The role of OPCAT and national law in preventing Ill-Treatment

Margret Osterfeld, psychiatrist and member of the Subcommittee on Prevention of Torture (UN SPT)
Eckhard Niewöhner, Attorney-at-Law

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Abstract:

The OPCAT is a strong UN Convention and enhances the power of CRPD. Particularly Art. 15. Legal guardianship law in Germany was revised several times since ratification of both conventions, but it still very often leads to substituted decision making and to placement in institutions without consent. In cases with mild cognitive deficits like early stages of dementia or mild mental retardation the German adult protection courts tend to follow medical assessment which denies the diagnosed person "insight capacity" or "ability to reason" on the basis of diagnosis but without further legal assessment.

In the field of psychiatry, as well as in social care homes for the elderly, involuntary placement, isolation, use of physical restraints, coerced administration of medication, sometimes even to the amount of chemical restraints are daily routine. This is legally permissible, pursuant to specified statutory exceptions. The use of such methods is still widespread and not administered in line with these exceptions. Thus, ill-treatment happens to institutionalised persons with disability and sometimes might even amount to torture. As the vulnerable group of persons diagnosed with dementia is fast-growing, it can be assumed, capacity is easily denied to some of them. Consequently, they may be prone to ill-treatment.

Two percent of the German population was diagnosed with Dementia in 2016 and annual incidence is 300.000. Demographic change as well as diagnostic sloppiness not only lead to societal challenge and financial problems for families and health insurance funds, but also more and more legal cases turn up.

A case report of law office will demonstrate how easily the German Legal Guardianship Law can be abused in a medical specialist assessment for the guardianship court. A doctor of public health reported legal conclusions only (f. e. loss of ability of free volition) without one word of a medical explanation the personal rights of a seventy year old male. The client was declared severely mentally ill and mentally not competent to dissent to guardianship. Only the fact the person was able to get legal aid by a lawyer and a respectful and critical judge saved him from substituted decision making by a guardian who might have taken him into an elderly care home by substituted decision making.

Two years later this client still cares for himself in his own flat, which without legal aid would have fallen to the state to pay for the guardian and him being deprived of liberty in an elderly care home.

A better protection of the rights of persons with cognitive disabilities or psychiatric diagnoses is urgently needed in Germany.

CRPD and OPCAT

More than forty times CRPD is mentioned in the abstract book of this conference. The acronym OPCAT turns up only five times (p. 52 and 289) but this human rights treaty is definitely not less innovative and important than CRPD. It is just less known to the world and the participants of this conference, particularly in the field of psychiatry. The five letters stand for **Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.** Like CRPD it entered into force in 2006 and was ratified by Germany in 2009.

CRPD is still blamed of being a step backwards in Mental Health care,[1] by international as well as German psychiatrists. Academic mainstream psychiatry, as an important field of medical science, is still defending its right to detain patients and coerce to treatment with psychoactive drugs. The much needed and innovative approach of a human rights based mental health care is hardly discernible for the majority of my profession. They just see symptom holders, who need treatment and find it difficult to see the same person as holders of inherent rights like dignity, freedom and equality.

The OPCAT, too, is a very new kind of treaty body in the United Nations Human Rights system. It has a mandate for all persons deprived of liberty, no matter if criminal or psychiatric proceedings apply. Let´s face the fact that detention, physical restraints and coercive medication always have the potential to be cruel inhuman or degrading to patients.

The innovative, sustained and proactive approach of OPCAT is „*to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment*“ (Art. 1)[2]. In order to achieve this, the Subcommittee on Prevention of Torture, short SPT, was established. I am now in my sixth year of membership in this Committee, visiting the states that ratified OPCAT. Art. 4 the convention allows us to visit any place under the jurisdiction and control of a state party „*where persons are or may*

[1] See e.g.: Appelbaum, P. S. 2019 Saving the UN Convention on the rights of Persons with Disabilities – from itself, World Psychiatry 18, 1, 1 or Steinert, T. The UN Committee´s interpretation of „will and preferences“ can violate human rights World Psychiatry 18, 1, 45

[2] https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx (last accessed: 15 July 2019)

be deprived of liberty, either by virtue or of an order given by public authority or at its instigation or with its consent or acquiescence (...)."

Without going into details at this point, this mandate gave M.O. the chance to have a closer view to the practical organisation of mental health care in states as different as Mongolia or Rwanda, but also in many Council of Europe (CoE) member states. If you are interested in details, you may read the SPT report of Portugal and the replies received from that state party.[3] As the SPT is working in a confidential, impartial, non-selective universal and objective manner (OPCAT, Art 2.3, General principles), it is the state´s decision to publish the SPT report and thus enhance public awareness of the presence of torture or ill-treatment.

