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“Nothing About Us Without Us”: The Legal Disenfranchisement of Voters With Disabilities in Germany and its Compliance with International Human Rights Standards on Disabilities

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**“NOTHING ABOUT US WITHOUT US”: THE
LEGAL DISENFRANCHISEMENT OF VOTERS
WITH DISABILITIES IN GERMANY AND ITS
COMPLIANCE WITH INTERNATIONAL
HUMAN RIGHTS STANDARDS ON
DISABILITIES**

KERSTIN BRAUN*

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I. INTRODUCTION

Germany's atrocious treatment of persons with disabilities in the first half of the twentieth century is a dark chapter in its history.¹ Within six months of taking power in 1933, Adolf Hitler and his Nazi regime initiated a genocide against persons with disabilities, portraying them as having "lives unworthy of living" and subjecting them to tremendous human rights violations.² One of Hitler's first initiatives was to enact compulsory sterilization laws to prevent "genetically diseased offspring."³ The 1935 Nuremberg Laws prohibited persons with disabilities from marrying and thus furthered the dehumanization of persons with disabilities.⁴ By the late 1930s, such laws and negative propaganda fostered the general public perception that having a disability justified murder.⁵ In 1939, the government initiated the year of the "duty to be healthy," an extermination program for children with disabilities.⁶ Euthanasia programs for adults

1. See Convention on the Right of Persons with Disabilities art. 1, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD] (defining "persons with disabilities" as "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others").

2. Mark P. Mostert, *Useless Eaters: Disabilities as Genocide Marker in Nazi Germany*, 36 J. SPECIAL EDUC. 155, 159-60 (2002).

3. *Id.* at 159.

4. See *id.* (discussing the Marriage Health Law, which banned marriage for anyone with a mental disability, "hereditary disease," or contagious disease) (internal quotation mark omitted).

5. See *id.* at 160 (stating that by the late 1930s, Nazi officials received mercy killing requests, particularly from parents of newborns and young infants with severe disabilities).

6. *Id.* at 161.

followed shortly.⁷ These programs subjected people with intellectual, emotional, and physical disabilities to the mass destruction techniques later used in the Nazi concentration camps.⁸ Ultimately, over 80,000 adults with disabilities died at the hands of the Nazi regime.⁹

The International Bill of Human Rights, composed of the three human rights treaties that emerged after World War II,¹⁰ the Universal Declaration of Human Rights (“UDHR”),¹¹ the International Covenant on Civil and Political Rights (“ICCPR”),¹² and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),¹³ is remarkably silent on the rights of persons with disabilities. The UDHR was adopted in 1948 to condemn the human rights violations that occurred during World War II and the Nazi era and to prevent them from recurring.¹⁴ Nevertheless, while article 2 of UDHR stipulates that all human beings are entitled to the rights contained in the instrument “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” disabilities are not explicitly referenced.¹⁵ Similarly, neither the ICCPR nor the ICESCR explicitly address the rights of persons with disabilities.¹⁶ Consequently, these legal instruments collectively ensured disability remained “an invisible element of international human rights law” for the last half of the twentieth century.¹⁷

7. *See id.* 162-63 (asserting the State permitted doctors to grant a “mercy death” for persons with “incurable” diseases).

8. *See id.* at 164 (explaining that hundreds of asylum inmates would be sent to killing centers, placed in gas chambers, and cremated once they were dead).

9. *Id.* at 165.

10. THE INTERNATIONAL BILL OF RIGHTS 3 (Paul Williams, ed., 1981).

11. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

12. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

13. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

14. *See* ELIZABETH WICKS, THE RIGHT TO LIFE AND CONFLICTING INTERESTS 38 (2010) (discussing the historical context surrounding the adoption of the UDHR and emphasizing that the Holocaust was the most important factor in shaping its content).

15. UDHR, *supra* note 11, art. 2 (“Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”).

16. *See* ICCPR, *supra* note 12; ICESCR, *supra* note 13.

17. Rosemary Kayeys & Philipp French, *Out of Darkness and Into Light?: Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM.

Yet, studies and statistics from UN agencies relating to the treatment of persons with disabilities reveal that such individuals continue to experience arbitrary and unfavorable treatment around the globe.¹⁸ In an attempt to improve this situation, in December 2006, the UN General Assembly adopted the Convention on the Rights of Persons with Disabilities (“CRPD”)¹⁹ and its Optional Protocol to promote the “full and effective participation and inclusion” of persons with disabilities in society.²⁰ Under this treaty, State parties must guarantee that persons with disabilities are treated equally and not discriminated against on the basis of their disability.²¹

The right to non-discrimination and full inclusion in society encompasses the fundamental right to participate in political life, which requires that persons with disabilities have the right to vote on equal footing with others.²² Article 25(b) of the ICCPR provides that every citizen shall

RTS. L. REV. 1, 12 (2008); cf. Michael Ashley Stein, *Disability Human Rights*, 95 CALIF. L.REV. 75, 80-81 (2007) (“Although disability is not specifically mentioned in any of these treaties, they technically include all human beings within their respective provinces.”).

18. See *Some Facts about Persons with Disabilities*, UNITED NATIONS (Aug. 14-25, 2006), <http://www.un.org/disabilities/convention/pdfs/factsheet.pdf> (setting forth that in some countries the unemployment rate for disabled people is almost eighty percent, that twenty percent of the world’s poorest people are disabled, and that ninety percent of children with disabilities in developing countries do not attend school); see also Arlene S. Kanter, *The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People Under International Law*, 25 GA. ST. U. L. REV. 527, 540 (2009) (asserting that the CRPD was enacted because states and the rest of the international community were ignoring persons with disabilities).

