

THE STATE'S OBLIGATION TO PROTECT LIFE AND HEALTH OF VULNERABLE ADULTS – THE ORDER OF 26 JULY 2016 OF THE GERMAN FEDERAL CONSTITUTIONAL COURT IN THE LIGHT OF CRPD AND ECHR

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I. INTRODUCTION

The principles of self-determination in medical matters and to respect people's decision not to be treated are implemented in German health law.¹ The law concerning medical treatment applies equally to people with mental illnesses. Yet, there are also protective measures for cases of significant risks to others or oneself. The German law offers legal possibilities for forced medical treatment² and forced hospitalization to protect life and health of adults with serious mental illnesses that lead to impaired decision-making capacity and the denial of medical treatment.³

However, from the perspective of German fundamental law as well as human rights, the interference with physical integrity and self-determination to prevent self-damage is a difficult issue and has led to landmark decisions on national level concerning forced medical treatment.⁴ In the decision of the 26th of July 2016,⁵ the German Federal Constitutional Court (BVerfG) as Germany's institution to interpret fundamental rights, defined a duty of the state to protect vulnerable adults and therefore to use protective measures. This includes medical treatment against the natural will⁶ under narrowly defined preconditions as a last resort.⁷ Deviating from former court decisions, the German Court did not decide about the permissibility of a treatment to regain the capacity to consent, but a somatic treatment to save the patient's life. In its reasoning the court considered the UN Committee on the Rights of Persons with Disabilities' reports and guidelines, as well as the case law of the European Court of Human Rights (ECtHR). As already stated in a previous order on forced medical treatment, the court

¹ As for example in the §§ 630a-630h BGB (German Civil Code) dealing with the treatment contract or § 1901a BGB which deals with the advance directive for health care.

² The terms 'involuntary medical treatment' and 'forced medical treatment' are used synonymously in this report and refer to a medical treatment against the will of a person. This treatment can either be of somatic or psychiatric nature. The term 'involuntary treatment' has no common definition in international law, see European Union Agency for Fundamental Rights, 'Involuntary placement and involuntary treatment of persons with mental health problems', 2012, p. 9, available at https://fra.europa.eu/sites/default/files/involuntary-placement-and-involuntary-treatment-of-persons-with-mental-health-problems_en.pdf (last accessed 22nd Dec. 2019).

³ On the basis of the federal adult protection law see § 1906 and § 1906a BGB; on the basis of public law there are 16 different mental health acts concerning the treatment of mentally ill people.

⁴ BVerfG, Order of the Second Senate of 23 March 2011 – 2 BvR 882/09 = BVerfGE 128, 282 = NJW 2011, 2113; BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15 = BVerfGE 142, 313 = BVerfG NJW 2017, 53.

⁵ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, available in English at https://www.bundesverfassungsgericht.de/e/ls20160726_1bv1000815en.html (last accessed 28th Dec. 2019).

⁶ "Treatment against the natural will" is the German definition for involuntary medical treatment.

⁷ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 71.

saw no contradiction in protective measures by the state including forced medical treatment as a last resort to the mentioned human rights treaties.⁸

However, the legitimacy of involuntary measures as involuntary hospitalization and forced medical treatment is discussed on international level as well.⁹ Whether involuntary measures should be completely banned against the background of the human rights treaties or whether they only require strict regulation is still controversially considered.¹⁰ Especially the United Nations Convention on Rights of Persons with Disabilities¹¹ (CRPD) encourages to rethink and discuss existing laws and practices concerning involuntary measures.¹² Perspectives, especially on 'will and preferences' Art. 12 (4) CRPD thereby differ considerably.¹³

⁸ BVerfG, Order of the Second Senate of 23 March 2011 – 2 BvR 882/09, para 52; for further information on the case see footnote 46.

⁹ Overview of the different UN Committee positions S. Gurbai and W. Martin, 'Is Involuntary Placement and Non-Consensual Treatment Ever Compliant with UN Human Rights Standards?', available at <https://autonomy.essex.ac.uk/wp-content/uploads/2018/01/EAP-UN-Survey.pdf> (last accessed 20th Dec. 2019); older report from the European point of view, European Union Agency for Fundamental Rights, 'Involuntary placement and involuntary treatment of persons with mental health problems', 2012, p. 9, available at https://fra.europa.eu/sites/default/files/involuntary-placement-and-involuntary-treatment-of-persons-with-mental-health-problems_en.pdf (last accessed 22nd Dec. 2019).

¹⁰ Compiling the opinions of human rights stakeholders such as the Special Rapporteur on the rights of persons with disabilities and other human rights experts who encourages the abolition of involuntary treatment and placement, 'Mental health and human rights, Report of the United Nations High Commissioner for Human Rights', UN Doc. A/HRC/39/36 of 24th July 2018. Furthermore, the 'Statement by the Committee on the Rights of Persons with Disabilities to oppose the Draft Additional Protocol to the Oviedo Convention', Sept. 2018, available at https://www.ohchr.org/Documents/HRBodies/CRPD/Statements/StatementOviedo_CRPD20th.docx (last accessed 28th Dec. 2019) stresses that the legitimacy of involuntary treatment and placement opposes Art. 14, 17 and 25 CRPD. Also, for the abolition of regulations allowing involuntary treatment and placement in its latest report, the UN Committee on the Rights of Persons with Disabilities, 'Concluding observations on the combined second and third periodic reports of Spain', UN Doc. CRPD/C/ESP/CO/2-3, para 26-30. More moderate view on involuntary treatment: Human Rights Committee, UN Doc. CCPR/C/AZE/CO/4 no. 13 ("psychiatric confinement is applied only as a measure of last resort and for the shortest appropriate period of time and that the confinement is strictly necessary and proportionate for the purpose of protecting the individuals in question from serious harm or from preventing injury to others"); Council of Europe: 'Draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment', DH-BIO/INF (2018) 7, see Art. 10 and 11.

¹¹ The United Nations Convention on the Rights of Persons with Disabilities (CRPD) passed by the general assembly of the United Nations 13th December 2006.

¹² E. Flynn, 'Disability, Deprivation Of Liberty and Human Rights Norms: Reconciling European and International Approaches', *International Journal of Mental Health and Capacity Law*, 2016, [75-101]; P. Cuenca Gómez, M. Barranco Avilés and P. Rodríguez des Pozo, 'Psychosocial Disability And Deprivation Of Liberty: Reviewing The Case Of Qatar In The Light Of The Convention On The Rights Of Persons With Disabilities', *International Journal of Mental Health and Capacity Law*, 2018, [55-77]; P. Fennell, in: I. Bantekas & M. Stein & D. Anastasiou (edit.), 'The UN Convention on the Rights of Persons with Disabilities: a commentary', Oxford University Press, 2018, Art. 15, [437-442]; Favorizing a strict abolition of involuntary measures: T. Minkowitz, 'Abolishing mental health laws to comply with the Convention on the Rights of Persons with Disabilities', in: B. McSherry, P. Weller (edit.), 'Rethinking Rights-Based Mental Health Laws' Oxford and Portland, Hart Publishing, 2010, [151-177].