International Treaties, National Law and the National Preventive Mechanism

Referring to the 2019 publication of World Psychiatry mentioned in footnote 1, just imagine, a high ranking international scientific paper would have written an editorial with the title: *"Saving the UN Convention on the rights of Women – from itself"*. Perhaps a few of you would still agree to such a headline, but there would be trouble. This is just to draw your attention to the fact, society is a changing matter. Psychiatry as a science has to adjust to social development, it cannot just claim a *"biological truth"* and statistical evidence.

Discriminating law should not exist in a rule-of-law-state. German mental health law is very discriminatory. The wording of mental health laws unfailingly starts with reasoning *"due to a mental disorder or impairment (...)."* At this point I would like to thank the psychiatrist George Szmukler for his book *"Men in White Coats"*, which was discussed just four weeks ago in a workshop in Bochum, Germany. Szmukler shows in detail, how *"Deeply entrenched stereotypes – that those with mental illness are not competent or are dangerous – and the lack of a `voice´of this marginalized sector in society have been key (....)* and *"Mental health law governing treatment under coercion in psychiatric practise has remained largely unchanged since the late eighteenth century."*[4] German national law should

[3] https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CountryVisits.aspx?SortOrder=Alphabetical (last accessed: 15 July 2019)

[4] See back cover of "Men in White Coats: Treatment Under Coercion", Szmukler, G. 2017

support and enforce international treaties as well as follow the basic norms of our constitution – dignity, freedom and equality.

Capacity is known as a *"catch for all"* legal term in Germany, defined as understanding a relevant information, appreciating a situation to use or weight the information and to communicate the decision. In German there is no law titled capacity law, but the federal legal guardianship law as well as 16 different state laws as part of the police and regulatory laws permit lawful preventive detention in a hospital or a social care home and medication without consent. Apart from the mental disorder only some risk of harm to self or third parties has to be assessed or assumed by psychiatric experts. How easily this happens and spoils someones life will be shown later by a case-report. Szmukler explains in his book how unreliable psychiatric risk assessment is in reality (p. 33-52). The legal mental health norms in Germany did not only lead to more detention and coercion in psychiatric hospitals and social care institutions, but also since 1992 to a new profession, the **"professional legal guardian".**

But there is positive influence of human rights treaties like CRPD and OPCAT. A law of advance healthcare directive came into operation in the year of OPCAT-ratification. Germany's Federal Constitutional Court only two years later in 2011 decided on forced medication, quoting CRPD.[5] Thus legal amendments were due to all of the mental health laws. At first professionals in psychiatry mainly responded defensively, complaining about the much higher threshold for coercive treatment and threatened, that, as a result of these changes, they would have to use mechanical restraint measures more frequently to control their patients' behaviour[6]. Alas, the willingness of clinical psychiatry to change procedures and standards was still lacking for several years.

So it is no surprise that one year ago, in summer 2018, our Federal Constitutional Court decided on two constitutional complaints about physical restraints in psychiatric hospitals. The question raised was, if the use of physical restraints – strapping the persons concerned on their back to a hospital bed using a special type of belts to largely or completely restrict their ability to move – constitutes an

[5] 2 BVerfG, Beschluss des Zweiten Senats. 23th March 2011 - 2 BvR 882/09 -, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2011/03/rs20110323_2bvr088209.html (last accessed: 31 July 2019)

[6] DGPPN Stellungnahme vom 16.01.2012, commented in Recht & Psychiatrie (2012) 30: 62 – 63

additional deprivation of liberty. The additional legal question was whether such deprivation of liberty was covered by coercive admission on the basis of state public law or guardianship law, or if a further juridical decision was needed as well as a doctor's order. Let me quote the first two headnotes of the Constitutional Court decision:

1. *The use of physical restraints on patients constitutes an interference with their fundamental right to freedom of the person (Art. 2(2) second sentence in conjunction with Art. 104 of the Basic Law).*

   b) Both the use of five-point and seven-point restraints that goes beyond mere short-term application constitutes a deprivation of liberty within the meaning of Art. 104(2) of the Basic Law that is not covered by a judicial order of confinement in a psychiatric hospital. A short-term application can generally be presumed where it is foreseeable that the measure will not last longer than approximately half an hour.

2. *The regulatory duty following from Art. 104(2) fourth sentence of the Basic Law obliges the legislature to enact provisions that specify the requirement of a judicial decision in procedural terms in order to give consideration to the specific characteristics of the different contexts in which deprivations of liberty are applied.'* [7]

A constant presence of nursing staff with patients in restraints is now constitutionally stipulated, and this regulation is applicable nationwide, not only in the two home states of the complainants. Additionally, the decision emphasised the need to carefully document the specific risks of a patient to be restrained. The justification and proportionality must be documented in a transparent way. More or less all 16 state laws have to be amended to ensure that restraints really are used after specific and individual risk assessment and after milder measures have been tried unsuccessfully. The federal German Guardianship law still does not have similar safeguards, so significant amendments are overdue.