19. See CRPD, *supra* note 1, pmbl. (“[R]ecognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.”).

20. *Id.* art. 3(c).

21. See *id.* art. 5 (“States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”).

22. Theresia Degener, Address at the 4th Conference of the State Party: The Right to Political Participation in Context of Disability (Art. 29 CRPD) 1 (Sept. 7-9, 2011) [hereinafter Degener, *The Right to Political Participation*]; Theresia Degener, *The Right to Political Participation: From Exclusion to Universality*, INT’L DISABILITY ALLIANCE HUM. RTS. PUBLICATION, Mar. 2013, at 1 [hereinafter Degener, *From Exclusion to Universality*], available at http://www.internationaldisabilityalliance.org/sites/disalliance.e-presentaciones.net/files/public/files/Theresia%20Degener_The%20right%20to%20political%20participation_from%20exclusion%20to%20universality.pdf (asserting that the right to political

have the right to vote by equal suffrage “without unreasonable restrictions.”²³ Article 29(a)(iii) of the CRPD explicitly extends this right to persons with disabilities, setting out that State parties must guarantee persons with disabilities the right to “effectively and fully participate” in political life on an “equal basis with others” and guarantee the “free expression” of their will as electors.²⁴

As a party to the CRPD and its optional protocol²⁵ and to the ICCPR,²⁶ Germany is obligated to allow persons with disabilities to participate in political life on an equal basis with others by granting them the right to vote.²⁷ Nonetheless, section 13(2) of the German Federal Elections Law (“FEL”) provides that a person “shall be disqualified from voting if . . . a custodian has been appointed . . . to attend to all [his] affairs.”²⁸ Consequently, persons in Germany who are under court-ordered full custodianship are automatically deprived of the right to vote.

This article assesses whether section 13(2) of the FEL complies with international human rights standards relating to persons with disabilities. Section II analyzes the legal status of persons under full custodianship in

participation is at the very “heart of democracy”).

23. ICCPR, *supra* note 12, art. 25(b).

24. CRPD, *supra* note 1, art. 29(a)(iii)-(b).

25. Gesetz zu dem Übereinkommen der Vereinten Nationen vom 13. Dezember 2006 über die Rechte von Menschen mit Behinderungen sowie zu dem Fakultativprotokoll vom 13. Dezember 2006 zum Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen [German CRPD Implementing Legislation], Dec. 21, 2008, BUNDESGESETZBLATT, TEIL II [BGBl. II] at 1419 (Ger.) (implementing the CRPD under German legislation).

26. Gesetz zu dem Internationalen Pakt vom 19. Dezember 1966 über bürgerliche und politische Rechte [German ICCPR Implementing Legislation], Nov. 15, 1973, BUNDESGESETZBLATT, TEIL II [BGBl. II] at 1533 (Ger.) (implementing the ICCPR under German legislation).

27. *See* CRPD, *supra* note 1, art. 29 (imposing on States the duty to guarantee persons with disabilities the right to participate in political and public life); ICCPR, *supra* note 12, art. 25 (obliging states to allow every citizen to enjoy the right to take part in public affairs, to vote, and to be elected in public elections).

28. Bundeswahlgesetz [BWG] [Federal Elections Act], Jul. 23, 1993, BUNDESGESETZBLATT, TEIL I [BGBl. I] at 1288, as amended, § 13, para. 2 (Ger.), *translated in Federal Elections Act (BWG)*, BUNDESWAHLEITER, http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlage_n/bundeswahlgesetz_engl.pdf (last visited Oct. 5, 2014). The official German legislation uses the male form (“his”) but refers to both male and female. In the interest of simplicity, this article will similarly use “his” to refer to both males and females, unless otherwise stated. *See id.* (using both “his” and “her” in the English translation).

Germany with respect to the right to vote.²⁹ Section III examines whether section 13(2) of the FEL is in accordance with modern international human rights law relating to disabilities and concludes that it is inconsistent.³⁰ Section IV identifies the future conduct required to ensure that German electoral legislation complies with international human rights laws on disabilities at the national and international level.³¹ Section V concludes that while disability rights have become more visible at the international level since the CRPD was adopted, the German example illustrates that States need to ensure that treaty provisions, particularly article 29, are sufficiently implemented at the national level.³² Substantial changes to the electoral participation of persons with disabilities are only possible if State parties fully and effectively implement article 29 of the CRPD into their national law.

II. THE RIGHT TO VOTE IN GERMANY FOR PERSONS UNDER FULL CUSTODIANSHIP

Germany considers the right to vote a “cornerstone” of modern parliamentary democracy.³³ The German Constitution states that every citizen who is at least eighteen years of age is guaranteed the right to vote in federal elections.³⁴ Elections in Germany must be general, direct, free,

29. See discussion *infra* Section II (illustrating that the government automatically excludes persons under full custodianship from the right to vote on the basis of their disability).

30. See discussion *infra* Section III (arguing that excluding all persons under full custodianship from voting without proof of their individual ability to make rational voting decisions is not reasonable but discriminatory, and thus violates international law).

