursuant to Art. 1906 (2) 2 Civil Code and Art. 1631 b 2 Civil Code if delay would be dangerous. In these cases, however, retrospective approval must be obtained without delay.
- [124]. In public law placement cases when a court decision cannot be made in time, the respective state laws regulating the placement of the mentally ill stipulate the criteria for temporary placement and specify which authorities are responsible for this.

⁸⁰ Art. 151 (6) and (7) Familienverfahrensgesetz (Fam-FG) [Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction] in conjunction with Art. 167 Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction.

⁸¹ Cf. M. Regus/K. Gries (2005): *Psychiatrische Krisenhilfe und Unterbringungspraxis*, Düsseldorf: pp. 136 – 137; W. Crefeld (2005), *Gesundheitsberichterstattung zur Anwendungspraxis des Unterbringungsrechts nach dem PsychKG NRW und de mBetreuungsrecht des Bundes*, Bochum: FESA, pp. 53-58; H. Melchinger (2006): *Vorschläge für Qualitätsanforderungen an Verfahrensweisen bei Unterbringungen nach § 1906 BGB und Entwurf eines Instrumentes zur Dokumentation*, Hannover, pp.6-7.

⁸² Art. 331 Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction.

- [125]. Decisions on involuntary placement under the provisions of criminal law are taken by the court responsible for the criminal proceedings.
- [126]. (50) Involuntary public law placements are terminated or revoked by the same court that was responsible for ordering the placement originally. In many states placement ends automatically if it was ordered for a limited period of time and has not been extended by the court before this time has elapsed.
- [127]. In private law placements under Art. 1906 (3) Civil Code placement must be terminated by the custodian as soon as the criteria for the placement no longer apply. In such cases the custodian merely informs the court about the termination of placement. The court rules only if it learns that the custodian has not fulfilled his/her obligation to terminate the placement.
- [128]. The court decides to terminate involuntary treatment only when it has been called on to do so. The law stipulates that involuntary treatment must be terminated as soon as it ceases to be necessary.
- [129]. (51) The legal provisions governing initial involuntary placement also apply to cases where placement that was initially voluntary later becomes involuntary. This applies to both private and public law placements.

4.4.3. Time limits and duration

4.4.3.1. Time period between examination and placement

- [130]. (52) The law does not explicitly specify how old the expert appraisal or testimony (see Subchapter 4.4.1) may be. Implicit restrictions can be inferred from the fact that the expert appraisal or testimony must consider whether from a medical point of view the criteria for a specific imminent placement measure are fulfilled. And since this assumes the existence of an immediate danger or a danger that can be expected at any time (see Subchapter 4.3.3), the court can only consider current appraisals and testimony that refer to the state of the person affected at the time when the court makes its decision.
- [131]. Over and above the implicit restrictions mentioned above the law does not specify a maximum period of time than can elapse between the doctor's examination of a patient and the beginning of an involuntary placement. Reports by patients' organisations and hospitals refer to a spectrum ranging from a few hours to eight days.

4.4.3.2. Emergency cases

- [132]. (53) In emergencies, when a court decision cannot be obtained in time, the court order, including a hearing of the person affected, must be obtained in retrospect without delay. Most of the laws of the federal states stipulate that the patient must be released if a court decision has not been obtained at the latest by the end of the day following placement (e.g. Art. 12 (5) of the Brandenburg Mentally Ill Persons Act). Baden-Württemberg is an exception with an unusually long deadline for a court decision. Art. 4 (4) of the Placement Act stipulates that the psychiatric institution must only have sent the application for a court order to the court by the end of the third day after placement has begun at the latest; hence the court is not required to actually make a decision within this three-day period.
- [133]. Reports from practice illustrate that in fact such emergencies are not exceptions, as provided for by the law, but rather the rule, since most hospital admissions take place outside court hours. Hence in most cases the person affected is already in hospital when the court hearing takes place; it is then

usually the hospital that provides the expert appraisal for the court. In such a situation conflicts of interest on the part of the doctors issuing the appraisal cannot be ruled out. In addition, it sometimes happens that for organisational reasons (e.g., if there is a weekend in between) more than two days elapse before a hearing can be held, and by that time placement has already been terminated again because there is no medical reason to continue it.

- [134]. Organisations representing patients' interests have also pointed out that in cases when the court hearing takes place only after the patient has been admitted to hospital the outcome of the hearing and the subsequent decision of the court may be distorted if, as often happens, the patient is already under medication at the time of the hearing. Since medication can considerably change both the cognitive functions and the behaviour of the patient, it is in some cases impossible for the judge to draw retrospective conclusions about the situation that led to placement in the first place. This ultimately makes it impossible for the judge to decide whether the criteria for involuntary placement originally existed and hence whether the placement was permissible or impermissible.

4.4.3.3. Maximum duration of placement

- [135]. (54) Pursuant to Art. 329 of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction placement ends as a rule at the latest after a year, in exceptional cases where sufficient grounds exist at the latest after two years, if it has not been expressly extended by a court order before this period has expired. The legal criteria applying to extensions of placement are the same as those that apply to initial placement. There is no particular deadline for ordering the extension of placement; the order must merely have been obtained before one year (or in special cases two years) have elapsed.

4.4.4. Health care interventions

- [136]. (55) Regarding the permissibility of health care interventions in custodianship cases which are governed by private law, reference is made to [193] below.
- [137]. Under public law, the laws of the federal states do not specify any particular treatment methods but instead lay down general criteria for the permissibility of treatment. According to these laws patients can generally be treated against their will if treatment is necessary to avoid considerable danger to the patient's own health or that of other people.
- [138]. Most of the states⁸³ do have specific provisions regulating treatment that in itself constitutes a considerable danger to the life or health of the patient. These provisions vary considerably, however. Only in Thuringia is such treatment completely impermissible. In ten states⁸⁴ such treatment may only be administered with the consent of the patient, or if he/she is incapable of consent, with the consent of his/her legal representative. Brandenburg in addition requires such treatment to be approved by the court, if a custodian is to give consent on behalf of the patient. In Hesse and Mecklenburg-Western Pomerania the patient's legal representative can give consent on behalf of the patient, irrespective of the latter's ability to consent.

⁸³ Exceptions are Bremen, North Rhine-Westphalia and Saarland.

⁸⁴ Berlin, Brandenburg, Baden-Württemberg, Bavaria, Hamburg, Lower Saxony, Rhineland-Palatinate, Saxony, Saxony-Anhalt and Schleswig-Holstein.

- [139]. Involuntary treatment that would change key aspects of the patient's personality is declared to be generally impermissible by about half the states.⁸⁵ In five states⁸⁶ this also applies to treatment to test drugs or medical procedures.
- [140]. Forced feeding is only expressly regulated by four states;⁸⁷ here it is permissible only to avoid damage to life and limb of the patient.

4.4.5. Special coercive measures

- [141]. (56) Alongside the legal provisions already described governing treatment the laws on the 'mentally ill' of two-thirds of the states also include special provisions governing so-called special security measures. In general these expressly list curfews and the isolation of the patient as well as immobilisation. Four states mention medical sedation as well as mechanical immobilisation. This tallies with reports by patients' organisations, which described the aforementioned measures as customary.
- [142]. These measures are not classified by the law as treatment measures or part thereof but as special measures restricting freedom, which as stipulated by Art. 104 Basic Law, are subject to a higher legal caveat (cf. Subchapter 4.3.2). They are thus subject to special criteria which must be fulfilled irrespective of whether or not they take place in connection with involuntary treatment.
- [143]. All the state laws governing the use of special security measures stipulate as a prerequisite the current existence of a considerable danger that the person affected will kill or seriously injure him/herself or others, will become violent or will leave the institution without permission.⁸⁸ One state, however, specifies a considerably lower intervention threshold: in Saxony the law says that security measures are permissible if they are 'essential for the purpose of placement and to avoid or eliminate considerable disturbances to hospital order'. (Art. 31 Saxony Law on Assistance and Placement in Cases of Mental Illness).
- [144]. Unless a delay would be dangerous, special security measures can only be ordered by a doctor, must be kept to an absolute minimum in terms of duration and precisely documented. The law does not require a court order.
- [145]. It is not possible to judge to what extent these rules are adhered to in practice since no reliable database exists. Organisations representing patients' interests have complained that the law is subject to broad interpretation.

4.4.6. Reviews and appeals

- [146]. (57) The person affected has a right to appeal court decisions. With private or public law placements the person can either lodge a complaint with the court that issued the order or with the court in the district where the hospital is located. The time limit for lodging complaints is usually four weeks, with temporary placement orders two weeks. As well as the person him/herself, under certain conditions relatives, persons enjoying the patient's confidence and the head of the institution where the person is placed are also entitled to lodge a complaint. In cases where a procedural curator has been appointed – see Subchapter 4.4.7 below – this person may also lodge a complaint on behalf of the patient (Art. 335, 336 in combination with Art. 58 et seq. of the Law on Procedure in Family Affairs and in

⁸⁵ Berlin, Brandenburg, Bremen, Hamburg, Mecklenburg-Western Pomerania, Saxony-Anhalt, Thuringia.

