# IV. State Actors and National Implementation

The present chapter is structured into five parts. In the first part, I study the state actors including the executive bodies stipulated by Art. 33 Para. 1 CPRD. The second and third parts discuss the division of legislative and administrative powers, and legal traditions of domesticating International Law. In the fourth part I elaborate upon the national implimentation of the CPRD and the role of state actors therein. Finally, in the concluding part, I evaluate, comparatively, the efficacy of national implementation in the light of the given legal and political system of Germany, Austria and Denmark.

## *1. Structure of states and their constitutional organs*

### 1.1 Federal Republic of Germany

The Federal Republic of Germany is a democratic social federal state[396]. It consists of 16 autonomous federal states (Bundesländer)[397] and 10,796 municipalities (Gemeinden).[398] The form and organization of the state, according to which the principle of power separation between legislative, executive and judicial branches is recognized, is based on the German Basic Law (Grundgesetz-GG). The remaining organizational aspects concerning the cooperation and interplay within and between the vertical and horizontal governments regulate the Procedural Rules of ministries and parliaments of federation and federal states, as well as the Federal Council.

396 GG, Arts. 20 and 79 (3); see also Laufer/Münch, 2013. For more on the type of its welfare system see Esping-Andersen, 1990; Palier, 2010; Blank, 2019.

397 These are Baden-Württemberg, Bavaria, Berlin, Bremen, Hamburg, Hesse, North Rhine-Westphalia, Saarland, Schleswig-Holstein, Rhineland-Palatinate, Lower Saxony and former DDR Länder Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt, and Thuringia.

398 See GG, Art. 28; see also Rudzio, 2013, 325–348; Bogumil/Holtkamp, 2016; The indicated number of municipalities has been taken from the webpage of Statistisches Bundesamt at: https://de.statista.com/statistik/daten/studie/1254/umfrage/anzahl-der-gemeinden-in-deutschland-nach-gemeindegroessenklassen/ (Last accessed on 01.07.2022).

### 1.1.1 Federal Level Constitutional Organs

Federal Chancellor and Federal Ministers form the core part of federal executive branch (Bundesregierung).[399] The Federal Ministries with their expert-units (Fachreferate) initiate and develop new draft laws or amend existing laws and prepare strategic concepts for the government, which are sent to the Federal Parliament (Bundestag) after they have been approved by the core of the federal executive branch and Federal Council (Bundesrat).[400] In the case of International Treaties, the initiative and development of Ratification Law is made only by the federal government.[401] Hereby the Federal Ministries involve representatives of municipal associations and other appropriate interest groups and bodies.[402]

The directly elected Federal Parliament is the main federal-level legislative organ.[403] This means that without its approval no legislative initiative including ratification laws of International Treaties developed by the government will be adopted. Nevertheless, the draft Ratification Law is voted for and, normally, passed in two-readings[404] without allowing for amendments.[405] As a result, the Federal Parliament and its standing committees (ständige Ausschüsse) have not been involved in pre-ratification processes of the CPRD and their actions were limited to passing or not passing the Convention. This explains the low participation rate of MPs on the approval day. Nonetheless, the Federal Parliament became the FP of the CPRD implementation after its ratification: MPs and their invited experts both from the ruling parties and opposition have been actively involved not only in the discussions of draft laws concerning DPs at the Committees of the Federal Parliament, but a number of CPRD-relevant inquiries have been made to the core of the executive branch. However, observation gives reasons to presume that the engagement of MPs towards the promotion and protection of the CPRD provisions reduces in policy fields that do not address DPs directly e.g., education. In view of the importance of the parliaments, further studies are necessary for shedding light on actions

399 GG, Art. 62.
400 Ismayr, 2008a.
401 GG, Art. 59 (2).
402 For more see chapter VI sections on Germany.
403 GG, Art. 38 (1).
404 BTGO, §81 (4) and §78.1; Ismayr, 2007a.
405 BTGO, §81 (4; for criticism see Ehrenzeller, 1993: 202.

taken towards assuming their decisive role in promotion of the human rights of DPs.

The Federal Council is composed of the members of state government[406] and is quorum with at least the majority votes of its members.[407] However, It does not form an equivalent second chamber of a uniform legislative body.[408] It is seen more as an executive body of the parliament[409] as it is equipped with the right to initiate legislation[410] and right to object to all federal draft laws, as well as the right to veto the large number of consent laws e.g., International Treaties, which, in fact, does not happen that often. Instead, as a matter of fact, it makes amendment requests.[411] On the other hand, it is also accorded with administrative competencies.[412] Accordingly, after giving its consent to the CPRD ratification, the Federal Council with its unique constitutional functions continued shaping disability politics by securing the influence of federal states. Thereby, it required amendments to the draft laws, for example during the Federal Participation Law, but did not block its adoption although one of its main requirements, namely ensuring federal financing for the new participation instruments e.g., in the field of education,[413] has not been guaranteed.[414] This might be explained, on the one hand, by the consent-oriented decision-making practices between actors of federal government and federal states.[415] On the other hand, the blockade of the Federal Council on the basis of unsecured funding of new participation instruments to which belong also reasonable educational accommodation would raise serious questions with regard to the compatibility of such requirements with the legislative competencies and responsibilities of federal states in the field of primary and secondary education.

406 GG, Art. 51 (1).
407 GG, Art. 52 (3).
408 BVerfGE 37, 363; See also Beyme 2004: 340.
409 Steffani, 1985: 226.
410 Münch, 2011a.
411 Laufer/Münch, 2013.
412 Beyme, 2004: 342.
413 BR-Drs. 428/16 (Beschluss).
414 BR-Drs. 711/16 (Beschluss).
415 Schmedes, 2019.

#### 1.1.1.1 Structure and resources of federal Focal Point

Following the ratification of the CPRD, the Federal Government of Germany designated the Ministry of Labour and Social Affairs as the federal-level FP.[416] The designation was mentioned in the CPRD State Report and National Action Plans on CPRD implementation, but not regulated through a separate legal act. The FP was involved in the development and ratification of the CPRD from the beginning.[417] Therefore, as the BMAS representative stated: "it makes sense that we have been assigned as the responsible body for the implementation".[418]

Nevertheless, the federal FP has a subordinate position in ministerial hierarchy.[419] This is because it is assigned to a unit (Referat),[420] instead of building a superordinate executive department (Stabsstelle) within the ministry.[421] Accordingly, it is not of a sufficiently high institutional rank to effectively carry out its duties as a mechanism for facilitating and coordinating matters relating to the implementation of the Convention at all levels and in all sectors of government.[422] Therefore, it is dependent on the cooperation of the Federal Ministries in carrying out its responsibilities: "with the development of the National Action Plan (2.0), we managed to ensure that each ministry has a contact person for the implementation of the CPRD, which improved our cooperation with the ministries... we meet with them regularly... but that does not mean that this individual person always has ways and means to access the entire breadth of the ministry-individual units".[423]

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416 Initial Report of Germany, Para. 284; Second-Third Periodic Report of Germany, Q. 35.

417 First-level-interview DE/A 2, on 08.08.2018, Q. 6.

418 First-level-interview DE/A 2, on 08.08.2018, Q. 6. The original reads as follows: "Also das macht schon Sinn, dass er bei uns angesiedelt ist tatsächlich. Weil erstens wir haben die Konvention begleitet. Wir haben die ganze Verhandlung gemacht, wir haben die Ratifizierungsgesetz gemacht. Das macht auch Sinn, dass wir diejenigen sind, die für die Umsetzung verantwortlich sind."

419 GGO, §7–9.

420 According to the BMAS Organizational chart ofMay 2, 2022, the task of FP is performed by the Referat V a 4, see: https://www.bmas.de/SharedDocs/Downloads/DE/Ministerium/bmas-organigramm.html (Last accessed on 01.07.2022).

421 GGO, §10.

422 Concluding observations on the initial report of Argentina, Para. 51; OHCHR et al., 2007: 94.

423 First-level-interview DE/A 2, on 08.08.2018, Q. 5. The original reads as follows:

For carrying out its responsibilities the federal-level FP has been allocated around 4.5 million euros yearly.[424] It, as an independent unit, in addition to the head of the unit, had two ministerial officers and two clerks as of August 2018.[425]This, at a first glance, seems to be sufficient.[426] However, in considering the relation between the number of staff and the number of Federal Ministries and their law-making activities, as well as the responsibility to coordinate and cooperate with 16 Länder-level FPs and interest groups, I allow an assumption that the available staff cannot be sufficient in controlling, coordinating and mainstreaming the legislative actions of the federal government.[427]

#### 1.1.1.2 Structure and resources of federal-level Coordination Mechanism

The Office of the Federal Government Commissioner for Matters relating to DPs has been established following the decision of the Federal Chancellor Helmut Schmidt (SPD) in January 1981 on the occasion of the International Year of the Disabled.[428] The Office has first been legally regulated with the adoption of the Federal Disability Equality Act of 2002 (BGBl. I S. 1467, 1468).

The Federal Government Commissioner is appointed by the Federal Cabinet for a legislative term.[429] Since its establishment, the office of the Federal Government Commissioner is located in the Federal Ministry of Labour and Social affairs, except between the period of 2002 to 2005, when it was attached to Federal Ministry of Health and Social Security.[430]

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"Also es gibt…es ist schon mal ein Fortschritt mit dem NAP, mit dem Aktionsplan haben wir das geschafft, dass jedes Resort ein Ansprechpartner hat… der sich um die Umsetzung der Konvention… Das gab es vorher nicht. Und so ist es für uns relativ einfach, weil wir uns regelmäßig mit den FP dem Bundesresort … mit dem Treffen wir uns regelmäßig. Austausch zu allen möglichen Sachen, … Also wir haben da schon ganz gute Ansprechpartner bei dem Resort, das funktioniert schon ganz gut. Das heißt aber nicht, dass das diese einzelne Person immer soweit Mittel und Wege hat die ganze Breite des Ministeriums in einzelnen Referaten einzutragen."; See also NAP 2.0, Section 5.2.3 (Rolle der Ressorts).

424 First-level-interview DE/A 2, on 08.08.2018, Q. 8.

425 First-level-interview DE/A 2, on 08.08.2018, Q. 8.

426 OHCHR et al., 2007: 94.

427 Huber/Shipan/Pfahler, 2001; Mills/Selin, 2017; Quirk/Bendix/Bachtiger, 2018.

428 Bericht der 5. Sitzung des 9. Deutschen Bundestages, S.33 C vom 24.11.1980.

429 BGG, § 17.1.

430 Sporke, 2008: 71 – 81.

Subsequent to the CPRD Ratification in 2009, the Federal Government Commissioner has been designated as the CM under Art. 33 Para. 1.[431]

According to Section 21.1 GGO in general, and Section 18.2 of the BGG specifically, the Federal Ministries shall involve the Commissioner in all legislative and other important projects in so far as they address or affect issues relating to the integration of DPs. Furthermore, section 21.1 GGO is concretized through the section 45.2 GGO, where the early involvement of federal government commissioners in drafting bills is made mandatory in case their field of responsibilities are affected. In practice, however, the cross-departmental structure does not function that well: "of course, I talk with appropriate ministers … but I wish we would have a structurally better cooperation… it's not bad in terms of quality, but I would like it to be more binding[432]". Moreover, some interviewees stated even that the Federal Disability Commissioner is not in the position to mainstream the disability-related issues across the ministries[433]. The statement of interviewees confirms the review of existing advisory organs of other Federal Ministries and their composition: e.g., Federal Ministry of Education and Research, which is responsible for vocational and higher education policies, maintains several advisory boards, but the participation of the Commissioner is ensured in none of them[434]. In addition, Section 21.2 of the GGO obliges the Commissioners to inform the appropriate ministry in matters of fundamental political importance. In these processes, however, the Commissioner's voice is seen equal to civil society[435]: "I can get involved, like civil society, for example, but I do not have more weight or voice than civil society based on the fact that I am the CM, which actually would be good"[436]. This is not

431 Initial Report of Germany, Para. 285.

432 First-level-interview DE/A 2, on 18.11.2015. Q. 12. The original reads as follows: "Ja…Also bin ich natürlich auch mit den entsprechenden Minister, mit der Ministerin beispielsweise im Gespräch aber meines Erachtens ist gerade bei…ja…also nein, ich sage mal etwas Positives… da würde ich mir noch eine strukturell bessere Arbeit wünschen vor allem natürlich, also wie gesagt, es ist nicht schlecht von der Qualität her, aber ich würde sie mir verbindlicher wünschen."

433 Third-level-interview DE/A 5, on 04.06.2018, Q. 5; First-level-interview DE/A 2, on 08.08.2018, Q. 9.

434 See for example BAföG § 44; StipG, §12.

435 First-level-interview DE/A 2, on 08.08.2018, Qs. 9 and 12.

436 First-level-interview DE/A 2, on 18.11.2015, Q. 12. The original reads as follows: "… kann ich mich einbringen wie beispielsweise die Zivilgesellschaft auch, aber habe jetzt da nicht aufgrund der Tatsache, dass ich der Koordinierungsmechanismus hier

surprising given the presumption that the office of the Commissioner is a foreign body.[437]

The Federal Commissioner has a staff of 21 members.[438] In order to carry out its responsibilities, the Office of the Commissioner has been allocated about EUR 1,684,040 by the 2018 federal budget (Haushaltsplan).[439] However, the comprehensive coordination of the CPRD implementation with the allocated amount of money is not possible.[440]

### 1.1.2 Länder-level constitutional organs

The constitutional order of the federal states corresponds to principles of the republican, democratic and social constitutional state.[441] Consequently, constitutions of federal states, normally, contain their own catalogue of basic rights, including Hesse and Thuringia,[442] except commitments under International Law,[443] and recognize the power separation between executive, legislative and judiciary. To this end, their political structure, by and large, corresponds to the structure of the federation.[444] For instance, the political system of both Hesse and Thuringia are structured into directly elected legislative power (Landtage),[445] judicial power exercised through Constitutional Court[446] and administrative, labour and social courts as long as the matter under consideration concerns the state law, as well as executive power, composed of the Minister President and state ministers.[447] The latter are responsible for the policy-development, where they consider

bin, habe ich jetzt nicht mehr Gewicht oder Stimme als Zivilgesellschaft und das wäre natürlich eigentlich gut…".

437 Fuchs, 1985: 133.
438 First-level-interview DE/A 2, on 08.08.2018, Q. 10.
439 Bundestag, Drucksache 19/2270.
440 First-level-interview DE/A 2, on 18.11.2015. Q. 8.
441 GG, Art. 28 (1).
442 Hessische Verfassung, Arts. 1 – 63; ThürVerf, Arts. 1 – 43; see also Jung, 1995; Schmidt, 1996; Würtenberger/Beck, 1996; Sacksofsky, 2016; Huber,2019.
443 Hessische Verfassung, Art. 67; ThürVerf, Art. 1 (2).
444 Hessische Verfassung, Art. 64; ThürVerf, Art. 44 (1) and Art. 45.
445 Hessische Verfassung, Art. 75; TH Verf, Art. 48; See also Linck, 1996; Schiller,2016; Leunig, 2018.
446 Hessische Verfassung, Art. 130; TH Verf, Art. 79; See also Sacksofsky, 2016; Huber, 2019; Leunig, 2018.
447 Hessische Verfassung, Art. 100; ThürVerf, Art. 70; See also Drapatz/Oppelland, 1996; Leunig, 2016, 2018.

views of various non-state[448] and state organizations including municipal governments (Gemeinden) that form the third politico-administrative level of the Federal Republic of Germany.[449]

After the unification, the governments of the federal states normally maintain two-party coalitions[450] or are even composed of three-party constellations as it is the case in Thuringia starting from December 2014.[451] The political agenda of coalition governments laid down in a government agreement shapes the policy fields under the exclusive legislative and executive powers of the federal states.

The cooperation between federation and federal states in policy fields falling under the exclusive legislative powers of federal states e.g., school education, has been first formalized in 1969 and takes place through informal initiatives or formal collaborative instruments e.g., Conference of Ministers of Education (Kultusministerkonferenz).[452] It is composed of Ministers of Education of the federal states and is responsible for ensuring equality of living conditions throughout Germany and representing and promoting the common concerns of federal states vis-à-vis the federal government in the field of education. The cooperation with the federal government in this field has been expanded with the amendment of the Basic Law in 2018.[453]

#### 1.1.2.1 Structure and resources of Länder-level Focal Points

In accordance with the requirement of the CPRD,[454] the 16 federal states also designated FPs, albeit not always on a legal-basis.[455] These, similar to the federal FP, are not of a sufficiently high institutional rank".[456] The

448 See chapter VI part on Germany.
449 Ismayr, 2009a.
450 In the examined Federal states of Hesse and Thuringia, the exception was in the period of 1999 – 2009, when the CDU received the Absolute majority of votes and could govern alone in Thuringia.
451 Oppelland, 2018.
452 Füssel, 2019: 102 – 127.
453 Bundestag, Drucksache 19/3440.
454 CPRD, Art. 4 (5); Concluding Observations on the Initial Report of Germany, Paras. 61 and 62a.
455 Second-Third Periodic Report of Germany, Q. 35.
456 Concluding observations on the initial report of Argentina, Para. 51; OHCHR et al., 2007: 94.

government of Hesse, for example, established an administrative unit based on the cooperative work of the Hessian Ministry of Social Affairs and the Ministry of Culture about 2 years after the entry into force of the CPRD in Germany. It started its work on January 03, 2011.[457] On July 15, 2014 the administrative unit has been converted into a permanent sub-unit by the decision of the Hessian Minister of Social Affairs and Integration[458] and thus merged with the department IV4 of the ministry,[459] despite the explicit recommendation of the NMB to keep its location in the State Chancellery.[460]

Thuringia installed a FP within the referat disability politics of the Ministry of Labour, Social Affairs, Health, Women and Family (TMASGFF).[461] However, it did not grow up to a functioning unit, which means that it "cannot perform whatever else FP is supposed to do".[462]

After the adoption of the Thuringian first Action Plan, an inter-ministerial working group has been established to advance the targeted implementation of the CPRD in Thuringia.[463] However, since its establishment meeting in June 2013, its second meeting took place in January 2016 and the third in August 2016.[464]

None of the Länder-level FPs have sub-bodies in the municipalities.[465] In order to coordinate the CPRD implementation "we set common and quality

457 Hessischer Aktionsplan: 6; See also NAP 2.0, Sektion 4.2.1 (Hessen).

458 First-level-interview DE/B-H 1, on 14.01.2016, Q. 8.

459 See Organisationsplan- Hessisches Ministerium für Soziales und Integration. Retrieved on 05.06.2022 from: https://sozialministerium.baden-wuerttemberg.de/de/ministerium/aufgaben-organigramm/.

460 Monitoring-Stelle, Evaluationsbericht zum Hessischen Aktionsplan zur Umsetzung der UN-Behindertenrechtskonvention, 2013, Sec. 1.3.

461 See TMASGFF- Geschäftsverteilungsplan. Retrieved on 05.06.2022 from: https://www.tmasgff.de/fileadmin/user_upload/Ministerium/Dateien/GVP_TMASGFF_anonym_20200801.pdf.

462 First-level-interview DE/B-T 2, on 23.05.2018, Q. 6. The original reads as follows: "Es gibt Referats und FP der ist instaliert na ja... der ist aber mehr..., der ist jetzt nicht in Personal reingewandert. Der Kollege, der hier sitzt, macht das mit so einer viertel – halben Stelle, um eben diese Arbeitsgruppe, wo sie nachher darauf kommen können mitzubegleiten, die Zivilgesellschaft mit einzubeziehen, Fachkonferenzen zu organisieren so was aber was FP alles noch soll, das kann man nicht leisten".

463 NAP 2.0, Sec. 4.2.1. (Freistaat Thüringen).

464 Monitoring-Stelle-Ergebnisse der Evaluierung des Thüringer Maßnahmenplans zur Umsetzung der UN-BRK, Sec. 3.4.3 (Interministerielle Arbeitsgruppe).

465 First-level-interview DE/B-T 2, on 23.05.2018, Q. 7; First-level-interview DE/B-H 1, on 14.01.2016, Q. 7.

standards but according to the right of supervision between the state and municipalities, the state government cannot say how the municipalities should implement these standards".[466]

The human and financial resources of the Länder-level FPs differ considerably from each other: the Hessian State unit tasked with the responsibilities of the FP, for example, had nine employees in 2015, some of whom were self-affected.[467] The unit received EUR 600,000 yearly to manage the 15 model regions, carry out the disability-related tasks and coordinate the CPRD implementation of the government.[468] Later, its separate funding was stopped as it was merged with a section of the Social Ministry.

The Thuringian State FP had only one part-time employee since its designation. He was, actually, employed for another responsibility field but if needed, took care of CPRD coordination.[469] The so called 'FP' has not been allocated a separate budget from the beginning of its designation[470] despite the fact that it should, among other things, coordinate the implementation of the CPRD across ministries and the Office of the Minister-President.

Thus, it becomes evident that the structural implementation of the CPRD at the state and municipal governmental levels was much weaker than that of the federal-level: the state-level FPs/CMs had neither the competence and adequate financial means nor the needed number of qualified staff to control, coordinate, and mainstream the legislative actions and participative processes of the federal state governments.[471]

#### 1.1.2.2 Structure and resources of Länder-level Coordination Mechanisms

The federal state governments also introduced offices of disability commissioners with the adoption of the state disability equality laws. Similar to the federation, the commissioners of the federal states have been, by and large,

466 First-level-interview DE/B-H 1, on 14.01.2016, Q. 7. The original reads as follows: "... Also es gibt Direktionsrecht, so zwischen Land und Kommunen, nach diesem Direktionsrecht, ... wir setzten gemeinsamen Standards und Qualitätsstandards auf... das Land sagt nichts, was damit sozusagen in die Kommunen umgesetzt wird an dieser Stelle".

467 First-level-interview DE/B-H 1, on 14.01.2016, Q. 8.

468 Ibid.

469 First-level-interview DE/B-T 2, on 23.05.2018, Qs. 6, 8 and 11.

470 Ibid.

471 Huber/Shipan/Pfahler, 2001; Mills/Selin, 2017; Quirk/Bendix/Bachtiger, 2018.

located in the social ministries, as it was in Thuringia[472] or in few cases in other ministries e.g., the Hessian Ministry of the Interior and for Sport.[473] Following the BGG amendment in 2016, the regulations on the structure and appointment of Länder-level commissioners have been reformed: the Thuringian Commissioner, for example is elected by and located in the Thuringian parliament,[474] whereas the Hessian Commissioner is appointed by the Hessian government and located in the Hessian Ministry for Social Affairs and Integration.[475]

In some federal states, appointed commissioners act independently and are not bound by instructions, as it is the case in Hesse.[476] The Thuringian Commissioner acts under the supervision of the President of the State Parliament.[477]

Unlike the federal government, federal states have not seen a need for designating the Länder-level disability commissioners as a CM under the CPRD: "the UN has not clarified what is a CM under the Art. 33. Para. 1, so we would have wished, or it would have been nice, if the United Nations would shed more light on it, especially with regard to responsibilities and their delimitation between the FP and the CM."[478]

The financial resources of the Länder-level disability commissioners are much more modest: the Thuringian Commissioner, for example, has been remunerated and had a staff consisting of five employees. In the period between 2014 to 2018, the office of the Commissioner had been allocated about EUR 100,000 yearly for performing the tasks assigned to Commis-

472 ThürGIG vom 16.12.2005 (GVBl 2005, S. 383), § 16.
473 HessBGG vom 14.12.2009 (GVBl S. 729), § 18.
474 ThürGIG vom 30. Juli 2019 (GVBl. S. 303), § 16 (1) and § 18.
475 HessBGG vom 19.06.2019 (GVBl. S. 161), § 18 (1) and (5).
476 HessBGG, § 18 (1).
477 ThürGIG, § 18 (1).
478 First-level-interview DE/B-H 1, on 14.01.2016, Q. 11. The original reads as follows: "Der Artikel 33, längere Zeit, oder immer wieder fließt, wird an den nicht klarer, was die Vereinten Nationen gemeint haben mit den vielleicht auch unterschiedlichen Aufgaben Stellungen zwischen einer nationalen Anlaufstelle Fokal Point und einem nationalen Koordinationsmechanismus. Wir hätten uns gewünscht, oder es wäre schön gewesen, die Vereinten Nationen hätten an diese Stelle vielleicht bisschen mehr Klarheit darein gebracht. Und auch so Abgrenzung dieser Funktionen und Aufgaben".

sioner.[479] However, this amount could not cover the growing responsibility-fields.[480]

The Hessian Commissioner did not get remuneration till the 2019 amendment to the HessBGG, but she got EUR 1,100 monthly as an expense allowance.[481] By law she was supported by a team and had to be allocated financial means for performing her responsibilities. The office arrangement of the newly appointed commissioner is in process.