31. See discussion *infra* Section IV (asserting that German legislation should be amended to reflect the international human rights standard as contained in article 25 of the ICCPR and article 29 of the CRPD, which requires that all persons under full custodianship have the right to vote regardless of whether they can exercise their right rationally or not, but also expressing concern that Germany is unlikely to amend its legislation in the near future).

32. See discussion *infra* Section V.

33. See PETER JAMES, THE GERMAN ELECTORAL SYSTEM 1, 9 (2003) (describing how Germany guaranteed the right to vote for bankrupts and extended the right to women in the Weimar Republic for the first time in German history in 1918 in an attempt at establishing a democratic system).

34. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I at 1, art. 38(2) (Ger.), translated in *Basic Law for the Federal Republic of Germany*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, http://www.gesetze-iminternet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf (last visited Oct. 5, 2014).

equal, and secret.³⁵ Moreover, all citizens can equally exercise the right to vote and their votes count equally.³⁶

While equality in elections is constitutionally guaranteed in Germany, this does not mean that the government cannot exclude certain groups from voting.³⁷ The German Constitutional Court has held that differentiating between certain groups of people is permissible for “compelling reasons.”³⁸ According to section 13(2) of the FEL, persons with court-appointed legal custodians are automatically disqualified from voting.³⁹ Courts can order full custodianship only when a person cannot take care of *all* of his affairs “due to mental illness or a physical, mental or psychological handicap.”⁴⁰ Where a person cannot take care of certain affairs of his life, such as finances, residence, or health care, the court does not place the person under full custodianship but appoints a custodian for those particular

35. *Id.* art. 38(1).

36. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 13, 2008, 120 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 82 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 23, 1988, 79 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 161 (Ger.).

37. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 29, 1990, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3001 (3002), 1990 (Ger.) (guaranteeing that equality in voting does not mean that the voting procedure cannot be subject to regulations by the legislature);

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 5, 1952, 1 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 208 (248) (Ger.).

38. NJW 3001 (3002) (Ger.) (“[Z]wingenden grundest”; 1 BVERFGE 208 (248) (Ger.) (“[Z]wingenden Grund”).

39. Federal Elections Act, *supra* note 28.

40. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL.] 195, as amended, § 1896, para. 1 (Ger.), *translated in German Civil Code BGB*, Bundesministerium der Justiz und für Verbraucherschutz, http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf (“If a person of full age, by reason of a mental illness or a physical, mental or psychological handicap, cannot in whole or in part take care of his affairs, the custodianship court . . . appoints a custodian for him.”); see GERO BIEG, JURIS PRAXIS KOMMENTAR BGB § 1896, para. 68 (6th ed. 2012) (Ger.) (referring to full custodianship as “Totalbetreuung” and discussing the effects of granting such custodianship); Bayerisches Oberstes Landesgericht [BayObLG] [Bavarian Higher Regional Court] Mar. 12, 1997, ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT [FAMRZ] 452 1998 (Ger.) (providing that similar norms exist excluding persons with disabilities from voting in local, regional, and European elections).

affairs.⁴¹ Section 13(2) of the FEL does not affect such persons and thus protects their right to vote.⁴² Persons who would be subject to full custodianship because of the extent of their disability but who choose to privately appoint an individual to take over their affairs through a power of attorney are also outside the scope of section 13(2) of the FEL.⁴³ The German Constitutional Court has not declared section 13(2) of the FEL unconstitutional.⁴⁴ This may suggest that German courts find a “compelling reason” to treat persons under full custodianship differently with respect to the right to vote.⁴⁵

The following section also analyzes whether section 13(2) of the FEL currently complies with international human rights laws relating to disabilities before considering whether, and in what way, the German Parliament would have to amend the legislation to meet international human rights standards.

III. GERMANY'S COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW ON DISABILITY

Prior to the adoption of the CRPD in 2006, no legally binding international instrument specifically relating to persons with disabilities existed at the international level.⁴⁶ Nevertheless, the right to vote under article 25(b) of the ICCPR is a fundamental human right applicable to every individual, including persons with disabilities and those under full

41. CIVIL CODE, *supra* note 40, § 1896, para. 2 (“A custodian may be appointed only for groups of tasks in which the custodianship is necessary.”); FAMRZ 452, 452-53, 1998 (Ger.); *see* BIEG, *supra* note 40.

42. *See* Federal Elections Act, *supra* note 28 (excluding only those under full custodianship from voting); *see also* BIEG, *supra* note 40.

43. *See* Federal Elections Act, *supra* note 28 (excluding only those who were appointed a custodian).

44. *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 23, 1999, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1593 (1594) (Ger.) (dismissing the case on admissibility grounds and therefore not deciding the question of whether being placed under full custodianship automatically excludes a person from the right to vote pursuant to § 1896 of the Civil Code); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 29, 1984, 67 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 146, 146-48 (Ger.) (stating that this was also the case under the old guardianship laws).

45. *See* discussion *infra* Section III (analyzing the two justifications of the German government to exclude persons under full custodianship from voting).