⁸⁶ Berlin, Brandenburg, Bremen, Hamburg, Saarland.

⁸⁷ Bremen, Saxony, Saxony-Anhalt, Thuringia.

⁸⁸ E.g. Art. 21 Brandenburg Mentally Ill Persons Act.

Matters Pertaining to Voluntary Jurisdiction). In cases of involuntary placement under criminal law the person's right to appeal is governed by the provisions of the *Strafprozessordnung* (StPO) [Code of Criminal Procedure] (Art. 304 ff.). In cases of temporary placement the rigorous criminal law regulations on review of remand in custody apply; these include in certain cases a review by the superior higher regional court.

- [147]. The patient can apply for the court to examine the legality of medical procedures and other measures performed by third parties.
- [148]. However, such retrospective examinations of the legality of measures by the courts usually only have a limited effect in the spheres of involuntary placement and treatment. Formal legal instruments are often ineffective due to a *fait accompli*, for example because the involuntary placement in question has in the meantime anyway been terminated. In addition the ability of the person affected to take legal recourse is often limited because he/she has been placed under sedation and has therefore lost the will to fight for his/her rights before the courts.
- [149]. For this reason we would here like to briefly outline the protective function of independent, preventive monitoring and low-threshold opportunities for appeal. Depending on the specific legal provisions in each state, affected persons have an informal right to appeal to the medical director of the hospital, to the patients' complaints office or to the responsible supervisory authority. Many states also provide for a right to appeal to visiting or supervisory commissions. These commissions were established as part of the psychiatric reforms that took place in the 1970s and 1980s and are charged with regularly inspecting psychiatric institutions and making recommendations. In terms of personnel, methods of working and influence these commissions vary considerably from one state to another. Researchers have voiced doubts about the effectiveness of the monitoring function carried out by these commissions.⁸⁹
- [150]. In recent years a network of non-state independent complaints offices has evolved in the field of psychiatry, which provide low-threshold channels to support patient appeals.⁹⁰

4.4.7. Legal aid

- [151]. (58) Courts do not charge costs for proceedings concerning placement matters (Art. 128 b *Kostenordnung* – KostO [Regulations on Ex-parte Costs]).
- [152]. To provide support for the person affected Art. 317 of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction stipulates the appointment of a procedural curator at state expense if there is reason to fear that the person will not be able to exercise his/her right to a legal hearing pursuant to Art. 103 Basic Law without assistance. One of the criteria for deciding whether it is necessary to appoint a procedural curator is how serious the encroachment on the person's rights is. If the court wishes not to appoint a procedural curator, it must give reasons.
- [153]. If the legal and practical complexity of the case appears to be above average and if the person affected submits an application to this effect, Art. 78 of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction gives him/her the right to have a lawyer of his/her choice appointed to assist him/her free of charge. If these narrow criteria apply, the appointment of a lawyer always takes priority over the appointment of a procedural curator (Art. 317 (4) of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction).

⁸⁹ H. Pollähne/M. Eink, in: Deutsches Institut für Menschenrechte (2007): *Prävention von Folter und Misshandlung in Deutschland*, Baden-Baden: Nomos, pp. 133 – 148 and 149-174.

⁹⁰ An up-to-date list of complaints offices can be found on the website of the German Social Psychiatry Society (Deutsche Gesellschaft für Soziale Psychiatrie e. V., DGSP), <http://www.beschwerde-psychiatrie.de>.

5. Competence, Capacity and Guardianship

- [154]. (59) The following comments refer exclusively to the general legal conditions applying to persons of full age. In due course of this study, “competence” is understood as the natural ability to act to be owned by every human being (*allgemeine Handlungsfähigkeit*), while the term “capacity” – along the line of Art. 12 of the CRPD – refers to all legal regulations establishing and guaranteeing the recognition of a person’s legal personality and further the legal capacity to act (*Rechts- und Handlungsfähigkeit*).
- [155]. In this Chapter and in Chapter 4 we describe and analyse the current legal provisions. We also consider and update the work of the Disability High Level Group and the findings of the Comparative Study on the Legal System of the Protection of Adults Lacking Legal Capacity referred to in the FRA Guidelines.
- [156]. (60) The German Civil Code contains provisions for the legal institution of *rechtliche Betreuung* [legal custodianship]. These state that, provided that the legal criteria apply, the Custodianship Court shall appoint a custodian for a person of full age who by reason of a mental illness or a physical, intellectual or emotional disability cannot in whole or in part take care of his/her affairs.
- [157]. Since the law reform in 1992, the appointment of a legal custodian as such does not have any effect on the constitutive legal capacity of a person to contract. Capacity or incapacity to contract must be established by the civil court that is responsible in the individual case for each contract in question.
- [158]. The *Drittes Gesetz zur Änderung des Betreuungsrechts* [Third Act Amending the Custodianship Act] and the Law on Procedure in Family Affairs and in Matters of Voluntary Jurisdiction Reform Act which came into force in September 2009 amends the legal provisions concerning living wills and legal custodianship and placement procedures affect the legal capacity of persons with mental (intellectual, emotional or psychological) disorders or intellectual disabilities.⁹¹

5.1. Competence and capacity

5.1.1. *Allgemeine Handlungsfähigkeit* [Competence]

- [159]. (61) German constitutional law comprehensively recognises and safeguards the freedom to self-determine one’s actions by establishing basic rights to freedom. The Federal Constitutional Court has ruled that Art. 2 (1) Basic Law guarantees competence in a global sense and thus protects for any form of human action.⁹²
- [160]. Apart from an absolutely protected core area of private life on which public authority has no influence, that competence is however only guaranteed within the limits and is subject to constitutional order.
- [161]. As described in Chapter 3, all natural persons have basic rights. However, such might be constricted concerning persons with mental (intellectual, emotional or psychological) disorders or intellectual disabilities in cases when a custodian has been appointed for them and they are incapable of asserting their basic rights against the custodian’s wishes.

⁹¹ Germany/BGBl 2008 I/2586.

⁹² Germany/Bundesverfassungsgericht/Judgment/case no. 1 BvR 921/85 (06.06.1989).

5.1.2. Capacity

5.1.2.1. Legal capacity in civil law

[162]. Art. 1 of the Civil Code states that the legal capacity of a human being begins on completion of birth. Legal capacity is independent of citizenship, gender, origin or the existence of abnormalities. The Civil Code does not use the generic term *Handlungsfähigkeit*. In this code, capacity also includes capacity to contract, *Deliktsfähigkeit* [capacity to commit an offence] and *Verantwortlichkeit für die Verletzung von Verbindlichkeiten* [responsibility for breach of obligations].⁹³

- Capacity to contract
 - German civil law is based on the principle of private autonomy. It leaves it to the individual to shape his/her living conditions on his/her own responsibility by means of legal transactions within the framework of the legal order. Capacity to contract is the capacity to engage in legal transactions autonomously with full effectiveness. The Civil Code assumes as a rule that every person has the capacity to contract and therefore only codifies the exceptions, *Geschäftsunfähigkeit* [incapacity to contract] and *beschränkte Geschäftsfähigkeit* [limited capacity to contract], the latter of which applies solely to minors.⁹⁴
 - The Federal Constitutional Court has stipulated that the state must fundamentally respect the provisions laid down concerning private autonomy.⁹⁵ Nonetheless, the Court has ruled that the private autonomy guaranteed by Art. 2 (1) Basic Law presupposes that the conditions for an individual to exercise self-determination are actually fulfilled. In cases where one contracting party carries so much weight that he/she can in fact determine the contract content unilaterally, the role of the law is to try to ensure that the basic rights of both contracting parties are observed to prevent self-determination from turning into heteronomy for one contracting party.
- Capacity to commit an offence
 - The Civil Code codifies the capacity to commit an offence in terms of the accountability of the person inflicting damage (tort), for instance in terms of his/her civil law responsibility for damage inflicted on another person.⁹⁶ Art. 827 (1) Civil Code states that a person of full age is not responsible for damage inflicted on another person if he/she does so in a state of unconsciousness or in a state of pathological mental impairment precluding free exercise of will. A highly clouded consciousness that precludes appreciation of the content and nature of the act either entirely or in a specific sense is sufficient to constitute unconsciousness. The second alternative mentioned in Art. 827 (1) Civil Code is that a state of pathological mental impairment precluding free exercise of will corresponds with the criteria for incapacity to contract laid down in Art. 104 no. 2 Civil Code.⁹⁷

⁹³ H. Heinrichs/J. Ellenberger in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., Introduction to § 104 para 1 and 2.