### 1.2 Federal Republic of Austria

Austria is a federal constitutional republic.[482] It is composed of 9 autonomous provinces (Bundesländer)[483] and 2,095 municipalities (Gemeinden)[484] in 94 political districts (Bezirke)[485], which manage the welfare state system.[486] Its international status is largely prescribed by the State Treaty (Staatsvertrag) of 1955. the form, organization and relations of Austria are regulated by the constitutional norms including the Federal Constitution of 1920. It establishes Austria as a two chamber parliamentary system with presidential elements and representative, or indirect, democracy by which the principle of power separation between legislative, executive and

479 Tätigkeitsbericht 2014–2018 des Beauftragten der Thüringer Landesregierung für Menschen mit Behinderungen, S. 87ff. Retrieved from: https://www.tlmb-thueringen.de/fileadmin/user_upload/redaktion_tlmb/publikationen/bmb-tatigkeitsbericht-2014-2018.pdf (Last accessed on 01.07.2022).

480 Ibid.

481 LT-Drucksache 18/5781.

482 B-VG, Articles 1 and 2 (1).

483 B-VG, Art 2 (2). States: "The federal state is formed by the autonomous provinces of Burgenland, Carinthia, Lower Austria, Upper Austria, Salzburg, Styria, Tyrol, Vorarlberg, and Vienna".

484 See B-VG, Arts. 115 – 120; see also Hämmerle, 2013; The indicated number of municipalities has been taken from the webpage of Statistik Austria, on municipalities (Gemeinden) at: https://www.statistik.at/services/tools/services/publikationen/detail/1144?cHash=2012ab10fa18425dcd6367d4d8aecae1 (Last accessed on 01.07.2022).

485 The level of political districts is below the level of provinces and they have no democratic elements (see *Pelinka*,2009. These are purely administrative units, relevant for monitoring municipal government and for policy areas delegated from federation or provincial governments policy fields e.g., Disability-related benefits, see for example Tyrolean Participation Act (Tiroler Teilhabegesetz), §26.

486 B-VG, Art. 12; see also Esping-Andersen, 1990; Palier, 2010; Österle/Heitzmann, 2019.

judicial branches is recognized.[487] The direct involvement of the population in the decision-making processes is ensured through participation in the election of the Nationalrat,[488] the Federal President,[489] the Provincial Parliaments (Landtage),[490] the municipal Councils, (Gemeinderat)[491] and through other democratic instruments of public participation.[492]

### 1.2.1 Federal Level Constitutional Organs

At the federal level, the executive power is vested in the Federal Chancellor, the vice-Chancellor, the federal ministers and their state secretaries. The ministries are responsible for the "pre-parliamentary" decision-making and policy formulation processes in their relevant fields. They also decide on the involvement and consideration of the views of various state actors, such as Federal Ministries (especially the Ministry of Finance), and all Länder and municipal governments,[493] as well as non-state actors[494] e.g., social partners.[495] In general, the views of provincial governments are taken into account, especially when the draft law is going to affect the Länder. However, in ratifying the CPRD, the federal government not only failed in considering various sub-national concerns, such as: "... education ... accessibility of buildings with regard to economy and protection of historical monuments... deinstitutionalization... ",[496] “but also states that there were no arguments from any actor against the ratification of the CPRD".[497]

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487 Foster, 2013; See also Welan, 1992; Dickinger, 1999; Dachs et al., 2006; Pelinka/Rosenberger, 2007.

488 B-VG, Art. 26 (1).

489 B-VG, Art. 60 (1).

490 B-VG, Art. 95 (1).

491 B-VG, Art. 117 (2).

492 E.g., popular initiatives (Volksbegehren- B-VG, Art. 41 (2)), referenda (Volksabstimmungen- B-VG, Art. 44 (3)) and opinion polls (Volksbefragungen- B-VG, Art. 49b (1)).

493 Vereinbarung zwischen dem Bund, den Ländern und den Gemeinden über einen Konsultationsmechanismus und einen künftigen Stabilitätspakt der Gebietskörperschaften, as adopted by BGBl. I Nr. 35/1999, Art. 1 (1).

494 For the involvement of the Disability-organizations, see chapter VI.

495 Pelinka, 1997: 488.

496 First-level-interview AT/B-T 1, on 26.10.2015, Q. 2. The original reads as follows: "Ich glaube, dass sie schon von allen Ebenen gekommen sind. Es gab viele Widerstände vor allem aus dem Bereich der Bildung. In Österreich war man der Meinung, dass es Sonderschulen braucht. Die Barrierefreiheit von Gebäuden war auch ein großes Thema vor allem seitens der Wirtschaft und des Denkmalschutzes. Es gibt

The principal parliamentary organs are the National Council (Nationalrat) and the Federal Council (Bundesrat), which make up the "fake two chamber Parliamentary system".[498] Fake as the powers of both chambers are extremely unequal: The federal government is politically responsible to the National Council, but not to the Federal Council.[499] Besides, the National Council is closely connected and with it also involved in the "pre-parliamentary" processes of the executive power through its Standing committees (ständige Ausschüsse), which belong to a relevant ministry.[500] The National Council as the main chamber of the Austrian parliament with its directly elected member's exercises, jointly with the Federal Council, the legislative power.[501] It is also responsible for approving the ratification of International Treaties,[502] but its role therein is very symbolic as the federal government can ask for an abbreviated procedure.[503] In this case, neither the National Council nor its committees have an opportunity to discuss the form and the content of the draft Ratification Law as it was in the case of the CPRD and its opt-protocol.[504] Later, the Nationalrat recognized its role as a human rights promoter[505] and became more active with regard to the implementation of the CPRD.[506] Nevertheless, to understand the efficacy of its actions, further research is needed.

The Federal Council, in its turn as the second parliamentary chamber, represents the interests of the Länder.[507] Its members are elected proportionally by the provincial parliaments, but they are not bound by instruc-

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Widerstände seitens der Einrichtungen, die der Meinung sind, bei Ihnen am besten aufgehoben zu sein".

497 First-level-interview AT/A 1, on 27.04.2016, Q. 2. The original reads as follows: "Es gab keine Argumente von irgendeiner Stelle gegen die Ratifizierung der Konvention".

498 Pelinka, 2009; see also B-VG, Art. 24.

499 Pelinka, 2009.

500 Ibid.

501 B-VG, Art. 41.

502 B-VG, Art. 50 (1).

503 Geschäftsordnungsgesetz 1975, as amended by BGBl. I Nr. 178/2021, § 28a.

504 Stenographisches Protokoll – 67. Sitzung des Nationalrates der Republik Österreich, 09.07.2008.

505 OHCHR et al., 2007: 43, 105 – 106; Hunt/Hooper/Yowell, 2015.

506 As of June 27, 2022, the research function of the parliament brings 1092 results in connection with the CPRD, out of which 177 are Interpellations (Schriftliche Anfragen) and 139 are commentaries on ministerial draft laws (Stellungnahmen zu Ministerialentwürfen).

507 B-VG, Art. 34.

tions from the provincial parliaments.[508] Instead, they pay more attention to the requirements of their parties,[509] as a result of which the Federal Council approves the position of the National Council in the majority of cases.[510] Accordingly, the approval of the CPRD and its opt-protocol was not an exception to this rule[511]. Moreover, the Federal council is not involved in the pre-parliamentary legislative processes of the executive branch.[512] Except for the cases concerning the provincial competencies, the veto power of the Federal Council is suspensive and can be overridden by the National Council (Beharrungsbeschluss). To this end, in comparison with the National Council, the Federal Council enjoys limited unique legislative competence and rights of participation in the legislative processes.[513]

#### 1.2.1.1 Structure and resources of Austrian federal Focal Point and Coordination Mechanism

The Austrian federal Ministry[514] of Social Affairs, Health, Nursing and Consumer Protection (Hereinafter referred as BMSGFK) has been designated as the FP under the CPRD.[515] Apparently, the decision to appoint the Social Ministry/office was based on the assumption that it had extensive expertise in disability policies. The legal establishment of the federal FP[516] has been first stipulated with the 2017 amendment of the BBG (BGBl. I Nr. 155/2017). Internally, however, the responsibilities of the FP have been assigned to the Social Department of the BMSGFK.[517] This was viewed critical by the DPOs as they assumed that the Social Office of the BMSGFK did not have "a higher hierarchy level than the other ministries…, which means

508 Foster, 2013: 26 f.
509 Gamper, 2000; Erk, 2004.
510 Pelinka, 2008.
511 See below.
512 Weber, 1992.
513 B-VG, Art. 41; see Tsebelis/Money, 1997; Lijphart, 1999; Fallend, 2000; Foster, 2003: 26 f., 2013.
514 At the time of ratification, the name of the ministry was "Federal Ministry of labour, Social Affairs and consumer Protection". Since then, the name of the ministry has been changed with every new government formation.
515 Initial Report of Austria, Para. 357.
516 See the appropriate suggestion in: OHCHR et al., 2007: 94.
517 Austrian National Council of DPs, Alternative Report to the CPRD Committee in connection with the Initial report of Austria: 79.

that it cannot exercise any superordinate influence on their implementation efforts".[518]

In fact, the federal law on the number, scope and establishment of the Federal Ministries makes the cooperation between the Federal Ministries in specific cases possible.[519] There is even a mutual agreement on close co-operation in legislative processes.[520] Evidently, the subordinate department of a federal ministry is not in the position to instruct or interfere with legislative processes of another federal ministry,[521] if it did not explicitly ask for support. Moreover, the BMS in general and its subordinate department specifically does not have the appropriate competencies to coordinate the implementation of the CPRD at the Länder-level outside of the field of social affairs.[522]

According to the structural plan of the BMSGFK, the department of the Section IV, acting as the FP has only one employee.[523] The federal government allocated neither additional resources nor staff to BMSGFK for carrying out its responsibilities under the CPRD.[524] "Hence, we had to align our priorities according to the CPRD and focus on the CPRD – on the National Action Plan".[525]

The CM is also assigned to the BMSGFK,[526] which involves the Federal Disability Advisory Board,[527] where the federal government, Länder and social partners,[528] as well as disability organizations (appointed by the umbrella organization) and the chairperson of the FMC are represented.[529]

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518 Ibid.

519 Bundesministeriengesetz 1986, as amended by BGBl. I Nr. 98/2022, §3 (1.1) § 5.

520 See: Vereinbarung zwischen dem Bund, den Ländern und den Gemeinden über einen Konsultationsmechanismus und einen künftigen Stabilitätspakt der Gebietskörperschaften.

521 Bundesministeriengesetz 1986, §7 (1); For the appropriate requirement, see the statement of the CPRD Committee in: Concluding observations on the initial report of Argentina, Para. 51; See also the appropriate suggestion in: OHCHR et al., 2007: 94.

522 Bundesministeriengesetz 1986, §3 (1.4).

523 From the BMSGFK structural plan it is not visible that Section IV department 1 acts as the FP of the CPRD. Retrieved from: https://www.sozialministerium.at/Ministerium/Organisation.html (Last accessed on 01.07.2022).

524 First-level-interview AT/A 1, on 27.04.2016, Q. 8.

525 First-level-interview AT/A 1, on 27.04.2016, Q. 8.

526 BBG, §13f (2).

527 Initial Report of Austria, Para. 357.

528 First-level-interview AT/A 1, on 27.04.2016, Q. 7; See also BBG, §8 (1) and §9.

529 BBG, §9.

The Advisory Board is chaired by the minister or an officer of the BMSGFK and convenes once or twice a year.[530]

The federal Advisory Board members do not get remunerated but their travel and subsistence expenses for attending the meetings of the Advisory Board and its committees is reimbursed.[531] Disability-related costs e.g., personal assistant or sign/easy-to-read-language interpretation, however, is not envisaged by the law establishing the Advisory Board.

In addition to the Disability Advisory Board, the BMSGFK established a support group (Begleitgruppe) for the National Action Plan 2012–2020, where all the Federal Ministries, provinces and disability-rights organizations meet.[532] The support group convenes two to three times a year.[533]

### 1.2.2 Länder-level constitutional organs

Similar to the federation, every Austrian province has its own Constitution, Parliament and Government and is led by a provincial Governor (Landeshauptmann). Each province is accorded with its legislative power,[534] the arrangement of which is, by and large, similar to the federal legislative processes. For instance, the provincial governments also accept views of various non-governmental organizations and state organs,[535] including Federal Ministries and local governments that are integrated into the state structure of Austria as the third and with it the lowest administrative level after the federal and provincial governments.[536]

In matters within the indirect federal administration, the Governor is bound by instructions from the federal government and individual federal ministers[537] and for executing the implementation of such instructions, the Governor is obligated to apply the powers available to him in his capacity as a functionary of the province's autonomous sphere of competence.[538]

530 First-level-interview AT/A 1, on 27.04.2016, Q. 7; see also BBG, §9 (2) and §12 (1).
531 BBG, §9 (5) and §11 (2).
532 First-level-interview AT/A 1, on 27.04.2016, Q. 7.
533 Ibid.
534 B-VG, Art. 95; Dachs, 2003.
535 Vereinbarung zwischen dem Bund, den Ländern und den Gemeinden über einen Konsultationsmechanismus und einen künftigen Stabilitätspakt der Gebietskörperschaften, Art. 1 (2).
536 Pelinka, 1977: 184.
537 Fallend, 2005.
538 B-VG, Art. 103 (1).

Moreover, the federation is, in the case of implementation of state Treaties, entitled to supervision also in such matters as belong to the provinces own sphere of competence.[539] Notwithstanding the narrow scope of action, provinces can, although with informal negotiation instruments e.g., Conference of Heads of Provincial Governments (Landeshauptleutekonferenz) influence the national decision-making processes as it is dominated by the party-politics.[540]

#### 1.2.2.1 Länder-level Focal Points and Coordination Mechanisms

In accordance with the Initial Report of Austria, the nine provincial branches of the federal Social Offices have been appointed as FPs.[541] Nevertheless, the examination of Länder-level FPs could not verify this statement. In particular, it became clear that the subordinate unit of the Office of Social Affairs has been appointed as a CM, but there is no FP for the CPRD as such:[542] "With us, the FP are all the departments that deal with the topic, they network with each other".[543] To this end, after the ratification of the CPRD, Tyrol has only appointed a CM for the CPRD, which is located in the Department of Social Affairs.[544]

The Länder-level FPs/CMs are, similar to federal FP, under-financed. For Instance, the TyroleanDepartment of Social Affairs, which is assigned as a CM for the CPRD gets financial resources for various disability-related activities.[545] At the same time, however, "it does not have enough staff for carrying out its responsibilities".[546]

539 B-VG, Art. 16 (5).
540 Rosner, 2000; Erk, 2004; Bußjäger, 2007.
541 Initial Report of Austria, Para 357.
542 First-level-interview AT/B-T 1, on 26.10.2015, Qs. 4, 7, 8, 9 and 10; third-level-interview AT/B-T 2, on 27.10.2015, Q. 6.
543 Second-level-interview AT/B-T 1, on 30.10.2015, Q. 14: The original reads as follows: "Bei uns sind die Anlaufstellen aller Fachabteilungen, die mit dem Thema zu tun haben, die sind untereinander vernetzt".
544 Geschäftseinteilung des Amtes der Tiroler Landesregierung, as amended by LGBl. Nr. 126/2020, §1 (Gruppe Gesellschaft, Gesundheit und Soziales- Abteilung Soziales).
545 First-level-interview AT/B-T 1, on 26.10.2015, Q. 8.
546 Second-level-interview AT/B-T 1, on 30.10.2015, Q. 14.

With the adoption of the Tyrolean Participation Act (Tiroler Teilhabegesetz),[547] Tyrol also established a Participation Council (Teilhabebeirat).[548] It is composed of a number of state bodies and non-governmental actors, as well as the "users" representatives[549] and is charged with the task of consulting the provincial government in matters concerning DPs, but there is no mentioning about the CPRD.[550]

Members of the Participation Council do not get remunerated, but disability-related assistance costs can be refunded.[551]

Thus, the Austrian FPs/CMs have not been equipped with adequate human and financial resources as it is recommended by the Handbook for Parliamentarians on the CPRD.[552] Besides, they did not get CPRD-related training or consultancy,[553] which would ensure the needed structural revision for overseeing the implementation of the CPRD.[554] This, in considering the number of Federal Ministries, 9 provinces and their executive bodies, as well as municipalities and relevant interest groups, limit the FPs/CMs of Austria in their mandate[555] to coordinate the implementation of the Convention at all levels and in all sectors of governments.[556] A vivid example for limitation caused by inadequate resources is the National Action Plan, which has been developed by the FP, but it has not been allocated financial means to implement the aims stipulated thereof.[557] Tyrol did not even develop an action plan as of June 2022.

547 LGBl. Nr. 32/2018.
548 Ibid. §47 (1).
549 Ibid., §47 (2).
550 Ibid., §47.
551 Tiroler Teilhabegesetz. §47 (9).
552 OHCHR et al., 2007: 94.
553 First-level-interview AT/A 1, on 27.04.2016, Q. 13; To question if the responsible bodies received CPRD Training, the representative of the TyroleanGovernment gave a positive answer (First-level-interview AT/B-T 1, on 26.10.2015, Q. 13), but the interviewee can neither bring an example nor could the entire interview content and examination of CPRD implementation processes be seen as confirmation of this statement.
554 OHCHR et al., 2007, P. 94.
555 Huber/Shipan/Pfahler, 2001; Mills/Selin, 2017; Quirk/Bendix/Bachtiger, 2018.
556 CPRD Committee, Concluding observations on the initial report of the UK, Para. 68.
557 First-level-interview AT/A 1, on 27.04.2016.

### 1.3 Kingdom of Denmark

Denmark is a unitary parliamentary constitutional Monarchy[558] and maintains an inclusive social-democratic Nordic welfare system.[559] It is based on the principle of tripartition of power, whereby the legislative power is vested in the government and parliament. Nevertheless, the majority of laws are initiated by ministers[560] who are responsible for the conduct of government, including conclusion and implementation of International Treaties,[561] and based on the principle of negative parliamentarism, which means that ministers might be forced to resign by passing the vote of no confidence with a simple majority of MPs.[562] Most often, however, it leads to toleration of the executive branch, which, since early 1980s is composed of minority multi-party governments. For example, right-wing populist Danish People's Party (Dansk Folkeparti), which actually received more votes than the liberals, and tolerated the center-right minority government led by the liberals (Venstre) since the 2015 election. The high price for this was that it always had a significant and very direct influence on the politics of government without having any formal government responsibility.[563]

#### 1.3.1 Structure and resources of Danish Focal Point and Coordination Mechanism

The organization of the Danish government is based on the principle of ministerial governance, with ministries headed by the minister who is accorded with the ultimate formal authority.[564] Similar to Germany and Austria, Danish ministries are structured into departments (departmental) and units as the lowest level of ministries, as well as various agencies (styrelser and institutioner) with different legal status.[565]

As of 2020, Denmark had 19 ministries, including the Ministry of Children and Education, the Ministry of Higher Education and Science, as well as the Ministry of Social Affairs and the Interior. The latter has been

558 Danish Constitution, Sections 2, 3, 69 – 74.
559 Kautto 2010; Greve, 2019.
560 Damgaard, 1994.
561 Harhoff, 1996: 151 – 182.
562 Danish Constitution, Sections 13 and 15. See also Nannestad, 2009: 76.
563 Horn, 2019.
564 Grøn/Salomonsen, 2020.
565 Thiel, 2012: 20.

designated as the FP with coordination functions[566] in accordance with the recommendations of the Handbook for Parliamentarians.[567] With this, the Danish government secured the equal horizontal rank of the FP within the government, but this does not mean that the enforcement power of the FP has been strengthened, since agreements around a policy field within minority and coalition governments,[568] require intense horizontal coordination between the coalition partners within the government as well as coordination between the government and its supporting parties.[569] Moreover, the principle of ministerial governance de jure grants substantial autonomy to the individual ministers of the Danish government, but the close alignment of the Ministry of Finance and the Prime Minister and his office de facto limit the policy autonomy granted formally to ministers individually and as the members of government.[570] Against this background, government committees, especially the Coordination Committee chaired by the Prime Minister and the Economic Committee chaired by the Minister of Finance became the most important policy-coordination tool. Committees under the chairmanship of other ministers, apparently, have lesser weight. For instance, Denmark appointed the Interministerial Committee of civil servants on disability matters chaired by the Minister of Social Affairs and the Interior as the policy coordination mechanism within the central government and between the civil society and the central government.[571] However, in studying the CPRD implementation in Denmark and in reviewing the Second and Third Report of Denmark, it becomes clear that on the one hand, the multi-sectoral recommendations of the CPRD Committee, especially in policy fields of accessibility, primary and secondary education made in the concluding observation on Denmark have been

566 B194 Forslag til Folketingsbeslutning vedrorende Danmarks Ratifikation af FN's Handicapkonvention af 13. december 2006 om Rettigheder for Personer med Handicap; Initial Report of Denmark, Para 380 and 381; Personal Communication with the Ministry of Social Affairs and the Interior on 05.02.2020 (it should be mentioned that the Request for an interview has been refused by the Ministry of Social Affairs and the Interior in December 2015).