¹³ G. Szumkler, "Capacity", "best interest", "will and preferences" and the UN Convention on the Rights of Persons with Disabilities', *World Psychiatry*, 2019, [34-41]; For example, some interpretations divide the term "will and preferences", giving "will" and "preference" different values in the will determination process. See A. Ward and P. Curk, "Respecting 'will': Viscount Stair and online shopping", *BtPrax*, 2019, [54-58]; A. Arstein-Kerslake & E. Flynn, 'The General Comment on Article 12 of the Convention on the

Human rights are mandatory guidelines for national law. But the texts of treaties as CRPD and ECHR often do not provide solutions to specific problems and need interpretation. However, the practical application of incorporated international law in national cases and the interpretation of indefinite terminology is often up to national courts.¹⁴ Therefore, besides international institutions, the national courts play an important role in interpreting human rights by applying them¹⁵ and it is worthwhile to have a closer look at national decisions considering international human rights treaties.

This report intends to explain the case and arguments of the BVerfG in the order of the 26th July 2016 in the context of CRPD and ECHR. The relationship to the interpretations of the CRPD Committee and the ECtHR case-law will be addressed in particular.

II. THE COURT'S CASE WITHIN THE CONTEXT OF GERMAN ADULT PROTECTION LAW

A. A brief introduction to German adult protection law

Germany has got a two-tiered legal system for the protection of adults. One tier is based on private mandates as the enduring power of attorney (*Vorsorgevollmacht*), which is a fully equivalent, private alternative to the second tier, the statutory system *Rechtliche Betreuung*.¹⁶ The German "*Betreuung*" is an instrument for the legal protection of adults in need of help. It ensures the exercising and protecting of the rights of the adult by appointing a legal representative by court order without incapacitating the adult or restricting legal capacity. Measures of protection for an adult are dealt with by a special court (a department of the local court), the "*Betreuungsgericht*," hereafter referred to as guardianship court. The "*Betreuer*" (court-appointed legal representative) takes care of the specific matters assigned to him in the individual case and is obliged to respect the will and preferences of the adult, § 1901 (3) German Civil Code (BGB). It is only as a last resort, i.e. if advising and assisting the adult proves unsuccessful, that the court-appointed legal representative may use his power to represent the adult in his or her affairs. The affected person remains able to give consent, even though he or she might have a legal representative for matters of health care.

Rights of Persons with Disabilities: a roadmap for equality before the law', *The International Journal of Human Rights* 20(4), [471-490].

¹⁴ There are differences in incorporation of international law. Germany has incorporated the CRPD as a federal law.

¹⁵ On the different roles of national courts in applying international humanitarian law, S. Weill, 'The Role of National Courts in Applying International Humanitarian Law', Oxford University Press, 2014.

¹⁶ "*Betreuung*" is an instrument for the legal protection of adults by appointing a legal representative by court order without incapacitation, for further English explanation of the term see https://www.wcag2016.de/fileadmin/Mediendatenbank_WCAG/Tagungsmaterialien/Glossar.pdf (last accessed 28th Dec. 2019); The law of "*Betreuung*" is based on the principles of necessity and autonomy. Voluntary (private) measures such as a continuing power of attorney for health care have priority, see § 1896 (2) BGB.

According to the law, with the exception of emergency cases, every medical treatment requires the informed consent of the patient. Doubts on the adult's capacity to consent have to be verified for each medical intervention by the physician. Due to mental illness, a patient might not understand the importance or consequences of treatment and thus cannot give informed consent. In this case his legal representative has to consent for him (§ 630d (1) BGB) if he does not have an advance directive in health care (§ 1901a (1) BGB) consenting or disagreeing with the needed medical treatment.

The ultimate limit of these regulations is the *natural will* of the adult. The term '*natural will*' in the context of the court implies any wish or will that is consciously expressed without necessarily being legally effective in terms of not having the capacity to consent.¹⁷ Any medical treatment against the natural will of a patient is characterized as involuntary medical treatment¹⁸ and therefore needs to accomplish the legal requirements and approval by court. Therefore, only in exceptional cases and under very strict conditions, German law allows forced medical treatment.¹⁹

Due to the federalist system, there are rules on forced medical treatment and deprivation of liberty regulated in the adult protection law *Betreuung* as well as in the Mental Health Acts of the 16 individual German states. These state laws do not require a consent of a legal representative and can concern a threat to the safety of others as well.²⁰ The Mental Health Acts differ in detail, usually apply to urgent cases and are not covered by the addressed BVerfG's decision.²¹

B. The case

The case dealt with by the BVerfG concerned a woman who suffered from a schizoaffective psychosis. She was under supervision of the German statutory adult protection system "*Betreuung*". Her court-appointed legal representative was assigned to manage matters of health care for her.²² She was accommodated in a care facility, where she refused to take medication for her autoimmune disorder and expressed the intent to commit suicide. After having been transferred to a closed dementia unit with the approval of the guardianship court, her illnesses were treated against her natural will on the basis of multiple court orders. At the hospital it was discovered that she also suffered from breast cancer. At this point she was physically weakened to such an extent, that she could neither leave the hospital, nor did she want to leave.

¹⁷ For an English explanation see A. Ward, 'A major step forward in CRPD compliance by the German Federal Constitutional Court?', *Mental Capacity Law Newsletter*, (70), Nov. 2016, 22, [30]; G. Szukler, 'The UN Convention on the Rights of Persons with Disabilities: 'Rights, will and preferences' in relation to mental health disabilities' *International Journal of Law and Psychiatry*, (54), 2017, 90, [92].

¹⁸ This can either be psychiatric or somatic treatment.

¹⁹ See § 1906 BGB (old version), which respects the requirements set by BVerfG, Order of the Second Senate of 23 March 2011 – 2 BvR 882/09; BVerfG, Order of the Second Senate of 12 October 2011 – 2 BvR 633/11 = BVerfGE 129, 269 = NJW 2011, 3571.

²⁰ According to several decisions of the BVerfG, these regulations had to be reviewed and are mostly subject to revision to new standards.

²¹ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 71 the court refers to "persons under custodianship".

²² There is no distinction between psychiatric and somatic matters of health care in Germany.

The woman was considered unable to give her consent to the medical treatment for the breast cancer. But she was able to express her natural will and communicated that she did not wish to be treated. Therefore, her court-appointed legal representative applied to the guardianship court for the extension of the patient's forced hospitalization and for involuntary medical measures to treat the cancer. The guardianship court denied the application because the woman did not want to leave the hospital and therefore did not meet the legal requirements for forced hospitalization. For that reason, she could not be subject to coercive medical treatment.

In German law, the natural will of the patient limits the possibility for the legal representative to decide on a treatment²³ and can only be overruled, if the requirements for the use of involuntary medical treatment are met.²⁴ At the time of the order, § 1906 (3) BGB (old version) listed the requirements which are necessary for the approval of the guardianship court.

The medical (psychiatric or somatic) treatment has to be necessary to prevent a threatening considerable damage to health and the rejection of the treatment by the patient has to be grounded on a psychiatric illness or a mental health disability.²⁵ Serious efforts have to be made to convince the patient to be treated voluntarily. The medical intervention needs to be the only possibility to prevent serious health damage and the expected profit has to outweigh the possible impairments. The crux of the case was that the provisions of § 1906 (3) BGB (old version) did not distinguish between the requirements of forced hospitalization and involuntary treatment. Hence, the law demanded in addition to other criteria the involuntary hospitalization of a patient when he was treated against his natural will.

The criteria for the court's approval for forced hospitalization, § 1906 (1) BGB²⁶ are not met if there is no deprivation of liberty, i.e. the hospitalization is not against or without the will of the person concerned and the patient stays in hospital voluntarily.²⁷ Thus, involuntary medical treatment was limited to patients who rejected hospitalization.