⁹⁴ H. Heinrichs/J. Ellenberger in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., Introduction to § 104 para 1 and 2.

⁹⁵ U. di Fabio in: Maunz-Dürig (Ed.), *Grundgesetz: Kommentar*, Munich: Beck, Art. 2 (1) para 108.

⁹⁶ H. Sprau in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., Munich: Beck, § 827 para 1.

⁹⁷ H. Sprau in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., Munich: Beck, § 827 para 1.

5.1.2.2. Criminal capacity

- [163]. The Criminal Code codifies the criteria for lack of criminal capacity due to a mental disorder and for the criminal capacity of an offender to be diminished for this reason.⁹⁸

5.1.2.3. *Verfahrens- und Prozessfähigkeit* [Capacity to sue or be sued and to engage in legal proceedings]

- [164]. In the provisions of the law on civil and administrative procedure⁹⁹ and the *Sozialgerichtsgesetz* (SGG)¹⁰⁰ [Social Welfare Courts Act], the capacity to sue and be sued, along with the capacity to engage in administrative proceedings in public law and in social law in principle is linked to capacity to contract according to civil law.
- [165]. Only in proceedings concerning custodianship and placement measures are the persons affected deemed capable of engaging in proceedings regardless of their capacity to contract. The Federal Constitutional Court found as a general principle of the German legal order that to protect their rights even people declared legally unfit to manage their own affairs and mentally ill persons¹⁰¹ should be deemed capable of engaging in proceedings in which measures to be taken on account of their mental state are decided.¹⁰² Following on from this ruling, the Federal Constitutional Court now assumes that mentally ill persons and persons with legal custodians have the capacity to engage in proceedings in which decisions concerning their mental illness and custodianship are made.¹⁰³ These proceedings mainly pertain to custodianship and placement pursuant to the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction in which those affected have the capacity to engage in proceedings because of the provisions that exist there.¹⁰⁴
- [166]. Anyone can file a *Verfassungsbeschwerde* [constitutional appeal] with the Federal Constitutional Court. Consequently, everyone who has one of the basic rights laid down in Art. 93 (1) 4 a Basic Law and rights equivalent thereto has the capacity to file an appeal. The *Bundesverfassungsgerichtsgesetz* (BVerfGG) [Federal Constitutional Court Act] does not define criteria for the capacity to sue or be sued (*Prozessfähigkeit*). Duely, Federal Constitutional Court decisions in individual cases concerning the capacity to sue or be sued are based on analogies with the other procedural laws and especially on the individual basic rights claimed.¹⁰⁵
- [167]. In criminal proceedings, the criterion for the capacity to face trial is not the capacity to contract, but in this context it is a sufficient degree of maturity and the freedom to formulate and exercise will. Capacity to face trial is to be judged as the individual proceedings demand and in the case of adult defendants is ruled out only on grounds of serious physical or mental deficiencies.¹⁰⁶

5.1.2.4. Causes determining legal incapacity

- [168]. (62) Art. 104 (2) Civil Code states that anyone who is in a state of pathological mental impairment that prevents the free exercise of will is incapable of contracting unless the state by its nature is a temporary one. To protect the person affected, Art. 105 (1) Civil Code stipulates that the declaration

⁹⁸ Art. 20 and 21 Criminal Law.

⁹⁹ Art. 52 Zivilprozessordnung (ZPO) [Code of Civil Procedure]; Art. 62 Administrative Court Procedures Code.

¹⁰⁰ Art. 71 Sozialgerichtsgesetz (SGG) [Social Welfare Courts Act].

¹⁰¹ According to the law as it stands, Art. 104 no. 2 Civil Code states that these are the so-called legally unfit.

¹⁰² B. Pieroth in: Jarras/Pieroth (2009) *Grundgesetz: Kommentar*, 10th ed., Munich: Beck, Art. 93 para 49.

¹⁰³ B. Pieroth in: Jarras/Pieroth (2009) *Grundgesetz: Kommentar*, 10th ed., Munich: Beck, Art. 93 para 49.

¹⁰⁴ Art. 275 and 316 Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction.

¹⁰⁵ B. Pieroth in: Jarras/Pieroth (2009) *Grundgesetz: Kommentar*, 10th ed., Munich: Beck, Art. 93 para. 49.

¹⁰⁶ L. Meyer-Großner (2003) *Strafprozessordnung: Kommentar*, 46th ed., Munich: Beck, Introduction para 97.

of intent of a person incapable of contracting is without exception void. In court practise, the criteria for the assumption of incapacity to contract are treated restrictively. Accordingly, it cannot be assumed that a person is precluded from free exercise of will if he/she has suffered from mental disorders for a long time. Nor is a person's weakness of will or susceptibility to influence a sufficient ground for incapacity to contract. However, the exercise of will is precluded if the person affected has an IQ of less than 60.¹⁰⁷ See Subchapter 2.2.1.7 for the authoritative Federal Supreme Court of Justice rulings on the preclusion of free exercise of will.

- [169]. Moreover, according to Art. 104 no. 2 Civil Code this individual state must be permanent.¹⁰⁸ In the case of temporary disorders such as unconsciousness or total intoxication the provision in Art. 105 (2) Civil Code applies, with the legal consequence that the declaration of intent made in this state is void.¹⁰⁹
- [170]. The Federal Supreme Court of Justice has ruled that incapacity to contract is not a medical finding but a legal consequence. For establishing this consequence, the court must take critical account of expert opinion.¹¹⁰ As part of its free consideration of evidence, the court must consider the reports of experts carefully and critically. If the court wishes to dissent from the expert opinion, the Federal Supreme Court of Justice has ruled that the court in question must state the reasons for its dissenting conviction and make it clear that the dissenting judgment has not been influenced by a lack of expertise.
- [171]. It can be stated that the relevant provisions relating to incapacity to contract mainly affect persons with mental (intellectual or emotional) disorders or disabilities as well as persons with psychological disorders. Taking into account the assessment criteria established in the case law of the Federal Constitutional Court and Federal Supreme Court of Justice, these persons are not completely excluded from legal relations but only in respect of certain legal transactions or areas of life for which the criteria for incapacity to contract are fulfilled. However, the decisive factor is whether the criteria are actually applied in individual cases, especially in the context of judicial determination of incapacity to contract. As regards judicial appraisal of incapacity to contract there is a broad bandwidth of rulings, depending to a considerable degree on the background experience of the relevant experts and judges.

5.1.2.5. Procedures and appeals

- [172]. (69, 70, 74) Incapacity to contract is established by the civil court that is responsible in the individual cases on the basis of the regulations in force, cf. Subchapter 5.1.2.4. The wording of Art. 104 no. 2 Civil Code merely lists the criteria for incapacity to contract that the court must check in each individual case. Since 1992, the court has no longer been possible to ascertain constitutive incapacity to contract. Determining incapacity to contract in keeping with the provisions of the Civil Code is a civil law dispute for which, pursuant to the provisions of the Code on Court Constitution, the ordinary courts are responsible.¹¹¹ The criteria for an appeal or a review must, like those for a possible constitutional appeal to the Federal Constitutional Court, be specially considered in each individual case and are subject to the relevant procedural regulations. Measures directed to the protection of the respective person or its property fall within the jurisdiction of the Custodianship Court. Such measures may – subject to the scope of his/her tasks – also be taken by the appointed custodian, cf. Subchapter 5.2.2 below (para. [180] - [187]). The lawful implementation of such measures taken by a

¹⁰⁷ H. Heinrichs/J. Ellenberger in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., Introduction to § 104 para 5.

¹⁰⁸ H. Heinrichs/J. Ellenberger in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., Introduction to § 104 para 4 and 5.

¹⁰⁹ H. Heinrichs/J. Ellenberger in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., Introduction to § 104 para 4.

¹¹⁰ Germany/Bundesgerichtshof/Judgment/case no. V ZR 126/00 (18.5.2001) p. 5.

¹¹¹ Art. 12, 13 *Gerichtsverfassungsgesetz* (GVG) [Court Constitution Code]; ordinary courts being defined as the Amtsgericht, the Landgericht and the Oberlandesgericht.

custodian is monitored by the Custodianship Court. In certain cases, measures intended by a custodian require consent of the Custodianship Court, see Subchapter 5.2.3.4 below (para [193]).