Whether and how this will be implemented in clinical practise and help to reduce the frequency of physical restraint depends on the willingness of psychiatric professionals to scrutinize their daily routine in a self-deprecating manner. There is

[7] an English version of this decision is to be found under: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/07/rs20180724_2bvr030915en.html (last accessed 17 July 2019)

not enough time in this talk, do give details about my experience as a member of state supervising bodies, but these, when annually visiting psychiatric hospitals in North Rhine-Westphalia, tend to be not very helpful in implementing new legal regulations. This remark will just take me back on international level and the OPCAT.

According to Article 3 of the OPCAT *"each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism, NPM)"*[8]. For ten years now Germanys NPM exists and its members are visiting not only prisons, but psychiatric hospitals as well as social care homes. In fact, the emphasis in 2018 was on elderly care homes and on the question if legal guardianship law and human rights standards were adhered to. An English version of the 2018 NPM annual report will be published in about four weeks time,[9] so you may read the findings. Let me just cite a few important sentences for this symposium: *"Im Rahmen ihrer Besuche nahm die Nationale Stelle stets auch Einsicht in die vorliegenden richterlichen Entscheidungen bezüglich freiheitsentziehender Maßnahmen. Hierbei wurden deutliche Unterschiede in der rechtlichen Bewertung einzelner freiheitsentziehender Maßnahmen festgestellt. Zudem waren Begründungen zu Entscheidungen nicht immer nachvollziehbar, in Einzelfällen bestanden erhebliche Zweifel an der Rechtmäßigkeit richterlicher Entscheidungen. (....) Die Nationale Stelle erachtet das Vorgehen des Gerichts als höchst bedenklich."(P. 35-f.)* The NPM doubted the lawfulness of some court decisions.

This takes us to the case report about the pitfalls of German guardianship law. Also it will give us a positive example of a guardianship judge, who did his job in an appropriate, non-discriminating way.

8 https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx (last accessed 17 July 2019)

9 See https://www.nationale-stelle.de/en/publications.html (Annual Report 2009-2017, in report 2018 see p.34-50), an English translation will soon be available at the given Internet address

Legal guardianship, personal rights and the ability to dissent

Just before Christmas 2016 the lawyer and co-author E.N. asked M.O. for advice about a medical assessment concerning an at that time 72 years old client. His name shall be Peter Müller for this case report. He urgently needed a lawyer because a person - unknown to him - suggested to the local court, that he might need a legal guardian. Anybody in Germany can prompt the mental health court to assess if an adult person who *"by reason of a psychiatric disorder or a bodily or mental deficiency cannot or partially cannot care for his personal matters"*[10] needs or wants a legal guardian. But the court needs a psychiatric assessment for that decision. The medical assessment was sent to court already, when Mr. Müller contacted E.N.

To obtain such a medical assessment a decision of the court is necessary. An appeal against such a decision is not possible. Only against the later decision to install a legal guardian the person concerned has the right to appeal. In this case the lawyer found out that Mr. Müller lived as flat-owner in the house of his childhood and the owner of the second flat in the building – called Mr. Y for now - had initiated the court case. A longer confrontation existed between the two owners of the building. Mr. Müller complained about his neighbour Y. and lived under the impression, that Y. wanted to force him to move from his own flat so that he could buy Mr. Müllers flat for his children. Such things are real in this world and lawyers as well as mediators are needed to sort out such neighbourhood disputes.

It might not surprise that some people try to use – most of us would say **abuse** - the possibilities to initiate the implementation of a legal guardian for their private interests. What is surprising in this – and unfortunately not only in this case - is, that the court - without prior contact to the person concerned - decides to examine this person. What could happen, if the person concerned refuses to cooperate with the assigned doctor even if the allegations are false might be theme of another discussion.

In our case at the end of November 2016 a medical specialist assessor surprisingly visited Mr. Müller at home. This doctor made up a completely different story and reported this version to the guardianship court. She obviously didn´t believe any

[10] Bürgerliches Gesetzbuch (German Civil Code) § 1896

saying of Mr. Müller, but took some of her cognitions and assumptions directly from information by Mr. Y. For example: She inspected Mr. Müllers car and found some scratches and bumps, so she decided Mr. Müller shouldn´t drive any more. She diagnosed a beginning process of dementia, which might be correct. Additionally, she attested persecutory delusions. About the risk of harm to self or third parties her statement did not say a single word. On that basis she endorsed legal guardianship, for the right to determine place of residence, for the right to health care including hospital care, for financial as well as administrative matters and even for receiving mail. Such guardianship is not only a social exclusion, it is like a *"social death"* in Germany. No decision would have been possible any more for Mr. Müller without the consent of his guardian.