In the sequence of proceedings, the BVerfG was engaged with the case having to decide about the compatibility of the current regulation with the German Constitution which necessarily required involuntary accommodation and therefore was preventing the woman from being treated.

The woman was not treated for her breast cancer and died before the court could decide about § 1906 (3) BGB. Whether the woman should have been treated

²³ See § 1904 BGB.

²⁴ Forced treatment against the free will of a person is not possible.

²⁵ § 1906 (3) BGB (old version).

²⁶The legal representative can apply for forced hospitalization for two reasons. Firstly, if the patient may seriously endanger his health or life because of a psychiatric illness. Secondly, if to prevent a serious health damage or death a treatment is necessary which needs a hospitalization which the patient refuses because of a psychiatric illness, see § 1906 (1) No. 1 and 2 BGB.

²⁷ BGH, Order of 1 July 2015 - XII ZB 89/15 = FamRZ 2015, 1484, para 18-19; BGH, Order of 23 January 2008 - XII ZB 185/07 = FamRZ 2008, 866, para 19-20.

involuntarily, was not decided by the court, as this was not the relevant question. This would have implied further investigation of the requirements of involuntary medical treatment as the original will of the woman on the treatment of her breast cancer.

III. KEY POINTS OF THE COURT'S DECISION

A. The state's duty to protect

The judges decided that not having a regulation to treat people with a court-appointed legal representative in need of a medical treatment who cannot recognise the necessity of a medical measure or who cannot act in accordance with this realisation violates the state's duty of protection of the right to life and physical integrity under Art. 2 (2) sentence 1 German Constitutional Law.²⁸

In its reasoning the court explained the origin of the state's "duty to protect". The court claimed that the constitutionally guaranteed right to life and physical integrity does not only guarantee a subjective defensive right of the individual against the state but sets up objective values that demand duties of protection on part of the state, to protect and support the life of individuals.²⁹

This usually undefined duty of the state takes a specific form if individuals meet the requirements for the appointment of a legal representative and are not able to recognize the necessity of a medical treatment or cannot act in this awareness due to their mental illness.³⁰ As ultima ratio, a medical examination and treatment against the natural will of the individual must be possible.³¹

Even though the court refers to individuals with the need of a court-appointed legal representative, this decision is also applicable to adults with a legal representative under an enduring power of attorney (*Vorsorgevollmacht*) who has been determined by the adult himself to decide on matters of deprivation of liberty and involuntary medical treatment.³²

Despite the aforementioned safeguard function of the right to life, involuntary medical treatment still conflicts with the person's right to self-determination and the right to physical integrity.³³ Generally, under German Constitutional Law all people are free to deal with their own health – the BVerfG called it the "freedom to illness".³⁴ To medically treat somebody because it is assumed the best out of an objective third party view would interfere with the general right of personality (Art. 2 (1) in conjunction with Art. 1 (1) German Constitutional Law).³⁵ This strictly implies that a treatment against the

²⁸ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 66-68.

²⁹ Ibid, para 68-69.

³⁰ Ibid, para 71.

³¹ Ibid, para 71.

³² See § 1906 (5) and § 1906a (5) BGB.

³³ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 74.

³⁴ BVerfG, Order of the Second Senate of 23 March 2011 – 2 BvR 882/09, para 19; BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 74.

³⁵ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 74.

free will³⁶ is impossible, because the free will is prior to the state's duty of protection.³⁷ But the person's right to self-determination and right to physical integrity can be interfered with by law in cases of serious threats to the health of persons who are unable to protect themselves. For those cases the state has to provide the possibility of involuntary medical treatment under certain conditions.³⁸

This requires the absence of free will, i.e. a missing competence to decide about necessary treatments due to a mental disorder or illness.³⁹ Additionally, the medical treatment needs to be necessary to avoid a serious threat to the person's health or life and must not be associated with dangerous treatment risks.⁴⁰ Most importantly, there must not be any reason to believe that the refusal of the treatment reflects the original free will of the person.⁴¹ The *original free will*⁴² is a former effectively expressed legal will e.g. by advance directives for health care. The court stressed that this process is a matter of balancing the rights in every individual case and the natural will has to be taken into account when deciding about involuntary treatment.⁴³ Moreover, firm procedural safeguards are necessary to ensure coercive treatment will only be used in the cases described above.⁴⁴

B. The compatibility of involuntary medical treatment with obligations under international law

The court reflected arguments of the interpreting sources of the CRPD and the European Convention on Human Rights (ECHR) concluding that coercive medical treatment is compatible with Germany's obligations under international law.⁴⁵

The BVerfG stated that its rulings on involuntary medical treatment are in line with the CRPD, including Art. 12 CRPD (equal recognition before the law). Thus, they confirmed their statement on Art. 12 CRPD which was already specified in a previous order on the prerequisites for compulsory medical treatment of a forensic patient.⁴⁶ The court affirmed that the CRPD aims at safeguarding and strengthening the autonomy of persons with disabilities. However, they saw no general prohibition of measures which are conducted against the natural will in case the capability of self-determination is

³⁶ 'Free will' means that the will is competent und legally effective in the matter concerned; for an English explanation see A. Ward, 'A major step forward in CRPD compliance by the German Federal Constitutional Court?', *Mental Capacity Law Newsletter*, (70), Nov. 2016, 22 [30].

³⁷ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 75.

³⁸ *Ibid*, para 80.

³⁹ *Ibid*, para 78-79.

⁴⁰ *Ibid*, para 80.

⁴¹ *Ibid*, para 82.

⁴² For an English explanation of the term see A. Ward, 'A major step forward in CRPD compliance by the German Federal Constitutional Court?', *Mental Capacity Law Newsletter*, (70), Nov. 2016, 22 [30].

⁴³ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 82.

⁴⁴ *Ibid*, para 84.

⁴⁵ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 87.

⁴⁶ BVerfG, Order of the Second Senate 23 March 2011 – 2 BvR 882/09. The court decided that the approval of forced medical treatment is not included in the approval of forced hospitalization. They decided that involuntary medical treatment strictly requires that the person accommodated is incapable of understanding the severity of his/her illness and the necessity of treatment measures or of acting in accordance with his or her understanding due to the illness.

limited. On the basis of Art. 12 (4) CRPD, the BVerfG concluded that measures against the natural will of the person must be possible, as long as suitable safeguards are implemented by the state.⁴⁷

The court also justified its decision with regard to the reports of the UN Committee on the Rights of Persons with Disabilities (CRPD Committee)⁴⁸. In the court's opinion the CRPD Committee does not impose binding decisions on how to interpret the treaty upon the member states,⁴⁹ but its reports have to be considered and dealt with in an argumentative way.⁵⁰ They admitted that the CRPD Committee criticized the German adult protection law in its *Concluding observations on the initial report of Germany* in 2015.⁵¹ The CRPD Committee recommends in line with the *General comment No. 1* in 2014⁵² on Art. 12 CRPD that all forms of substituted decision-making should be replaced by systems of supported decision-making.⁵³ Yet, the court underlined that the CRPD Committee remained vague. It did not refer to this special case addressed by the court and thus did not exclude involuntary medical treatment for this situation.⁵⁴

The court also referred to the CRPD Committee's interpretation of Art. 14 CRPD (Liberty and security of the person) in its *Guidelines on article 14 of the CRPD*.⁵⁵ The BVerfG assumed that the spirit of the CRPD cannot possibly deny people who cannot form a free will any help. Therefore, the court stated that in their opinion the CRPD is not opposed to coercive treatment if it is strictly regulated.⁵⁶ Additionally, the court emphasised that due to the German adult protection law, the will and the - if necessary - "supported will" of the patient have priority as demanded by the CRPD Committee.⁵⁷ The court summarised that even taking the CRPD committee's arguments into account, there is no good reason under the text and spirit of the CRPD to abandon such persons to their fate, and to conclude that the CRPD is opposed to compulsory medical treatment where this is constitutionally required under strictly regulated circumstances.⁵⁸

According to the BVerfG the state's obligation to protect and therefore use coercive medical treatment as ultima ratio is also in accordance with the ECHR and the case law of the ECtHR.⁵⁹ They referred to the ECtHR's jurisprudence on Art. 8 ECHR which

⁴⁷ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 88 citing BVerfG, Order of the Second Senate of 23 March 2011 – 2 BvR 882/09.