567 OHCHR et al., 2007: 94.

568 Christensen, 2006; Hansen, 2020.

569 Howard/Salomonsen, 2020.

570 Rhodes/Salomonsen, 2018: 6.

571 B194 Forslag til Folketingsbeslutning vedrorende Danmarks Ratifikation af FN's Handicapkonvention af 13. december 2006 om Rettigheder for Personer med Handicap; Initial Report of Denmark, Para 381; Personal Communication with the Ministry of Social Affairs and the Interior on 05.02.2020.

addressed either to an unsatisfactory degree or have not been considered at all. On the other hand, the interviews with Danish DPOs revealed that the Interministerial Committee did not assume its responsibility as a mediator between the central government and the civil society.[572]

Besides, the fact that the FP addresses only the central government,[573] weakens its coordination power as the municipalities have a critical importance for the implementation of the CPRD due to their high level of local autonomy,[574] especially in the field of education and fiscal decentralization.[575] Instead, the Ministry of Finance plays a decisive role in coordinating and controlling the municipalities as their spending is regulated through negotiated agreements between the Ministry of Finance and local government of Denmark.[576] To this end, it might be assumed that the Danish FP and its CM are not of a sufficient high institutional rank to effectively carry out their duties as a mechanism for facilitating and coordinating matters relating to the implementation of the Convention at all levels and in all sectors of government as it is required by the CPRD Committee.[577]

The organization chart[578] of the Ministry of Social Affairs makes it clear that there is no separate unit in the ministry in charge of tasks under the CPRD. The explanation to the Ratification Law of the CPRD, where the government stated that the CPRD ratification will have no administrative consequences for the central government confirms this.[579] Accordingly, the

572 See chapter VI.

573 According to explanation to the ratification law of the CPRD, the CPRD ratification will have no administrative consequences for the State, municipalities and regions (B194 Forslag til Folketingsbeslutning vedrorende Danmarks Ratifikation af FN's Handicapkonvention af 13. december 2006 om Rettigheder for Personer med Handicap).

574 Ladner et al. 2016; Initial Report of Denmark, Paras. 9 – 12; Draft Combined second and third periodic reports of Denmark, Paras. 16, 17; Supreme Court case 52/2010 (dom af 18–10–2011).

575 Ivanyna/Shah, 2014; Rodden, 2004.

576 Sorensen, 2014.

577 CPRD Committee, Concluding observations on the initial report of Argentina, Para. 51.

578 The organization chart that is inaccessible, can be found at: https://english.sm.dk/the-ministry (Last accessed on 01.07.2022).

579 B194 Forslag til Folketingsbeslutning vedrorende Danmarks Ratifikation af FN's Handicapkonvention af 13. december 2006 om Rettigheder for Personer med Handicap.

FP has not been given additional human and financial resources,[580] which jeopardized not only its capability to undertake CPRD coordination at the horizontal and vertical levels of government but also led to disregard of its responsibility[581] to oversee the promotion of awareness-raising.[582]

## *2. Division of Legislative and Executive Competencies*

### 2.1 Federal Republic of Germany

Germany divides its legislative and executive duties between the federation, federal states and municipalities. As a result, the German Constitution distinguishes between two types of division of legislative powers – exclusive legislative (ausschließliche Gesetzgebung) and concurrent legislative (konkurrierende Gesetzgebung) competencies of federation and federal states.

#### 2.1.1 Exclusive legislative competencies

The list of responsibilities that fall under the exclusive legislative powers of federation is not that large: these are, for example, statistics for federal purposes and foreign affairs, including political and economic representation with regard to other countries, in particular the conclusion of International Treaties.[583] In line with Para. 3 of the 1957 Lindau Agreement between the federation and federal states, this applies also in cases where the state treaty falls also under the exclusive legislative powers of federal states. Most particularly, it has been agreed that: "in concluding state Treaties which, in the opinion of the federal states, affect their exclusive competences and are not covered by federal competence, especially in the case of cultural agreements, the procedure is as follows:

580 In the personal communication on February 5, 2020 with the Ministry of Social Affairs and the Interior, the direct question if the FP has been provided with human and financial resources, has been left unanswered.

581 OHCHR et al., 2007, 95.

582 See the answers of the government in the Initial Report of Denmark, Paras. 48 – 52. For the criticism see DIHR, 2014, 19 and DPOD, 2013, Para 8.2; The answers in Combined second and third periodic reports of Denmark put the responsibility of awareness-raising on the Danish Disability Council, which in fact is the part of Monitoring Framework, Paras. 51–54.

583 GG, Arts. 73 and 32 (1; See also Fastenrath, 1986: 120 f.

If state Treaties envisage obligations in areas of the exclusive competences of the Federation or federal states, the consent of the federal states should be obtained. This consent should be given before the obligation becomes binding under International Law. If the federal government submits such a treaty to the Bundesrat in accordance with Art. 59, Para. 2 of the Basic Law, it will at least simultaneously, request the federal states to give their consent.

In the case of the Treaties referred to in paragraph 1 sentence 1, the federal states should be involved in the preparations of the conclusion as early as possible, in any case in good time before the final treaty text has been decided upon".[584] For instance, before ratifying the CPRD, the government of Hesse has been asked and "gave its consent".[585] the representative of the Thuringian government, instead, stated that they "... did not give such a consent".[586] However, in considering the consent of the Federal Council,[587] this statement cannot be perceived as valid. After approval of the treaty by the Bundesrat and its adoption by the Bundestag, the federal states should, based on the principle of federal loyalty, adapt the respective state laws to the requirements of the ratified treaty.[588] Only a number of federal laws are implemented by the federation directly.[589] The implementation of the rest, and with it almost all the disability-related federal laws, including the CPRD are transferred to the federal states, which decide on the establishment of the requisite authorities and regulate their administrative procedures.[590] They might also deviate from the administrative procedures established by a federal law.[591] Nevertheless, in exceptional cases, owing to a special need for uniform federal legislation, the federation may regulate

584 See also GG, Art. 32 (2).

585 First-level-interview DE/B-H 1, on 14.01.2016, Q. 1. The original reads as follows: "Das Hessische Kabinett hat in 2008, also vor in Kraft treten, der Behindertenrechtskonvention in Deutschland, der Behindertenrechtskonvention, als solche zugestimmt. Also im Vorfeld des Bundesgesetzes hat bereits das Hessische Kabinett der UNBRK zugestimmt."

586 First-level-interview DE/B-T 2, on 23.05.2018, Q. 1. The original reads as follows: "Selbst Thüringen hat nicht ratifiziert. Klar, wir sind ja nur ein Bundesland der Bundesrepublik. Wir haben nicht zugestimmt, kein Land, kein Bundesland muss zustimmen, das ist so in Deutschland."

587 Bundesrat Drucksache 760/08 (Beschluss).

588 Kaiser, 1957/58, 526 ff.; Heckt, 1958, 445; Maunz/Dürig, 2014, Art. 32 Rn 70 and Art. 59 Rn 185; Dreher, 1969.

589 GG, Arts. 87 – 90.

590 GG, Arts. 83 – 85.

591 GG, Art. 84 (1) Sentence 2.

the administrative procedure with no possibility of separate federal states legislation.[592] If the federal states implement federal laws on behalf of the federation, the federal state authorities shall be subject to instructions from the competent highest federal authorities and might be required to submit implementation status reports.[593]

The traditional fields of exclusive legislative powers of federal states have been, for example, the school and educational affairs, cultural issues, police and municipal law,[594] as well as matters that have not been expressly bestowed on the federation for legislation and execution[595] e.g., building and construction law. As a result of the Federalism Reform I, the legislative competencies of the federal states have been, explicitly, expanded to e.g., university, care facilities and housing construction legislation.[596]

### 2.1.2 Concurrent legislative competencies

A large number of legislative fields, including Civil Law, judicial proceedings, public welfare, regulation of training grants and the promotion of scientific research, as well as university admission and university degrees fall under the concurrent legislative competencies, where the federal states have the power to legislate as long as and to the extent that the federal government has not made use of its legislative competences.[597] In fact, the federation has applied its legislative rights extensively by adopting framework laws that had to ensure the "equivalent living conditions" across the state. This, however, has been viewed as critical by the Federal Constitutional Court.[598] Accordingly, the extensive right of the federation to adopt framework laws under Art. 75 GG has been abolished with the introduction of the Federalism Reform I. Instead, the federation was allowed to legislate on the basis of "equivalent living conditions or the preservation of the unity of rights and economy" in selected policy fields, including regulations on training grants and the promotion of scientific research,[599] as well as public

592 GG, Art. 84 (1) Sentence 4; See also BeckOK Grundgesetz/Suerbaum, 41. Ed. 15.5.2019, GG Art. 84 Rn. 1–66.
593 GG, Art. 85 (3 and 4).
594 Kilper/Lhotta, 1996: 102.
595 GG, Arts. 30 and 70 (1).
596 Leunig/Pock, 2010; Huber/Uhle, 2014.
597 GG, Art. 72 (1).
598 E.g., BVerfG 2 BvF 2/02, am 27.07.2004.
599 Huber, 2014a; see also Münch, 2018.

welfare.[600] However, federal states have got a right to enact laws at variance with laws adopted by the federation in these policy fields.[601] In these cases, the federal states adopt implementation laws (Ausführungsgesetz) to federal laws as it is the case, for example, with the Federal Participation Law (BTHG).[602] In enacting deviating laws, the federal states are bound by constitutional, international and European Law provisions as much as the federation.[603]

The structure and field of responsibilities of municipalities are regulated by the municipal constitutions of the federal states,[604] which are of a **statutory character and** adhere to fundamental rights guaranteed by the respective federal state constitution and the Basic Law. They have a two-type function in the political system of Germany. On the one hand, they carry out tasks falling under their own area of responsibilities, which are in principle unlimited.[605] On the other hand, the municipalities, in line with German tradition, administer the tasks delegated by the federal and federal states governments.[606] A large number of their own area of responsibilities,[607] belong, among other areas, schools, social security, health, public facilities, transport, construction and housing, including building schools.[608] In carrying out their responsibilities, the municipalities are under the supervision of their state government[609] and dependent on the financial means provided by the federation and federal states.[610] Therefore,

600 GG, Art. 72 (2).

601 Regardless of the right to adopt deviating regulations given to the federal states under the Art. 72 Para. 3GG, a deviation of the federal states remains excluded for certain parts- non-deviant cores (abweichungsfeste Kerne), see: Explanation to Draft law (Begründung zum Gesetzentwurf), BT-Drs. 16/813; see also Huber, 2014b.

602 See below.

603 Explanation to the draft law (Begründung zum Gesetzentwurf), BT-Drs. 16/813.

604 Hessische Verfassung, Arts. 137 and 138; TH Verf, Arts. 91 – 95; see also Nothacker/D'Antonio 2016; Kraft-Zörcher, 2018; Naßmacher, 2007.

605 According to the Federal Constitutional Court (BVerfGE 79, 127, 146) the municipalities can "take care of all matters of the local community that have not already been assigned to other public administration bodies by law without a special title ("universality" of the municipality's sphere of activity)".

606 E.g., HGO, as amended on 11.12.2020 by GVBl. S. 915, §4; ThürKO, as amended on 17.02.2022 by GVBl. 87, § 3.

607 E.g., ThürKO, §2 (2).

608 See for example the Budget of the capital city of Hess (Haushaltsplan 2020/2021 der Landeshauptstadt Wiesbaden) and the capital city of Thuringia (Haushaltsplan 2019/2020 der Landeshauptstadt Erfurt).

609 Verf HE, Art. 37 (3); ThürVerf, Art. 94; Meyer, 1996; Huber, 1996.

610 GG, Art. 91e (2); Verf HE, Art. 37 (5 and 6); ThürVerf, Art. 93.

it is not surprising that the municipalities took rather a critical stance regarding the feasibility and in particular, financial viability of the full inclusion in the field of education.[611] For instance, according to the Hessian State representative,, even if the federal states adjust school laws to the CPRD by stipulating a general right to school for all children with disabilities in mainstream schools as it is in Hesse and Thuringia, "it does not realize every child's right of being enrolled in mainstream school because at the administrative level, the school commissions apply it in accordance with structural and financial features of the schools…".[612] Accordingly, instead of implementing the individual right of each disabled child to enrolment at the mainstream school, the State government of Hesse, for example, wants to "create enough schools within a reasonable radius so that children with disabilities do not have to travel far and at least not have to attend special schools, but at the moment it cannot guarantee that every disabled child can attend the school of its choice whenever the child wants it. This situation is true for many other federal states, which adapted their school laws and stipulated a general right to school for all children with disabilities in mainstream schools. But the reality, of course, often lags far behind",[613] especially in eastern federal states, such as Thuringia, which

611 E.g., Deutscher Städtetag (2012); Höfling (2012); Thüringer Landkreistag – Landkreisversammlung (2013).

612 First-level-interview DE/B-H 1, on 14.01.2016, Q. 4. The original reads as follows: "Rechtlich, das ist der dritte Fragepunkt. Das Hessische Ministerium hat für das Hessische Schulgesetzt dies bezüglich geändert, dass es ein generelles Recht auf Beschulung aller Kinder mit Behinderung in Regelschulen gibt. Das ist so festgeschrieben. … Im Vollzug ist auch diese Umsetzung der rechtlichen Regelungen führt nicht in dem Fall dazu, dass jedes Kind in Regelschule eingeschult wird, weil diese rechtliche Regelung, dieser generelle Anspruch vorbehaltlich, entsprechend der strukturelle und finanzielle Ausstattungsmerkmalen in den Schulen sich vorzieht. Das heißt in dem Moment, wo eine Beschulung an eine Schule zumindest auf Grund der Schulkommission deswegen nicht möglich ist, weil bestimmte Vorräte noch nicht da sind, werden diese Kinder gegebenenfalls auch nicht alle an alle Regelschulen eingeschult. Ich will das nur in dem Kontrast sagen, ohne dass den Bundesministerium Schaden einzurichten…".

613 First-level-interview DE/B-H 1 on 14.01.2016, Q. 4. The original reads as follows: "Das was wir hier in Hessen haben, haben wir in vielen anderen Bundesländern auch. Viele andere Länder haben ihre Schulgesetze angepasst bei diesen generellen Grundsätzlichen Rechtsanspruch festgeschrieben. Aber die Realität hinten natürlich häufig bleibt deutlich hinterher... Es gibt die eine Fraktion, die sagt: das muss daraus resultieren, dass jedes, und ich sage das jetzt auch in diese Form: Jedes Kind mit Behinderung an jede Schule, zu jeden Zeitpunkt an jeden Ort in Hessen beschult werden kann. Das hieß, aber in der Konsequenz, dass wir in einzelnen Bereichen,

finds that: "the radical abolition of support centers and special schools is not the way..." because the current schools do not have the necessary technical, spatial and personal equipment for being capable of providing simultaneous schooling for children with disabilities i.e., those with severe intellectual disabilities".[614]

## 2.2 Federal Republic of Austria

Due to the extensive legislative and executive powers of federation and highly limited competences of Länder, Austria is often perceived as a Unitarian federal state or a federal state with centralistic traits[615]. It divides its legislative and executive duties between the federation, Länder and municipalities. According to this division, the Austrian Constitution distinguishes between four types of division of powers:[616] Legislative and executive powers of the Federation[617] including foreign affairs e.g. political and economic representation with regard to other countries, in particular the conclusion of state Treaties, administration of justice, Civil Law, labour-legislation, social and contractual insurance and public health. Legislative power of the Federation, execution power of the Länder.[618] This category includes matters relating to the employment law and the staff

Schulen haben oder hätten. Wo ein Kind mit Hörbehinderung, wo ein Kind mit Sehbehinderung, ein Kind wie auch immer. Also wir reden nicht immer von vielen Kindern, die aufschlagen, dann die Schule, die schulische Institution für dieses Kind für dieses eine Kind in gegebenenfalls alle Vorausgaben erfüllen müsste. Um natürlich eine inklusive Schule zu gewährleisten. Das ist die eine Position. Die andere Position, an der das Landesregierung... aber zu sagen: wir müssen innerhalb eines vertretbaren Umkreises, es schaffen genug Schulen zu schaffen, damit Kindern mit Behinderung nicht irgendwo weit hinreisen müssen, schon gar nicht an Förderschule gehen müssen. Wir können, aber momentan zumindest nicht gewährleisten, dass jedes Kind zu jeder Zeit an jede Schule geschult wird. Das sind beide Positionen. An der zweiten Position wird gearbeitet.

614 First-level-interview DE/B-T 2, on 23.05.2018, Q. 4. The original reads as follows: "Es ist gerade neues Schulgesetz, wo man auch wieder gesagt hat, die radikale Abschaffung von Förderzentren und Förderschulen ist nicht der Weg, weil die jetzigen Schulen gar nicht so ausgestattet sind, dass sie (räumlich und Personal) ansprechend mehrfach Unterricht für Kinder mit Behinderung also mit schwer geistiger Behinderung gerecht werden können...".

615 Dachs, 2002, 32; Erk, 2004; Watts, 1999, 25.

616 Gamper, 2000; Adamovich et al., 2011: 293- 339.

617 Gesetzgebung und Vollziehung des Bundes (Art 10 B-VG).

618 Gesetzgebung des Bundes, Vollziehung der Länder (Art 11 B-VG).

representation law of teachers of public compulsory schools.[619] Basic legislative powers of the Federation, implementing legislative and executive powers of the Länder.[620] Under such a category fall, for example, external organization (structure, forms of organization, establishment, maintenance, discontinuance, number of pupils in classes, and teaching time) of public compulsory schools.[621]The exclusive legislative and executive powers of Länder include kindergarten and after-school care[622] and other type of educational establishments,[623] as well as in matters that have not been expressly bestowed on the federation for legislation or execution.[624] These are, for example, building and construction, personal assistance outside of labour market, independent living and rehabilitation.[625]

In carrying out their responsibilities, the federal government, the Länder and the municipalities are obliged to provide mutual assistance in accordance with the principle of cooperative federalism.[626] However, in reality, the cooperation in implementing international obligations e.g., CPRD can be "highly challenging i.e., the division of responsibilities between the federal and provincial governments and Länder and municipalities.... makes the implementation and control of the CPRD particularly difficult..."[627] especially in considering the fact that: "there is no political consensus regarding the contents of the UN Convention. There are simply different perspectives".[628] Accordingly, "in Austria the federal states and the federal government almost collide with one another because there are disputes over jurisdiction between the different ministries, the federal government

619 Art. 14 Para. 2 BV-G.
620 Grundsatzgesetzgebung des Bundes, Ausführungsgesetzgebung und Vollziehung der Länder (Art 12 B-VG).
621 Art 14 Para. 3a BV-G. See also Bußjäger, 2018c; Adamovich et al., 2011: 305 – 307.
622 Art. 14 Para. 4b B-VG.
623 Art. 14a para. 1 B-VG.
624 Art. 15 Para 1 B-VG.
625 See for example Tiroler Teilhabegesetz, Section 5.1.
626 B-VG, Art. 22; see also Dachs, 1996; Neuhofer, 1994: 32; Bußjäger, 2019.
627 First-level-interview AT/A 1, on 27.04.2016, Q. 16. The original reads as follows: "Eine spezielle Herausforderung in Österreich ist der Föderalismus, also die Teilung der Verantwortlichkeiten zwischen Bund und Ländern und zwischen Ländern und Gemeinden. Dadurch ist die Umsetzung und Kontrolle der UN-BRK besonders schwierig. Das würde ich schon als größte Herausforderung bezeichnen."
628 First-level-interview AT/B-T 1, on 26.10.2015, Q. 16. The original reads as follows: "Es gibt politisch keine Einigkeit darüber, was die Inhalte der UN-Konvention sind. Es gibt einfach nur unterschiedliche Sichtweise".

and the Länder ",[629] "particularly in the field of Art. 19 and education since each province can decide individually"[630] and “when it is about education then the federation thinks that it is the task of Länder but the latter believes that the federation is in charge… they simply do not let take each other's competencies and powers away, which eventually leads to blockade".[631] Nonetheless, despite widely acknowledged weaknesses, attempts to initiate a reform of Austrian federalism[632] remain unsuccessful up-to-date.

### 2.3 Kingdom of Denmark

Subsequent to the adaption of the so-called "Structural Reform" of 2004,[633] Denmark maintains a three-level governance structure as of 2007:[634] central, regional and municipal. There is no hierarchy between the regions and the municipalities, but the state administration is responsible for the supervision over the local and regional authorities.

The five regions and 98 municipalities do not have legislative powers. However, they decide upon their own structure and organization. The right

629 Third-level-interview AT/A 1, on 23.05.2016, Q. 2. The original reads as folows:
"… in Österreich die Bundesländer, der Bund fast gegnerisch auf einander prallen. Das sind die einzelnen Zuständigkeiten, die einerseits der Bund aufgrund der Verfassung hat, wo der Bund überall zuständig ist und dann haben die Länder Zuständigkeiten. Das ist auch im Verfassungsgesetz festgeschrieben. Die Länder sagen aber: „Wir lassen uns vom Bund in unseren Angelegenheiten nichts sagen. Das ist unser Privileg in diesen Bereichen zu entscheiden.“ Es gibt also Streitigkeiten über die Zuständigkeit innerhalb der unterschiedlichen Ministerien, dem Bund und den Ländern…".

630 Third-level-interview AT/A 1, on 23.05.2016, Q. 16. The original reads as follows:
"Der Föderalismus ist in jedem Fall ein Problem, weil jedes Land individuell entscheiden kann, vor allem bei der Bildung und Artikel 19".

631 Second/third-level-interview AT/B-T 2, on 27.10.2015, Q. 4. The original reads as follows:
"Aber es ist bei uns so, Schulsystem ist ja kompliziert, weil es gibt bei uns den Bund, und es gibt das Land, und die lassen sich nicht gegenseitig einfach Kompetenzen und Macht wegnehmen. Und deswegen blockiert es sich gegenseitig. Wenn es um die Schule geht, dann Bund meint, dass das Land zuständig ist, und umgekehrt".

632 Bußjäger, 2002, 2006, 2017, 2018c.

633 For more information on the reform see the webpage of the Ministry of Interior and Housing on Structural Reform at: https://english.im.dk/responsibilities-of-the-ministry/economics-of-municipalities-and-regions/structural-reform (Last accessed on 01.07.2022).

634 It also has two special autonomous regions- the Faroe Islands and Greenland.

to self-government of municipalities is even stipulated by Section 82 of the Danish Constitution. To this end, municipalities and the regions are in charge of policy fields of their interest, which are not expressly conferred to the central government. For instance, the state is responsible for police, armed forces, the judicial system, foreign affairs and development aid, higher education and research, as well as social welfare payments and related support in the field of specialised social education.[635] The regions are in charge of the health sector and are financed directly by the state.[636] The municipalities are responsible for all tasks aimed directly at citizens e.g., care for the elderly, social services, assistive devices, day-care centres for children and the 10 years of compulsory school education in Denmark.[637]

The structural reform, in addition, required the municipalities to establish a local Disability Council to ensure dialogue between local authorities and disability organizations.[638] The local disability councils contributed to the adoption of municipal disability policies e.g., 86 out of 99 municipalities adopted a disability policy as of 2010.[639] Thus, the institutional participation of DPOs has been ensured at a central level since 1980 and at a municipal level since 2007.