46. *See supra* Section I.

custodianship.⁴⁷ The right to vote is the backbone of democracy and thus article 25(b) allows restricting the right only to the extent such restrictions are not “unreasonable.”⁴⁸ While the treaty does not define “unreasonable restrictions,”⁴⁹ the United Nations Human Rights Committee (“HRC”), which was established to interpret the norms of the ICCPR and monitor its compliance, assessed the meaning of “unreasonable restrictions” in its General Comment 25 (“Comment 25”).⁵⁰ The HRC concluded that “every citizen”⁵¹ should have the right to vote without distinctions between citizens in the enjoyment of the rights on grounds of “race, color, sex, language, religion, political or other opinion, national or social origin, birth or other status.”⁵² However, the HRC noted that States may restrict the right to vote but only if the conditions are based on “objective” and “reasonable” criteria and established by law.⁵³ Whether Germany complies with article 25(b) of the ICCPR depends on whether full custodianship represents an “objective” and “reasonable” criterion to justify *automatically* excluding persons with disabilities from voting.

A. THE OBJECTIVITY AND REASONABLENESS OF USING FULL CUSTODIANSHIP AS AN AUTOMATIC BAR TO VOTING

The German political discourse and academic scholarship propose two rationales for satisfying the “objective” and “reasonable” criterion to automatically exclude persons under full custodianship from voting. First, persons under full custodianship are justifiably excluded from voting

47. See ICCPR, *supra* note 12, art. 25(b) (setting forth that every citizen possesses the right “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

48. *Id.*

49. *See id.*

50. See U.N. Human Rights Comm’r, CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote): The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, ¶¶ 3-4, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996) [hereinafter CCPR General Comment 25] (asserting that restricting the right to vote must be limited and based on both objective and reasonable criteria). *See generally Human Rights Committee*, UNITED NATIONS, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last visited Sept. 8, 2014) (providing more information on the work of the HRC).

51. *Id.* (emphasis added).

52. *Id.* ¶¶ 1, 3.

53. *See id.* ¶ 4 (setting forth examples of objective and reasonable limitations on the right to vote, such as age requirements and mental incapacity).

because they are unable to make rational voting decisions and would effectively diminish the quality of election results. Second, allowing persons under full custodianship the right to vote would increase the risk of vote manipulation and undermine the integrity of the electoral process. Neither of these justifications is “reasonable” or “objective.” Germany’s exclusion of persons with disabilities from voting is arbitrary and discriminatory.

1. Disenfranchisement of Persons Under Full Custodianship Because They Are Ipso Facto Unfit to Vote and Would Endanger the Functioning of Democracy

The German Government proposed that excluding persons under full custodianship from voting is “objective” and “reasonable” because such persons are *per se* unable to make rational voting decisions.⁵⁴ Commentators suggest that “rational” voters are better able to select government officials than “irrational” voters, such as those under full custodianship.⁵⁵ They reason that permitting those who make “irrational” voting decisions to vote could endanger the functioning of democracy because only those capable of making rational voting decisions select government officials who secure more operational governments.⁵⁶ The

54. See DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT], Oct. 19, 2011, 17/132 (15636) (Ger.) (justifying how FEL complies with the CRPD on this ground); DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT], Nov. 8, 2008, 16/10808 (63-64) (Ger.) (discussing this rationalization when drafting Germany’s implementing legislation of the CRPD); BUNDESMINISTERIUM FÜR ARBEIT UND SOZIALES, UNSER WEG IN EINE INKLUSIVE GESELLSCHAFT - DER NATIONALE AKTIONSPLAN DER BUNDESREGIERUNG ZUR UMSETZUNG DER UN-BEHINDERTENRECHTSKONVENTION 86 (2011) (Ger.), available at http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a740-nationaler-aktionsplan-barrierefrei.pdf?__blob=publicationFile; see also LEANDER PALLEIT, GLEICHES WAHLRECHT FÜR ALLE? MENSCHEN MIT BEHINDERUNGEN UND DAS WAHLRECHT IN DEUTSCHLAND 11-12 (2011) (Ger.), available at http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/policy_paper_18_gleiches_wahlrecht_fuer_alle.pdf (discussing the objective reasoning behind excluding persons under full custodianship from voting).

55. Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1653 (1979); see also Heinrich Lang, Stellungnahme zur Anhörung im Innenausschuss, Jun. 3 2013, AUSSCHUSSDRUCKSACHEN [AD] 17(4)744 F, 5 (Ger.).

56. Lang, Stellungnahme, *supra* note 55, at 5 (explaining that excluding voters who, due to their disabilities, are unable to exercise their right to vote properly is non-discriminatory in at least certain cases); see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jul. 4, 2012, 132 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 39, 40(Ger.) (finding that creating a

German Government has confirmed that this sufficiently justifies excluding persons under full custodianship from voting.⁵⁷ However, this rationale is neither “reasonable” nor “objective.”

The assumption that all persons under full custodianship are unable to make rational voting decisions and thus endanger the functioning of democracy is not “reasonable” for two reasons. First, it is indiscriminately based on stereotypes and preconceived ideas of the political understanding of persons with certain biological and psychological conditions.⁵⁸ Although section 13(2) of the FEL automatically withdraws the right to vote when a person is placed under full custodianship, the court granting full custodianship does not assess whether the person is actually fit to vote. On the contrary, the court’s decision is solely based on whether the person requires legal representation in the conduct of his affairs.⁵⁹ Consequently, the automatic revocation of the right to vote is based on the assumed physical and cognitive constitution of a person, without positive affirmation of the individual’s fitness to vote.⁶⁰ Ultimately the right to vote is withdrawn in the custodianship process even though no connection exists between ordering full custodianship and the right to vote.⁶¹ Paul

functioning government and securing the integrity of the voting procedure are legitimate reasons for restricting voting rights).

57. DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT], Nov. 8, 2008, 16/10808 (63-64) (Ger.).

58. Sabine Jentsch, *Behinderung und Politische Teilhabe*, Paper Presented at University of Hamburg Lecture Series: *Behinderung ohne Behinderte?! Perspektiven der Disability Studies* 4, 9 (Dec. 10, 2012) (Ger.), transcript available at http://www.zedis-ev-hochschule-hh.de/files/jentsch_10122012.pdf (concluding that the exclusion of persons under custodianship from voting is not reasonable but arbitrary and not democratically justified).

59. Hans Meyer, *Stellungnahme zu den Wahlrechtsinitiativen*, May 28 2013, AUSSCHUSSDRUCKSACHEN [AD] 17(4)744 A, 2 (Ger.); Bernd Schulte, *Die UN-Behindertenkonvention und der Ausschluss von Menschen mit Behinderung vom Wahlrecht*, ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 16, 18 (2012) (Ger.).

60. Schulte, *supra* note 59, at 18; *see* Jentsch, *Behinderung*, *supra* note 58, at 7 (noting that the government puts a physical disability on the same level as an inability to act and decide independently).

61. BRK-Allianz – Ger. CRPD Alliance, Joint NGO submission: UPR regarding the Fed. Republic of Ger., 16th Sess., May 2013, 14, (Sep. 27, 2012) [hereinafter BRK-Allianz Submission], available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session16/DE/js4_upr16_deu_s16_2013_joints submission4_e.pdf; *see* Ulrich Hellmann, *Der Ausschluss vom Wahlrecht im Betreuungsrecht - Handlungsbedarf für den Gesetzgeber*, Discussion Paper 8/2012 for Deutsche Vereinigung für Rehabilitation Forum D – Entwicklungen und Reformvorschläge 6 (May 11, 2012), (Ger.) (transcript available at <http://www.reha-recht.de/file>

Appelbaum confirms that a dominating societal view that persons with disabilities are “inherently irrational and incapable of participating in civic functions” has contributed to preventing such persons from exercising their right to vote in the US.⁶²

While the blanket exclusion of persons under full custodianship from voting has remained unchallenged in German jurisprudence, some scholars continue to criticize it. Bernd Schulte, for example, argues that people under full custodianship may be legally incapable but still have the capacity to understand the electoral process and act upon this understanding.⁶³ He summarizes that affected individuals should not be excluded from the voting process purely because courts have placed them under full custodianship and contends that, if at all, judges should address this issue on an individual basis.⁶⁴ The above illustrates that excluding all persons under full custodianship from voting without proof of their individual ability to make rational voting decisions is not “reasonable” but discriminatory because it is based on stereotypical assumptions and preconceived ideas.⁶⁵

Second, excluding persons under custodianship from voting because they are unable to make rational voting decisions and thus endanger the functioning of democracy is not “reasonable.” The participation of those persons does not actually compromise democratic elections. The overall number of persons affected by the electoral legislation is relatively small, particularly because section 13(2) of the FEL only applies to persons under *full* custodianship and not those who have only been placed under custodianship for certain areas of life. Moreover, the threshold for imposing full custodianship is high. German courts customarily impose full custodianship only on people with extreme physical disabilities who also suffer from mental conditions, people suffering from dementia, and people in persistent vegetative states, such as

admin/download/foren/d/2012/D82012_Wahlausschluss_im_Betreuungsrecht.pdf) (arguing that excluding persons under full custodianship from voting is arbitrary).

62. Paul S. Appelbaum, “*I Vote, I Count*”: *Mental Disability and the Right to Vote*, 51 L. & PSYCHIATRY 849, 850 (2000).

63. Schulte, *supra* note 59, at 16-17.

64. *Id.*

65. Individually assessing a person’s capacity to vote during the custodianship hearing would remedy this issue, but would not make the legislation comply with international human rights law. See discussion *infra* Section IV (arguing that individualized assessments are not an “objective” or “reasonable” criterion for denying persons with disabilities the right to vote).

comatose patients and persons with severe brain injuries.⁶⁶ Yet, it has been alleged that, in some circumstances, German courts order full custodianship to afford family members the freedom to holistically act on behalf of their relatives despite the fact that the requirements of full custodianship may not be strictly met.⁶⁷ Family members are often unaware that persons placed under full custodianship automatically lose the right to vote and generally do not intend this consequence.⁶⁸ Political parties in Germany have petitioned the government to compile statistics on the exact number of persons under full custodianship several times, but the government has failed to do so.⁶⁹

Advocates for inclusive electoral law have stated that the government has prevented an estimated 12,000 people with intellectual or psychological disabilities from taking part in elections because they are under full custodianship.⁷⁰ Based on the 2013 federal elections projections, the Institute of Federal Statistics confirmed that approximately 61.8 million Germans are eligible to vote.⁷¹ These two figures suggest that section 13(2) of the FEL excludes around 0.00019 percent of the German population from voting. Given these projections, it is highly doubtful that granting the right to vote to persons under full custodianship will endanger the functioning of the German democratic state. The fact that not all those falling within the scope of section 13(2) of the FEL, such as comatose patients, will be able to exercise the right to vote, even if they wanted to vote, further illuminates this point.⁷² Therefore, arguing that section 13(2)

66. Leander Palleit, *Deutschland Braucht Endlich ein Inklusives Wahlrecht*, AKTUELL: DEUTSCHES INSTITUT FÜR MENSCHENRECHTE, (May 2012), at 2 (Ger.), available at http://www.behindertenbeauftragte.de/SharedDocs/Downloads/DE/Wahlrecht_Monitoringstelle.pdf?__blob=publicationFile.