5.1.2.6. Degrees of incapacity

[173]. (63) The regulation concerning natural incapacity to contract described above was criticised as disproportionate and therefore unconstitutional interference in the self-determination of a person with disabilities because it included everyday transactions and legally solely beneficial declarations of intent.¹¹² In 2002, by means of the *Gesetz zur Änderung des Rechts der Vertretung durch Rechtsanwälte vor den Oberlandesgerichten* (OLGVertrÄndG) [Act to Amend the Law on Representation by Lawyers Before Regional Appeal Courts] designed to protect persons incapable of contracting and to safeguard legal relations, a number of regulations on the capacity to contract of persons incapable of contracting¹¹³ were inserted into the relevant laws.

- Everyday transactions

- Art. 105 a Civil Code gives a person incapable of contracting the possibility of entering into everyday transactions, with or without a consideration, that can be effected with funds of low value. The contract entered into is regarded as being effective with regard to performance and consideration. The deciding factor for the constituent fact ‘everyday’ is whether the generally accepted view counts the transaction as one of the everyday transactions.¹¹⁴ These include, for example, the purchase of articles of everyday use and simple foodstuffs, drinks and tobacco intended for immediate consumption that do not exceed the customary extent in quantity and value, along with simple services. The fiction of Art. 105 a (1) Civil Code merely means that reversal is ruled out as soon as performance has been rendered and consideration effected. However, the contract is not effective from the outset. As a result, no reciprocal contractual obligations are established that could run contrary to protection of the person incapable of contracting. Pursuant to Art. 105 a 2 Civil Code this fiction does not apply in the case of considerable danger to the person or the property of the person incapable of contracting.¹¹⁵
- Following the rationale of Art. 105 a Civil Code, simultaneously with this regulation provisions were included in the Social Code Book IX and the *Heimgesetz* (HeimG) [Homes Act] that were designed to protect a not inconsiderable proportion of persons incapable of contracting who are parties to *Werkstatt- und Heimverträgen* [workshop and home agreements] from clawbacks in the event of an agreement being wound up and from summary termination of an agreement.¹¹⁶ The *Wohn- und Betreuungsvertragsgesetz* (WBVG) [Residential and Custodianship Agreement Act], which came into force on 1 October 2009, superseded the contract law provisions of the Homes Act and included the existing Home Act provisions to protect persons incapable of contracting in Art. 4 (2) of the Residential and Custodianship Agreement Act.¹¹⁷

- Partial capacity to contract

- A person has partial capacity to contract if his/her incapacity to contract is limited to a specific category of affairs and he/she is therefore incapable of contracting in this area alone.¹¹⁸ The Federal Supreme Court of Justice has ruled that this applies if, due to a pathological mental impairment, the person affected is incapable in that sphere of life of formulating his/her will

¹¹² F. Welti (2005) *Behinderung und Rehabilitation im sozialen Rechtsstaat : Freiheit, Gleichheit und Teilhabe behinderter Menschen*, Tübingen: Mohr, p. 506.

¹¹³ E.g. Art. 105 a Civil Code, Art. 138 (5), (6) and (7) Social Code Book IX.

¹¹⁴ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 14/9266 (05.06.2002), explanations of Art. 25 (2).

¹¹⁵ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 14/9266 (05.06.2002), explanations of Art. 25 (2).

¹¹⁶ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 14/9266 (05.06.2002), explanations of Art. 30.

¹¹⁷ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 16/12882 (06.05.2009) Appdx. 1 - *Bundestags-Drucksache* 16/12409 (24.03.2009), ground B. Special mention of Art. 1 to Art. 4 (2).

¹¹⁸ H. Heinrichs/J. Ellenberger in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 104 para. 6.

freely and uninfluenced by the existing disorder or of acting according to an appropriately gained understanding, whereas this is not the case in other spheres of life. In contrast, the Federal Supreme Court of Justice has made no provision for relative incapacity to contract limited to especially difficult transactions.¹¹⁹

- Capacity to marry
 - Art. 1304 Civil Code stipulates that a person who is incapable of contracting pursuant to Art. 104 no. 2 Civil Code may not enter into a marriage. Nonetheless, the Federal Constitutional Court has ruled that, notwithstanding considerable doubts as to capacity to contract, a partial capacity to contract as defined in Art. 104 no. 2 Civil Code may exist with regard to marriage and this must be verified in each individual case.¹²⁰ Readers are referred to the further comments on capacity to marry in Subchapter 3.7.
- Capacity for parenthood
 - Art. 1673 (1) Civil Code states that the parental custody of a parent is suspended if he/she is incapable of contracting pursuant to Art. 104 no. 2 Civil Code. However, partial capacity to contract suffices if it relates wholly or partially to parental custody.¹²¹ Readers are referred to the comments on capacity for parenthood in Subchapter 3.8.
- Testamentary capacity
 - Art. 2229 (1) and (4) Civil Code stipulate that minors who have not reached 16 years of age and persons over the age of 16 who are unable to recognise the importance of a declaration of intent on account of pathological mental impairment, mental deficiency or derangement of the senses pursuant to the provisions of Art. 104 and 105 (2) Civil Code may not make a will. This applies if their deliberations and volitions are influenced by pathological ideas or feelings in such a way as to be controlled by them.¹²²
- Incapacity to contract and capacity to consent
 - For acts of a strongly personal character that are tantamount to business transactions, such as consent to restriction of liberty, bodily injury and medical intervention, capacity to contract must not be a schematic consideration.¹²³ The Federal Constitutional Court made it clear in an early decision of 1960 that ‘an encroachment on personal freedom is without doubt not conceptually ruled out merely by the fact that the person whose personal freedom has been encroached upon is not fully able to contract’. According to the Federal Constitutional Court the only criterion that matters in the case of encroachments on the freedom of people who lack full capacity to contract is their actual, natural will. The consent of people incapable of contracting to breaches of their strictly personal interests (such as the right to freedom and physical integrity) is legally valid insofar as they are able, by virtue of their intellectual and moral maturity, to grasp the scope and significance of the encroachment in question and of their consent to it.¹²⁴ Similarly, the effectiveness of consent to medical intervention such as sterilisation or termination of pregnancy depends not on capacity to contract but on the ability of the person affected to understand or to judge.¹²⁵
 - According to Federal Supreme Court of Justice case law, all examinations, treatments and medical interventions that impinge upon physical integrity encroach on the patient’s right to

¹¹⁹ Germany/Bundesgerichtshof/Judgment/case no.V ZR 126/00 (18.05.2001).

¹²⁰ Germany/Bundesgerichtshof/Judgment/case no.V ZR 126/00 (18.05.2001).

¹²¹ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1673 para 2.

¹²² W. Edenhofer in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 2229 para 8.

¹²³ H. Heinrichs/J. Ellenberger in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., Introduction to § 104 para 8.

¹²⁴ H. Sprau in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 823 para. 38.

¹²⁵ H. Sprau in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 823 para. 38, 39; H. Fischer (2009), *Strafgesetzbuch: Kommentar*, 56th ed., 2009, § 218a para. 16.

physical integrity. The patient's consent justifies these interventions. The consent is ineffective, however, if it is not given voluntarily but by means of violence, illegal threats or coercion.¹²⁶

5.1.2.7. Right of self-determination and living will

- [174]. According to Federal Supreme Court of Justice human dignity as guaranteed by Art. 1 (1) Basic Law requires the right of self-determination when exercised in a state in which the individual is capable of consent to be respected even if the person in question is no longer in a state to decide for him- or herself.¹²⁷ The Court has ruled that an earlier statement of will by which a patient has consented to or rejected measures of the kind in question in the situation that has now arisen remains valid insofar as the patient has not revoked it. Further, the subsequent incapacity to consent in no way changes the ongoing validity of the previous statement of will pursuant to the legal concept defined in Art. 130 (2) Civil Code. Even life-sustaining measures may not be undertaken if a patient is incapable of giving consent at the time of the medical measure and the withholding of consent corresponds with his/her previous intent as expressed in the form of a living will.
- [175]. In 2009, after 'struggling' with legislation for over six years the German parliament passed the third reading of a Bill making the Federal Supreme Court of Justice ruling on the validity of a living will binding, especially on the patient's custodian.¹²⁸ The Third Act Amending the Law on Custodianship including living will provisions that apply only to custodianship or power of attorney came into force on 1 September 2009.

5.2. Custody

5.2.1. Basic features

- [176]. (64) Since the Custodianship Act came into force on 1 January 1992, ever since the concept of guardianship has only applied to minors. Guardianship for adults was replaced by the concept of 'legal custodianship'.¹²⁹
- [177]. (65) The quintessence of custody is that a custodian is appointed for a person of full age authorised to represent the person in custody to the extent specified by a court and upholding his/her right to self-determination to the greatest possible degree irrespective of capacity or incapacity to contract. The appointment of a custodian does not in itself have any immediate effect on the person in question's right to marry or to make a will or on the parental right of custody. According to Art. 1903 (2) Civil Code a consent caveat is ruled out because the custodian is not to influence decisions of a strictly personal nature for which custodianship may not be legally required.¹³⁰
- [178]. The Custodianship Court must in selecting and appointing a custodian comply with a proposal by an affected person of full age on who the custodian should be, such as in a *Betreuungsverfügung* [precautionary appointment of a legal representative] or a *Vorsorgevollmacht* [durable power of attorney], as long as it does not run counter to the patient's well-being. This also applies, according to Art. 1897 (4) 2 Civil Code, to a refusal by the person in question to accept the appointment of a certain person. Subject to the criteria laid down in Art. 1899 (1) Civil Code the Custodianship Court

¹²⁶ H. Sprau in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 823 para. 39.