In carrying out their responsibilities, public authorities should adhere to the principle of sector accountability (Sektoransvarlighedsprincippet), which is a division of public tasks and public responsibilities),[640] and means that each governmental level should cover the costs of sectors that fall under their responsibilities. The principle is of particular importance to citizens with a disability as, on the one hand, there is no national disability authority with responsibility for the entire disability-area and on the other hand, a "public body offering a service or a product to persons without disabilities is responsible for offering and making accessible the service or product to DPs".[641] Nevertheless, the principle of sector accountability is seen critical, especially in the field of school education[642] as there is a risk that the child and the family fall between two chairs because individual

635 Initial report of Denmark, Para. 9; DPOD, 2013: 8 and 9.
636 Ibid.
637 Ibid.
638 Lov om aendring af lov om retssikkerhed og administration pa det sociale omrade og andre love § 37a stk. 2, stk. 3 and stk. 4.
639 Socialstyrelsen, Fra konvention til kommunal handicappolitik, 2012: 4.
640 Ketscher, 2014: 183; See also Initial report of Denmark, Paras. 10 – 12.
641 Initial report of Denmark, Paras. 10 – 12.
642 DPOD) 2013: 38 and 39; DIHR, 2014: 13.

actors relinquish responsibility on the expectation that others assume it, which in fact should be avoided.[643] For example, the 2017 study carried out by the DIHR on the implementation of the right to inclusive education at the municipal schools showed that the principle of sector responsibility in practice is the cause of significant interpretation doubts and inconsistent practices.[644] In several cases, the principle prevents or delays support, while support in other cases is given despite disagreement between sectors.[645] Besides, according to 2017 DIHR report on the legal security in municipalities, citizens with disabilities and with ethnic backgrounds other than Danish experience more difficulties in communicating with the local authorities than others and feel to a lesser degree that they were consulted and treated in a fair manner during their complaint case.[646] Moreover, a social welfare board of a municipality, despite its general obligation to contribute to the fulfillment of the international obligations,[647] refused to consider complainant's references to the ECHR in a decision establishing a payment scheme under the Child Benefit Recovery Act with a statement that it is of the view that a law passed by the Folketing is in accordance with applicable laws and regulations.[648]

### *3. Incorporation and application of International Law in the domestic legal system*

#### 3.1 Federal Republic of Germany

The German legal system with regard to relations between the domestic legal order and international obligations is premised on the conception of "moderate dualism".[649] According to the statement of the Federal Constitutional Court made in the "Görgülü" case, "the Basic Law is clearly based on the classic idea that the relationship of public International Law and

643 Ketscher, 2014: 183.
644 Nielsen, 2017 (for english summery see P. 10).
645 Ibid.
646 Jacobsen et al. 2017, (for english summery see P. 10).
647 Folketingets Ombudsmand, FOB 2005.14 – 1, tilgngelig pä:_https://www.ombudsmanden.dk/find/udtalelser/beretningssager/alle_bsager/05-425/#cp-title_(Last accessed on 01.07.2022); See also Andersen, 2016: 6. udgave, s. 50.
648 Ibid.
649 Papier, 2006: 60).

domestic law is [one] between two different legal spheres [whose nature] can only be determined from the viewpoint of domestic law (…) itself".[650]

According to Art. 59 Para. 2 of the German Basic law (GG), "Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law". Moreover, in line with Art. 25 of the GG, the general rules of International Law shall be an integral part of federal law and shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.[651] However, the term 'general rules of International Law ' applies to custom and general principles, but not Treaties. Therefore, the United Nations Conventions along with the ECHR have the same legal status as a federal act of parliament, meaning that they have a similar status as all other federal acts of parliament.[652] *Consequently*, International Treaties cannot be directly invoked in German courts since they are incorporated into German law as an ordinary statute.

However, the Federal Constitutional Court (FCC), in its decision of October 14, 2004 made clear that International Treaties, which had been adopted by the German parliament, are incorporated into the German domestic law.[653] Accordingly, the International Treaties that have been adopted by the German Parliament and incorporated into the German domestic law should be applied by German courts, like other federal statutes, "in the framework of accepted methods of interpretation".[654] Moreover, the International Treaties aiming at ensuring the fundamental rights and the rule of law, as enshrined in the Basic Law should serve as interpretative tools of German norms of a constitutional nature,[655] and thus be binding in all German state organs, including the courts in line with the rule-of-law principle enshrined in the Basic Law. Additionally, in view of the fact that the International Treaties such as the ECHR serve as a guaranty for fostering the development of human rights protection, the FCC maintained that Art. 1 Para. 2 of the GG, which ensures special protection to some core human rights, in conjunction with Art. 59 Para. 2 of the GG, form

650 BVerfGE 111, 307 (para. 34).
651 Hillgruber in SBHH, Art. 25 Rn. 1; BVerfGE 63, 343, 370; 111, 307, 318.
652 Grabenwarter/Pabel 2021: 15–23; Seidel, 1996; Frowein/Peukert, 2023.
653 Görgülü, BverfGE, Oct. 14, 2004, 2 BvR 1481/04, Para. 31.
654 Ibid.
655 Ibid., Para. 32.

the constitutional basis for the responsibility to abide by the human rights Conventions in the interpretation of German fundamental rights.[656]

### 3.2 Federal Republic of Austria

In accordance with Art. 9 Para. 1 of the Austrian Constitutional Law (B-VG), generally recognized rules of International Law e.g., some rules of customary International Law and the general principles of law recognized by civilized nations, are regarded as integral parts of federal law. However, Austrian constitutional law takes a middle position on the question of monism or dualism as well as on the question of aplications rank of international law. The relevant provisions i.e., in particular Articles 9, 49, 50, 65, 66 and 140a of the Federal Constitutional Law (B-V-G) show that international law is recognized as a genuine and independent legal order in the sense of a moderate monism, which does not enjoy priority over domestic law, but which norms are to be implemented in a proper manner, i.e., in a manner corresponding to the claim to validity of international law. The position of the B-VG can, therefore, be described as friendly to international law.[657]

The Federal Government has a dominant position in the conclusion of international treaties. It may also regulate matters which fall within the competence of the Länder.[658] However, the Länder have certain rights of co-decision-making in ratifying treaties that affect their competences.[659] The responsibilities for domestic implementation are governed by the rules of the constitutional division of competences.

Certain international treaties do require parliamentary approval. However, its competencies are limited to the option of approving the treaty or rejecting it as a whole. The parliament has no amending power. Since the amendment of the B-VG,[660] the possibility of creating constitutional law through general transformation of international treaty law has been

656 "The German people therefore acknowledge inviolable and inalienable human rights as the bases of every community, of peace and of justice in the world." GG, Art. 1 (2).
657 Adamovich et al., 2011: 199.
658 Art. 10 (1) (2) B-VG.
659 Art. 10 (3), Art 50 (3), Art. 50 para. 2 subpara. 2 B-VG.
660 BGBl I 2008/2 (RdZ 09.019 – 81.

eliminated. If an international treaty requires the enactment or amendment of formal constitutional law, this must be adopted separately.[661]

In ratifying international treaties, the responsible federal decision making organ can resolve to which extent the state treaty in question shall be implemented by the issue of laws.[662] It, for example, approved the ratification of many International Treaties, including the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination Against Women and Convention on the Rights of DPs with the statement that the Convention shall be fulfilled by enactment of laws,[663] whereas in some cases e.g., ICERD and CAT, it guaranteed the conscientious observance of the provisions contained in the Conventions.[664] Conventions that have been ratified with the fulfilment reservation,[665] and there have been no or selected legislative efforts in incorporating their provisions into domestic law, have no direct effect on the domestic courts and administrative acts as long as the government did not adopt appropriate implementation laws.[666] Consequently, the effectiveness of an international treaty within the domestic legal order is to a greater extent dependent on the will of the legislative and executive organs of the state.[667]

The Treaties, which alter or amend the Constitution have constitutional status, if they have been passed by the National Council in the presence of at least half of the members and by a majority of two thirds of the votes cast.[668] For instance, the ECHR has been given a constitutional status[669]

661 Adamovich et al., 2011: 200 -203.
662 B-VG, Art. 50 (2.4).
663 CRC- BGBl. Nr. 7/1993, Para. 2; CEDAW- BGBl. Nr. 443/1982, Para. 2; CPRD- BGBl. III Nr. 155/2008, Para. 2; ICESCR- BGBl. III Nr. 80/2020; ICCPR- BGBl 591/1980.
664 BGBl.Nr. 492/1987; BGBl. III Nr. 104/2012; BGBl. Nr. 377/1972.
665 Öhlinger in Korinek/Holoubek (Hg), B-VG (9. Lfg 2009) Art 50 B-VG Rn 84ff.
666 OGH (Supreme Court), Case (3Ob97/13f mwN), 15.05.2013; OGH, 10ObS162/16w; 5Ob183/17y; 10ObS16/18b; 3Ob242/19p, 24.01.2017.; OGH, 10ObS162/16w, 24.01.2017; OGH, 5Ob183/17y, 21.12.2017; OGH, 10ObS16/18b, 20.02.2018; OGH, 3Ob242/19p, 22.01.2020; see also Austrian Constitutional Court (VfSlg) 3950/1961, 27 May 1961; VfSlg 12281/1990, 27 June 1960; VfSlg 7448/1974, 14 December 1974; VfSlg 12.558/1990, with reference to Öhlinger, 1973, 149ff; Walter et al., 2007, Rn 239f; Adamovich et al., 2011, 212; Öhlinger/Eberhard, 2012, Rn 119.
667 Adamovich et al., 2011: 209ff; Adamovich et al., 2015: 8ff.
668 B-VG, Art. 44 (1).
669 BGBl. Nr. 59/1964; see also Thurnherr, 2008a.

thus enlarging the catalog of fundamental rights in Austrian legal system.[670] In contrast, Treaties that alter or amend statutes are perceived to have a legislative status, whereas those that neither alter nor amend the Constitution or statutes are considered to have a status of regulations.[671]

### 3.3 Kingdom of Denmark

According to Section 19.1 of the Danish Constitution, the King as the head[672] of the executive branch should ratify International Treaties, whereas the government bears the political responsibility for the ratification.[673] Nevertheless, the power of the executive is limited as without "the consent of the Folketing, the King shall not … enter into any obligation which for fulfilment requires the concurrence of the Folketing or which is otherwise of major importance; nor shall the King, except with the consent of the Folketing, terminate any international treaty entered into with the consent of the Folketing".[674] To this end, the international agreements might be concluded through statutory law or parliamentary approval e.g., either as an act of Parliament or as a parliamentary resolution (Folketingsbeslutning). In the case the requirements of the treaty could be met without legal amendments, the treaty might be ratified by the executive without a parliamentary resolution (almindelig folketingsbeslutning).[675] However, in line with the doctrine of dualism[676] and the doctrine of transformation, ratified Treaties and international agreements do not "automatically become a part of domestic law and, as a general rule, cannot be applied directly

670 Adamovich et al., 2015: 7f; Berka/Binder/Kneihs, 2019.

671 See, Adamovich/Funk/Holzinger, 2015; Case-law of the Austrian Constitutional Court, 24 June 1954, VfSlg 2680/1954.

672 Danish Constitution, Sec. 3: "legislative authority shall be vested in the King and the Folketing conjointly. Executive authority shall be vested in the King.…".

673 Harhoff, 1996: 151 – 182.

674 Danish Constitution, Sec. 19 (1).

675 Harhoff, 1996: 151 – 182.

676 See for example, Gulmann, 1991, op. cit., p. 247; Kjeldgaard-Pedersen, 2017; Non-implemented international law might, nevertheless, be considered as a source of law, see, Gulmann et al, 1989: 96–7; Spiermann, Ole, 'Højesterets anvendelse af folkeret I det 20 århundrede' (Application of International Law by the Supreme Court in the 20th Century), JUR 2001: 1–29, especially pp. 1–2; See also, Betænkning no. 1407. Inkorporering af menneskerettighedskonventioner i dansk ret (Incorporating the Human Rights Conventions in Danish Law) (2001): 24–8.

by the courts or the executive unless incorporated by the legislature".[677] In fact, Denmark might choose between (1) establishing norm harmony (konstatering af normharmoni), (2) targeted adoption (omskrivning og) and (3) incorporation (inkorporering). in order to comply with its international obligations.[678] For instance, in ratifying the European Human Rights Convention (ECHR) in 1953, the government assumed that Danish law fully complies with the provisions of the ECHR. Accordingly, it was not incorporated and as a consequence the Supreme Court did not find the ECHR, (at that time non-incorporated) directly enforceable: "It [ECHR] is, however, not by a general statute transformed to form a part of the applicable law in this country".[679] However, in several cases, the ECTHR interpreted and applied some of the provisions of the ECHR in a way that Danish law became inconsistent with the Convention.[680] As a result, the Danish government was forced to incorporate the Convention to ensure that it would prevail over conflicting Danish law,[681] unless there is a distinct opposite legislative intention.[682] Thus, it has a status of a general statutory law and does not override the Danish Constitution.[683]

677 Harhoff, 1996: 151 – 182; Björgvinsson, 2015: 55 – 88.

678 Betænkning (nr. 1546) om inkorporering mv. inden for menneskeretsomradet, 2010. Kapitel 3 Section 2. Retrieved from: https://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2014/Betaenkning_1546.pdf (Last accessed on 01.07.2022).

679 Judgement UfR. 1986.898 H in UfR. 1987B.50.

680 The first case that rose doubts if the Danish law is consistent with the ECHR was the Case of Young, James and Webster, Series A, Vol. 44 (1981), where Denmark was not a party but took appropriate measures to ensure consistency with ECHR (see, Act No. 285 of 9 June 1982). The case in which Denmark has been found in breach of the Convention was the Hauschildt case (ECHR, Series A, Vol. 154 (1989).

681 See Act No. 285, Apr. 29, 1992; see also the commentary by Hofmann, 1992.

682 Rytter, 2016: 55.

683 Rytter, 2016: 53 and 54; Björgvinsson, 2015: 138–141; see also Den europæiske Menneskerettighedskonvention og dansk ret, Betænkning No. 1220 1991: 149 et seq.

## 4. CPRD Ratification, Incorporation and Application

### 4.1 Federal Republic of Germany

#### 4.1.1 Ratification and legal status

The Federal Republic of Germany has signed the CPRD together with its Optional Protocol on 30 March 2007. After the signature, both the federal government and the federal states governments did not carry out a domestic law assessment or norm screening.[684] "There were various reasons for that, but the decision not to conduct norm-screening was deliberate… we were aware of it… but we knew also that the Art. 4 of the CPRD envisages progressive realisation provision, which basically means that it provides implementation time... ".[685] Consequently, "the federal government started the ratification process, during which various actors including, federal states and municipalities, (although the latter do not have a right to speak in such processes), did not have any real arguments against the ratification… there were, of course, arguments in selected fields e.g., there was quite a lot of discussion in the field of education, Equality Law, especially access to justice and whole Guardianship Law, but there was no general objection to the ratification, rather discussions about how it should be interpreted."[686]

684 First-level-interview DE/A 2, on 08.08.2018, Q. 3; First-level-interview DE/B-T 2, on 23.05.2018, Q. 3; First-level-interview DE/B-H 1, on 14.01.2016, Q. 3.

685 First-level-interview DE/A 2, on 08.08.2018, Q. 3. The original reads as follows: "das hatte verschiedene Ursachen, aber das war gewollt, da hat man es auch gesehen. Zumal so zu sagen die Konvention als solches in Art. 4 für die, gerade für die und das ist die entscheidende Rechte, Sowieso eine Umsetzungsperiode lässt. Ja, also ich meine die Finanzielle Resorts. So schrittweise die einzelne Rechte und aus diese kann man ja auch ableiten: okay zu den damaligen Zeiten kann man sagen, ja okay, das hat gepasst. Das heißt aber nicht, dass man sie nicht weiter entwickeln kann".

686 First-level-interview DE/A 2, on 08.08.2018, Q. 2. The original reads as follows: "gegen eine Ratifikation hat man, hatten wir, glaube ich so richtig keine Argumente… da hatten wir gar nicht. Also richtig dagegen war niemand. Also sowohl Kommunen als auch Ländern, als auch der Bund nicht so zu sagen. Also zumal die Kommunen auch kein Sprachrecht diesbezüglich auch haben…Also Argumente gab es natürlich zu sagen, wie ist es das in dem Bereich der Bildung. Da gab es ziemlich große Diskussion. Und beim Thema natürlich, wie ist es das mit der rechtlichen Gleichstellung, also Zugang zum Recht, ganze Betreuungsrecht usw. Auch da gab es Überlegung so zu sagen, ob es alles so passt, ob… Aber das waren die einzelnen Bereiche zu den eine Diskussion gab. Da gab es aber nicht so zu sagen das generelle, das man dann sagen würde: wir waren dagegen das es ratifiziert wird, sondern es gab die Diskussionen, wie ist das auszulegen."

On 24 February 2009, the Bundestag with the approval of the Bundesrat has adopted the Ratification Law proposal of the federal government.[687] In the ratification Memorandum (Denkschrift), the federal government, by stating that German laws fully meet the requirements of the CPRD, made it clear that the ratification of the Convention will not result in any legal amendments.[688] This, according to Felix Welti, gives reason to conclude that at the time of the ratification the legislature assumed that the implementation of the Convention would and should, essentially, be carried out by the administrative organs and jurisdiction.[689] According to federal government representatives, however: "... if they would have stated something else, the CPRD would not be ratified. So easy is the game so to say...."[690]

On 26 March 2009, The CPRD became binding for Germany[691] as a sub-constitutional federal act of parliament.[692] This means that the majority of the CPRD provisions cannot be directly invoked in German courts, since for this, they should have all attributes that a German law provision must have to entitle or obligate an individual. This is the case with the prohibition of discrimination under Art. 5 CPRD, which, due to the equivalent provision of the German constitution, namely, Art. 3 Para. 3 sentence 2 Basic Law, has been recognized as self-executing and, thus, directly applicable,[693] as both provide, principally, the same protection level.[694] Neverthe-

687 Art. 59 para. 2 Sentence 1 GG states: "treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law".

688 Bundestag, Drucksache 16/10808, 45 et seq.

689 Welti, 2016: 640.

690 First-level-interview DE/A 2, on 08.08.2018, Q. 3. The original reads as follows: "... tatsächlich was anderes dürfte gar nicht rauskommen. Wenn da was anderes rausgekommen wäre, wurde es nicht ratifiziert so einfach ist das Spiel so zu sagen. Ja, das muss man einfach so sehen. Dadurch ist das so zu sagen da..."; The same answer also in the First-level-interview DE/A 2, on 18.11.2015. Q. 3.

691 Notice of the entry into force of the UN Convention on the Rights of DPs from 5 June 2009 (BGBl. II S.812).

692 Federal Constitutional Court, (Bundesverfassungsgericht, BverfG), 2 BvR 1481/04, on 14 October 2004: para. 31; BVerfG, 2 BvC 62/14, on 29 January 2019.

693 E.g., BVerfG, B 8 SO 14/13 R, on 23 July 2014: para. 25; BVerfG, B 9 SB 1/15 R, on 16 March 2016: para. 16; For the discussion according to which CRPD rights could be self-executive and applied by the courts without further legislation, see Degener, 2009b,34 ff.

694 BVerfG, B 1 KR 10/11 R, on 06 March 2012: para. 31.

less, it has to be taken into account that the self-executing international treaty provisions concern only the relation to public legal bodies but not the private law subjects.[695] In all other cases, the CPRD provisions are non-self-executing and have to be implemented by a domestic implementation law.[696] Nonetheless, a non-self-executing provision may affect the German law.[697] The statements of committees or comparable treaty institutions, despite their significant importance, are, in contrast, binding neither for international nor for national courts. The same concerns the reports (Art. 39 CPRD), guidelines (Art. 35 CPRD) and recommendations (Art. 36 CPRD) of the CPRD Committee[698] Furthermore, the Committee has no mandate for a mandatory interpretation and competence for the further development of Treaties. Therefore, national courts, as part of an international-law-friendly interpretation, shall take the views of treaty organs into account but they do not have to comply with them.[699]

### 4.1.2 CPRD incorporation and application in the policy fields under the legislative powers of federation

#### 4.1.2.1 Responsibilities of the federal Focal Point and Coordination Mechanism

The BMAS as the federal FP governs the implementation processes of the CPRD and promotes cross-departmental awareness-raising.[700] It has developed the first and second National Action Plans and is responsible also for the NAP update, as well as the supervision of the NAP committee.[701] It is aimed at the supervision of the NAP implementation and consists of representatives of the DPOs, social and welfare associations, the social partners, academia, Federal Disability Commissioner and the NMB with an advisory status.[702]

695 See Welti/Frankenstein/Hlava, 2018: 28.
696 BSG, B 1 KR 10/11 R, on 06 March 2012: para. 23.
697 BVerfG, 2 BvR 1481/04, on 14 October 2004: para. 31 et seq.; BVerfG, 2 BvC 62/14, on 29 January 2019: para. 63.
698 BVerfG, 1 BvL 8/15, on 26. July 2016, para. 90; BVerfG, 2 BvC 62/14, on 29.01.2019, para. 65.
699 BVerfG, 2 BvC 62/14, on 29.01.2019, para. 65.
700 BMAS, NAP 2.0, Section 5.2.2 (BMAS als FP).
701 Ibid.
702 NAP 2.0, Section 5.4.2 (NAP-Ausschuss).

Since the CPRD ratification, the FP managed also the reporting process: it submitted the first, as well as the second and third combined reports on the CPRD implementation, answered the written questions of the Committee and participated at the live dialogue of the Committee on Germany. In preparing the reports, the BMAS, as the federal FP, was in contact with the state FPs. These had a decisive role in coordinating and sharing the information collected from the Länder-level ministries.[703]

In addition, the FP organizes a two-day meeting with the federal states twice a year, where they discuss various aspects of the CPRD implementation and share best practices.[704] The BMAS together with the KMK also address the implementation of the inclusive education in the federal states.[705]

The scope of responsibilities assigned to the Federal Disability Commissioner by the law, in comparison to the long task list envisaged for the CM,[706] is not that large. The Commissioner ensures that the responsibility of the federation to guaranty equal living conditions for persons with and without disabilities is fulfilled in all areas of social life.[707] In carrying out the function outlined by Section 18.1 of the BGG, the Commissioner, as the National CM, ensures the involvement of the disability organizations, acts as a coordination body between the government and civil society and works towards awareness raising.[708] For this purpose, the former Commissioner, Hubert Hüppe (CDU, 2009 – 2013) established an Inclusion Advisory Council (Inklusionsbeirat) in 2011, which is chaired by the Federal Government Commissioner and, mostly, comprised of persons with various disabilities,[709] as well as a representative of the Conference of state disability commissioners and a representative from the NMB and FP that have observer status. Appointed members from the disability organizations have been recommended by the DBR.[710] In addition to representatives of the disability organizations, the inclusion Advisory Council includes repre-

703 Einstmann, 2020 (Personal Communication).
704 First-level-interview DE/A 2, on 08.08.2018, Q. 7; see also Zweiter und dritter Staatenbericht der BRD, Para. 34; NAP 2.0, Section 4.4 (Gemeinsame Aktivitäten und Maßnahmen).
705 Ibid.
706 OHCHR et al., 2007 : 95.
707 BGG, §18 (1).
708 NAP, 1.0, 2011: 108.
709 Arnade, 2015.
710 The State Coordination Agency Report 2010 – 2013, published on 01.06.2013: 10. Retrieved from: https://www.behindertenbeauftragter.de/DE/Presse-und-Aktuelles/Publikationen/publikationen_node.html.

sentatives of industry, trade unions, churches, cost and service providers, charitable organizations, and scientific and other associations.[711] The representatives of other Federal Ministries e.g., Federal Ministry of Education and Research are not part of the Inclusion Board.