⁴⁸ Concerning the function of the United Nations Committee on the Rights of Persons with Disabilities see part IV.

⁴⁹ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 90 with further references.

⁵⁰ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 90.

⁵¹ CRPD Committee, *Concluding observations on the initial report of Germany* (2015), UN Doc. CRPD/C/DEU/CO/1.

⁵² CRPD Committee, *General comment No. 1* (2014), UN Doc. CRPD/C/GC/1.

⁵³ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 91.

⁵⁴ *Ibid.*

⁵⁵ CRPD Committee, *Guidelines on article 14 of the CRPD* adopted during the Committee's 14th session, September 2015, Annex to the Report of the Committee on the Rights of Persons with Disabilities, UN Doc. A/72/55.

⁵⁶ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 91.

⁵⁷ *Ibid.*, para 91.

⁵⁸ *Ibid.*, para 91.

⁵⁹ *Ibid.*, para 92.

provides the right to respect one's private life and therefore to live in self-determination, as well as on the right to life, Art. 2 ECHR.⁶⁰ The court stressed that the ECtHR gives the states a margin of appreciation to which extent the right to live in self-determination and to harm one's health may be granted.⁶¹ The ECtHR demands that decisions which may lead to serious harm or death may only be accepted if the adult has a free will and is of sound mind.⁶² Otherwise the ECtHR states, that keeping a person from risking his or her life is manifested in Art. 2 ECHR as a duty of the state.⁶³ The state has to take care that there are sufficient regulatory arrangements which ensure that an individual's decision of not being treated is based on a free will.⁶⁴ Therefore, the BVerfG concluded that the ECtHR's interpretation of Art. 2 and Art. 8 ECHR does not contradict their own assumptions.⁶⁵

IV. DISCUSSION OF THE COURT'S ARGUMENTS

A. Arguments concerning CRPD compliance

Although the court assumed that its results are in conformity with the CRPD, some parts of the German adult protection law, especially concerning forced medical treatment, are controversial.⁶⁶ In particular, the compliance with the CRPD is in question. This was notably expressed by the CRPD Committee in the *Concluding observations on the initial report of Germany*.⁶⁷ Therefore, the various arguments raised by the BVerfG shall be discussed in the light of the CRPD. In addition, the court's understanding of the CRPD Committee's statements shall be explained.

The CRPD was adopted to ensure that people with disabilities receive equal enjoyment of the basic rights, Art. 1 CRPD. In Germany the CRPD has the force of law and helps to determine the scope of fundamental human rights.⁶⁸ According to Art. 4 CRPD the

⁶⁰ Ibid, para 93 with reference to *Pretty v UK* (App no 2346/02) ECHR 2002-III, 155 [194], para 62-63. *Pretty v UK* deals with the legislative position on assisted suicide.

⁶¹ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 93 with reference to *Lambert and others v France* (App no. 46043/14) ECHR 2015-III, 67 [117], para 148. The case of *Lambert and others* was about the range of the state's obligation according to Art. 2 ECHR.

⁶² BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 94; for the requirements of "unsound mind" see *Winterwerp v the Netherlands* (App no 6301/73) ECHR Series A no. 33; *Winterwerp v the Netherlands* is a landmark decision on Art. 5 ECHR naming the minimum criteria for the lawful detention of people with "unsound mind".

⁶³ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 94 with reference to *Lambert and others v France* (App no. 46043/14) ECHR 2015-III, 67 [114], para 140; dealing with the question whether it is an individual right to decide to end one's life *Haas v Switzerland* (App no 31322/07) ECHR 2011-I, 95 [117], para 54; *Arskaya v Ukraine* (App no 45076/05) (ECHR 5th December 2013), para 69-70; *Arskaya v Ukraine* deals with the state's obligation to ensure adequate health-care regulations, concerning decision-making capacity of the patient.

⁶⁴ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 94 with reference to *Arskaya v Ukraine* (App no 45076/05) (ECHR 5th December 2013), para 69-70, 88.

⁶⁵ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 95.

⁶⁶ S. Schmahl, 'Menschenrechtliche Sicht auf die Zwangsbehandlung von Erwachsenen bei Selbstgefährdung', in: D. Coester-Waltjen et al. (edit.), 'Zwangsbehandlung bei Selbstgefährdung', Universitätsverlag Göttingen, 2016, [43-53]; D. Kuch, 'Wohltätiger Zwang', DÖV, 2019, 723, [730-732]; P. Masuch and C. Gmati, 'Zwangsbehandlung nach dem Gesetz zur Regelung der betreuungsrechtlichen Einwilligung in eine ärztliche Zwangsmaßnahme und UN-Behindertenrechtskonvention', NZS, 2013, 521.

⁶⁷ UN Doc. CRPD/C/DEU/CO/1, para 25.

⁶⁸ Incorporated in German Federal Law in 2008, see BGBl. II, 2008, p. 1419.

Convention's rights have to be respected in legislation and jurisprudence of the national courts.

The CRPD Committee is a safeguard implemented by the treaty itself (Art. 34 CRPD), which gives advice and evaluates the state reports on legal basis of Art. 36 (1) CRPD. The countries report about their progress implementing the CRPD to the CRPD Committee, which evaluates the measures and gives general recommendations (as demanded by Art. 35 CRPD). An optional protocol, which was signed by Germany as well, gives the Committee the authority to examine individual complaints about state's violations of the Convention, however, without the ability to sanction them.⁶⁹

In several decisions, the BVerfG already confirmed that it does not consider the statements of the CRPD Committee as binding, neither on international nor national courts.⁷⁰ Regardless of the content of the UN Committee's statements, the BVerfG's view seems plausible. Primarily, the interpretation of the treaty is the duty of the member states and has to focus on the treaty's intention, Art. 31 (1) Vienna Convention⁷¹. In addition, the competence of committees developed by human rights treaties is not uniformly valued.⁷² Therefore, the CRPD Committee as an organ implemented by the treaty itself, does not necessarily provide an obligatory interpretation of the CRPD. In Germany, the CRPD is implemented in national law and is reviewed within the national jurisdictions. Unlike the ECHR, the CRPD is not reviewed by an international court like the ECtHR who may take binding decisions. The committee cannot be accorded the same status. Their interpretations (such as the concluding observations) are not legally binding, they only "shall make [...] suggestions and general recommendations" Art. 36 (1) CRPD.⁷³ Yet, the CRPD Committee plays an important role in the unification of interpretation and the supervision of implementation. Therefore, as said by the court, their argumentation is important and has to be well considered.⁷⁴

The question remains whether the considerations of the BVerfG concerning the justification of involuntary medical treatment for vulnerable adults comply with the CRPD. The CRPD Committee's interpretation clearly rejects any form of restricting autonomy and especially involuntary medical treatment as a form of substituted decision-making.⁷⁵ The *General comment No. 1* on the interpretation of the CRPD articles criticized involuntary medical treatment, declaring it to be in violation of Art.