¹²⁷ Germany/Bundesgerichtshof/Judgment/ case no. XII ZB 2/03 (14.03.2003).

¹²⁸ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 16/8442 (06.03.2008), Entwurf eines Dritten Gesetzes zur Änderung des Betreuungsrechts, ground A. General, para. 4 lit. a.

¹²⁹ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., Introduction to § 1773 para 1.

¹³⁰ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1903 para 10.

may appoint several custodians, and in cases of consent to sterilisation it is even legally required to appoint a special custodian, the ‘*Sterilisationsbetreuer*’ [sterilisation custodian]. According to Art. 1896 (3) Civil Code a so-called control custodian may even be appointed to assert the patient’s rights against his/her attorney and to assign expressly to the control custodian the authority to revoke powers of attorney granted. According to Federal Constitutional Court the appointment of a control custodian with express authority to revoke powers of attorney granted constitutes for the person affected an important inroad into that person’s right of self-determination.¹³¹ Granting durable powers of attorney to prevent legal custodianship is in the opinion of the Federal Constitutional Court an expression of the right of self-determination guaranteed by Art. 2 (1) in combination with Art. 1 (1) Basic Law.

[179]. In custodianship cases, especially including the appointment of a custodian and the revocation of custodianship, the court must appoint a special advocate for the person in question, subject to the criteria stated in the Act, should this be necessary to look after the person’s interests.¹³² On the basis of the Law on Procedure in Family Affairs and in Matters of Voluntary Jurisdiction Reform Act the previous regulation on the appointment of a special advocate was amended to state that the appointment ends with the final decision and that the special advocate must not be specially appointed for each level of jurisdiction as in the past.

5.2.2. Conditions and procedures

[180]. (66) A custodian is appointed irrespective of the person in question’s capability to contract and thereby also when the person in question is legally capable and is not incapable to contract. The criteria for appointing a custodian derive solely from the provisions of Art. 1896 Civil Code, which states that in deciding whether or not the appointment is necessary a distinction must be drawn between the need for and the necessity of custody. The need arises from a person’s inability to look after his/her own affairs owing to the medical criteria for custody stated in Art. 1896 (1) Civil Code. Insofar as this inability is due to mental illness or a physical, intellectual or emotional disability the Custodianship Court will appoint a custodian for persons of full age on the basis of their application or in its official capacity if that does not run counter to the free will of the person in question and the necessity of custody also exists as per Art. 1896 (2) Civil Code. The law expressly states that an application may also be made by someone with an incapacity to contract. For persons of full age with mental illness or intellectual or emotional disabilities the law does not, however, in contrast to cases of physical disability, specify the criteria for appointing an official custodian.¹³³ The law therefore employs different criteria for people with mental (psychological, emotional or intellectual) disorders or mental disabilities than it does for people with other impairments.

[181]. The appointment must include a description of the scope of the custodian’s tasks. They may include, depending on the individual case, the following:

- Healthcare in respect of all measures relating to the state of health of the person being taken care of, including placement involving deprivation of liberty and other related measures along with access to the patient’s records.
- The right to determine the place of stay, including placing the person being taken care of in a residential or care home.
- Care of assets, especially including asset management and power of disposal over bank accounts and assets.
- Representation in dealings with the authorities and the courts.

¹³¹ Germany/Bundesverfassungsgericht/Decision/case no. 1 BvR 1415/08 (10.10.2008).

¹³² Art. 276 Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction.

¹³³ Art. 1896 (1) 3 Civil Code.

- Postal and telecommunications traffic, especially receiving, opening and retaining postal communications for the person being taken care of.¹³⁴
- [182]. In keeping with the principles of substantiation and subsidiarity of custody,¹³⁵ custodianship may not be assigned for matters that the person who is being taken care of can still handle him/herself or can arrange to be taken care of by third parties, especially the holder of a durable power of attorney. The appointment of a custodian may nonetheless be considered in spite of the existence of a *General- oder Vorsorgevollmacht* [general or durable power of attorney] for tasks not therein specified or in view of misgivings as to the efficacy of the power of attorney.¹³⁶ It must, however, be borne in mind that in the context of a differentiating assessment partial capacity to contract will suffice, so that the power of attorney granted to prevent a custody order may even be effective if the person in question is no longer capable of conducting complicated business transactions.¹³⁷
- [183]. The court can entrust a custodian with looking after a person and his/her assets – in other words, all of the person’s affairs – if custody is required for all of his/her affairs. This is known as *Totalbetreuung* [total custody]. In this case the Custodianship Court must specify the action currently required.¹³⁸ A custody order may not, however, be issued against the will of a person of full age who is capable of making a free decision – not even if it would objectively be to the person’s benefit.¹³⁹ Insofar as the person in question does not have the understanding sufficient for a free determination of will or of acting in accordance with such an understanding, a custody order may in principle be issued against the will of the person in question, subject to due consideration of the individual case.¹⁴⁰
- [184]. With regard to the encroachment on the rights of the person to be taken care of, the principle of necessity applies to all areas of custodianship in respect of the following issues:
- Whether or not a custodian is to be appointed
 - The scope of the care to be provided
 - The repercussions of the court order and
 - The duration of custody.¹⁴¹
- [185]. According to Federal Constitutional Court case law the express mention of the principle of necessity in the relevant legal provisions is intended in particular to ensure that custodians are not granted fairly extensive powers as standard and without thorough checks. The law has thereby ‘considered the commissioning of expert reports indispensable for enabling the courts to carry out their duties in respect of strict consideration of the circumstances of the individual case and the principle of necessity in determining the scope of tasks to be performed’. The law is considered to have deliberately refrained from defining criteria for the tasks to be performed so as to prevent failure to rule in a differentiated fashion geared to the individual case.
- [186]. (67) Custody is only permissible for as long as it is necessary. The court must rule on cancelling or renewing custody seven years after the order is issued at the latest.¹⁴²

¹³⁴ Custodianship law brochure of the Federal Ministry of Justice, as of 2008, <http://www.bmj.bund.de> (26.10.2009).

¹³⁵ Art. 1896 (2) Civil Code.

¹³⁶ A. Jürgens/D. Kröger (2007), *Betreuungsrecht kompakt*, 6th ed., para 71, 73.

¹³⁷ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., Introduction to § 1896 para. 7.

¹³⁸ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1896 para 18.

¹³⁹ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1896 para 4.

¹⁴⁰ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1896 para 4.

¹⁴¹ Custodianship law brochure of the Federal Ministry of Justice, as of 2008, p. 7, <http://www.bmj.bund.de> (26 October 2009); A. Jürgens/D. Kröger (2007), *Betreuungsrecht kompakt*, 6th ed., para. 59.

¹⁴² Art. 294 (3), 295 (2) Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction.

- [187]. (68) In accordance with Art. 1896 (1) Civil Code a custodian is appointed on the basis of an application by the person of full age concerned or ex officio. In cases where third parties such as family members, doctors or authorities apply to the Custodianship Court for a custody order, the order is issued ex officio.

5.2.3. Appointment and powers of the custodian

- [188]. (71) An individual, an employee of a recognised care organisation,¹⁴³ an employee of an authority that is responsible for custody matters¹⁴⁴ or, subsidiarily, a person who works professionally as custodian may all be appointed as custodians.¹⁴⁵

5.2.3.1. Well-being and wishes as yardstick

- [189]. (72) The yardstick for all action and measures undertaken by the custodian is, pursuant to Art. 1901 (2) and (3) Civil Code, the well-being of the person or persons being taken care of and their wishes, given that their well-being includes being able to shape their lives as they see fit within the framework of the abilities they retain. In their work, custodians must take into account the views of the person being taken care of and thereby help to maintain his/her identity and accustomed lifestyle. The wishes of the person being taken care of, including those expressed before the custody order was issued, must also be taken into account irrespective of his/her capacity to contract or any formal considerations.¹⁴⁶ Insofar as the wishes of the person being taken care of cannot be ascertained, the custodian should try to establish what they might be by, for instance, seeking information from people who are close to him/her.
- [190]. The custodian is entitled to disregard any such wishes if fulfilling them would be in breach of the law, would run counter to the well-being of the person being taken care of or could not be expected of the custodian.¹⁴⁷

5.2.3.2. Representation in and out of court

- [191]. On the basis of the powers vested in him/her by Art. 1902 Civil Code, the custodian is entitled to represent the person being taken care of both in court and out of court. Externally, the representation powers are limited solely to the tasks as defined in the custody order. The capacity to contract of the person being taken care of is unaffected by the issuance of a custody order. That is why, in the case of a person being taken care of who retains the capacity to contract, conflicting legal transactions and/or court actions may lead to ‘competition’ between the custodian’s right of representation and the legal capacity to contract of the person being taken care of.¹⁴⁸ The effectiveness of the statement of will by the person being taken care of is determined solely by his or her capacity or incapacity to contract pursuant to the relevant Civil Code provisions and by whether a consent caveat has been issued as per Art. 1903 Civil Code.