#### 4.1.2.2 Legislative Action

Following the CPRD ratification, the federal government developed the first National Action Plan on the implementation of the CPRD.[712] It was composed of 12 action fields and contained more than 200 individual measures. The CPRD Alliance in its first civil society report on the implementation of the CPRD in Germany stated that the NAP 1.0 lacked binding, verifiable goals that it was supposed to achieve. Moreover, many of the measures listed in the NAP 1.0 did not include specific targets and an implementation schedule, which made measuring or monitoring the implementation of the NAP impossible.[713] The NMB, in its turn, stated that action plans adopted both by the federal government and the federal states, lack a human rights-based approach aligned to the Convention.[714] As a result, the Committee recommended Germany to ensure that "Federal and all local governments establish overarching human rights-based action plans with a clear concept of disability, setting adequate measures to promote, protect and fulfil rights, and with targets and indicators to monitor the implementation of the Convention".[715]

Thus, in 2013, the federal government announced a paradigm shift in all societal fields for DPs. This had to be achieved through further development of the NAP 1.0 and a new Participation Law. Nevertheless, it should have not caused additional expenditure dynamics for the implementing actors.[716]

711 For more on the cooperation with the civil society refer to: https://www.gemeinsam-einfach-machen.de/GEM/DE/AS/NAP/NAP_10/Umsetzung_NAP/Zusammenarbeit_Zivilgesellschaft/zusammenarbeit_zivilgesellschaft_node.html (Last accessed on 01.07.2022).
712 NAP 1.0.
713 CRPD Alliance, 2013:8.
714 National Monitoring Body, 2015:9.
715 CPRD Committee, Concluding Observations on the Initial Report of Germany, Para. 8b.
716 CDU, CSU, & SPD, 2013:67, 77.

In 2015, right after the publication of the sobering Concluding Observations on Germany by the CPRD Committee, the federal government started to develop the second edition of the National Action Plan, which was adopted on 28 June 2016.[717] Moreover, it, despite its initial position that there is no need for legal amendments, started reforming the social and equality rights of DPs that fall under the concurrent legislative competencies and should meet the requirement of ensuring "equivalent living conditions" across the state. Most particularly, it drafted the reform of the Participation Law (Bundesteilhabegesetz) and amendment law to the Equality Law for DPs that was based on the evaluation of the Equal Opportunities for DPs Act (Behindertengleichstellungsgesetz)[718].

On 26 April 2016, the Federal Ministry of Labour and Social Affairs, following intensive consultations with relevant actors,[719] including the federal states and associations of municipalities, published the first draft of the Federal Participation Law (Bundesteilhabegesetz). The draft law addressed a number of concerns raised in the Concluding Observations on Germany. Most specifically, it brought the definition of disability in line with the CPRD disability concept, recognised the right to reasonable accommodation, and foresaw creation and financial support of Independent Consulting Centres (Ergänzende Unabhängige Teilhabeberatung) and strengthening political participation of DPs through their representative organizations at the federal level. Besides, the federal legislator introduced the budget for work as a response to concerns and recommendations expressed by the Committee in the first individual complaint against Germany.[720] However, in view of the DPO's, reforms failed to ensure accessibility in the private sector, exit strategies from the sheltered structures and workplace accessibility.[721]

717 NAP 2.0.
718 See Welti et al., 2014.
719 For the involvement of the DPOs, see chapter VI.
720 Liliane Gröninger at al. vs. Germany (CRPD/C/D/2/2010).
721 Deutscher Behindertenrat et al., 2018:2 et seq.

Subsequent to the adoption of the BTHG by the Bundestag,[722] federal states adopted implementation laws to the BTHG,[723] which, except selected institutional and administrative deviations,[724] had to ensure uniform implementation of social and equality rights of DPs in all 16 federal states. However, on July 7 2020, the FCC declared the parts of the municipal education package in SGB XII introduced with the BTHG to be incompatible with the Basic Law.[725] Most particularly, it found the relevant regulations of the third chapter of the SGB XII constitute an impermissible transfer of tasks by federal law to municipalities and violate their municipal self-government rights. Therefore, the federal government amended the regulations of education and participation with the Participation Strengthening Law (Teilhabestärkungsgesetz).[726]

Legislative amendments concerned also other policy fields e.g. the intensive care and strengthening of Rehabilitation Law (Intensivpflege- und Rehabilitationsstärkungsgesetz- GKV)[727] and newly processed draft on Guardianship Law (Gesetz zur Reform des Vormundschafts- und Betreuungsrechts).[728]

#### 4.1.2.3 Consideration by the Courts

Loyal to the German court and jurisprudence tradition, the CPRD is subjected to the theory of an indirect application via interpretation of existing norms.[729] Accordingly, the provisions of the CPRD have been used to

722 Act on Strengthening the Participation and Self-Determination of DPs [Gesetz zur Stärkung der Teilhabe und Selbstbestimmung von Menschen mit Behinderungen, BTHG] from 23 December 2016, BGBl. I, 3234.

723 For more seeUmsetzungsstand Länder – Umsetzungsbegleitung Bundesteilhabegesetz at: https://umsetzungsbegleitung-bthg.de/gesetz/umsetzung-laender/ (Last accessed on 01.07.2022).

724 See for example the implementation in Hess at: Umsetzungsstand in Hessen and the implementation in Thuringia at Umsetzungsstand in Thüringen (Last accessed on 01.07.2022).

725 FCC- Az. 2 BvR 696/12.

726 BGBl. I 2021 S. 1387; BT-Drucksache 19/27400.

727 BGBl. I 2020 S. 2220; BT-Drucksache 19/19368.

728 For more see the BMJV webpage on Gesetz zur Reform des Vormundschafts- und Betreuungsrechts at: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Reform_Betreuungsrecht_Vormundschaft.html (Last accessed on 01.07.2022).

729 Welti, 2016, 635 ff.

substantiate a legal argument based on domestic law[730] or as a clue for indefinite legal norm interpretation[731] but not as the main reference point for interpretation. To this end, in over 11 years of ratification, the CPRD not only reached the German courts but also managed to become a significant source of arguments for case law relating to DPs. The number of citations are quite impressive compared to the consideration rate of other UN Conventions by German lower and higher courts. In contrast to 150 references in 45 years of the Social Pact and Civil Pact, the legal information portal (Juris) brings 456 lower and higher court decisions referring to the CPRD as of June 24, 2022.[732]

The indirect interpretation of the CPRD can, for example, be observed in the Labour Law cases, where it is, normally, used only in combination with the provisions of the European Council Directive 2000/78/EG.[733] This led, for instance, to the recognition of an asymptomatic HIV-Disease as a disability,[734] since the definition of disability in the Directive had to be interpreted in the light of the CPRD.[735]

An example of a successful use of the CPRD in Social Security Law, was the 2014 case, where disabled claimants contested the practice of minimum cash benefits:[736] the disabled adults living in a household with others, normally, were not considered as the person responsible for the household, as a result of which they got a monthly 60 euros less payment than the person who was considered as the head of the household. The federal Social Court ruled that the general assumption that disabled adults were not responsible for the household was indirect discrimination.

The CPRD has been successfully used also in the 2020 judgment recognizing the need for an aid – special therapy tricycle as a preventive measure and its importance for ensuring the basic need for mobility.[737]

Another important case concerning the CPRD was the 2019 case of voting rights for the federal parliament, where a number of persons under full guardianship filed a claim before the Federal Constitutional Court

730 See BSG, B 9 SB 2/09 R, on 29 April 2010: para. 43.
731 See BSG, B 11 AL 5/14 R, on 06 August 2014: para. 21.
732 See also, Aichele, 2018:176.
733 Federal Labour Court (Bundesarbeitsgericht, BAG), 8 AZR 402/14, on 21 April 2016: para. 21 et seq.; BAG, 6 AZR 190/12, on 19 December 2013: para. 52 et seq.
734 BAG, 6 AZR 190/12, on 19 December 2013: para. 56 et seq.
735 European Court of Justice, C-335/11, on 11 April 2013: para. 28 et seq.
736 Federal Social Court, 23.07.2014, B 8 SO 14/13 R, BSGE 116, 210.
737 BSG B 3 KR 7/19 R, Urteil vom 07.05.2020, Rn 29.

after being excluded from the federal elections of 2013. The FCC found the specific linking of voting exclusion to full guardianship to be discriminating and unreasonable and ruled that the regulation was in contradiction to Art. 3 Basic Law. As a result, the Bundestag completely abolished the election exclusion.[738]

In view of this, it might be assumed that the CPRD, unlike other human rights conventions, such as ECHR, quickly became a frequently used instrument for claimants and an important source of judicial interpretation for domestic courts in matters concerning federal laws. However, the efforts of the CPRD Committee to make it a "lively instrument"[739] through General Comments and own jurisprudents failed among domestic courts.[740]

### 4.1.3 CPRD incorporation and application in the policy fields under the legislative powers of federal states

#### 4.1.3.1 Responsibilities of Focal Points and Coordination Mechanisms

The responsibilities of the Länder-level FPs do not differ that much from the federal FP: they should act as cross-ministerial coordinators, and involve civil society, as well as promote awareness raising and disability-mainstreaming across the ministries.[741] However, their subordinate rank in the government hinders effective discharge of their responsibilities: "we have no competencies at all… to ask any other ministry to do something… we are simply a section in a ministry, which is just one ministry among many…."[742]

738 BVerfG, 29.01.2019, 2 BvC 62/14, BGBl. I 2019, 368; NJW 2019, 1201.

739 Letsas, 2007, S. 65 et seq.; Cremer, 2013, S. 162 et seq. – 183 et seq.

740 BVerfG, 1 BvL 8/15, on 26. July 2016, para. 90; BVerfG, 2 BvC 62/14, on 29.01.2019, para. 65.

741 NAP 2.0, Section 4.2.1.

742 First-level-interview DE/B-T 2, on 23.05.2018, Q. 11. The original reads as follows: „Wir müssen da nichts machen aber wir haben auch gar keine Kompetenzen also irgendein anderes Ressort aufzufordern irgendwas zu machen, also das wir sind … schon mal vorhin erklärt hat, wir sind einfach Referat in einem Ministerium was nur wieder ein Ministerium unter vielen ist, was im Kabinett zusammengefasst wird der Ministerpräsident steht darüber also wir sind als FP, wie gesagt sind wir so koordinierungsstelle vielleicht…".

Their main task, thus, was to develop or as it was in Thuringia, update the process of the Länder-level action plan.[743] Hereby, they created working groups composed of different actors,[744] including the associations of the municipalities. Working Groups were structured into action fields of the plans and were dissolved after completing the development of the action plans. Therefore, the transparent and participative controlling of their implementation was impossible.[745]

Although the scope of responsibilities of Länder-level disability commissioners are similar to the Federal Disability Commissioner, they have not been appointed as a CM under the CPRD. They, on the one hand, serve as contact point for disabled individuals and their organizations, on the other hand, they act as disability consultants for the public authorities.[746] Through their work, they raise awareness on disability and accessibility, and help in ensuring equal opportunities for DPs in all spheres of social life.[747] After the adoption of the CPRD, the Commissioners of Hesse and Thuringia also help in implementing the CPRD at the Länder-level.[748]

In order to carry out their responsibilities, especially in connection with the CPRD, Commissioners of Hess and Thuringia are supported by advisory boards.[749] The inclusion board of the Hessian Commissioner, for example, is composed of at least 16 members from the disability-organizations and 14 other relevant actors, including representatives of municipal commissioners and municipal associations, as well as representatives of Social Ministry.[750] Before the amendment of the Hessian Disability Equality Law (HessBGG), with which the existence and structure of the Board has been legally regulated, the Board met once a year.[751]

743 First-level-interview DE/B-H 1, on 14.01.2016; First-level-interview DE/B-T 2, on 23.05.2018.

744 First-level-interview DE/B-H 1, on 14.01.2016; First-level-interview DE/B-T 2, on 23.05.2018; See also the action plans of Hesse and Thuringia. For the involvement of the Länder-level DPOs, see chapter VI.

745 Monitoring-Stelle, Evaluationsbericht zum Hessischen Aktionsplan zur Umsetzung der UN-Behindertenrechtskonvention, 2013; Monitoring-Stelle, Ergebnisse der Evaluierung des Thüringer Maßnahmenplans zur Umsetzung der UN-BRK, 2016.

746 HessBGG, §18 (2); ThürGIG vom 30.07.2019 (GVBl. S. 303), §20 (1).

747 Ibid.

748 HessBGG, §18 (2.3); ThürGIG, §20 (1.3).

749 HessBGG, §19; ThürGIG, §21.

750 HessBGG, § (2).

751 For more, including the involvement of DPOs and their opinion see chapter VI. The New Commissioner is in office since March 2020.

The Disability Board of Thuringia, in turn, consists of over 12 members with voting rights, including DPOs and 17 members with advisory status, such as representatives of ministries responsible for Social Law, building and construction affairs and education politics, as well as representatives of fractions of the parliament, representatives of municipal associations and commissioners.[752] After the structural changes based on the amendment of the Thuringian BGG, the Board convened first on July 1 2020 under the chairmanship of the Commissioner.[753]

The involvement of state Commissioners in other advisory bodies of the state ministries, instead, is rare. For instance, the Commissioner has not been involved in the state school Advisory Council of Thuringian Ministry of Education, which plays an important role in developing and monitoring the implementation of educational laws.[754] Instead, the Thuringian government decided to establish an Advisory Board on inclusive education. The Board was divided into 6 Working Groups composed of state and non-state actors, including the Disability Commissioner, a few DPO representatives, and a member from the municipal associations, the Social Ministry and fractions of the parliament.[755] It convened in the period of November 2, 2011 (first meeting) and November 16, 2016.[756]

The state school Advisory Council of the Hessian Ministry of Education includes the Hessen State Disability Commissioner as one of its members[757] and there have not been established further advisory boards on inclusive education.

In general, it might be concluded that Länder-level commissioners play an important role in raising awareness about disability-related issues. However, their restrained competencies and resources hinder the productive performance of their actions taken with or across various ministries concerning the implementation of the CPRD, in particular the right to inclusive education.

752 ThürGIG, §21 (2).
753 Link: see: https://www.tlmb-thueringen.de/aktuelles/presse-und-medien/presse-archiv/ (Last accessed on 01.07.2022).
754 See TH ThürSchulG, §39; ThürMitwVo, §7.
755 For the list of members see the beirat_inklusion_geschaftsordnung at: https://bildung.thueringen.de/fileadmin/schule/inklusion/beirat_inklusion_geschaftsordnung.pdf (last accessed on 01.07.2022).
756 Minutes of further meetings are not available online.
757 HSchG, §99a.

#### 4.1.3.2 Legislative action and concideration by the courts in the field of cultural rights

With the ratification of the CPRD, the right to inclusive education became one of the central and most controversial aspects of the legal and political implementation of the CPRD in Germany. The claims landed at the courts of the federal states. However, the results did not justify the expectation of claimants: the Hessian Administrative Court, for example, maintained in its decision of November 2009 that: "the treaty provisions in Art. 24 of CPRD- currently have no domestic validity insofar as they concern the area of public schools".[758] Other courts, including the Federal Administrative Court, came to similar conclusions.[759]

In fact, the aim of the Art. 24 CPRD is twofold: on the one hand, it aims at elimination of discrimination on the grounds of disability in educational settings. On the other hand, it requires establishment of inclusive education at all levels.[760] To achieve this, the SPs are obligated to adopt legal measures that would ensure equal access of disabled children to regular education, reasonable accommodation and physical and structural accessibility of schools. Hereby, CPRD distinguishes between progressive implementation-systemic change towards inclusive education, especially in strongly segregated educational systems[761] and immediately applicable rights-reasonable accommodation, non-discrimination in accessing regular

758 VGH Hessen, Beschluss vom 12. November 2009- 7 B 2763/09 – 1. Leitsatz, NVwZ-RR 2010, 602. "Die Vertragsbestimmungen in Art. 24 des Übereinkommens über die Rechte von Menschen mit Behinderungen – BRK – besitzen derzeit keine innerstaatliche Geltung, soweit sie den Bereich des öffentlichen Schulwesens betreffen"; Similar conclusion in, Hessischer Verwaltungsgerichtshof 7 A 1138/11.Z, Beschluss vom 14.05.2012.

759 BVerwG 6 B 52.09, Beschluss vom 18. Januar 2010, Rn 4; VGH Baden- Württemberg 9 S 1833/12, Beschluss vom 21. November 2012, Rn 56, VB1BW 2013, 386, 389 f.; OVG Lüneburg 2 ME 278/10, Beschluss vom 16. September 2010; OVG Nordrhein-Westfalen 19 E 533/10, Beschluss vom 3. November 2010; SG Augsburg S 15 SO 110/11 ER, Beschluss vom 27. September 2011, Rn 73; VG Düsseldorf 18 K 5702/10, Urteil vom 16. Dezember 2010, Rn 9 ff; VG Arnsberg 10 L 397/10, Beschluss vom 17. August 2010, Rn 12.

760 CPRD, communication No. 41/2017, Rubén Calleja Loma and Alejandro Calleja Lucas v Spain (CRPD/C/23/D/41/2017), adopted on August 28, 2020.

761 CPRD Committee, General Comment No. 4, (CRPD/C/GC/4), adopted 26 August 2016, Paras. 39 and 40.

schools and realization of educational aims enshrined by the Art. 24. Para. 1 CPRD.[762]

The right to education in Germany is stipulated by the Basic law[763] and regulated by the 16 federal states.[764] The general right of all disabled children to schooling has been secured through the non-discrimination provision of the Basic Law as of 1994.[765] Their attendance to special schools, however, has been preferred and promoted both through socio-political structures and legal norms.[766]

On October 20 2011, the KMK took further steps encouraging harmonised access to regular schools for disabled children by adopting the recommendation on inclusive education. Following this, federal states started reforming their school laws.[767] In Hesse the reform process started in 2011 and the amendment law which aimed at adopting the Hessian School Law to the CPRD has been passed in 2017.[768] Thuringia started the reform process after the School Law was evaluated by the NMB, although it did not take into account its recommendations.[769] Nevertheless, regardless of the principle of federal loyalty,[770] the reformed school laws, except reforms of Bremen and Hamburg, have not been adapted to the requirements of the CPRD: Thuringian School Law, for example, does not provide entitlement to inclusive schooling, instead, parents should choose the type and form of the school.[771] Hessian School Law stipulates the primacy of regular school but does not provide entitlement to attendance of regular school.[772] Some federal states e.g., Saxony-Anhalt even stipulate that disabled children are obligated to attend special school if other school forms cannot cover the required special needs.[773] The majority of federal states, including Hesse[774] stipulate a resource reservation for the schooling of children with special

762 Ibid., Para. 40.
763 GG, Art. 7 (1).
764 E.g., HessVerf, Art. 56 (1); ThürVerf, Art. 23 (2).
765 Welti, 2005: 682.
766 Welti, 2005: 681–694; Gercke et al., 2017.
767 Mißling/Ückert, 2014.
768 LT Hessen, Drucksache 19/3846.
769 First-level-interview DE/B-T 2, on 23.05.2018, Qs. 3 and 4.
770 Kaiser, 1957/58: 526 ff; Heckt, 1958: 445; Maunz/Dürig, 2014, Art. 32 Rn 70 and Art. 59 Rn 185; Dreher, 1969.
771 TH ThürSchulG, §3 (1).
772 HSchG, §51.
773 SchulG LSA, as amended on 8.07.2022 by GVBl. LSA S. 149)2, §39 (1).
774 HSchG, §51 (2.2).

educational needs in regular schools,[775] whereas the assignment to a regular school cannot be subject to resource and organization reservations as these are inconsistent with the provisions of the CPRD and ECHR.[776]

Some years after the CPRD ratification, federal states, including Hesse and Thuringia passed action plans on the implementation of the CPRD. A few of them have been updated after the NMB evaluation.[777] The action plans aimed at laying down the future steps of the federal state governments in implementing CPRD provisions fall mainly under the exclusive legislative powers of the federal states e.g., school education and accessibility. The steps laid down in the action plans were on the one hand subjected to financial reservations. For instance, the Hessian Plan stated: "based on connectivity principle (Konnexitätsprinzip) in Art. 137 of the Hessian Constitution, the implementation of measures in municipalities should be carried out within the framework of municipal services of general interest and in accordance with public budget availability".[778] On the other hand, the Action Plans failed in setting up CPRD conform objectives,[779] especially in the field of education. The government programs of federal states have confirmed this line of action.[780] However, it is assumed that they had an important role in Länder-level incorporation of the CPRD: "we brought out an action plan in 2012 ... this is our transformation at the political level. We have transformed what the federal laws, federal side does, into the Hessian administration, into the Hessian parliament and into the Hessian politics".[781] Further efforts of the state parliaments in promoting and monit-

775 See Lange, 2017. For the implementation of the right to inclusive schooling in individual federal states see, Dörschner, 2014; Schippmann, 2016; Bernhard, 2016; Kroworsch, 2019.

776 E.g., CPRD Committee, Communication No. 41/2017 of August 28, 2020; ECTHR disision of September 20, 2020, G.L. v. Italy (no. 59751/15); see also Mißling/ Ückert, 2014: 43.

777 Thuringia adopted the updated action plan on March 29 2019.

778 Hessischer Aktionsplan zur Umsetzung der UN-Behindertenrechtskonvention, 2012, §1.2.

779 CPRD Committee, Concluding Observations on the Initial Report of Germany, Para. 5.

780 E.g., CDU und BÜNDNIS 90/DIE GRÜNEN, Koalitionsvertrag 2014 – 2019; die Linke, SPD und Bündnis 90/die Grünen, Koalitionsvertrag 2014 – 2020.

781 First-level-interview DE/B-H 1, on 14.01.2016, Q. 1. The original reads as follows: "Wir haben in 2012 einen Aktionsplan herausgebracht … Also das ist so gesehen unsere Transformation auf politische Ebene. Wir haben das was die Bundesgesetze, Bundesseite macht in die hessische Verwaltung, ins Hessische Parlament und in die hessische Politik transformiert".

oring the implementation outside of legislative processes is insignificant; there are very few parliamentary discussions regarding inclusive education and, at least in the examined federal states, there have been no inquiries of MPs regarding accessibility of schools.

To this end, it becomes clear that the possibility of disabled children to receive equal and inclusive education, especially for disabled children wishing to make Abitur varies from federal state to federal state.[782] For instance, the number of children with special needs in regular schools from 2009 to 2018 rose only by 22.54 %, which means that years after the ratification more than the half of children with special needs attend segregated schools: in 2009 from 483.267[783] children with special needs only 95.475 (about 19.76 %)[784] attended regular schools and in 2018 from 556.317[785] children with special needs only 235.325 (about 42.30 %)[786] attended regular schools. The rate of inclusion varies from federal state to federal state and depending on the type of schools.[787] For instance, Hauptschule have the highest rate of inclusion, which is to be seen as critical as after graduation from this type of school, the chances of DPs to access the general labour market is significantly low. Gymnasiums show the lowest rate of inclusion, whereas they ensure direct access to universities. This might be explained not only by social factors but also and primarily by fragmented and therefore highly unequal access to reasonable accommodation and non-existence of universally accessible mainstream schools as the subsections below show.

#### 4.1.3.2.1 Reasonable educational accommodations

The CPRD defines reasonable accommodations as necessary and appropriate modification and adjustments not disposing a disproportionate or undue burden, where needed in a particular case, to ensure to DPs the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[788] Reasonable accommodation is a key to the non-discrimination concept of Art. 5 CPRD. In the context of Art. 24

782 Aichele et al, 2019: 30 – 36.
783 KMK, 2020: 3.
784 KMK, 2020: 6.
785 KMK, 2020: 3.
786 KMK, 2020: 6.
787 KMK, 2020.
788 CPRD, Art. 2.