⁶⁹ See Art. 6 and 7 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

⁷⁰ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 90; confirmatory BVerfG, Order of the Second Senate of 24 July 2018 – 2 BvR 309/15, 2 BvR 502/16, para 90-91 = BVerfGE 149, 293.

⁷¹ Vienna Convention on the Law of Treaties, opened for signature Vienna 23 May 1969 and entered into force in Germany, 20 August 1987.

⁷² See A. Ward, 'A major step forward in CRPD compliance by the German Federal Constitutional Court?', *Mental Capacity Law Newsletter*, (70), Nov. 2016, 22 [26] with reference to HRC, General Comment No 33, UN Doc. CCPR/C/GC/33 of 5 November 2008, para 13.

⁷³ G. Szmukler, 'The UN Convention on the Rights of Persons with Disabilities: 'Rights, will and preferences' in relation to mental health disabilities', *International Journal of Law and Psychiatry* (54), 2017, 90 [91] speaks of the CRPD Committee's interpretations as 'authoritative' but not 'legally binding'.

⁷⁴ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 90.

⁷⁵ UN Doc. CRPD/C/GC/1, para 7, 9, 42; UN Doc. CRPD/C/DEU/CO/1, para 26, 37-38.

17⁷⁶, Art. 15⁷⁷, Art. 16⁷⁸ and Art. 12 of the Convention.⁷⁹ The CRPD Committee insists that all medical interventions relating to physical or mental integrity shall be based on the free and informed consent of the individual.⁸⁰ They attested the member states a "general failure to understand"⁸¹ the treaty's intention on supported decision-making and requested to make alternative assistance available.⁸²

Furthermore, the CRPD Committee presented their opinion on the German rules on compulsory medical treatment and the German adult protection law in their *Concluding observations on the initial report of Germany* in 2015.⁸³ The legal instrument of "Betreuung"⁸⁴ was declared incompatible with the CRPD.⁸⁵ They criticized the use of compulsory treatment and recommended the elimination of all forms of substituted decision-making.⁸⁶

Despite the CRPD Committee's obvious position on involuntary treatment, the BVerfG asserted that the CRPD Committee did not consider the special situation addressed in the order.⁸⁷ Looking at the CRPD Committee's reports, this can be confirmed. They did not explicitly focus on people with serious mental illnesses which are in a life-threatening condition. Furthermore, they did not state that the member states have to accept the death of persons with impaired decision-making capacity.

The BVerfG also affirmed that its argumentation complies with the CRPD Committee's guidelines regarding the interpretation of Art. 14 CRPD.⁸⁸ The guidelines declare that during deprivation of liberty there shall be no medical measures for the protection of health without the free and informed consent of the person concerned.⁸⁹ Therefore, the BVerfG concluded that the CRPD Committee demands the state to abandon coercive treatment.⁹⁰ However, the court assumed that the CRPD Committee's statement cannot exclude people who cannot give their consent from access to medical treatment.⁹¹ The CRPD Committee itself has seen a need for exceptions in cases when no will can be determined, such like a coma. In such cases, the "best interpretation of will and preferences"⁹² may be applied. To the German Constitutional Court the term

⁷⁶ Protecting the integrity of the person.

⁷⁷ Freedom of torture or cruel, inhuman or degrading treatment or punishment.

⁷⁸ Freedom from exploitation, violence and abuse.

⁷⁹ UN Doc. CRPD/C/GC/1, para 42.

⁸⁰ *Ibid*, para 41.

⁸¹ UN Doc. CRPD/C/GC/1, para 3.

⁸² UN Doc. CRPD/C/GC/1, para 3, 28-29; Criticising the uncompromising stance of the CRPD Committee S. Schmahl, 'Stellung und Rolle der UN-Behindertenrechtskonvention im Gefüge des universellen Menschenrechtsschutzsystems', in: A. Diekmann et al. (edit.), 'Betreuungsrecht im internationalen Kontext', Eigenverlag Betreuungsgerichtstag e.V., 2017, 82 [89].

⁸³ UN Doc. CRPD/C/DEU/CO/1.

⁸⁴ See footnote 16.

⁸⁵ UN Doc. CRPD/C/DEU/CO/1, para 25.

⁸⁶ *Ibid*, para 26, 37-38.

⁸⁷ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 91.

⁸⁸ *Ibid*, para 91 referring to the Guidelines on Art. 14 CRPD.

⁸⁹ Guidelines on article 14 of the CRPD, UN Doc. A/72/55, no. 11.

⁹⁰ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 91.

⁹¹ A. Ward, 'A major step forward in CRPD compliance by the German Federal Constitutional Court?', *Mental Capacity Law Newsletter*, (70), Nov. 2016, 22 [28-29].

⁹² UN Doc. CRPD/C/GC/1, para 21.

“free and informed consent” in Art. 25 (d) CRPD implies that whether or not the incapability to give the free and informed consent refers to a coma or a mental illness, the treatment should still be given⁹³ if it reflects the *original or presumed free will*⁹⁴ of the person.

To understand the BVerfG's interpretation of the CRPD Committee's statements, one must assume that the court's arguments are based on two ideas. Firstly, the court assumes that the rights of the individual, namely Art. 12 and Art. 10 or Art. 25 CRPD respectively, can be weighed against each other under certain circumstances in cases of serious threats to life and health. Secondly, to clarify the stance of the court, one has to assume that there is a distinction between a *natural* and a *free will*.⁹⁵

The fundamental idea of the CRPD is to promote equality and equal treatment of persons with disabilities. Yet, the view of the BVerfG that Art. 12 CRPD is not granted without respecting the other rights of an individual as long as the interventions are objectively justified and proportionate,⁹⁶ is also supported by the convention's text.

Involuntary medical treatment of persons with impaired decision-making capacity is not explicitly prohibited by the CRPD. An earlier draft of the CRPD planned to strictly regulate coercive measures in Art. 17 CRPD.⁹⁷ Though, it was not included in the convention's final text. However, no regulation of involuntary medical treatment does not indicate a prohibition.⁹⁸

Furthermore, the CRPD's aim is to protect life and health of the person as stated in Art. 10 and 25 CRPD. In cases of conflict, those rights have to be carefully considered for the individual.⁹⁹ Therefore, the text of the CRPD does not generally exclude the right to protect the life in favour of guaranteeing autonomy if the person requires support.¹⁰⁰ In the international discussion, too, efforts have been made to find

⁹³ A. Ward, 'A major step forward in CRPD compliance by the German Federal Constitutional Court?', *Mental Capacity Law Newsletter*, (70), Nov. 2016, 22 [29].

⁹⁴ On the basis of known values which are important to the person, a third person interprets the will and preferences representatively for the concerned person.

⁹⁵ Medical treatment against the free will of the person is not possible.

⁹⁶ V. Lipp, 'Erwachsenenschutz, gesetzliche Vertretung und Artikel 12 UN-BRK', in: V. Aichele (edit.) 'Das Menschenrecht auf gleiche Anerkennung vor dem Recht', *Nomos*, 2013, 329 [335-336]; R. Marschner, 'Menschen in Krisen: Unterbringung und Zwangsbehandlung in der Psychiatrie', in: V. Aichele (edit.) 'Das Menschenrecht auf gleiche Anerkennung vor dem Recht', *Nomos*, 2013, 203 [221].