¹⁴³ Association custodian pursuant to Art. 1897 (2) 1 Civil Code.

¹⁴⁴ Public authority custodian pursuant to Art. 1897 (2) 2 Civil Code.

¹⁴⁵ Professional custodian pursuant to Art. 1897 (6) Civil Code.

¹⁴⁶ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1901 para 5; U. Hellmann, *Bundesvereinigung Lebenshilfe, in Rechtliche Betreuung, Selbstbestimmungsrecht, Handlungsfähigkeit und Geschäfts(un)fähigkeit – wie passt das zusammen?* <http://www.lebenshilfe.de> (26.10.2009).

¹⁴⁷ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1901 para 6.

¹⁴⁸ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1902 para 5; U. Hellmann, *Bundesvereinigung Lebenshilfe, in Rechtliche Betreuung, Selbstbestimmungsrecht, Handlungsfähigkeit und Geschäfts(un)fähigkeit – wie passt das zusammen?* <http://www.lebenshilfe.de> (26.10.2009).

5.2.3.3. Consent caveat

[192]. Pursuant to Art. 1903 (1) Civil Code the Custodianship Court will rule that the person being taken care of requires the custodian's consent (consent caveat) to statements of will that relate to the custodian's tasks insofar as this consent is necessary to avert a significant threat to the person or the person's assets. Even if a consent caveat provision exists, however, the person being taken care of does not require the custodian's consent pursuant to Art. 1903 (3) 1 Civil Code if the statement of will merely affords the person being taken care of a legal advantage. The consent caveat is issued ex officio because the main purpose it serves is to prevent persons being taken care of who lack insight from harming themselves or their interests. Issuing a consent caveat has no repercussions for the capacity to contract of the person being taken care of.¹⁴⁹

5.2.3.4. Consent of the Custodianship Court

[193]. The law makes express provision for the cases in which the consent of the Custodianship Court is required. In addition to the criteria for placement and similar measures outlined in Chapter 4, they are consent to giving up a rented flat, consent to making a provision from the assets of the person being taken care of and, in particular, consent to medical procedures and sterilisation.

- Medical procedures

- Given that medical procedures constitute an encroachment on a highly personal legally protected interest of the person being cared for, what matters is whether he/she is capable of understanding or judging the specific medical procedure. That is why the custodian must in each case clarify – even if decisions on medical procedures come within his or her remit – whether the person being cared for is incapable of giving his/her consent and the custodian is therefore entitled to act on his/her behalf. Yet even if the person being cared for is incapable of giving consent the custodian must take into account the provisions of a living will according to the newly incorporated provisions of custodianship law and arrive at a decision on this basis. On the basis of the law in force since 1 September 2009, a living will exists if a person of full age capable of consent has stated in writing whether, if he/she were to become incapable of making a decision, he/she would consent to or refuse certain examinations of his/her state of health, treatments or medical interventions that were not yet imminent at the time when he/she made this provision.¹⁵⁰ According to Federal Supreme Court of Justice case law as it now stands, Art. 1901 a (1) second half-sentence Civil Code requires the custodian or guardian to check whether the provisions of the living will apply to the specific living and treatment situation of the person being cared for.¹⁵¹ Where no living will exists or the provisions made therein do not apply to the current living and treatment situation, the custodian or the person appointed must ascertain the likely wishes for treatment or will of the person being cared for and decide on this basis whether to consent to the medical procedure or refuse it.¹⁵² Pursuant to relevant Federal Supreme Court of Justice case law, the new provisions of Art. 1901 a (2) 2 and 3 Civil Code stipulate that upon establishing what the person being cared for might want, the person's ethical or religious convictions and other personal value judgments in addition to any statements made orally or in writing must be taken into consideration.¹⁵³
- According to Art. 1904 (1) BGB the custodian's consent to an investigation of his/her state of health, to a treatment or to a medical intervention must be accompanied by the Custodianship

¹⁴⁹ U. Diederichsen in: Palandt (2008) *Bürgerliches Gesetzbuch: Kommentar*, 67th ed., § 1903 para 16.

¹⁵⁰ Art. 1901a (1) 1 Civil Code.

¹⁵¹ Germany/Deutscher Bundestag/*Bundestags-Drucksache* 16/8442 (06.03.2008), Entwurf eines Dritten Gesetzes zur Änderung des Betreuungsrechts, ground A. General para. 4 a); Germany/Bundesgerichtshof/Decision/case no. XII ZB 2/03 (17.03.2003).

¹⁵² Art. 1901a (2) Civil Code.

¹⁵³ Germany/Bundesgerichtshof/Decision/case no. XII ZB 2/03 (17.03.2003).

Court's consent when there is a justified risk that the person being cared for might die or suffer serious long-term health damage as a result of the procedure. This also applies to a measure of this kind if the custodian refuses or withdraws consent.¹⁵⁴ According to Federal Supreme Court of Justice case law the custodian may only with the consent of the Custodianship Court effectively refuse consent to a life-sustaining or life-prolonging treatment offered by the medical profession. According to Federal Supreme Court of Justice case law, however, there is no scope for consent by the custodian and approval by the Custodianship Court if the medical profession does not offer any such treatment or further treatment.¹⁵⁵

- Where a decision by the Custodianship Court is not required and no living will exists, the Federal Supreme Court of Justice has ruled that the custodian is authorised by Art. 1902 Civil Code, even if the person being cared for is incapable of giving or refusing consent, by virtue of his statutory power of representation to consent on behalf of a person being cared for who is unable to grasp the significance or control the course of events to investigations of his/her medical condition, to treatment and to medical interventions. The well-being of the person being cared for, which may not, according to Art. 1901 Civil Code, be jeopardised by his/her lack of insight and ability to control the course of events, includes maintaining his/her health and reducing or eliminating illnesses. According to Federal Supreme Court of Justice case law the law of custodianship provides a general legal basis for ensuring that the custodian is able to consent to a medical procedure against the natural will of the person being cared for.¹⁵⁶
- Sterilisation
 - The appointment of a special custodian is a legal requirement for a decision on consent to sterilisation.¹⁵⁷ The criteria for the custodian's consent are stated expressly in the law. Readers are here referred to Subchapter 3.8.

5.2.4. Appeals

- [194]. (73) An appeal may be lodged against a custody order, but it must as a rule be lodged within a month to the court whose ruling is being challenged.¹⁵⁸ According to Art. 59 of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction the person affected by the decision is entitled to appeal against it. Pursuant to the criteria stated in Art. 303 of the Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction a right to appeal in the interest of the person affected is also held, *inter alia*, by the spouse, partner or issue of the person being cared for and by a person who enjoys his/her confidence.

5.2.5. Cancellation and review

- [195]. (75) The time by which the court must decide on cancelling or renewing custody must be laid down in the initial ruling.¹⁵⁹ The review must, as stated above, take place after seven years at the latest.¹⁶⁰ It must, however, be borne in mind that, pursuant to Art. 1908 d (1) Civil Code, custody must be cancelled in accordance with the principle of necessity if the criteria no longer apply. The application may also be submitted by someone with an incapacity to contract. In the case of people for whom a custodian was appointed on account of a mental illness or an intellectual or emotional disability

¹⁵⁴ Art. 1904 (2) Civil Code.

¹⁵⁵ Germany/Bundesgerichtshof/Decision/case no. XII ZB 2/03 (17.03.2003).

¹⁵⁶ Germany/Bundesgerichtshof/Decision/case no. XII ZB 236/05 (01.02.2006).

¹⁵⁷ Art. 1899 (2) Civil Code.

¹⁵⁸ Art. 58, 63, 64 Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction.

¹⁵⁹ Art. 286 (3) Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction.

¹⁶⁰ Art. 294, 295 Law on Procedure in Family Affairs and in Matters Pertaining to Voluntary Jurisdiction.

consideration must be given in the individual instance to whether custody can be cancelled. Art. 1908
b Civil Code also makes express provision for the dismissal of a custodian.

