National CRPD Monitoring Mechanism

Submission to the CRPD Committee

Regarding the Draft General Comment No. 5; June 2017

The German Institute for Human Rights is Germany’s independent National Human Rights Institution. It has A-Status and operates in compliance with the Paris Principles. In accordance with Article 33 (2) of the Convention on the Rights of Persons with Disabilities (CRPD, the Convention), the National CRPD Monitoring Mechanism was established as an integral part of the German Institute for Human Rights in 2009.

The German National CRPD Monitoring Mechanism thanks the Committee on the Rights of Persons with Disabilities (the Committee) for the opportunity to respond to the Draft General Comment No. 5 (Draft GC) on Article 19 CRPD. We have chosen to focus only on selected issues which we would like to draw the Committee’s attention to; hence this submission does not constitute an exhaustive statement on the Draft GC on our behalf.

We embrace the Draft GC and its detailed explanation of the right to live independently and be included in the community as well as States parties’ obligations. It contains important clarifications for furthering the national implementation of Article 19 CRPD. Thus, there are several elements which we consider indispensable:

First of all, the clarification on how the right to live independently and be included in the community is rooted within international human rights law in paragraphs 7 to 12 is of great significance as it explains not only where Article 19 originates from but also the relational character of the right itself. The interdependence and mutual conditionality of individual autonomy and social inclusion as well as participation in the community ­­– also stressed in essential paragraphs such as 3, 9, 18, 41 and 68 – underline the complexity of Article 19 CRPD and its specific value within the Convention itself for States parties.

Secondly, we welcome the normative explanations, especially the definitions given in chapter II.A (Definitions) as they clarify many questions on how Article 19 CRPD has to be understood. They are of special importance to prevent misunderstandings which we also have observed in Germany. One of the key passages is, in our opinion, the clarification that institutionalization or life in institutions is not defined by group or building size but by the lack of choice and control over a person’s life as outlined in paragraph 15 (c). We also find it important that the Committee clearly states in paragraph 15 (a) that living independently is about having choices and control over one’s daily routine as well as one’s life in general and is not to be confused with being able to carry out activities by oneself or living alone. Furthermore, it is relevant that community is not only defined by location but constituted by social interactions and communication as well, as pointed out in paragraph 15 (b). Moreover, by highlighting the significance of decisions about by whom, how, when, where and in what way service delivery takes place, the definition of personal assistance in paragraph 15 (d) distinguishes it clearly from other modes of service delivery. Consequently, the remarks in paragraph 16 are crucial in addressing misinterpretations of living independently and being included in the community.

Thirdly, we consider it a strength that the Draft GC clarifies what a rights-based approach means in relation to Article 19 of the Convention. This concerns especially, but is not limited to, paragraphs 20, 23, 27, 58 and 59, which state that support is a matter of rights, not charity, that the right to live independently and be included in the community applies to all persons with disabilities irrespective of their impairment or the type or amount of support they require and that assessment should be non-discriminatory and focus on barriers and support requirements of a person. This is important as the way people are assessed or the kind of support they need often de facto limits their right to live independently and be included in the community.

Furthermore, we think that the Committee has found an overall balance between allowing openness for national and cultural differences and detailing States parties’ obligations under Article 19 CRPD. However, in chapter II.B (Chapeau) we miss an explicit reference to the Convention’s wording “with choices equal to others” as this is central when it comes to understanding Article 19 within different cultural and social contexts. Paragraph 22 which states that “persons with disabilities have the same choices that other people have in their communities” therefore could be phrased stronger and clarify that living independently and being included in the community does not promote an individualist lifestyle. Rather it means having the same degree of choice and control over one’s life as other community members. We believe that cultural diversity can and should be adequately reflected in human rights law. Consequently, the Committee should make sure that its interpretation of Article 19 CRPD is in all aspects emancipated from a too narrow, western-centric understanding.

Our main concern refers to paragraph 47. Although it may be legitimate and necessary for a legislator to regulate access to existing institutional settings during times of transition to an inclusive society and de-institutionalization, we think that from a strict human rights perspective, the decision to live in an institutional setting falls outside the scope of Article 19 as it enshrines the right to live in the community and not the opposite. We assume the paragraph’s intention and rationale in distinguishing between individual decisions and structural changes and to explicitly make it clear that respecting the former does not mean that they can be used as an argument against the latter, i.e. de-institutionalization. Therefore we consider the second sentence of this paragraph as central. However, its phrasing might be misleading as it does not refer to the closure of institutions and de-institutionalization but uses the terms „maintain“ and „ensure the availability“. According to our understanding of human rights outlined above and taking into account the risk of misunderstandings, we strongly recommend the Committee to either delete the entire paragraph or alternatively place it in chapter V. (Implementation at the national level) in order to clarify that this refers to times of transition but is not an integral part of the right to live independently and be included in the community.

Finally, we would like to see a clarification from the Committee about the role independent monitoring mechanisms and National Human Rights Institutions should play in the implementation of Article 19 on a national level. Paragraph 94 (k) could be more detailed in this regard.