⁹⁷ R. Kayess and P. French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities', *HRLR*, 2008, 1 [29-30].

⁹⁸ *Ibid*, [30] R. Kayess and P. French see no opposition by the Ad Hoc Committee to forced medical treatment.

⁹⁹ R. Marschner, 'UN-Konvention über die Rechte von Menschen mit Behinderungen – Auswirkungen auf das Betreuungs- und Unterbringungsrecht', *R&P*, 2009, 135 [137]; M.C. Freeman et al., 'Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities', *Lancet Psychiatry*, 2015, [844-850].

¹⁰⁰ Same opinion S. Schmahl, 'Menschenrechtliche Sicht auf die Zwangsbehandlung von Erwachsenen bei Selbstgefährdung', in: D. Coester-Waltjen et al. (edit.), 'Zwangsbehandlung bei Selbstgefährdung', *Universitätsverlag Göttingen*, 2016, 43 [52]; P. Masuch and C. Gmati, 'Zwangsbehandlung nach dem Gesetz zur Regelung der betreuungsrechtlichen Einwilligung in eine ärztliche Zwangsmaßnahme und UN-Behindertenrechtskonvention' *NZS*, 2013, 521 [526].

solutions to these ethical conflict situations.¹⁰¹ Possible state interventions should be disability-neutral.¹⁰²

Furthermore, the safeguard function of Art. 12 (4) CRPD, "the state parties shall ensure that measures taken to exercise legal capacity are appropriate and proportional to the person's rights and interests", indicates that substituted decision-making as a last resort is also covered by the treaties text. In 2011, the BVerfG confirmed that Article 12 CRPD does not forbid measures which limit self-determination in general.¹⁰³ Following this decision, the BVerfG has based its position upon Art. 12 (4) CRPD.¹⁰⁴ It stated that "the context of the provision in Art. 12 (4) CRPD, which expressly relates to measures limiting persons concerned in their legal capacity and agency, proves that the Convention does not prohibit such measures in general, but that it limits their permissibility inter alia by obliging the signatories to the Convention under Art. 12 (4) CRPD to provide for suitable safeguards against conflicts of interests, misuse and disregard, and to ensure proportionality".¹⁰⁵ Thus, the court extended the requirements of Art. 12 (4) CRPD to involuntary medical treatment.

Though in Germany many scholars generally agree that forced medical treatment complies with the CRPD,¹⁰⁶ the interpretations of Art. 12 CRPD differ: For instance, *Lachwitz* limits Art. 12 (4) CRPD to supportive measures provided by Art. 12 (3) CRPD.¹⁰⁷ This would exclude forced medical treatment. It is widely agreed on that Art. 12 (3) CRPD may give a right to support but does not force support upon the person.¹⁰⁸

¹⁰¹ Giving an overview of the different approaches L. Series and A. Nilsson, in: I. Bantekas & M. Stein & D. Anastasiou (eds), 'The UN Convention on the Rights of Persons with Disabilities: a commentary', Oxford University Press, 2018, Art. 12, 339 [357].

¹⁰² For example, E. Flynn and A. Arstein-Kerslake, 'State intervention in the lives of people with disabilities: the case for a disability-neutral framework', *International Journal of Law in Context*, (13), 39 [49-52].

¹⁰³ BVerfG, Order of the Second Senate of 23 March 2011 – 2 BvR 882/09, para 52-53.

¹⁰⁴ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 88.

¹⁰⁵ *Ibid*, para 88 with reference to BVerfG, Order of the Second Senate of 23 March 2011 – 2 BvR 882/09, para 52-53.

¹⁰⁶ S. Schmahl, 'Menschenrechtliche Sicht auf die Zwangsbehandlung von Erwachsenen bei Selbstgefährdung', in: D. Coester-Waltjen et al. (edit.), 'Zwangsbehandlung bei Selbstgefährdung', Universitätsverlag Göttingen, 2016, [43-53]; P. Masuch and C. Gmati, 'Zwangsbehandlung nach dem Gesetz zur Regelung der betreuungsrechtlichen Einwilligung in eine ärztliche Zwangsmaßnahme und UN-Behindertenrechtskonvention', *NZS*, 2013, 521 [526]; V. Lipp, 'Erwachsenenschutz, gesetzliche Vertretung und Artikel 12 UN-BRK' in: V. Aichele (edit.) 'Das Menschenrecht auf gleiche Anerkennung vor dem Recht', *Nomos*, 2013, 329 [335].

¹⁰⁷ K. Lachwitz, 'Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderung', *BtPrax*, 2008, 143 [147]; *ibid*, 'Funktion und Anwendungsbereich der „Unterstützung“ („support“) bei der Ausübung der Rechts- und Handlungsfähigkeit gemäß Artikel 12 UN-BRK – Anforderungen aus der Perspektive von Menschen mit geistiger Behinderung', in: V. Aichele (edit.) 'Das Menschenrecht auf gleiche Anerkennung vor dem Recht', *Nomos*, 2013, 67 [84-85]; also W. Kaleck, S. Hilbrans and S. Scharmer, *Gutachterliche Stellungnahme* (2008), [32], available at <https://www.die-bpe.de/stellungnahme/stellungnahme.pdf> (last accessed 28th Dec. 2019).

¹⁰⁸ S. Baufeld, 'Zur Vereinbarkeit von Zwangseinweisungen und -behandlungen psychisch Kranker mit der UN-Behindertenrechtskonvention', *R&P*, 2009, 167 [172] referring to the word "provide"; K. Lachwitz, 'Funktion und Anwendungsbereich der „Unterstützung“ („support“) bei der Ausübung der Rechts- und Handlungsfähigkeit gemäß Artikel 12 UN-BRK – Anforderungen aus der Perspektive von Menschen mit geistiger Behinderung', in: V. Aichele (ed) 'Das Menschenrecht auf gleiche Anerkennung vor dem Recht', *Nomos*, 2013, 67 [75]; V. Lipp, 'Erwachsenenschutz, gesetzliche Vertretung und Artikel 12 UN-BRK' in: V. Aichele (edit.) 'Das Menschenrecht auf gleiche Anerkennung vor dem Recht', *Nomos*,

However, this does not imply that interventions through substituted decision-making cannot be involved as a last resort.¹⁰⁹ As a strict regulation for “unwanted” measures would be much more essential, *Lipp* states that restricting sec. 4 to required measures in Art. 12 (3) CRPD would limit the safeguard function of Art. 12 (4) CRPD enormously.¹¹⁰ Therefore, the requirements of Art. 12 (4) CRPD apply to every intervention in the persons legal capacity.¹¹¹ Even though the CRPD encourages the state to strengthen supported decision-making in the first place, to meet the requirements for appropriate help and to establish safeguards, it does not explicitly exclude involuntary medical treatment.

However, the CRPD Committee does not follow the idea of different qualities of will and does not distinguish between *free* and *natural will*.¹¹² As the free will cannot be scientifically and objectively determined, the fact that the BVerfG does not make any observations on this point, even though their argumentation bases on this assumption, can certainly be criticised.¹¹³ Yet, the system of giving different legal weight to different “qualities” of will also allows an allocation of responsibilities, which protects the individual.¹¹⁴ Not regulating specific standards for the quality of human actions would imply giving legal weight to any kind of human action and make vulnerable people receptive to manipulation. Furthermore, advance statements would be of limited use when the conserved will would contradict the natural will and thus could not be respected when deciding about medical treatment. One also has to take into account that the absence of free will in the sense of the BVerfG does not describe a legal status of a person but the lack of a condition for a legally binding will concerning a particular medical intervention. The legal status of the individual as a person before the law and the legal capacity in general are not questioned. The distinction of free and natural will is therefore not opposed to Art. 12 CRPD.