Annex – Case Law

Case title/No.	Application No. 61603/00 Storck ./ Germany
Decision date	16 June 2005
Reference details	European Court of Human Rights (ECtHR)
Key facts of the case	The petitioner, born in 1958, was placed in private psychiatric hospitals against her will in the years 1977 to 1979 and 1981 and treated for psychosis. The adult petitioner was placed in the psychiatric hospitals on her father's instructions, although she had not given her consent; neither had a guardian been appointed nor the placement ordered under the Mentally Ill Persons Act. After escaping from the hospital she was brought back against her will by the police. The petitioner had already brought several unsuccessful compensation claims before the German courts and filed a constitutional complaint.
Main reasoning/ argumentation	The petitioner claimed that her rights had been violated pursuant to Art. 5, 6 and 8 of the European Human Rights Convention (EHRC).
Key issues (concepts, interpretations) clarified by the case	<ul style="list-style-type: none"> • Positive state obligations (protection obligations) pursuant to Art. 5 EHRC also covering deprivation of liberty in a private hospital. Return of the petitioner to the hospital by the police without the legality of the deprivation of liberty being checked. • Medical treatment against the will of the patient as a violation of the right to privacy, Art. 8 EHRC. Imputation of the private interventions to violation of the state's protection obligation.
Results (sanctions) and key consequences or implications of the case	ECtHR: Violation of Art. 5 (1), violation of Art. 8 (in each case imputed to violation of protection obligation); no violation of Art. 6. Immaterial damage: €75,000; rejection of material damage due to lack of causality; cost of the proceedings €18,135.

Case title	“Horse riding in the forest”
Decision date	6 June 1989
Reference details	Reference 1 BvR 921/85, Federal Constitutional Court, First Division
Key facts of the case	The petitioner, who owns several horses and rides in his spare time, brought a complaint before the Constitutional Court criticising the court rulings in the original case and indirectly a state law on riding in the forest that permits riding in the forest only on private roads and paths (bridle paths) designated as such by the Road Traffic Regulations.
Main reasoning/ argumentation	The court stated that riding as a form of human activity was protected by the general freedom to act provided for by Art. 2 (1) of Germany’s Basic Law, but was not a central area of private life. Accordingly, it was not fundamentally exempt from legal restrictions. It stated, however, that the restrictions on riding in the forest imposed by the regulation indirectly criticised in the constitutional complaint complied with the constitution.
Key issues (concepts, interpretations) clarified by the case	The ruling of the Federal Constitutional Court was in keeping with previous rulings according to which general freedom of action was fully guaranteed. Protection was hence accorded not only to a limited area of the development of the personality but to any form of human activity irrespective of what weight the activity carried in the development of the personality. Constitutional judge Dieter Grimm cast a special dissenting vote on the matter.
Results (sanctions) and key consequences or implications of the case	The Federal Constitutional Court rejected the constitutional complaint in this case. The broad interpretation of general freedom of action gives the Federal Constitutional Court broad powers to examine such matters, since it implies that any law restricting human activity is subject to constitutional examination. This means that there is a broad fundamental legal protection of human activity, since the general freedom of action serves as a blanket fundamental right, insofar as no protection of a special right to freedom has been established.
Proposed keywords for database	General freedom of action; free development of personality; protection of fundamental rights

Case title	-
Decision date	28 May 1993
Reference details	Reference 2 BvF 2/90 and 4, 5/92, Federal Constitutional Court, Second Senate
Key facts of the case	The subject of the judicial review for joint consideration and decision was the issue of whether various criminal law, social insurance law and organisation law provisions governing termination of pregnancy were sufficient to comply with the state's constitutional duty to protect unborn life.
Main reasoning/ argumentation	The foetus was said not to develop into a human being but as a human being. Unborn life is entitled to human dignity and the right to life. The state's duty to provide protection relates to the individual life and not to life in general. The mother's basic rights that clash with this entitlement are, starting with respect for and protection of her human dignity, the right to life and physical integrity and general personal rights. To fulfil its duty to protect, the state must make adequate normative and actual provision to ensure that adequate and effective protection of the unborn life is provided by means of a combination of preventive and repressive measures.
Key issues (concepts, interpretations) clarified by the case	The Court found that termination of pregnancy must be seen as illegal and be prohibited throughout pregnancy. Termination of pregnancy during a specified period could therefore only go unpunished but not be justified. In unacceptable, exceptional situations, however, it may be permissible or advisable not to impose on the mother a statutory duty to carry the child to term. Abortion within a specified period of pregnancy is in principle permissible under constitutional law, whereby in the early period of pregnancy the focus should be on providing counselling for the pregnant woman and creating positive conditions in which to carry the child to term; an indication-based threat of punishment should be dispensed with.
Results (sanctions) and key consequences or implications of the case	The Federal Constitutional Court declared Sections 218a (1) and 219 n. F. and Art. 15 (2) and Art. 4 of the Fifth Criminal Law Reform Act null and void. It also issued instructions pursuant to Section 35 BVerfGG to make a transitional arrangement requiring the woman to undergo counselling that complied with the constitution.
Proposed keywords for database	Termination of pregnancy; abortion within a specified period of pregnancy; foetus; human dignity; duty of the state to protect; pregnancy conflict counselling

Case title	-
Decision date	5 April 2006
Reference details	Reference BVerwG 9 C 1.05, Federal Supreme Administrative Court, Ninth Division
Key facts of the case	The plaintiff, a disabled persons' organisation, brought a case against planning permission granted to German Railways to reconstruct a station in a small town as part of modernisation work on the line. They complained that the new station did not provide the same accessibility as the old one, because after reconstruction the platform could only be reached via stairs, and the building plans provided only for the construction of a lift shaft which could later be equipped with lifts if required. The plaintiff cited among other things the Eisenbahn Bau- und Betriebsordnung (EBO) [Railways Construction and Operating Regulations], which stipulate in Section 2 (3) that the regulations should be applied in such a way as to permit disabled and older people as well as children and others who might experience difficulties to use the railway station and trains without any particular difficulty.
Main reasoning/ argumentation	The Federal Supreme Administrative Court stated that the EBO contained no provisions specifying the type or extent of access to platforms nor the point in time at which it should be realised. The law had expressly left these issues to be decided in the programmes to be drawn up by the railways with the participation of disabled persons' organisations. The planned gradual provision of access outlined in the German Railways programme, to be realised as stations used by more than 1,000 passengers a day were newly built or reconstructed, could not be criticised from a legal point of view, it stated.
Key issues (concepts, interpretations) clarified by the case	The Federal Supreme Administrative Court's ruling made some fundamental statements about the group action, including that this was a case based on an objective complaint that would not lead to a comprehensive review of planning decisions, namely with respect to procedural errors or a violation of the requirement to consider all the facts and circumstances of the case. With respect to the discrimination ban contained in Art. 3 (3), sentence 2 of the Basic Law the court, referring to rulings by the Federal Constitutional Court, stated that this was not a subjective right but rather contained an objective value judgement that charged the state with providing support and that in carrying out this task the state had a great deal of leeway with respect to financial, personnel, material and organisational potential. It said the legal provision did not imply any entitlement; it did not grant any direct third party effect vis-à-vis other legal subjects under private law.
Results (sanctions) and key consequences or implications of the case	The Federal Administrative Court confirmed the decision of the lower court and rejected the petition. The verdict makes some key statements about group action as a legal instrument, about the principle of proportionality and about the constitutional discrimination ban. The value of the subject of litigation was set at €30,000 for the appeal proceedings.
Proposed keywords for database	Group action; accessibility requirement; principle of proportionality, discrimination ban

Case title	-
Decision date	10 October 2008
Reference details	Reference 1 BvR 1415/08, Federal Constitutional Court, Second Chamber of the First Division
Key facts of the case	The petitioner had granted a lawyer and his GP enduring power of attorney to avoid the appointment of a custodian. The Guardianship Court later ordered the appointment of a control custodian for the petitioner whose assignments included the assertion of all rights of the petitioner vis-à-vis any persons who might have been given power of attorney. The control custodian revoked the powers that the petitioner had given to the lawyer and doctor. The legal protection against this action for which the petitioner had applied to the Higher Regional Court had been rejected on the grounds that there was no requirement for legal protection. The petitioner accordingly lodged a constitutional appeal.
Main reasoning/ argumentation	The Federal Constitutional Court overruled the rejection of the case by the Higher Regional Court on the grounds that it violated the petitioner's right to effective legal protection. It ruled that in the event of profound encroachments on fundamental rights, which encompassed the appointment of a custodian including a control custodian, there was a legitimate interest in the proceedings, even if the matter was closed and legal protection during the brief duration of typical proceedings could no longer be obtained. It said the Higher Regional Court had failed to recognise this.
Key issues (concepts, interpretations) clarified by the case	The appointment of a control custodian with express powers to revoke powers of attorney granted by the persons in his/her care constitutes a major encroachment of the right to self-determination. Granting enduring power of attorney in order to avoid legal custodianship was an expression of the right to self-determination. The requirement for effective legal protection demands that the legitimate interest in the proceedings of the person affected should be accepted in order to examine the legality of the encroachment on fundamental rights associated with custodianship.
Results (sanctions) and key consequences or implications of the case	With this decision the Federal Constitutional Court thus extended the requirement of effective legal protection to the appointment of a custodian and clarified that a legitimate interest in the proceedings existed with respect to examining the legality of custodianship on account of an encroachment of fundamental rights even after the matter was closed.
Proposed keywords for database	Requirement for effective legal protection; right to self-determination; custodianship; control custodian