CPRD, reasonable accommodation is an instrument for ensuring the equal right of each disabled child to inclusive schooling at all educational levels. The concept is also promoted by the ECTHR,[789] according to which the provision of reasonable accommodation cannot be denied on the basis of financeability of services.[790] It is also a part of EU Law.[791]

In Germany, the explicit entitlement to reasonable accommodation and recognition of its denial as discrimination by the Federal Disability Equality Law has been introduced as a reaction to the recommendation of the CPRD Committee.[792] Some federal states followed the example of the federation,[793] whereas others did not, even after amending their disability equality laws.[794] Accordingly, these federal states did not secure the right of DPs to reasonable accommodation in policy fields under their exclusive legislative competencies and within their public authorities.

In general, reasonable educational accommodation is divided into a social support system or core school area. As a result, medical rehabilitation, technical e.g., Braille displays and computers, and accompaniment of disabled children to schools are regulated through federal laws. However, federal states lay out the administrative scope through their framework laws. This leads to diverging practises due to varying decision-making logics of cost bearing authorities of federal states.[795] Nonetheless, according to the Federal Social Court, the provision of reasonable accommodation should be interpreted uniformly across Germany.[796] Reasonable educational accommodations concerning core areas of schools e.g., school helpers, communication assistants and organizational adjustment of schools, in-

789 Grigoryan, 2017; Waddington/ Broderick, 2017.
790 Case of G.L. v. Italy (application no. 59751/15).
791 Lawson, 2017; Ferri, 2018.
792 CPRD Committee, Concluding observations on the initial report of Germany, Paras. 13 and 14.
793 E.g., HessBGG, §4; ThürGIG, §4 (4); BremBGG, §7 (2) and (3); HmbBGG, §6 (2); SächsInklusG, §4 (3); BGG LSA, as amended on 6.05.2019 by GVBl. LSA S. 85, §4; BGG NRW, as amended on 11. April 2019 by GV. NRW. S. 207, §3.
794 E.g., LGBG; BbgBGG, as amended on 18.12.2018 by GVBl. I/18, (Nr. 38) S. 16; BayBGG.
795 Welti, 2017.
796 BSG, Urt. v. 22.03.2012, Az. B 8 SO 30/10 R, BSGE 110, 3013, Rn. 21; BSG, Urt. v. 15.11.2012, Az. B 8 SO 10/11 R, BSGE 112, 196, Rn. 15; SG Leipzig, B. v. 16.11.2015, Az. S 5 SO 66/15 ER, juris Rn. 32f.

stead have to be ensured through school laws of federal states.[797] This, normally,[798] leads not only to the refusal of reasonable educational accommodation,[799] but also creates responsibility conflicts between the cost bearing authorities.[800]

Thus, as a matter of fact, disabled children wishing to attend regular schools face serious obstacles in obtaining reasonable accommodations necessary not only for their equal access to regular schools but also for achieving equal opportunity of getting quality education, that would ensure development of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential. Accordingly, for accessing their right to reasonable educational accommodation, disabled children are often forced to go through long-lasting court procedures, which is not an option for many disabled children and their families, or they should give up their wish of attending regular schools.

#### 4.1.3.2.2 Accessible schools

One of the fundamental requirements of the CPRD is stipulated by the Art. 9. It requires the SPs to take legislative and administrative measures to ensure to DPs access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. In line with the CPRD Committee's General Comment on Art. 9 of the CPRD, the duty to provide accessibility is an ex ante duty, meaning that SPs have the obligation of providing accessibility before

797 LSG Schleswig-Holstein, B. v. 15.04.2014, Az. L 9 SO 36/14 B ER, SchlHA 2014, 50; LSG Schleswig-Holstein, B. v. 17.02.2014, Az. L 9 SO 222/13 B ER, SchlHA 2014, 112; SG Rostock, B. v. 28.10.2013, Az. S 8 SO 80/13 ER, RdLH 2014,30.

798 Exception: OVG Sachsen, 3 A 975/19, 23.09.2020.

799 VG Berlin, 3 L 120.18, 19.03.2018; VGH Bayern, B. v. 04.09.2015, Az. 7 CE 15.1791, BayVBl 2016, 129; OVG Rheinland-Pfalz, Urt. v. 27.10.2011, Az. 7 A 10405/11, ZFSH/SGB 2012, 284; VGH Hessen, B. v. 10.11.2004, Az. 7 TG 1413/04, NVwZ-RR 2005, 189; OVG Berlin, B. v. 22.02.2002, Az. 8 SN 164.01, NVwZ-RR 2002, 577; OVG NRW, Urt. v. 15.06.2000, Az. 16 A 3108/99, Behindertenrecht 2000, 239; VG Frankfurt, B. v. 15.11.1995, Az. 7 G 2569/95 (2), RdLH 1996, 30.

800 Welti, 2017.

receiving an individual request to enter or use a place or service.[801] In the field of education, the provision obligates the SPs to ensure inclusive school systems at all educational levels.

In Germany, the requirements of Art. 9 CPRD are not new: disability equality laws of the federation and federal states foresaw provisions addressing accessibility of public authorities long before the ratification of the CPRD.[802] Nevertheless, some federal states including Hesse continue the strategy of weakening the duty to ensure accessibility in administrative fields falling under the own responsibility area of municipalities,[803] to which belong also schools. Even in the federal states where there were no such limitations, finding at least one fully accessible school in a municipality is not an easy task, which often excludes the option of attending regular school.

The accessibility of generally used buildings, including schools, has been addressed also in the building and construction laws of the federal states.[804] However, 12 federal states, with the exception of Brandenburg, Hamburg, Saarland and Thuringia, limited the application of accessibility provisions to cases that do not concern old buildings, to which the majority of schools belong and/or do not cause disproportional burden.[805] The number of schools that have been made accessible or have been built/renovated in line with accessibility standards of state building and construction laws as well as the disability laws is not known.[806]

Similarly, there is no data on the resources available to ensure adequate staff, supervision and training to guarantee support for disabled pupils and students in mainstream schools.[807] In fact, the main step taken in this respect was the recommendation jointly adopted by the KMK and the HRK

801 CPRD Committee, General Comment No 2, Para. 25; see also, CRPD/C/14/D/21/2014,; Grigoryan, 2017.
802 Welti 2012, 2015b.
803 HessBGG, §10 (5); SächsInklusG, §1 (3).
804 E.g., HBO, as amended on 3.06.2020 by GVBl. S. 378, §54 (2); ThürBO, as amended on 23.11.2020 by GVBl. S. 561, §50 (2).
805 E.g., HBO, §54 (3); SächsBO, as amended on 1.06.2022 SächsGVBl. S. 366, §50 (3); BauO LSA, as amended on 18.11.2020 by GVBl. LSA S. 660, §49 (3); BauO Bln, as amended on 12.10.2020 by GVBl. S. 807, §50 (5).
806 Second and Third Periodic Report of Germany, Q and A on education (Art. 24) Section D (German version).
807 Ibid. Q. 24b.

Educating Teachers to Embrace Diversity,[808] which, as the teacher training programs Curriculum of the universities show, did not result in tangible changes.

In addressing Art. 24 CPRD, governmental programs, action plans and courts, thus, point out the "progressive realisation" clause, thereby disregarding not only the fact that it contains immediately applicable provisions, but in over 12 years of the CPRD ratification, also fails to recognize that the "progressive realisation" clause requires concrete, expeditious, equal, and coordinated legislative and administrative actions[809] leading to the full realisation of inclusive education across the SP.[810]

## 4.2 Federal Republic of Austria

### 4.2.1 Ratification, legal status and consideration by the courts

On July 9 2008, the Austrian National Council (Nationalrat) had approved the ratification of the CPRD and its Optional Protocol in accordance with Art. 50, Para. 1 no. 1 B-VG with a statement that "in line with the Art. 50 Abs 2 Z 3 B-VG the application of the CPRD is to be fulfilled through the adoption of relevant domestic legal measures".[811] On July 25, 2008, the Federal Council (Bundesrat) had approved the decision of the National Council unanimously.[812] Consequently, the CPRD together with its Optional Protocol (OP-CPRD) entered into force in Austria on 26 October 2008.[813] To this end, the government (federal level), the Länder (regional level) and local authorities (local level) are, according to the first state report of Austria, under equal obligation to implement the Convention in Austria.

Nevertheless, the courts, in pointing out the declaration made by the government in the CPRD ratification decision, find that "it is necessary to adopt transformation norms that would assist in insuring effective applica-

808 Decision of the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder of 12 March 2015 and decision of the German Rectors' Conference of 18 March 2015 (Lehrerbildung für eine Schule der Vielfalt – Gemeinsame Empfehlung von Hochschulrektorenkonferenz und Kultusministerkonferenz).

809 CPRD Committee, General Comment No 4, Para. 39; CRC, General Comment no 5, Paras. 6 and 9.

810 CPRD communication No. 41/2017.

811 BGBl. III Nr. 155/2008.

812 Ibid.

813 Federal Law Gazette, BGBl. III No. 155/2008.

tion of the Convention within the framework of the domestic law".[814] "Such norms, nevertheless, have not yet been adopted".[815] In view of this, "the UN CRPD as an international treaty does not (actually) have legal effect within the domestic law; it is not directly applicable, does not create any subjective right and cannot serve as a legality measurement for another legal act".[816]

Prior to the ratification, Austria did not evaluate if the domestic laws were consistent with the CPRD provisions as it was underestimated: "in Austria we thought that the CPRD would not affect us that much and that we therefore would not need to amend many laws. It was only later that we saw what a high standards the CPRD sets, which actually made it clear that we have to amend many laws".[817] The Austrian civil society representatives, in their turn, noted that the Austrian legal framework, especially with regard to coordination of responsibilities between the governmental levels, does not meet the standards of the Convention.[818] As a result, the CPRD committee noted that there is an apparent fragmentation in the different definitions of disability, different accessibility standards, and different protections against discrimination across the various Länder and that according to Art. 4, Para. 5 of the Convention, the "administrative difficulties of a federal structure" do not allow a state to avoid its obligations under the Convention.[819] Henceforth, the CPRD Committee recommended Austria to ensure that federal and regional governments consider an overarching legislative framework and policy on disability in conformity with the provisions of the Convention.[820]

814 See, the OGH (Supreme Court), Case (3Ob97/13f mwN), 15.05.2013.
815 See, the OGH (Supreme Court), Cases (7Ob135/14z iFamZ 2015/26, 34 [Ganner]; (7Ob134/14b, SZ 2014/101).
816 See, the OGH (Supreme Court), Cases (3Ob65/11x SZ 2011/106); (4Ob223/08k; Mayer/Muzak, Bundes-Verfassungsrecht Art. 50 B-VG AnmII.3 mwH).
817 First-level-interview AT/A 1, on 27.04.2016, Q. 3. The Original reads as follows: "Meine Einschätzung ist die, dass wir vor der Ratifizierung die UN-BRK sehr unterschätzt haben. Wir haben uns in Österreich gedacht, dass die UN BRK uns nicht sehr betreffen würde und dass wir deswegen nicht viele Gesetze ändern müssen. Wir haben erst später gesehen welche hohen Standards die UN BRK ansetzt und dass es wirklich bedeutet, dass wir viele Gesetze ändern müssen."; See also Austrian written replies to list of issues in relation to the initial report of Austria, Para. 32.
818 Austrian Civil Society Representatives 2013, Paras. 1 – 5.
819 CPRD Committee, Concluding observations on the initial report of Austria, Para. 10.
820 Ibid., Para. 11.

In its Second and Third Periodic Reports, the Austrian government reiterates that:

> "the Federal, provincial and municipal governments have been equally obliged to implement the CPRD since its entry into force. In addition to administration, both the federal and provincial legislative bodies and case-law are required to ensure the conformity of measures with the CPRD or make decisions in accordance with the CPRD".

Nonetheless, the federal government took selective steps towards adaption of transformation norms that would assist in ensuring the effective application of the Convention within the framework of the domestic law.[821] Consequently, courts continue stating in their decisions that the CPRD cannot be considered in the domestic law as there is no appropriate transformation laws in the considered cases.[822]ArtsExceptions to these are the cases concerning Guardianship Law (Erwachsenenschutz-Gesetz).[823]

As of June 2022, there have been four individual complaints launched against Austria to the CPRD Committee; two of which have already been decided and two are pending.[824] The first communication has been launched in February 2014 by an Austrian national, who claimed that failure of the Austrian authorities to promote the accessibility of a person with disabilities in the context of a private dispute between neighbours constitutes a violation of his rights under Arts. 3, 9, 14, 19, 25, 26 and 28 of the CPRD.[825] The Committee came to the conclusion that "the SP has failed to fulfil its obligations under article 9, read alone and in conjunction with article 3 of the Convention and recommended the SP to provide the complainant with an effective remedy, in particular by facilitating a solution to the conflict related to the use of the path, which was the only means of gaining access to the complainant's family home, taking into account the special needs of Complainant as a disabled person; … reimbursing the complainant for the legal costs reasonably incurred in domestic pro-

821 See below.

822 OGH, 10ObS162/16w; 5Ob183/17y; 10ObS16/18b; 3Ob242/19p, 24.01.2017.; OGH, 10ObS162/16w, 24.01.2017; OGH, 5Ob183/17y, 21.12.2017; OGH, 10ObS16/18b, 20.02.2018; OGH, 3Ob242/19p, 22.01.2020.

823 OGH, 3Ob87/19v, 29.08.2019; OGH, 9Ob53/19p, 30.10.2019.

824 For the full list of pending cases see: https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRPD/Tablependingcases.pdf (Last accessed on 17.07.2022).

825 CPRD Committee, communication No. 26/2014, on 16.02.2018.

ceedings and in the processing of the communication".[826] The Committee was also of a view that the SP is under an obligation to take measures to prevent similar violations in the future through ensuring continuous capacity-building of the local authorities and courts responsible for monitoring implementation of accessibility standards; developing an effective MF and set up efficient Monitoring Bodies with adequate capacity and appropriate mandates to make sure that accessibility plans, strategies and standardization are implemented and enforced…".[827] A follow-up progress report on this individual communication is not yet available but media contributions write that Austria, most specifically TyroleanGovernment, does not have any intention to solve this issue even after the decision of the CPRD Committee.[828]

The second communication has been submitted in March 2014 by a blind Austrian citizen, who claimed that his rights under the Convention: namely Arts. 2, 5 (2), 9, 19 and 20 had been violated by the refusal to provide accessible live information in public transport for a blind person on an equal basis with others.[829] The CPRD Committee found that the "SP has failed to fulfil its obligations under articles 5 (2); 9 (1) and (2) (f) and (h) of the Convention".[830] To this end, the Committee recommended the SP to remedy the lack of accessibility to the information visually available for all lines of the tram network and provide adequate compensation to the author for the legal costs incurred during domestic proceedings and the costs incurred in filing the present communication; to take measures to prevent similar violations in the future, including by creating a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment necessary to enable the access by persons with visual impairment to the information that is visually available. The SP should also ensure that all newly procured tram lines and other public transport networks are fully accessible for DPs; … ensuring that disability rights laws concerned with non-discriminatory access in areas such as transport and procurement include access to information and communications technology and the many

826 Ibid. Para. 10A.
827 Ibid. Para. 10B.
828 derStandard.at, "Behinderter Tiroler kämpft seit 17 Jahren erfolglos um sein Recht ", 25. Okt. 2018; Hannah Marlene Wahl, "UN rügen Österreich: Rechte von Menschen mit Behinderung ernstnehmen", Unsere Zeitung, 01.07.2018.
829 CPRD Committee, Communication No. 21/2014, on 21.08.2015.
830 Ibid. Para. 9.

goods and services central to modern society that are offered through such technology. Legislation should incorporate and be based on the principle of universal design and should provide for the mandatory application of accessibility standards and for sanctions for those who fail to apply them".[831] Nevertheless, the follow-up progress report on individual communications shows that the SP neither took any significant steps to ensure prohibition of similar violations by amending or adopting necessary legal measures nor it provided compensation for the legal costs incurred during the domestic proceedings and for filing the communication.[832] The inactivity of the SP has been also confirmed by the 2018 parallel report of the FMC.[833]

### 4.2.2 Responsibilities of Focal Point/Coordination Mechanisms and legislative actions

As the federal FP and the CM under Art. 33.1 CPRD, the BMSGFK promotes the dissemination of knowledge of the rights guaranteed by the Disability Rights Convention and the possibilities for their implementation through appropriate measures.[834] In issues concerning social affairs it coordinates its actions with other relevant Federal Ministries and provinces through the Federal Disability Advisory Board.[835] However, "in Austria, contrary to the CPRD, there is no FP that can involve other actors in a binding manner:[836] there is, of course, the FP of the Social Ministry, which continuously calls for action, but it is unpredictable if these calls for action will be followed. One can see what a tough process it is; one actor shifts it's responsibilities on another and no actor feels really responsible".[837] To this end, the coordination in all other matters are managed by the relevant

831 Ibid.
832 CPRD Committee, Follow-up progress report on individual communications, (CRPD/C/14/3), adopted 17 August-4 September 2015.
833 Federal Monitoring Committee, 2018, Art. 9.
834 BBG, §13f.
835 First-level-interview AT/A 1, on 27.04.2016, Qs. 7 – 10.
836 See also section 1.3 of part II in this chapter.
837 Third-level-interview AT/A 1, on 23.05.2016, Q. 2. The original reads as follows: "... Es gibt in Österreich, entgegen der UN-Konvention keinen FP, der die anderen Akteure verbindlich mitinvolviert. Es gibt zwar den FP Sozialministerium, der auch immer wieder einfordert, aber ob dieser Forderung nachgegangen wird ist nicht abzusehen. Man sieht daran, was das für ein zäher Prozess ist. Es schiebt der eine dem anderen etwas zu, was er machen sollte, aber keiner fühlt sich wirklich verantwortlich".

federal ministry as it is stipulated by the act on the Federal Ministries:[838] For example the Federal Ministry of Education established its own working groups on inclusion strategy with provinces, and the Federal Ministry of Justice, in turn, set up a working group with provinces on supported decision making.[839] Nevertheless, efforts to conclude an agreement[840] between the federation and provinces concerning the cooperation in accessibility, personal assistance, de-institutionalization and employment was unsuccessful.

In the same vein, the federal government in drafting the National Disability Action Plan (NAP- 2012 – 2020) failed not only in laying down the exact responsibility fields of individual ministries but also the provinces have not been involved in this process despite the fact that "very crucial areas of responsibilities are part of their jurisdiction".[841] The participation of other relevant actors, including disability organizations has been limited, mainly, to submitting commentaries on the final draft of the NAP, which has not been considered with the explanation that "the date for submission to the Council of Ministers had already been set".[842] The NAP was then adopted by the Council of Ministers but has not been sent to the National Council.

The National Action Plan 2022 – 2030 also contains a number of measures formulated through a participative policy-formulation process. However, it again does not have secured financing, which makes its implementation questionable.[843]

In response to criticism of the CPRD Committee,[844] the Federal Ministry of Justice (BMJ) started a 5-year reform process of the Guardianship Act in late 2013. To manage the participation process, which in fact was the first as such, the BMJ set up two working groups; a big and a small group. The small group was aimed at collecting ideas and discussing possible alternatives to existing provisions and included experts from judges, notaries, attorneys, representatives of guardianship organizations, service providing

838 Bundesministeriengesetz 1986, §3 (1).
839 First-level-interview AT/A 1, on 27.04.2016, Qs. 7 – 10; see also BMASK (2017). Bericht über die Lage der Menschen mit Behinderungen in Österreich: 19 – 20.
840 Link. 2015.
841 Federal Monitoring Committee, 2018: 3.
842 Federal Monitoring Committee, 2013: 7.
843 BIZEPS2022.
844 CPRD Committee, Concluding Observations on the Initial Report of Austria, Paras. 27 and 28.

organizations and Guardianship Law professors.[845] The purpose of the big working group was to receive feedback from a more diversified group of people on the progress and results of the small working group.[846] Later, the BMJ organized three special working group sessions primarily for persons under guardianship.[847] Depending on the issue discussed, representatives of other Federal Ministries e.g., BMASK and national social security agencies also took part at the sessions of the working groups.[848] Nevertheless, participants from the provinces were underrepresented and the representatives of the provincial governments were missing.[849] In March 2017, the Adult Protection Act (2. Erwachsenenschutzgesetz) had been adopted by the National Council[850] and entered into force in July 2018. However, provinces did not yet adopt provisions that would expand support measures and provide adequate alternatives ensuring supported decision-making.[851]

Another participative process has been initiated by the Federal Ministry of Europe, Integration and Foreign Affairs (BMEIA), which established a working group composed of academics, civil society and DPO representatives, as well as members of the FMC and some Federal Ministries e.g., BMASGK to implement the recommendation of the CPRD Committee regarding the correct translation of the Convention into German language.[852] The new version of the CPRD translation had been published in 2016 (BGBl. II Nr. 105/2016) and became binding in Austria, but other German language states, including Germany did not adopt it.

The next legislative initiative of the federal government was the 2017 reform of three federal disability acts (Inklusionspaket- BGBl. I 2017/155). It had been developed in consultations with the relevant actors and contained a number of improvements in the protection from discrimination, financing of employment-related projects and strengthening the position of the FMC. However, similar steps have not been taken at the Länder-level.

845 Lamplmayr/Nachtschatt, 2016: 71 – 73.
846 Ibid.
847 Ibid.
848 Lamplmayr/Nachtschatt, 2016: 75 – 77.
849 Ibid.
850 BGBl. I Nr. 59/2017.
851 Federal Monitoring Committee, 2018, Art. 12; Österreichische Behindertenrat, 2018, Art. 12.
852 Federal Monitoring Committee, 2018, Articles 1 – 4; Zweiter und dritter Staatenbericht Österreichs, 2019, Q. 5.

The rest and with it the majority of the CPRD Committee recommendations concerning e.g., accessible building and construction, inclusive education, and de-institutionalization remains either unaddressed by the federal and provincial governments, or amendments have even led to *deterioration* of the situation.[853]

The actions of the Länder-level FPs/CMs with regard to the CPRD implementation were more symbolic than factual: for example, in 2018, the Tyrolean government, with the involvement of all the governmental and non-governmental actors,[854] drafted and adopted the above mentioned Participation Act,[855] which amended the disability definition to implement the recommendation of the CPRD Committee. However, "this has hardly changed anything with regard to the services for DPs ".[856] For instance, the so-called 'Participation Act' not only reinforced special schools,[857] sheltered workshops[858] and living in special institutions[859] but also continues requiring DPs or their family/relatives/partners to co-finance their disability-related services.[860]

Except for the adoption of the Participation Act, there have been no significant initiatives of evaluating or aligning the provincial laws with the CPRD provisions. Even the announced[861] Disability Action Plan has not been adopted. Accordingly, the Tyrolean MC stated in March 2018 that instead of tangible improvements, the situation of DPs even worsened, especially with regard to inclusive education, independent living and accessibility.[862]

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853 Federal Monitoring Committee, 2018, e.g., Arts. 9, 19, 24, 33 (2); Österreichische Behindertenrat, 2018, e.g., Arts, 9, 19, 24, 33.

854 Parliamentary documents, including commentaries can be found at: https://portal.tirol.gv.at/LteWeb/public/ggs/ggsDetails.xhtml?id=14904& (Last accessed on 01.07.2022).

855 LGBl. Nr. 32/2018.

856 Federal Monitoring Committee, 2018, Art. 4.

857 Tiroler Teilhabegesetz, §9 (2b), §10 (1b and c).

858 Tiroler Teilhabegesetz, §11 (2a – f).

859 Tiroler Teilhabegesetz. §12.

860 Tiroler Teilhabegesetz. §23, §24.

861 , 2019.