Even interpretations by researchers with legal backgrounds which are not used to the distinction of *natural* and *free will* still come to similar conclusions as the BVerfG on the basis of Art. 12 (4) CRPD. For example, *Ward and Curk* or *Szmukler* conclude that different interests of the individual must be weighed against each other by dividing the terms “will and preferences”, giving “will” and “preference” different value in the will determination process.¹¹⁵

2013, 329 [332] referring to the word „support“. Other opinions see forced medical treatment as a part of „support“ in Art. 12 (3) CRPD P. Masuch and C. Gmati, 'Zwangsbehandlung nach dem Gesetz zur Regelung der betreuungsrechtlichen Einwilligung in eine ärztliche Zwangsmaßnahme und UN-Behindertenrechtskonvention', NZS, 2013, 521 [526-527].

¹⁰⁹ "Art. 12 [CRPD] does not prohibit substituted decision-making", A. Dhanda, *Syracuse Journal of International Law and Commerce* 34 (2007), 429, [460-461].

¹¹⁰ V. Lipp, 'Betreuungsrecht und UN-Behindertenrechtskonvention', *FamRZ*, 2012, 669 [673-674].

¹¹¹ V. Lipp, 'Betreuungsrecht und UN-Behindertenrechtskonvention', *FamRZ*, 2012, 669 [673-674].

¹¹² UN Doc. CRPD/C/GC/1, para 13–15.

¹¹³ R. Uerpman-Witzack, 'annotation on BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15', *FamRZ*, 2016, [1746-1747]; general criticism on the term 'natural will' R. Beckmann, 'Der "natürliche Wille" – ein unnatürliches Rechtskonstrukt', *JZ*, 2013, [604-608].

¹¹⁴ J. Neuner, 'Natürlicher und freier Wille', *AcP*, 2018, 1 [18].

¹¹⁵ A. Ward and P. Curk, "'Respecting 'will': Viscount Stair and online shopping'", *BtPrax*, 2019, [54-58]; G. Szmukler, 'The UN Convention on the Rights of Persons with Disabilities: 'Rights, will and preferences'

B. Arguments concerning ECHR compliance

As the decisions of the ECtHR are binding on the courts of the ECHR parties,¹¹⁶ they are an important variable in national human rights implementation. The interpretation of the ECtHR on Art. 2 and Art. 8 ECHR supports the assumptions of the BVerfG, as explained in more detail below.

Art. 8 ECHR includes the right to make decisions that can be dangerous or harmful to one's health.¹¹⁷ Medical treatment against the free will would violate this freedom even if the denial of treatment may lead to death.¹¹⁸ Art. 2 ECHR provides the right to life. As well as the BVerfG, the ECtHR argued that the right to life obliges the authorities to protect an individual from itself under certain circumstances.¹¹⁹ The ECtHR's requirements for the states to protect life and health of vulnerable adults can be seen in *Arskaya v. Ukraine*.¹²⁰ The ECtHR confirmed that Art. 2 ECHR obligates the state to protect the patient's life.¹²¹ Yet, with respect to Art. 8 ECHR they saw no obligation of the state to prevent an individual from taking his or her own life if the decision has been taken freely and with full understanding.¹²² This implies that if conditions of a sound mind are not met, the duty to protect the individual's life maintains. The ECtHR also criticised that in this particular case no domestic regulations were at hand which sufficiently elaborated the conditions under which refusal to undergo treatment was valid and binding on medical staff.¹²³ They mentioned the necessity to implement a regulatory framework, which shall ensure that a patient's decision-making capacity is objectively evaluated in a fair and proper procedure.¹²⁴

The ECtHR explained that not ensuring adequate health-care regulations which sufficiently elaborate as to whether the rejection of treatment by the patient is valid violates Art. 2 ECHR.¹²⁵ This implies that if the state had considered the patient

in relation to mental health disabilities', *International Journal of Law and Psychiatry*, (54), 2017, 90 [93-96].

¹¹⁶ Concerning the relationship of German Constitutional law and the ECHR see BVerfGE 111, 307 = BVerfG, Order of the Second Senate of 14 October 2004 – 2 BvR 1481/04, para 30-39; BVerfGE 128, 326 = BVerfG, Judgement of the Second Senate 4 May 2011 – 2 BvR 2365/09, 740/10, 2333/08, 1152/10, 571/10, para 86-90.

¹¹⁷ *Arskaya v Ukraine* (App no 45076/05) (ECHR 5th December 2013), para 69; *Pretty v UK* (App no 2346/02) ECHR 2002-III 155 [194], para 63.

¹¹⁸ BVerfG, Order of the First Senate of 26 July 2016 – 1 BvL 8/15, para 93 referring to *Lambert and others v France* (App no 46043/14) ECHR 2015-III, 67 [109], para 120 and *Pretty v UK* (App no 2346/02) ECHR 2002-III 155 [194], para 62-63.

¹¹⁹ Thematic Report, Health-related issues in the case-law of the European Court of Human Rights, June 2015, p. 19 referring to *Keenan v UK* (App no 27229/95) ECHR 2001-III, 93 available at https://www.echr.coe.int/Documents/Research_report_health.pdf (last accessed 28th Dec. 2019); About the duty of protection by the state concerning denied necessary treatment of a mentally disabled person in a psychiatric institution see *Câmpeanu v Rumania* (App no 47848/08) (ECHR 17th July 2014), para 130.

¹²⁰ *Arskaya v Ukraine* (App no 45076/05) (ECHR 5th December 2013).

¹²¹ *Ibid*, para 62.

¹²² *Ibid*, para 69.

¹²³ *Ibid*, para 88.

¹²⁴ *Ibid*, para 88.

¹²⁵ *Ibid*, para 69.

incapable of making a valid treatment decision, the patient would have been treated against his wishes to protect his life. As seen in *Herczegfalvy v. Austria*, the ECtHR does not categorically exclude involuntary medical treatment as long as it is therapeutically indicated.¹²⁶

Moreover, the ECtHR as a human rights institution at European level also tends to consider the CRPD as 'relevant international law' in its judgements.¹²⁷ The ECtHR explained its understanding of Art. 12 (4) CRPD in *A.-M.V. v. Finland*¹²⁸: "the applicant's rights, will and preferences were taken into account" as long as the state authorities had properly balanced the right to self-determination and the protection of the health of the person.¹²⁹

Those decisions of the ECtHR indicate that the ECHR demands a state's duty of protection for vulnerable people as well. The ECtHR is not opposed to involuntary medical treatment as long as the countries provide a regulatory framework.¹³⁰ It can be concluded that the order of the BVerfG does not contradict the ECtHR's case-law and therefore complies with the ECHR.

V. IMPACTS ON GERMAN LAW

As a consequence to the order of the BVerfG, § 1906a BGB was introduced in July 2017.¹³¹ Forced hospitalization and involuntary medical treatment are now regulated in two different paragraphs. Involuntary treatment no longer requires forced hospitalization. However, it requires an in-patient stay at a suitable facility which can guarantee the necessary medical standards for the treatment. Furthermore, the law confirms that involuntary medical treatment has to comply with the original will of the patient, for example in an advance directive for health care.¹³² An involuntary medical treatment at home, in ambulatory practices or in nursing homes remains prohibited.