Case title	-
Decision date	18 May 2001
Reference details	Reference V ZR 126/00, Federal Supreme Court of Justice, Fifth Civil Division
Key facts of the case	As executor of the deceased's estate the plaintiff asserted that the testatrix, who had left a property to the defendant, had while the notarial contract was being concluded been in a state of pathological mental impairment excluding the free exercise of will and had therefore at that point in time been incapable of contracting. She applied for the court to approve the amendment of the land title register and the vacation and surrender of the property. Both the Regional Court and the Higher Regional Court rejected the plaintiff's claim.
Main reasoning/ argumentation	The Federal Supreme Court of Justice came to the conclusion that the statements of the court of appeal would not stand up to re-examination, since these contradicted the expert evaluation with respect to incapacity to contract and the court had failed to present its own competent evaluation.
Key issues (concepts, interpretations) clarified by the case	The Federal Supreme Court of Justice stated that in order to determine incapacity to contract it was important to consider not only mental faculties but also the voluntary nature of a decision. It ruled that incapacity to contract was not a medical finding, but a legal consequence the criteria for which had to be determined by a court after critically assessing the expert evaluation. The Federal Supreme Court of Justice also clarified that there was no such thing as relative incapacity to contract restricted to particularly difficult business such as property dealings.
Results (sanctions) and key consequences or implications of the case	The Federal Supreme Court of Justice granted the plaintiff's appeal. With this ruling the Federal Supreme Court of Justice gave a more specific definition of the term incapacity to contract as well as defining the requirements for how the courts should deal with expert evaluations as part of a free assessment of evidence.
Proposed keywords for database	Incapacity to contract

Case title	-
Decision date	1 February 2006
Reference details	Reference XII ZB 236/05, Federal Supreme Court of Justice, Twelfth Civil Division
Key facts of the case	The patient was admitted as an inpatient to the psychiatric clinic of a hospital. The district court ordered the patient to be placed in temporary legal custodianship. On the application of the temporary custodian the district court approved the placement of the patient in a closed ward 'to undertake necessary medical examinations and therapeutic treatment, even by coercion'. The complaint lodged against this action was rejected as unfounded by the District Court and the Regional Court; following a further appeal the Higher Regional Court brought the case before the Federal Supreme Court of Justice in line with Section 28 of the Law on Matters of Voluntary Jurisdiction (FGG).
Main reasoning/ argumentation	The Federal Supreme Court of Justice stated that it was only permissible to refer the case pursuant to Section 28 (2) FGG if the referral order could satisfactorily demonstrate that, had the Higher Regional Court referring the case adhered to the legal position from which it wished to deviate, it would have had to reach a different final decision from the one it wished to reach. It said the referral order did not address the issue of proportionality as it was required to do.
Key issues (concepts, interpretations) clarified by the case	Citing the rulings of the Federal Constitutional Court (BVerfGE 58, 208ff.) and previous case law rulings (BGHZ 145, 297ff.) of the Federal Supreme Court of Justice the court stated that the so-called 'right to be ill' of a patient incapable of consent must be taken into account in an examination of proportionality in civil law placements. The threat of damage to health must always be so great as to justify the encroachment on liberty entailed by the intended placement. Even stricter criteria must be applied, it said, if the deprivation of liberty entailed involuntary treatment. In its ruling the Federal Supreme Court of Justice adhered to the view that involuntary treatment pursuant to Section 1906 of the BGB can in principle be considered, and thus rejected the counterview that custodianship law did not contain any enabling basis for involuntary treatment (see, for example, Higher Regional Court Celle, ruling of 10 August 2005). The Federal Supreme Court of Justice clarified that the custodian in principle had the authority to consent to medical treatment against the natural will of a person being cared for who was legally incapable of consent. In the context of an approved placement pursuant to Section 1906 (1) 2 BGB this authority exceptionally included the right, if necessary, to overcome the will of the person being cared for if it ran counter to the medical treatment.
Results (sanctions) and key consequences or implications of the case	The Federal Supreme Court of Justice sent the case back to the Higher Regional Court instructing it to rule on its own responsibility because it regarded the referral as inadmissible. The ruling is of fundamental significance for custodianship law and for involuntary treatment and civil law placement.
Proposed keywords for database	Custodianship; placement; involuntary treatment; principle of proportionality

Case title	-
Decision date	17 March 2007
Reference details	Reference XII ZB 2/03, Federal Supreme Court of Justice, Twelfth Civil Division
Key facts of the case	After suffering brain damage the patient was artificially fed via a gastric feeding tube. It was not possible to communicate with him. The patient's son, who had been appointed as custodian by the District Court, applied to the court for his father to stop being fed artificially. He referred to a living will signed by the patient in his own hand in the past in which the patient had asked for life-support measures to be discontinued if he became incapable of making a decision and was suffering from an incurable disease.
Main reasoning/ argumentation	In previous rulings the High Court had expressed the view that for the custodian to consent to the discontinuation of feeding via a gastric tube of a patient who was himself no longer capable of making decisions having suffered irreversible brain damage required the approval of the Guardianship Court pursuant to Section 1904 BGB. The Federal Supreme Court of Justice confirmed the necessity of approval by the Guardianship Court.
Key issues (concepts, interpretations) clarified by the case	The court took the view that the discontinuation of life-support measures in keeping with the patient's previously expressed will after the patient had become incapable of consent and his condition had become terminal was an expression of respect for human dignity. If a custodian was appointed to care for the patient, it stated, this person was obliged to enunciate and assert the will of the patient to the doctor and nursing staff on his own legal responsibility. It stated that the custodian could refuse to give consent to life-preserving treatment offered by the doctor only with the approval of the Guardianship Court.
Results (sanctions) and key consequences or implications of the case	With this ruling the Federal Supreme Court of Justice adopted a general position on the question of the admissibility of life-preserving or life-extending measures and emphasised the importance of living wills.
Proposed keywords for database	Living will; custodianship; Guardianship Court approval; human dignity

Case title	-
Decision date	10 August 2005
Reference details	Reference 17 W 37/05, Higher Regional Court Celle, Seventeenth Civil Division
Key facts of the case	The patient, for whom a custodian had been appointed, had made a living will stating that he did not want to be treated with neuroleptic drugs. Following court approval he was placed in a closed ward of a regional hospital. His custodian subsequently applied to the court to approve involuntary treatment with a neuroleptic drug. During the hearing the District Court approved the custodian's consent to forced medical treatment. The complaint lodged against this measure was rejected by the Regional Court. The patient thereupon appealed against the decision to the Higher Regional Court.
Main reasoning/ argumentation	The Higher Regional Court found the decision of the lower court to be legally faulty because the decision had been reached in contravention of the principle of the official investigation. It stated that involuntary treatment under civil law required a rigorous examination of the proportionality of the measure, a prerequisite for which was a sufficiently explained and ascertained statement of the facts. However, it said, the decisions of the lower courts had not been based on a sufficient presentation of the facts of the case. It said the validity and scope of the living will should also have been clarified.
Key issues (concepts, interpretations) clarified by the case	The Higher Regional Court, citing the provisions for involuntary inpatient treatment under private law, expressed the view that given the lack of a sufficient legal basis this must be seen as legally impermissible. It said the law expressly refrained from any private law regulation of involuntary treatment. Section 1906 of the Civil Code could therefore not be regarded as a legal basis, since the clear wording of the text of the Code granted authority for placement or placement-like measures only, but not for the – in terms of the gravity of the encroachment – much more serious involuntary treatment.
Results (sanctions) and key consequences or implications of the case	The Higher Regional Court revoked the challenged decision and sent the case back to the Regional Court. Subsequent rulings by the Federal Supreme Court of Justice rejected the view that the basis for the authority to consent to involuntary treatment under private law was lacking (BGH Az. XII ZB 236/05 v. 1.2.2006, Rdnr. 19; BGH Az. XII ZB 185/07 v. 23.01.2008, Rdnr. 22).
Proposed keywords for database	Custodianship; involuntary treatment; placement; principle of official investigation; principle of proportionality; living will.