67. BRK-Allianz Submission, *supra* note 61, at 14.

68. *Id.*

69. Jentsch, *Behinderung*, *supra* note 58, at 4.

70. Klaus Lachwitz, *Engaging MPs in Law Reform to Secure the Right to Vote in Germany*, INT’L DISABILITY ALLIANCE HUM. RTS. PUBLICATION, Mar. 2013, at 2, available at <http://www.internationaldisabilityalliance.org/sites/disalliance.e-presentaciones.net/files/public/files/Engaging%20MPs%20in%20Law%20Reform%20to%20Secure%20the%20Right%20to%20Vote%20in%20Germany.pdf>; see Palleit, *Deutschland*, *supra* note 66, at 14 (noting that only a small fraction of the 1.3 million individuals under some form of custodianship are under full custodianship and thus unable to vote).

71. *Pressemitteilung 21. Februar 2013 61,8 Millionen Wahlberechtigte*, BUNDESWAHLEITER, (Feb. 2013), (Ger.), http://www.bundeswahlleiter.de/de/bundestagswahlen/BTW_BUND_13/presse/w13001_Wahlberechtigte.html.

72. PALLEIT, GLEICHES, *supra* note 54, at 14.

of the FEL safeguards democratic elections is misguided and unreasonable.

In addition, full custodianship is not an “objective” criterion for excluding German citizens from voting because it leads to treating similar cases arbitrarily. As mentioned above, people placed under full custodianship are excluded from exercising the right to vote.⁷³ However, the legislation does not apply to those who have privately identified an individual to conduct their affairs through a power of attorney.⁷⁴ These persons maintain the right to vote despite the fact that they may be as unable to take care of their own affairs and allegedly make rational voting decisions as people under full custodianship.⁷⁵ The legislators have failed to explain why these two groups of persons with disabilities are treated differently. Seemingly, the only basis for including one and excluding the other from voting is that the former privately designates his legal custodian while German courts impose custodianship on the latter. Therefore this differentiation is arbitrary and not “objective.”

2. Disenfranchisement of Persons Under Full Custodianship Because Their Participation Increases the Risk of Electoral Manipulations

Some commentators argue that allowing persons under full custodianship to vote increases the risk of voting manipulation because such person will likely require assistance while voting.⁷⁶ They explain that individuals providing electoral support could unduly influence the voting decisions of persons under full custodianship or override votes altogether by replacing them with their own.⁷⁷ They warn that such electoral

73. See *supra* Section I.

74. Hellmann, *Der Ausschluss vom Wahlrecht*, *supra* note 61.

75. Bundesverband Selbsthilfe Körperbehinderter e.V., *Stellungnahme des Bundesverbands Körperbehinderter e.V. zu den parlamentarischen Initiativen zur Änderung des Bundeswahlgesetzes von Menschen mit geistiger Behinderung*, (May 28, 2013), AUSSCHUSSDRUCKSACHEN [AD] 17(4)743 D, 7 (Ger.); cf. BRK-Allianz Submission, *supra* note 61, at 15 (contending that automatically excluding persons under full custodianship from voting is “not appropriate” and “contravenes the principle of equal participation in political life[.]” particularly because not all persons with disabilities are excluded from voting).

76. Palleit, *Deutschland*, *supra* note 66, at 2 (describing that often vote misappropriation is a major argument against law reform on the matter).

77. See M. Redley et al., *The Voting Rights of Adults with Intellectual Disabilities: Reflections on the Arguments, and Situation in Kenya and England and Wales*, 56 J.I.D.R. 1026, 1028 (2012) (noting that commentators are concerned that the susceptibility of voters to manipulation is exacerbated in States providing voting assistance to persons with disabilities).

manipulations could cause vote misappropriation.⁷⁸ For these reasons, these commentators argue that excluding persons under full custodianship from voting is “reasonable” and “objective.”

This argument, however, is not a “reasonable” justification for denying persons with disabilities the right to vote. While persons under full custodianship may require assistance when voting, this does not necessarily mean that those assisting them will manipulate their votes. This assumes that all persons under full custodianship are particularly vulnerable and easy to manipulate.⁷⁹ This generalization is discriminatory. Even if it were accurate, establishing transparent support procedures to overcome or reduce possible risks would be preferable to denying the right of persons under full custodianship to vote altogether.⁸⁰

In addition, the argument that the possibility of vote manipulation necessitates excluding persons under full custodianship from voting is not “objective” because it overlooks the fact that other groups of people in need of voting assistance receive the required support instead of losing their right to vote. For example, in Germany, according to article 57 of the Federal Electoral Regulations, persons who are disabled or illiterate are permitted to bring a support person into the electoral booth to assist them in marking, folding, and submitting the ballot.⁸¹ Moreover, article 62 Federal Electoral

78. *Id.* at 1028; see Heinrich Lang, *Staatsbürgerliche Partizipation von Menschen mit Behinderung*, ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 133, [135] (2013) (Ger.).

79. *Contra* Palleit, *Deutschland*, *supra* note 66, at 2 (arguing that even if allowing persons under full custodianship to vote would create a greater risk of abuse, such risk does not justify depriving persons with disabilities their fundamental rights).