862 See the Commentary of the Tyrolean Monitoring Committee on the formation of new provincial government at: https://www.tirol.gv.at/fileadmin/themen/gesellschaft-soziales/UN-Konventionen/tiroler-monitoring-ausschuss/dokumente/stellungnahmen/Wichtige_Anregungen_aus_dem_Staatenbericht_an_die_Tiroler_Politik.pdf (Last accessed on 01.07.2022).

The federal government justifies the inconsistent and insufficient steps taken to domesticate the CPRD into the provincial laws by the federal structure of Austria, where each provincial government is responsible for implementing the CPRD within its own area of legislative power.[863] However, the extensive legislative powers of federal government,[864] and the fact that provinces are obliged to take measures that are necessary in their independent sphere of influence for the implementation of state Treaties,[865] allow assumptions that the legislative responsivity in these policy fields lays, both nationally and internationally[866] by the federal government.

Against this background, it should be mentioned that although the Austrian provinces have budgetary authority, their revenues come, largely, from financial equalization and they cannot raise their own taxes.[867] Accordingly, provinces decided to demand a "disability fund" that would ensure the funding of measures for the assistance of DPs concerning the implementation of the CPRD from the federal government at the 2014 meeting of social officers of provinces (Konferenz der Landessozialreferenten). The demand had been repeated at the 2018 meeting,[868] but only in May 2022 an agreement had been achieved in this respect.[869] However, the provincial governments still have a lot of leeway. This seriously endangers equal consideration of CPRD Committee's recommendation "to ensure that federal and regional governments consider adopting an inclusive legislative framework and policy on disability in Austria, in conformity with the Convention".[870]

863 Initial Report of Austria, 1 – 3; First-level-interview AT/A 1, on 27.04.2016, Qs. 6 and 16.
864 B-VG, Arts. 10 and 14 (1), Art. 14a (2); Thorlakson, 2003.
865 "If a province does not fulfill this obligation in a timely manner, the responsibility for such measures, in particular for the enactment of the necessary laws goes to federation" B-VG, Art. 16 (4).
866 VCLT, Arts. 26 and 27; CPRD, Art 4 (5).
867 Bußjäger, 2018c.
868 VOL.AT, Länder begrüßen neuen Anlauf zur Harmonisierung der Mindestsicherung, 13.04.2018; kaernten.ORF.at, Einheitliche Mindestsicherung gefordert, 14.04.2018; see also Parlamentskorrespondenz Nr. 1421 vom 15.12.2016.
869 Parlamentskorrespondenz Nr. 495 vom 12.05.2022 (Last accessed on 01.07.2022).
870 CPRD Committee, Concluding observations on the initial report of Austria, Para. 11.

## 4.3 Kingdom of Denmark

### 4.3.1 Ratification, legal status and concideration by the courts

The proposal of the Danish government to ratify the CPRD had been approved by the parliament on May 28, 2009.[871] Accordingly, it was ratified by the executive without reservations on 13 July 2009 and came into force on 23 August 2009.[872] To this end, it, according to the Danish government, "must … be observed by all authorities applying its legislative provisions, including state, regions and municipalities".[873] This means that administrative authorities should exercise their discretionary powers in such a way that administrative acts conform to International Law, which is known as the rule of instruction, but their actions should be guided by and based exclusively on domestic law[874]. The best example for this delivers the Supreme Court case of 2011,[875] where the appellant, who due to her disability (Epidermolysis Bullosa- EB) had recurring expenses for dental treatment, maintained that the costs of dental treatment should be covered by the municipality as these costs are caused by her disability and that there was no other legislation that would cover the additional cost for dental care. Therefore, the interpretation of section 100 of the Services Act should not be restrictive and should consider the disability concept of CPRD and the right to equal treatment.[876] The Supreme Court has stated, inter alia, that it does not follow from the wording of section 100 of the Services Act that a municipality must cover medical and dental costs, and that this is not stated in the guidelines to this law. It must be assumed that it is a settled administrative practice that expenses for medical and dental treatment are not covered by this provision, which has always been stated in the guidelines of

871 B 194 – 2008–09 (Forslag til folketingsbeslutning om Danmarks ratifikation af FN's konvention af 13. december 2006 om rettigheder for personer med handicap).

872 Bekendtgørelse nr. 35 af 15. september 2009 af FN-konvention om rettigheder for personer med handicap; See also, the Draft Combined second and third periodic report of Denmark, Para 5. The ratification date mentioned in the First report deviates from the combined second and third periodic report of Denmark (see, CRPD/C/DNK/1, Para. 1).

873 CRPD/C/DNK/1, Paras. 36 and 37; Draft Combined second and third periodic reports of Denmark, Para. 7.

874 Harhoff, 1996: 151 – 182.

875 Supreme Court case 52/2010 (dom af 18–10–2011).

876 Supreme Court case 52/2010 (dom af 18–10–2011), Para 3.

the Ministry of Social Affairs.[877] Therefore, the Court had ruled that "this was in accordance with the principle of sector responsibility and neither the UN Disability Convention, which has been ratified by Denmark, nor the principle of equal treatment of DPs can lead to a different result".[878]

Thus, the CPRD is "a relevant source of law and can be and is mentioned before and considered by courts although it is not incorporated into Danish law".[879] Nevertheless, in over 12 years of ratification, the CPRD can be found in only four disability-relevant cases of the Supreme Court.[880] In all four cases the CPRD has been invoked by complainants and led to statements that the CPRD provisions have not been violated. The most recent case,[881] for example, where it was assessed whether the state administration's decisions on the forced release of disabled parent's child for adoption and subsequent granting of adoption was valid, the Supreme Court stated that "the decision of adoption without consent was not based on parent's disability"[882] but on the fact that "the child's affiliation with the foster family had assumed such a character that it would be detrimental for the child to break that affiliation, especially in taking into account the continuity and stability of the child's upbringing. Hence the court held that the conditions for adoption without consent under the Adoption Act were met"[883] and "thus it is not in breach of CPRD".[884]

In fact, prior to CPRD ratification, the Danish government established a working group[885] that had to assess the consistency of domestic laws with the CPRD, especially Arts. 5, 9 and 24 CPRD.[886] It suggested to amend the Parliamentary Election Act[887] and, despite explicit inconsistencies, especially with regard to Arts. 5, 9, 24 and 29 CPRD,[888] it came to the conclu-

877 Ibid. Para. 6.
878 Ibid. Para. 7.
879 Draft Combined second and third periodic reports of Denmark, Para. 6.
880 Supreme Court case 52/2010 (dom af 18–10–2011); Supreme Court case 16/2016 (dom af 22–12–2016); Supreme Court case 159/2017 (dom af 18–01–2018); Supreme Court case 106/2018 (dom af 18–02–2019).
881 Supreme Court case 106/2018 (dom af 18–02–2019).
882 Ibid. Para. 6.
883 Ibid. Para. 6.
884 Ibid. Para. 7.
885 A Member of the Working Group was appointed by Danish umbrella organization (DPOD).
886 CRPD/C/DNK/1, Paras. 32 and 33.
887 Ibid.
888 Ventegodt Liisberg, 2013.

sion that there was "no need for further changes to Danish legislation"[889] as Denmark has been assessed to fulfil its obligations under the CPRD, including the civil and political rights.[890] With this statement, the Danish government avoided the need for CPRD incorporation into the domestic law. This means that the CPRD implementation has been left to the will of highly unstable and internally fragmented Danish minority governments, which, sets up compliance policy and undertakes appropriate measures for fulfilling its obligations under the CPRD.[891]

Nevertheless, the CPRD Committee stated that "it is concerned that the SP lacks comprehensive antidiscrimination legislation that would provide protection from discrimination on the basis of disability beyond the labour market".[892] The Committee also noted with concern "the absence of comprehensive measures to ensure to DPs access, on an equal basis with others, to the physical environment, to transportation, to information and communications, and to other facilities and services open to or provided to the public, both in urban and rural areas".[893] It expressed concern by the "lack of clarity regarding the extent to which pupils with disabilities can receive adequate support and accommodation to facilitate their

education, and regarding the discrepancies in accomplishment rates between pupils with and without disabilities in elementary, secondary and higher education",[894] as well as that "the Legal Incapacity and Guardianship Act continues to allow for substituted decision-making, thereby restricting the individual's exercise of rights such as the right to vote, access to justice, and consent to medical treatment".[895] In response, the government developed a general Antidiscrimination Law for DPs,[896] which was adopted by the parliament in May 2018. Later it was amended to include an

889 CRPD/C/DNK/1, Para. 33.

890 B194 Forslag til Folketingsbeslutning vedrorende Danmarks Ratifikation af FN's Handicapkonvention af 13. december 2006 om Rettigheder for Personer med Handicap.

891 Betænkning (nr. 1546) om inkorporering mv. inden for menneskeretsomradet, Kobenhavn 201. Kapitel 3.

892 CPRD Committee, Concluding observations on the initial report of Denmark. Paras. 14 and 15.

893 Ibid. Para. 26.

894 Ibid. Para. 52.

895 Ibid. Para. 32.

896 Denmark, Act no. 688 of 8 June 2018 on the Prohibition of Discrimination on the Grounds of Disability (Lov nr. 688 af 8. Juni 2018 om forbud mod forskelsbehandling på grund af handicap).

obligation to provide reasonable accommodation in schools[897] but it does not provide for an obligation to comply with existing accessibility standards.[898] Consequently, under Danish law there is still no comprehensive legal protection against discrimination on the grounds of disability with regard to denial of reasonable accommodation or lack of accessibility.[899] All other concerns of the CPRD Committee have either been reported to be in the process of amendment or have been partially solved, as it is the case with school education and the rights of persons under guardianship[900] or remained unresolved, as it is the case with accessibility.[901]

In 2013, the Danish government set up a Commission[902] that had to examine whether the CPRD and other UN conventions should be incorporated into Danish law.[903] The Commission, in admitting that the incorporation would strengthen citizens legal status in the areas governed by the Convention to the extent that the provisions of the Convention would be suitable for enforcement by the courts and other law enforcement authorities, and it would give the courts and other law enforcement authorities a statutory basis for the application of the Convention, which is important in the event of a conflict between a provision of the Convention and a provision of another Danish law, came, nevertheless, to the conclusion that there is no need for incorporation of the CPRD.[904] The main argument against incorporation was that a number of the CPRD provisions were

897 Lov om ændring af lov om forbud mod forskelsbehandling på grund af handicap (LOV nr 2218 af 29.12).2020.

898 Denmark, Act no. 688 of 8 June 2018 on the Prohibition of Discrimination on the Grounds of Disability (Lov nr. 688 af 8. Juni 2018 om forbud mod forskelsbehandling på grund af handicap, section 3).

899 DIHR Report to the CPRD Committee Prior to Adaption of list of Issues on Denmark 2019: 11.

900 See, for example, the government's reply in draft Combined second and third periodic reports of Denmark, Paras. 20, 185, 10, 90, 190 – 194; see also the DIHR Report to the CPRD Committee Prior to Adaption of list of Issues on Denmark 2019.

901 Ibid. E.g., Paras. 6, 14, 16, 227 – 228; see also the DIHR Report to the CPRD Committee Prior to Adaption of list of Issues on Denmark 2019.

902 One of the Committee members has been nominated by the Danish umbrella Disability organization (DPOD). Overall, it was composed of legal practitioners e.g., the president of the Supreme Court and academics. It had also considerable representatives of the Government.

903 Betænkning (nr. 1546) om inkorporering mv. inden for menneskeretsomradet, 2010.

904 Ibid., chapter 8, especially Section 8.3.

vague and generally worded,[905] which might entail a risk that it would be left to the courts and other law enforcement authorities to make judgments on cases that in accordance with Danish legal tradition, should be decided on by the legislative authority e.g., distribution policy (fordelingspolitiske) issues.[906] Accordingly, the CPRD implementation in Denmark is based on the method of establishing norm harmony (konstatering af normharmoni), which means that the government is in charge of setting compliance policy and taking appropriate measures for fulfilling its obligations under the CPRD[907] and the courts in their judgments should adhere to the framework of guidance policy set by the government[908] in relation to a particular law. This is visible both in the case mentioned above (Case Nr. 52/2010) and in the case on the right of individuals under guardianship to vote, where the appellants maintained that the disenfranchisement was in contravention of Section 29 of the Danish Constitution, the

ECHR, and CPRD and they claimed compensation.[909] The Supreme Court ruled that in line with Section 29 of the Constitution, individuals, who have been declared incapable of conducting their own affairs do not have the right to vote for parliament and that individuals, who have been deprived of their legal capacity under Section 6 of the Guardianship Act. had to be regarded as having been declared incapable of conducting their own affairs within the meaning of the Constitution and were thus not entitled to vote for parliament. Furthermore, it stated that section 1 of the Danish Act on parliamentary elections reflects this. Accordingly, regardless of what followed from Denmark's international obligations, the applicants claim, that they were entitled to vote for the 2015 parliamentary election, was not upheld. The Supreme Court also did not find any basis for concluding that the provision in Section 29 of the Constitution was in breach of Art. 3 of Protocol No. 1 to the ECHR or of Art. 14 read in conjunction with Art. 3 of Protocol No. 1 or of the CPRD.

905 E.g., Arts. 6 (2), 9 (2), 25 (1), 27 and 28.
906 Betænkning (nr. 1546) om inkorporering mv. inden for menneskeretsomradet, 2010.
907 Betænkning (nr. 1546) om inkorporering mv. inden for menneskeretsomradet, 2010. Kapitel 3.
908 See Supreme Court case 52/2010 (dom af 18–10–2011); Supreme Court case 159/2017 (dom af 18–01–2018); see also Harhoff, 1996: 151–182; Betænkning (nr. 1546) om inkorporering mv. inden for menneskeretsomradet, 2010. Kapitel 3, Sections 4 and 5.
909 Case Nr. 159/2017, 18.01.2018. ECTHR case, Strobye v. Denmark and Rosenlind v. Denmark.

After several years of struggle, on 13 May 2014 the Danish parliament with the Resolution No B 58 also approved the bill of the government allowing accession to the Optional Protocol. It states, however, that: "It should be noted that the Committee's opinions are not legally binding and that the Committee has no judicial character. The government will therefore decide on a case-by-case basis whether it will follow the committee's guidance. In order to provide the necessary clarity for the law enforcement authorities, the government's decisions on this will be published on the Ministry for Children, Gender Equality, Integration and Social affairs website. This procedure will include both individual appeals against Denmark and appeals against other States Parties if the Committee has issued an opinion which is of general significance for the interpretation of the Convention". This is not surprising given the fact that "Denmark together with other Nordic states is considered to be frontrunner in human rights, handing over peace prizes, signing up to international courts and conventions, but display an enormous hesitance when it comes to the domestication of the values they themselves stand for".[910]

The Opt-CPRD is in force in Denmark since September 2014[911] and there has been one individual complaint against Denmark concerning family reunification already on 6 January 2017.[912] Nevertheless, there is no follow-up information regarding the implementation of the Committees' views adopted in August 2018.

### 4.3.2 Responsibilities of Danish Focal Point/Coordination Mechanism and legislative actions

The main activities of the Ministry of Social Affairs and the Intra-Ministerial Committee in connection with CPRD Ratification were the writing the initial and combined Second and Third Periodic Reports of Denmark to the CPRD Committee, preparing the National Disability Action Plan and initiating a few legal amendments: Two years after the CPRD Ratification the Ministry drafted and submitted the Initial Report to the CPRD Committee in 2011. Civil society, including DPOs and the MF under the CPRD were not directly involved in the development of the Initial Report with

910 Wind, 2017.
911 Draft Second and Third periodic reports of Denmark, Para. 5.
912 CPRD Committee, Communication No. 39/2017, Iuliia Domina and Max Bendtsen vs. Denmark.

the exception of the participation in one open meeting organised by the Ministry of Social Affairs.[913] Moreover, the report has been criticised by the Danish Disability Council and the Danish Institute for Human Rights "for being a list of initiatives and measures for the promotion of equal treatment of DPs rather than being a base-line study of the human rights situation of DPs in Denmark".[914]

In 2013 the Ministry of Social Affairs in cooperation with the Ministry of Foreign Affairs coordinated the development of the National Disability Plan, which not only failed in ensuring multi-level sectoral coherence[915] but also did not "consistently provide concrete and measurable targets for Danish disability policy".[916] The involvement of DPOs and the CPRD MF in the development process of the action plan has also been limited.[917] Nevertheless, the government, even after the recommendation made by the CPRD Committee in its Concluding Observations,[918] declared that "a revision of the 2013 National Disability Action Plan has not been undertaken and there are currently no plans to prepare and adopt a new action plan".[919]

The legislative actions taken by other ministries in connection with the recommendations made by the CPRD Committee in its concluding observations on the Initial Report of Denmark were insignificant and the overall human rights situation of DPs in Denmark worsened according to the Disability Index developed by the DIHR.[920]

In 2020, the Ministry of Social Affairs prepared the Second and Third Periodic Reports on the CPRD implementation in Denmark. According to personal communications with the Ministry of Social Affairs and the Interior, on February 5 2020, "Civil society organisations were involved in the UN reporting process through the Danish Institute for Human Rights (DIHR) and through public hearing on the official web-site for the

913 Ventegodt Liisberg, 2013.
914 Ventegodt Liisberg, 2013.
915 DPOD, 2013, Para. 13.
916 DIHR, 2014: 7.
917 For more see chapter VI.
918 CPRD Committee, Concluding Observation on the Initial Report of Denmark, Paras. 8 and 9.
919 Draft Combined second and third periodic reports, Para. 14.
920 For more see the DIHR Report to the CPRD Committee Prior to Adaption of list of Issues on Denmark 2019.

Ministry of Social Affairs and the Interior".[921] The comment submitted by the DIHR on the draft Second and Third Periodic Reports of Denmark point out that governments replies are misleading, incomplete and evasive: it is suggested that the government provides explanations regarding the statement that there is no plan of reviewing the Disability Action Plan; It is underlined that the answer of the government does not reveal that law on cross-sectoral prohibition of discrimination of DPs does not include comprehensive reasonable accommodation and does not protect against non-compliance with accessibility requirements; it is stated that the remarks mentioned in the draft report do not give a true picture of the protection against discrimination on the grounds of disability in relation to insurance law, especially for persons with a mental or psychosocial disability; and that various accessibility measures mentioned lack information on objectives, timeline, budgets and enforcement mechanisms, including sanctions, in line with the Committee's questions; the Government also fails in answering the questions concerning actions taken to promote supported decision-making, which, as such, does not exist in Danish law; and it was requested that the government include information on the developments caused by the 2015 amendments to the forced adoption in case of disabled parents.[922] The DPOD, which in addition to a written comment had an opportunity to participate at the public hearing on the draft state report, addressed and confirmed all the concerns mentioned by the DIHR and added further points of concerns: e.g., it called on the government to inform about future plans for the involvement of DPs in the political processes, including persons under guardianship; provide information about plans to ensure that school budgets will not limit inclusion of disabled pupils due to the fact that the responsibility of ensuring school inclusion has been transferred to the school principals; provide information on initiatives to promote the quality of rehabilitation and reduction of geographical and social inequalities.[923]

921 Personal communication with the Ministry of Social Affairs and the Interior, on February 5 2020; The draft of Denmark's combined second and third periodic report for public hearing.

922 The comment of the DIHR on the draft report is available in Danish at: https://menneskeret.dk/hoeringssvar/udkast-danmarks-2-3-kombinerede-periodiske-rapport-fns-handicapkomite (Last accessed on 01.07.2022).

923 The comment of the DPOD on the draft report is available in Danish at: https://handicap.dk/arbejder-vi-for/vidensbank/hoeringssvar-om-udkast-til-regeringsrapport-med-svar-paa-spoergsmaal-fra; See also the comment of the LAP –

## 5. Comparative evaluation

At the time of drafting the CPRD, it was already clear that the international monitoring instruments alone[924] cannot ensure compliance of the SPs.[925] Accordingly, the hybrid model of implementation and monitoring at the domestic level has been considered the best way out of the non-enforcement crisis.[926]

The innovative character of the national implementation structure raised hopes of effective implementation of the CPRD. The main stress thereby has been put on the FP and the CM without, however, clearly defining their responsibilities. As a result, the arrangements put in place to fulfil the obligations under the Art. 33. Para. 1, by and large, varied from SP to SP.

Accordingly, in the present section I seek to evaluate, comparatively, the effects of these arrangements on the implementation of the CPRD at multiple governmental levels through the application of, albeit with some adjustments, the dimensions common in research on institutional reform policies: effective restructuring, adequate resources, horizontal and vertical coordination, democratic accountability, and cross-regional/municipal equity of implementation.[927]

### 5.1 Effective restructuring

FPs and CMs are seen as agents of paradigm shift. For them to be effective in attaining this aim, it is preferable not to locate them in the ministries of health or welfare and labor affairs.[928] If, however, governments decide not to restructure the responsible bodies and designate already existing sections of social ministries as the FP, they would need to be revised to oversee

Landsforeningen Af nuværende og tidligere Psykiatribrugere, available in Danish at: https://www.lap.dk/vedroerende-udkast-til-danmarks-2-og-3-kombinerede-periodiske-rapport-til-fns-handicapkomite-crpd/ (Last accessed on 01.07.2022).

924 Arbour, 2006; UN Enable, Daily summary of discussions of the sessions of the Ad Hoc Committee.

925 Quinn/Degener, 2002; Kumar, 2003; Lord/Stein, 2008.

926 Quinn, 2009a; Gatjens, 2011; Beco, 2013; Raley, 2015. For the views of Disability organizations see International Disability Alliance, 2009; Mental Disability Advocacy Center, 2011; see also OHCHR et al., 2007; OHCHR, 2009; Beco, 2011; Schulze/Kabir, 2013.

927 See Pollitt/Bouckaert, 2004; Kuhlmann/Wollmann, 2011: 490–1.

928 Human Rights Council, 2009: 7.

the implementation of the CPRD.[929] For this, they would need to undergo human-rights-based training and maintain CPRD-related cooperations.

Interestingly, a vivid similarity in arranging CPRD structures I could observe in all the examined SPs was in the location of these mechanisms; all FPs/CMs have been located in the social ministries. This decision has been based on the view that social ministries are experts of disability-related policies and they are the most competent bodies to oversee the implementation of the CPRD. I might agree with this standpoint if not for the observation that the designated FPs/CMs, especially at the Länder-level, have not received enough training to be able to act within the framework of the paradigm shift envisaged by the CPRD: the representatives of the Danish FP actively participate at the international processes of the CPRD, but there has been no effort to raise awareness about the CPRD at the domestic level. Federal FPs in Austria and Germany acquired know-how through written and live communications with the CPRD Committee. The knowledge of the Hessian State has been primarily based on collaborations with the federation, whereas the FP of Thuringia appeared to have difficulties in accepting the disability concept of the CPRD. The FP of Tyrol also did not get CPRD-related training.

Thus, it might be assumed that the majority of EU Member States maintain a convergent arrangement, where the federal/national FPs have acquired the necessary expertise for promoting CPRD-conform laws, whereas sub-bodies, by and large, remain devoted to pre-CPRD concepts of disabilities, which proves to be a serious obstacle for the effective administrative and legislative implementation of the human rights concept of the CPRD.