For a professional legal guardian, it is always the easiest to put an elderly person in a home for the elderly. He can be sure the person he has to guard will be cared for. But German Guardianship Law points out that having a guardian does not mean the person has no legal capacity. The law says the guardian has to comply with the wishes of the supervised, as far as these are not against the ***"best interest"*** of the person.[11] But who decides about ***"best interest"***?

At that point it was not difficult for M.O. to write a statement for the court and just point out, that this assessment was far below any standard, full of just assumptions and personal opinions and did not give evidence about the legal capacity of Mr. Müller. So only by the legal aid, the action of E.N. and consequently by a judge who did not only follow the "*expertise*" of a doctor but listened to other views as well, some success at that time can be reported. The judge visited Mr. Müller in his flat and was surprised, that his home was proper and clean. A decision against a legal guardian was made and Mr. Müller was able to live in his home, supported in some aspects by friends and neighbours for two more years.

But the owner of the second flat, Y., still pursued his goal. On repeated and urgent suggestion of Y. with the claim, Mr. Müller did not pay the water cost for the two flats, a second assessment by a psychiatrist was made. The court did not inform E.N. about the new guardianship approach. The psychiatric expert was able to get the confidence of Mr. Müller and the written assessment was of much higher quality. But he, too, saw the only solution in a legal guardian and again no harm to

[11] Bürgerliches Gesetzbuch (German Civil Code) § 1901

self or others was stated.

Now, in 2018 the court decided for a professional guardian. When he was put in place; he soon took the chance to confine Mr. Müller to a psychiatric hospital for nearly two months. On December 28th 2018, M.O. visited Mr. Müller, together with his friendly and helpful neighbour-lady. A hopeless, sad Mr. Müller was found, the nursing staff hadn´t even cared for him to wear his own clothing. By hospital decision he was not allowed to go out and have some fresh air, and a few days before that visit the staff stopped him to sign a form permitting E.N. to represent Müllers interest again. They said, a person under legal guardianship is **not allowed** to engage a lawyer in his own capacity. This was definitely a false and misleading information. Even the protest of E.N. to the head physician, who should know the rules of law, did not change anything. On the contrary of the clear legal situation even the hospital management defends the breaking of the law by the doctor and the nursing staff.

Meanwhile the guardian asked the court for permission to sell Mr. Müllers flat. At discharge from hospital he organised daily nursing care at home to make sure, medication was taken. But after only five days of this nursing service they asked the above-mentioned neighbour lady, if she could take care of Mr. Müller during the weekend because they had a shortage of staff. The reaction of the lady was a little bit helpless after she witnessed so much overprotective legal action and coercion for Mr. Müller. When she asked the care service for more information they refused, referring to their non-disclosure-obligation. Afterwards these professional carers informed the professional guardian, they were *"unable to take the responsibility"* for Mr. Müller.

The personal interest, the will and preferences of an elderly person are not taken into account when state officials, like the guardian or health insurance paid services (like the nurses) take over. For five months now, Mr. Müller is living in an elderly care home and all his property is used to pay for this and the guardian. Mr. Müller cannot live to his habit any more, to spend daytime with his friend and the helpful lady.

The guardian only cares about the easily usable property. He does not care about the will and interests of Mr. Müller, who has paid the house insurance fee and

water cost for the two flats for many years. He actually has the right and the legal power to ask Y. for financial compensation. Probably that causes too much workload for a guardian. The daily conduct of guardians is not supervised by any official body. Neither Mr. Müllers wishes, nor his abilities were seriously considered, all officials just decided in their own interest to get *"the job done easily"*.

Conclusions:

- The legal term "best interests" (German: Wohl) is not sufficient for laws, which discriminate according to mental illness. The wishes and preferences of vulnerable persons are not protected by the law.
- High level and expensive decisions by experts of law or psychiatry or legal guardians are likely to be in the best interest of these experts – not the person that needs help.
- Reasonable complaints are not heard by state paid institutions like the hospital in our case report.
- Criminal proceedings are difficult to gain for persons like Mr Müller – he might have been victim of severe stalking by Mr. Y.
- Elderly care homes in Germany often are privately run businesses. Shareholder value may be more important than human rights for those who need the care. Economy or rights-based care, that´s the question.
- Even Germany – one of the wealthiest members of the Council of Europe – has to admit, there is a lot of ill-treatment and coercion in psychiatric and social care.
- NPMs can be helpful to stop the acquiescence of state. But the German NPM should have the authority to publish the names of the institutions visited that are privately run, as well as the visit reports and respective statements made by the competent ministries.
- NPMs can be helpful to stop the acquiescence of state. But German NPM should have the authority to publish the names of the institutions visited that are privately run, as well as the visit reports and respective statements made by the competent. Even in the tenth year of its existence, this authority was not given to the NPM

Thank you very much for your attention!