80. Article 12 of the CRPD explicitly requires States parties to implement such safeguards to address the vote manipulation issue. CRPD, *supra* note 1, art. 12(4) (“States parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse . . . Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.”).

81. Bundeswahlordnung [BWO] [Federal Electoral Regulations], Apr. 19, 2002, BUNDESGESETZBLATT, TEIL I [BGBL. I] at 1376, as amended May 13, 2013, BGBL. I at 1255, § 57 (Ger.), translated in *Federal Electoral Regulations (BWO)*, BUNDESWAHLLLEITER, <http://www.bundeswahlleiter.de/en/bundestagswahlen/>

Regulations permits patients in small hospitals and nursing homes to cast their vote remotely rather than travel to a voting center.⁸² While the risk of vote manipulation in the cases above and for persons under full custodianship may be equally prevalent, German electoral regulations only accommodate the former.

In fact, the legislature permits voting procedures that present a greater risk of vote manipulation under those circumstances than in the case of persons under full custodianship. For example, in the 2009 federal election, over nine million people, or around 21.4 percent of the eligible German voters, cast their ballots through the post.⁸³ In this instance, the risk of vote manipulations is substantially greater because it exposes a larger number of votes to third-party manipulation. Nevertheless, the German Constitutional Court declared postal votes constitutional.⁸⁴ Therefore, the risk of vote manipulation rationale is indiscriminately applied only to persons under full custodianship.

B. MENTAL INCAPACITY AS A “REASONABLE RESTRICTION” WITHIN THE MEANING OF ARTICLE 25 OF THE ICCPR

The previous subsection concluded that the two reasons for automatically excluding persons under full custodianship from voting are neither based on “objective” nor “reasonable” criteria.⁸⁵ Therefore, section 13(2) of the FEL does not comply with the HRC’s test for permissibly restricting the right to vote under article 25 of the ICCPR. However, the HRC’s statements in other parts of Comment 25 may suggest otherwise.

The HRC’s interpretation of the ICCPR is an authoritative source of international human rights law.⁸⁶ In 1996, the HRC explicitly identified “established mental incapacity” as a valid criterion for denying a person’s right to vote.⁸⁷ This suggests that section 13(2) of the FEL permits

downloads/rechtsgrundlagen/bundeswahlordnung_engl.pdf (last visited Oct. 5, 2014).

82. *Id.* § 62.

83. DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT], Jan. 16, 2013, 17/12068 (4) (Ger.).

84. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 1967, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 924, 1967 (Ger.).

85. *See* discussion *supra* Section IIIA.

86. *Human Rights Committee: Introduction*, UNITED NATIONS, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> (last visited Oct. 9, 2014).

87. CCPR General Comment 25, *supra* note 50, ¶ 4.

excluding persons under full guardianship from voting may be consistent with international human rights law. Germany takes this view and argues that the HRC’s interpretation of article 25 of the ICCPR is “universally accepted” and allows Germany to exclude persons under full guardianship from voting based on the objective “legal capacity” criterion without violating international human rights law.⁸⁸ However, State parties to the ICCPR could no longer rely on the HRC’s 1996 interpretation of “reasonable restrictions” if this interpretation were outdated and article 25 of the ICCPR would have to be interpreted differently today in light of the adoption of more recent human rights standards relating to disabilities and the right to vote. Such “modern” human rights standards possibly requiring a different interpretation of article 25 of the ICCPR could be contained in article 29 of the CRPD.

1. Incapacity as a Reasonable Restriction on the Right to Vote Under Article 29 of the CRPD

Article 29 of the CRPD expressly stipulates that States must guarantee persons with disabilities “the free expression of [their] will as electors.”⁸⁹ Unlike article 25 of the ICCPR,⁹⁰ this provision does not explicitly permit restricting the right of persons with disabilities to vote.⁹¹ This suggests that established mental incapacity is not a legitimate reason to exclude individuals from electoral participation. However, in a statement prepared for the German Parliament on this topic, Gerd Strohmeier made the following observations. He reasoned that article 29 of the CRPD does not contain permissible restrictions on the right to vote only because the provision would become too detailed otherwise. He contends the absence of explicit restrictions of the CRPD does not mean that restrictions are inadmissible.⁹²

88. DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT], Nov. 8, 2008, 16/10808 (64) (Ger.).

89. CRPD, *supra* note 1, art. 29.

90. ICCPR, *supra* note 12, art. 25.

91. CRPD, *supra* note 1, art. 29.

92. Gerd Strohmeier, Stellungnahme für die öffentliche Anhörung des Innenausschusses des Deutschen Bundestages zum Gesetzentwurf BT-Drs. 17/12068 und zum Antrag BT-Drs. 17/12380, Jun. 3 2013, AUSSCHUSSDRUCKSACHEN [AD] 17(4)744 E, 7-8 (Ger.).

To determine whether article 29 of the CRPD implicitly allows restricting the right to vote on the basis of incapacity, the rules of treaty interpretation outlined in article 31 of the Vienna Convention on the Law of Treaties (“Vienna Convention”) are applied below.⁹³ Article 31 of the Vienna Convention states that a treaty provision must be interpreted in light of its ordinary meaning, the overall object and purpose of the treaty,⁹⁴ and subsequent practice regarding the application of the treaty.⁹⁵ The provision must be interpreted in good faith to ensure that the interpretation does not lead to an absurd result.⁹⁶ Based on these principles, the interpretation of article 29 of the CRPD affirms that the article, neither explicitly nor implicitly, permits restricting the right of persons with disabilities to vote on the basis of an “established mental incapacity.”