### 5.2 Adequate resources

The CPRD Committee and the Handbook for Parliamentarians on the CPRD underline the importance of providing the FPs at multiple levels of government with necessary financial resources.[930] In fact, the provision of adequate financial and human resources is vital for the functionality of the decision-making bodies in controlling and coordinating legislative

929 OHCHR et al., 2007: 94.

930 OHCHR et al., 2007: 94; Concluding observations on the initial report of the UK, Para. 68; Concluding observations on the initial report of Argentina, Para. 51; Concluding observations on the initial report of Germany, Para. 62b.

actions,[931] especially at the vertical and horizontal levels of governments, as well as organizing institutional deliberative processes.[932]

Present studies show, however, that there are tangible differences in this respect not only between the examined SPs but also within a SP: since its designation, the Austrian federal FP did not receive financial and human resources for discharging its functions. The same is true for Austrian province Tyrol. Denmark also follows this strategy. The federal FP of Germany, instead, has been equipped with financial and human resources. While the financial resources were sufficient for awareness-raising activities, the vertical and horizontal level coordination definitely requires more human resources. The Federal State of Hesse invested in the establishment of the FP in the beginning, but CPRD-related funding has been reduced with the merge of the FP with the disability-focused department of Social Ministry. The Thuringian FP has not been provided with any CPRD-related additional resources.

This confirms, on the one hand, the assumption that the establishment of new or modified administrative structures require immediate and somewhat far-reaching cost increases, which is a burden that tends to overstretch the capacities of local governments.[933] On the other hand, examples of Austrian and Danish non-resourced FPs, it becomes clear that explanation should not be seen solely in the limited or missing financial capacity of governments but also in absence of political will to ensure multi-sectoral and multi-level implementation of their international obligations.

## 5.3 Horizontal and vertical coordination

Decentralized structures are expected to ensure a highly integrated and synchronized system of coordination that covers the entire territorial area and transcends a single-policy orientation.[934] This assumption has been evidently shared also by the CPRD drafters in opting for multi-level national structures.[935]

931 Huber/Shipan/Pfahler, 2001; Mills/Selin, 2017.
932 Quirk/Bendix/Bachtiger, 2018.
933 Kuhlmann/Grohs/Bogumil, 2014.
934 For an overview, see Treisman, 2007: 1–14.
935 OHCHR et al., 2007: 95 – 110; IDA, 2009; MDAC, 2011; Gatjens, 2011; Beco, 2013.

Based on my observations I argue, however, that harmonized and effective implementation cannot be achieved solely by the designation of FPs/CM but heavily depends on their competencies and the level in the organizational hierarchy of the government:[936] Most particularly they should be located at the highest governmental organ (e.g., offices of chancellors and minister presidents) or be equipped with multi-sectoral competencies.

As the present study showed, none of examined FPs of SPs has the required organizational rank and competence to successfully discharge its functions both at the vertical and horizontal levels of the government. For instance, Denmark, which is among the most decentralized countries in the world,[937] designated the Social Ministry as a FP. It might influence the decision-making processes within the central government if the power of minority government allows, but municipalities that administer almost all disability-related policies are under the supervision of the Ministry of Finance. The federal FP of the Austrian federal government has the lowest organizational rank at the horizontal level and has collaboration and coordination competences only in the field of social affairs. Similarly, the provincial government of Tyrol appointed only a CM again at the lowest organizational level of the government. Federal government of Germany established an independent section in the BMAS as a FP, which, as interviews revealed, cannot directly influence policy-making processes in other Federal Ministries, and performs Länder-level coordination through FPs of federal states. These, however, are located at the lowest organizational level of the government and do not have competencies to interfere with the legislative processes of other federal state ministries. Moreover, Austrian and German FPs collaborate with the municipalities in the framework of legislative processes but cooperation at the administrative level does not take place despite the fact that the municipalities implement the majority of laws as their autonomous sphere of action.

Thus, it becomes clear that the designated FPs/CMs do not have the necessary power. Accordingly, in contrast to presumptions that these state bodies will lead to mainstreamed and equal implementation of the CPRD, their opportunities to supervise and coordinate decision-making processes are limited, especially in considering the division of legislative and executive powers of SPs. Accordingly, the administration of CPRD-related social

936 OHCHR et al., 2007: 94; CPRD Committee, Concluding observations on the initial report of Argentina, Para. 51.

937 Ivanyna/Shah, 2014; Rodden, 2004; Ladner et al., 2016.

policies remain non-harmonized. Similarly, legislative and administrative implementation of the right to inclusive education allow not only unequal access to and achievement in regular schools but even sustain segregative educational structures.

## 5.4 Democratic control and accountability

Transparency of decision making, inclusive participation in drafting and implementing laws and programs leads to input legitimacy. This is also the cornerstone of the CPRD, which requires the SPs to establish inclusive, transparent, accessible and accountable decision-making structures, where the participation and involvement of DPOs and Monitoring Bodies could be ensured at all governmental levels.[938] While the main examination on DPOs and Monitoring Mechanism is covered in following chapters, in this sub-section I discuss the results of their involvement in the work of the FPs, according to which the steps of SPs to ensure democratic control and accountability differ considerably.

In examining the DPO[939] involvement in the work of Austrian, Danish and German FPs, I could observe divergences between SPs and within the governmental levels: While Danish DPOs, albeit mainly through their umbrella organizations, could participate in the final decision-making processes concerning domestic laws, their institutionalised and regular cooperation with the designated FP and the CM located in the central government has not been ensured. At the municipal level they have a participation structure, but CPRD plays no role thereof. This situation, as the examination of the legal and political structure, as well as three-actor interviews showed, might be explained primarily by the legal status of the CPRD: the CPRD is not binding on the public authorities as it is not incorporated, which gives reasons to DPOs to perceive it as unfit for domestic use.

Involvement and institutional collaboration of the Austrian federal FP takes place mainly through the Federal Disability Advisory Board, which supports the coordination of the CPRD implementation in Austria.[940] A similar advisory organ has been established also at the provincial level e.g., Tyrol, but its involvement in CPRD implementation has not been

938 CPRD Committee, General Comment No. 7.
939 For the full examination see chapter VI.
940 BBG, §8 (2.4).

stipulated by law.[941] Interviews with TyroleanDPOs showed that they have irregular contact to executive organs, but they could neither identify the existence of a FP nor their contact with the executive bodies was related to CPRD implementation.[942]

Close cooperation and liaison of the German federal FP with the federal level DPOs started even before the ratification of the CPRD. In the ratification process, the collaboration has been weakened but with the development of the National Action Plan, close consultations and involvement of federal level DPOs has become more institutionalised and intensive. Unlike Denmark and Austria, the Federal Government of Germany designated the Federal Disability Commissioner as the CM. Nevertheless, the office of the Federal Commissioner serves more as a coordinating instrument between the government and the federal level DPOs than as a mainstreaming mechanism within the federal government, in contrast to envisaged CPRD structures. Accordingly, DPOs closely collaborate with the Commissioner, but evaluate the ability of the Commissioner to influence multi-sectoral decision-making processes of the federal executive bodies as too limited.[943] Federal states also have disability commissioners, but they have not been designated as CM, the involvement of the DPOs in the work of the examined Länder-level FPs started only about 4 years after the ratification within the framework of the state Action Plan development. However, it did not grow into a regular and institutionalised collaboration, which in view of the administrative federalist structure of Germany could be key for ensuring effective and legitimate application in the legislative processes at both vertical and horizontal levels of governments, as well as ensure successful monitoring at the administrative levels across 16 federal states and their municipalities.

Multi-level and multi actor interviews, in addition, made it clear that the designated FPs, especially at the Länder-level did not ensure transparency and accessibility-hearing impaired and learning-DPs have been often left out and otherwise disabled did not receive the necessary technical and personal support that would ensure their effective participation in the work of FPs.[944]

941 TTHG, §47.
942 For detailed examination see chapter VI.
943 For more see chapter VI.
944 For detailed elaboration refer to chapter VI.

The second instrument within the CPRD accountability structure is the Independent Monitoring Mechanism, which should be involved in and have access to decision-making processes and structures, including the FPs.[945] The examination showed that all national/federal level FPs maintained formal and regular cooperation with the designated Monitoring Bodies, albeit the independence of the Austrian FMC from the federal FP can be put under serious doubt. At the state/municipal level, however, the designated Monitoring Bodies either have no access to decision-making processes and structures, as it is in Denmark, German and Austrian municipalities, their access is limited to some states and/or punctual collaborations, as it is in the German federal states of Hesse and Thuringia or, they exist and participate officially but in fact do not have the necessary independence to act as an effective accountability instrument, as it is in Tyrol.

Against this background, it might be concluded that the degree of inclusive participation and accountability may vary depending on the strength of the existing CPRD-related institutional structures and SP commitment to international obligations both at the vertical and horizontal levels of governments. Evidently, the capacity of national/federal FPs to ensure the transparent, accessible and effective participation of DPOs and Monitoring Bodies in their work is greater than the capacity of state/Länder-level FPs/CM. The FPs at this governmental level maintain only irregular participation processes with the DPOs and Monitoring Mechanisms despite their legislative and administrative competencies. In the same vein, it became evident that some groups of DPs were completely left out from such processes or their effective participation has been seriously hampered due to inaccessible participation conditions at all governmental levels of SPs. Similarly, the designation of the national/federal level FPs did not lead to comprehensive, regular and effective inclusion of DPOs and Monitoring Bodies in multi-sectoral decision-making processes and structures, especially at the Länder-level.

Finally, despite the fact that all 3 SPs maintain highly decentralized and independent administrative structures, the designated FPs do not have municipal control and supervision mechanisms and there are no FPs at the municipal level. Accordingly, human rights oriented democratic control, accountability and monitoring through DPOs and Monitoring Bodies does

945 CRPD/C/1/Rev.1, annex, Para. 21.

not take place at the administrative level, which, apparently, constitutes a serious obstacle for the effective and equal implementation of the CPRD.

### 5.5 Multi-level equity of implementation

Usually it is assumed that policy implementation in multi-level structures leads to equal treatment of citizens. In the supranational context this would require at least policy convergence within member states. Before the EU enlargement, however, scholars questioned whether convergence of disability policies has been achieved between Western EU Member States.[946] The review of the CPRD reporting documents of former and present 27 Member States shows at least convergence in adopting non-discrimination measures to the Equal Treatment Directive 2000/78.[947] Accordingly, reasonable accommodation has been recognized as an employer's duty[948] and has been followed by EU Member States.[949] Nevertheless, the provision of reasonable accommodation, the denial of which often leads to discrimination, has not found explicit mentioning in domestic laws of EU Member States. This is not surprising given the fact that reasonable accommodation falls under the field of social policy, where EU Member States have exclusive competence to legislate.[950] Accordingly, the execution of this provision diverges not only between the Member States but also within the Member States.

With the adoption of the CPRD, the traditional concept underlying disability policies has been challenged: on the one hand, the SPs have been required to envisage reasonable accommodation for all spheres of life and recognise its denial as discrimination, on the other hand, they became obligated to ensure ex ante accessibility, meaning that SPs have the duty of providing accessibility before receiving an individual request to enter or use a place or service.[951] The concept has been recognized also by the Council of Europe.[952] The EU as the SP to the CPRD, adopted the Web Accessibility Directive (2016/2102) and the European Accessibility Act (Directive

946 Aarts et al. 1998; Prinz, 2003; van Oorschot/Hvinden, 2000, 2001; Hvinden, 2003.
947 See for example CPRD reporting documents of Austria, Denmark and Germany.
948 Art. 5 Directive 2000/78.
949 Lawson, 2017; Ferri 2018; Rabe-Rosendahl 2017.
950 Machado/de Lorenzo, 1997.
951 CPRD Committee, General Comment No 2, Para. 25; see also, CRPD/C/14/D/21/2014, (adopted 21 August 2015).
952 Grigoryan, 2017.

2019/882), which covers accessibility for limited products and services,[953] but fails in regulating building and construction, and environment and transportation sector.[954] To this end, the important policy areas e.g., indoor and outdoor accessibility of workplaces, including schools and universities, as well as accessible infrastructure for employees, has been left to the good will of Member States. Therefore, their enforcement might differ depending on various legal factors.

In comparing 3 SPs with similar legal systems, namely Civil law systems, I could not observe convergence in domesticating and giving effect to the CPRD. Subsequent to signing the CPRD and its Opt-Protocol, the Federal government of Germany obtained the approval of federal states through provisions established by the Lindau Agreement and the Basic Law. Accordingly, it has been incorporated into the German domestic law[955] and became binding on state organs, including courts, like other federal statutes, "in the framework of accepted methods of interpretation". In accordance with the principle of federal loyalty,[956] federal states first passed action plans and then amended selected, in particular school and disability laws throughout their parliaments to enact the provisions of the CPRD under their exclusive legislative powers. Nonetheless, amended laws, especially in the field of education, either have not been aligned to the requirements of the CPRD or provide no "Unconditional legal claim to disabled children for accessing a regular school with joint teaching and inclusive education". Consequently, the courts have not recognise the direct effect of the CPRD, and have pointed out the provision of progressive implementation of Art. 24 CPRD.[957]

953 Areas such as health services, education, transport, housing and household appliances are not covered by the directive.

954 EDF, 2019.

955 Görgülü, BverfGE, Oct. 14, 2004, 2 BvR 1481/04, Para. 31.

956 Kaiser, 1957/58, 526 ff.; Heckt, 1958, 445; Maunz/Dürig, 2014, Art. 32 Rn 70 and Art. 59 Rn 185; Dreher, 1969.

957 VGH Hessen, Beschluss vom 12. November 2009- 7 B 2763/09 – 1. Leitsatz, NVwZ-RR 2010, 602; Hessischer Verwaltungsgerichtshof 7 A 1138/11.Z, Beschluss vom 14.05.2012; BVerwG 6 B 52.09, Beschluss vom 18. Januar 2010, Rn 4; VGH Baden-Württemberg 9 S 1833/12, Beschluss vom 21. November 2012, Rn 56, VBlBW 2013, 386, 389 f.; OVG Lüneburg 2 ME 278/10, Beschluss vom 16. September 2010; OVG Nordrhein-Westfalen 19 E 533/10, Beschluss vom 3. November 2010; SG Augsburg S 15 SO 110/11 ER, Beschluss vom 27. September 2011, Rn 73; VG Düsseldorf 18 K 5702/10, Urteil vom 16. Dezember 2010, Rn 9 ff; VG Arnsberg 10 L 397/10, Beschluss vom 17. August 2010, Rn 12; Bayerischer Verwaltungsgerichtshof7 ZE 15.1791, Beschluss vom 04.09.2015, Rn 25.

Austria, which is also a federal state with a Civil Law system, signed the CPRD with its Opt-Protocol and without significant involvement of provinces, pushed it through federal and national councils, which approved the ratification with the statement that the Convention shall be fulfilled by the enactment of laws.[958] Accordingly, unless there have been legislative efforts in incorporating the provisions of the CPRD into domestic law, it has no direct effect on the domestic courts and administrative acts as long as the government did not adopt appropriate implementation laws.[959]This reservation does not affect laws falling under the EU competences.[960]

Denmark as a unitary state maintaining a Civil Law system with Common Law elements, signed the CPRD and after a superficial assessment of domestic laws, the central government obtained the consent of the parliament to ratify the Convention. As the government assumed that the domestic laws fully meet CPRD requirements, the CPRD as the majority of human rights conventions has not been incorporated into domestic law. Consequently, the implementation of the CPRD has been left to the will of the central government, which based on the method of establishing norm harmony, sets up the guidelines of compliance measures.[961] In accordance with the Danish legal tradition, courts, normally, do not challenge these guidelines.[962] To this end, central government, regions, municipalities and courts shall observe the CPRD as an international obligation,[963] but their actions shall be guided by and based, solely, on domestic law[964] as the CPRD cannot be applied directly by the courts or the executive unless

958 BGBl. III Nr. 155/2008, Para. 2.

959 OGH (Supreme Court), Case (3Ob97/13f mwN), 15.05.2013; OGH, 10ObS162/16w; 5Ob183/17y; 10ObS16/18b; 3Ob242/19p, 24.01.2017.; OGH, 10ObS162/16w, 24.01.2017; OGH, 5Ob183/17y, 21.12.2017; OGH, 10ObS16/18b, 20.02.2018; OGH, 3Ob242/19p, 22.01.2020; see also VfSlg 12.558/1990, with reference to Öhlinger, Der völkerrechtliche Vertrag im staatlichen Recht, 1973, 149ff; Walter et al., 2007, Rn 239f; Adamovich et al., 2011, 212; Öhlinger/Eberhard, 2012, Rn 119.

960 Schroeder et al, 2014.

961 Betænkning (nr. 1546) om inkorporering mv. inden for menneskeretsomradet, 2010. Kapitel 3.

962 See Supreme Court case 52/2010 (dom af 18–10–2011); Supreme Court case 159/2017 (dom af 18–01–2018); See also Christensen, 2020; Harhoff, 1996, pp. 151–182; Betænkning (nr. 1546) om inkorporering mv. inden for menneskeretsomradet, Kobenhavn 201. Kapitel 3, Sections 4 and 5.4.

963 CRPD/C/DNK/1, Paras. 36 and 37; Draft Combined second and third periodic reports of Denmark, Para. 7.

964 Harhoff, 1996: 151 – 182.

incorporated by the legislature.[965] This strategy has been reconfirmed also in ratifying the Optional Protocol to the CPRD.[966]

Thus, despite the similarities in the legal systems of Austria, Denmark and Germany, I could observe considerable divergence in domesticating the provisions of the CPRD. In fact, all the examined states have ratified the Vienna Convention on the Law of Treaties, which means that they as a SP to the CPRD, are obligated to implement it in good faith.[967] Nevertheless, the domestication method chosen by Denmark, for example, made the effective application of the CPRD within the domestic law and its consideration by the administrative actors impossible. Internal reservation of Austria allowed only targeted implementation, whereas the CPRD has been incorporated within the domestic law of Germany upon its ratification and led to active consideration by the courts and significant legislative reforms by the federal government.

In contrast to dissimilarities in domesticating the CPRD, the SPs, in particularly German courts and the Danish government, equally refused the efforts of the CPRD Committee of making the CPRD a "lively instrument"[968] through General Comments and own jurisprudents.[969] This allows an assumption that sovereign states, in general, are not open to uncontrolled international influence on their domestic laws.

At the same time, the hesitance of state/provincial governments in applying and complying with the CPRD in accordance with the SPs obligations,[970] is not only vivid, but also leads to inconsistent legislative implementation within the SPs.

In studying the selected states from the perspective of their modes of government, I could discern divergences in applying the CPRD within the federal/national laws and convergences in the CPRD implementation at the state/provincial/municipal level.

Germany, which maintains a high-level administrative and legislative federal constitutional structure, took considerable steps for implementing the CPRD. At the federal level, it amended the federal law, regulating

965 Ibid.; Björgvinsson, 2015: 55 – 88; see also the judgement UfR. 1986.898 H in UfR. 1987B before the incorporation of the ECHR.
966 Resolution No B 58.
967 VCLT, Art. 26.
968 Letsas, 2007, S. 65 et seq.; Cremer, 2013, S. 162 et seq. – 183 et seq.
969 BVerfG, 1 BvL 8/15, on 26. July 2016, para. 90; BVerfG, 2 BvC 62/14, on 29.01.2019, para. 65; Resolution No B 58.
970 VCLT, Art. 29; CPRD, Art. 4 (5).

support systems for DPs (SGB IX and the Federal Disability Equality Law to guarantee, among other things, the sub-constitutional entitlement to reasonable accommodation and recognition of its denial as discrimination within the federal laws and public authorities. Federal states, as the administrators of this law, enacted implementation laws to federal laws by using their right of administrative deviation. As a result, there is one federal law but there are 16 implementation laws affecting the equal implementation of human rights of DPs.

Austria, which, similar to Germany, maintains a federal constitutional structure, took serious steps in aligning federal laws to CPRD only in targeted policy fields e.g., guardianship and federal disability laws, whereas progress regarding other policy fields, especially inclusive education falling under shared responsibilities of federation and Länder, remains stagnant,[971] despite the concern expressed by the CPRD Committee.[972]The main cause of this should be seen in intertwined legislative and/or administrative responsibilities between the federation and provinces.

The only tangible step of Denmark to react to the multiple concerns and recommendations of the CPRD Committee made in its Concluding Observations on the Initial Report of Denmark, was the law on cross-sectoral prohibition of discrimination of DPs. Nevertheless, even this legislative step failed in ensuring the right of DPs to comprehensive reasonable accommodation and recognition of its denial as a discrimination. As a result, the disparities in equal and human-rights-based treatment of DPs persists at the administrative level, where 98 autonomously governed municipalities manage, among other disability-related policy fields, the elementary and secondary education,[973] oversee the general provision of reasonable accommodation and the school principals decide on the technical and personal support of disabled children.[974]

971 Austrian Federal Monitoring Committee, 2018, Art. 24; Österreichische Behindertenrat, 2018: 19 – 22. see also Weber et al., 2016; Feyerer/Altrichter, 2018; Feyerer, 2019; the report of the TyroleanMonitoring Committee on Inclusive Education. Retrieved from: https://www.tirol.gv.at/fileadmin/themen/gesellschaft-soziales/UN-Konventionen/tiroler-monitoring-ausschuss/dokumente/stellungnahmen/Stellungnahme_Inklusive_Bildung_Tirol_Letztversion_schwer_9.10.15.pdf (Last accessed on 01.07.2022).

972 CPRD Committee, Concluding observations on the initial report of Austria, Paras. 40 – 42.

973 Wiborg, 2020.

974 DPOD, 2013: 38 – 43; DIHR, 2014: 13; DIHR, 2019: 11 and 18; Nielsen, 2017 (for english summery see P. 10).

Convergence could be identified, instead, in incorporating the CPRD within the state/provincial laws: some years after the ratification, federal states of Germany started legal reform processes in policy field's falling under their exclusive legislative powers, namely education, building and construction. Nonetheless, amended laws neither ensured consistency with the CPRD nor at least secured equal access to and development of disabled children's personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential within mainstream schools across the federal states. In particular, federal state legislators failed in ensuring the provision of reasonable accommodation in the core area of educational work, as well as, structural and physical accessibility of schools and educational processes thereof.

Austrian Provinces as the exclusive legislators of the social support system, amended the disability definition in their rehabilitation laws, but despite the concerns expressed by the CPRD Committee, kept unchanged their medical approach based fragmented service provision and administration, which seriously hampers the execution of the equal right of disabled children to inclusive education.

In carrying out cross-country and multi-level examination, I noticed dissimilarities in understanding and applying the human rights concept of disability, which I link to particular legal and socio-cultural traditions of the given society and SPs. To prove the validity of this observation, however, further studies are needed.

In some, as is typical of states with legislative and administrative federal structures, the implementation of the CPRD has been slowed down or even avoided through symbolic amendments at the state/provincial governmental levels. Accordingly, the comparative evaluation made it clear that legal harmonization of SPs linked to the CPRD adoption,[975] is rather an ambitious expectation than a realistic happening, especially in taking into account the differences of its legal status between the SPs. The endeavor of consistency cannot be achieved solely by national structures but should be combined with enforceable legal mechanisms, which as the case of ECHR shows, might lead to "streamlining", and help to "build the Tower of Babel".[976]

975 Priestley, 2010: 411.
976 Nußberger, 2012, 2014, 2020.