Of course, the order of the BVerfG has been met with varying response in Germany. Some researchers and psychiatrists criticize an expansion of the possibilities for forced

¹²⁶ *Herczegfalvy v Austria* (App no 10533/83) ECHR Series A no. 244, para 82.

¹²⁷ L. Waddington, 'The Domestication of the Convention on the Rights of Persons with Disabilities', in: A. Waddington and A. Lawson (eds), 'The UN Convention on the Rights of Persons with Disabilities in Practice', Oxford University Press, 2018, 538 [554]; see for example *A.-M.V. v Finland* (App no 53251/13) (ECHR 23rd March 2017).

¹²⁸ *A.-M.V. v Finland* (App no 53251/13) (ECHR 23rd March 2017).

¹²⁹ *A.-M.V. v Finland* (App no 53251/13) (ECHR 23rd March 2017), para 90.

¹³⁰ More restrictive E. Flynn, 'Disability, Deprivation Of Liberty and Human Rights Norms: Reconciling European and International Approaches', *International Journal of Mental Health and Capacity Law*, 2016, 75 [88-89] who finds that the ECtHR assumes that in specific situations the state has to protect the life of the patient, even though other rights may be restricted, but pledges for a more CRPD-friendly interpretation of the ECHR and the ECtHR decisions.

¹³¹ The current law on compulsory medical treatment is § 1906a BGB, introduced by BGBl. I, 2017, p. 2426.

¹³² See § 1906a (1) No. 3 BGB.

medical treatment.¹³³ Other scholars call for an extension to forced medical treatment without a necessary inpatient stay.¹³⁴

The effects of the new § 1906a BGB will have to be observed.¹³⁵ On the positive side, however, the consideration of advance statements for health care for forced medical treatment was strengthened significantly.¹³⁶ If the patient has denied a somatic or psychiatric treatment in an advance directive for health care that meets the legal requirements such as being able to consent at the time of writing down that statement, the will of the patient has to be respected even though the denial of treatment might lead to death.¹³⁷

VI. CONCLUSION

Even though there are many points of criticism and the decision of the BVerfG contradicts the general trend to interpret the CRPD such as the statements of the CRPD Committee, it can be concluded that the order complies with both, the legal requirements of the CRPD and the ECHR.

Despite the focus on self-determination, the protection of the individual (even against oneself) by the state remains an objective of the human rights treaties. The CRPD does not focus on self-determination alone. Primarily, the treaty's intention is the protection of vulnerable people, including the obligation to balance the rights of the individual in each case.

This approach corresponds to the view of the ECtHR on the ECHR. The ECtHR does not explicitly mention involuntary medical treatment in its judgements, but the state's obligation to protect the life if the patient cannot decide with "sound mind". Thus, it is the logical conclusion that – if not treating violates the patient's right to life – involuntary medical treatment must be possible.

Therefore, in the context of the human rights framework, the BVerfG presents a concrete and solid answer concerning the difficult question on how to deal with people suffering from severe mental illnesses who cannot express a free will and face serious health damage or death. The court's understanding of the CRPD's articles happens in the light of its own national jurisprudence. Yet, it offers impulses on how to interpret them and transfer their contents as Art. 12 (4) CRPD "will and preferences" to practical use. Looking at the current challenge of practical implementation of the CRPD, it is

¹³³ For instance A. Schmidt-Recla, 'Karlsruhe „On Liberty“', MedR, 2017, [92-96]; M. Zinkler, Statement on the draft law on § 1906a BGB, available at <http://www.antipsychiatrieverlag.de/artikel/recht/pdf/zinkler-1906a.pdf> (last accessed 20th Dec. 2019); earlier publication M. Zinkler, 'Germany without Coercive Treatment in Psychiatry – A 15 Month Real World Experience', (Vol. 5), Laws, 2016, [1-6].

¹³⁴ For instance A. Spickhoff, 'Nach der Reform ist vor der Reform: Zur Neuregelung der Zwangsbehandlung im Zivilrecht', FamRZ, 2017, [1633-1639]; A. Brilla, in: 'Beck'scher Online Grosskommentar BGB', Gsell et al. (edit.), § 1906a, para 14-15.

¹³⁵ According to Art. 7 of 'Gesetz zur Änderung der materiellen Zulässigkeitsvoraussetzungen von ärztlichen Zwangsmaßnahmen und zur Stärkung des Selbstbestimmungsrechts von Betreuten' of 17th July 2017, BGBl. I, 2017, p. 2426, § 1906a BGB will be evaluated in 2020.

¹³⁶ See § 1906a (1) no. 3.

¹³⁷ See § 1906a (1) no. 3 and § 1901a (1) BGB.

quite evident that even if the existing mental health law systems have to be viewed critically, practicable interpretations are targeted.¹³⁸

However, the legal justification of protective measures against the natural will on part of the state will remain of particular interest to legal, medical and ethical researchers, especially, the interpretation of Art. 12 (4) CRPD "will and preferences" as there is not only one way of interpreting the article.¹³⁹ Whichever approach is taken, the focus has to remain on exercising the patient's will.

The BVerfG allows involuntary medical treatment as a last resort, if it is based on the original or presumed will of the adult. An effective way to respect will and preferences in this context, is to strengthen the establishment and use of voluntary measures such as advance directives to determine the original will.¹⁴⁰

In Germany, there is still potential to develop legal and practical concepts to implement the ideas of the CRPD. Since the current periodic state report of Germany draws upon the BVerfG judgment¹⁴¹, the reaction from the CRPD Committee remains to be seen.

¹³⁸ Ideas on practical implementation in hospitals see M. Zinkler, 'Supported Decision Making in the Prevention of Compulsory Interventions in Mental Health Care', *Frontiers in Psychiatry*, 2019, article 137, [1-3].

¹³⁹ A. Ward and P. Curk, "'Respecting 'will': Viscount Stair and online shopping'", *BtPrax*, 2019, [54-58]; G. Szmukler, 'The UN Convention on the Rights of Persons with Disabilities: 'Rights, will and preferences' in relation to mental health disabilities', *International Journal of Law and Psychiatry*, (54), 2017, [90-97].

¹⁴⁰ On the current status of voluntary measures see, for example, the report by A. Ward, 'Enabling Citizens To Plan For Incapacity', *CDCJ(2017)2final*; on the challenges of psychiatry specific advance decision-making in particular, G.S. Owen, et al., 'Advance decision-making in mental health – Suggestions for legal reform in England and Wales', *International Journal of Law and Psychiatry*, 64, 2019, [162-177]; also emphasizing on advance directives as a forward solution F. Mahomed, M. A. Stein and V. Patel, 'Involuntary mental health treatment in the era of the United Nations Convention on the Rights of Persons with Disabilities', *PLoS Medicine*, October 2018, 1 [5-6]; M. Scholten and J. Gather, 'Adverse consequences of article 12 of the UN Convention on the Rights of Persons with Disabilities for persons with mental disabilities and an alternative way forward', *J Med Ethics*, (44), 2018, 226 [231-232].

¹⁴¹ Federal Ministry of Labour and Social Affairs, Combined second and third periodic report of the Federal Republic of Germany, submitted September 2019, [21], available in English at https://www.gemeinsam-einfach-machen.de/GEM/DE/AS/UN_BRK/Staatenpruefung/Zweite_Staatenpruefung/Bericht_englisch.pdf?blob=publicationFile&v=2 (last accessed 22nd Dec. 2019).