When assessing the ordinary meaning of a treaty provision, the terms of the article must be read in light of its conventional meaning.⁹⁷ As discussed earlier, article 29 of the CRPD provides that State parties shall undertake to “ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected.”⁹⁸ As the language of the article enunciates a positive right to vote without explicitly including restrictions, the ordinary meaning of article 29 of the CRPD suggests that State parties cannot automatically restrict the right to vote based on “established mental incapacity” or court-ordered full custodianship.

93. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

94. *Id.* art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”); *see generally* ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 203-35 (2007) (outlining how to analyze ordinary meaning, object and purpose, and supplementary means of interpretation).

95. *See* VCLT, *supra* note 93, art. 31(3)(a)-(b) (stating that “[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” and “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall be accounted for when interpreting a treaty).

96. *See* LINDERFALK, *supra* note 94, at 44-45; *see* VCLT, *supra* note 93, art. 31(1) (“A treaty shall be interpreted in good faith.”).

97. LINDERFALK, *supra* note 94, at 62, 66 (arguing that the conventional language concept encompasses both everyday and technical language).

98. CRPD, *supra* note 1, art. 29.

To determine whether the overall “context” of the CRPD supports this interpretation of article 29, the treaty’s “object” and “purpose” must be determined first. As discussed earlier, the CRPD was the first international legally binding instrument relating to persons with disabilities.⁹⁹ The UN Secretary General noted that the CRPD demonstrated the “dawn of a new era—an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long.”¹⁰⁰ Article 1 of the treaty reflects this notion and provides that the primary purpose of the CRPD is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”¹⁰¹ Article 3 further elaborates that the CRPD was adopted to foster the respect for “inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons,” to promote “non-discrimination,” to enable “full and effective participation and inclusion in society,” to create “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity,” and to ensure the “equality of opportunity.”¹⁰²

These aims illustrate that the CRPD was introduced to break away from the dominant perception that persons with disabilities are consumers of welfare and/or medical services, rather than right-holders and active members of society.¹⁰³ The Convention’s object is, therefore, to shift from the traditional “welfare” approach to a “rights-based” approach with respect to persons with disabilities.¹⁰⁴ Accordingly, some commentators

99. See *supra* Section III.

100. Press Release, U.N. Secretary-General, Secretary-General Hails Adoption of Landmark Convention on Rights of People with Disabilities, SG/SM/10797, HR/4911, L/T/4400 (Dec. 13, 2006).

101. CRPD, *supra* note 1, art. 1.

102. *Id.* art. 3.

103. United Nations, Office of the High Comm’r for Human Rights, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol: From Exclusion to Equality - Realizing the Rights of Persons with Disabilities, U.N. Doc. HR/PUB/07/6 (2007); see Don MacKay, *The United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT’L L. & COM. 323, 328 (2007); Michael Waterstone, *The Significance of the United Nations Convention on the Rights of Persons with Disabilities*, 33 LOY. L.A. INT’L & COMP. L. REV. 1, 2 (2010) (stating that “the Convention envisions people with disabilities as full citizens seeking to make their own decisions about their lives[,]” instead of treating them through a medical lens and making objects of pity).

104. See Redley et al., *supra* note 77, at 1026-27 (emphasizing that this shift

have referred to article 3 as a “moral compass for change.”¹⁰⁵ Ultimately, the CRPD’s object and purpose to promote an inclusive and non-discriminatory “rights-based” approach to persons with disabilities support the interpretation that article 29 does not permit restricting the right to vote on the basis of established incapacity.

Subsequent practice of applying the CRPD confirms this interpretation. The Committee on the Rights of Persons with Disabilities’ (“Committee”) recommendations and statements best reflect subsequent practice.¹⁰⁶ They are effective tools for interpreting the CRPD because the Committee is responsible for monitoring the implementation of the CRPD by reviewing periodic state reports and providing authoritative interpretations of its provisions.¹⁰⁷ When reviewing periodic state reports, the Committee has consistently confirmed that incapacity is not a valid basis for restricting the right of persons with disabilities to vote under article 29 of the CRPD.¹⁰⁸

In 2011, the Committee reviewed Spain’s electoral legislation, which is similar to Germany’s, and expressed concern that the laws restricted the right of persons with disabilities to vote merely because such persons were

does not grant persons with disabilities new rights but rather guarantees rights already protected under the UDHR).

105. E.g. Gerard Quinn, *The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability*, 15 TEX. J. C.L. & C.R. 33, 41 (2009).

106. CRPD, *supra* note 1, art. 34 (establishing the committee and setting out its responsibilities).

107. See *Committee on the Rights of Persons with Disabilities: Questions and Answers*, OFF. HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (last visited Sept. 2, 2014) (explaining the responsibilities of the Committee). The authoritative interpretations of treaty bodies, such as the Committee, reflect subsequent practice pursuant to article 31(3)(b) of the VCLT. Christopher Keith Hall, *The Duty of States Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 EUR. J. INT’L L. 921, 927 (2007); Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT’L L. 905, 920 (2009) (noting that subsequent practice pursuant to the VCLT cannot only be limited to state practice because of the “special role” of human rights treaty bodies).

108. E.g. U.N. Comm. on the Rights of Persons with Disabilities, Concluding Observations of the Committee on the Rights of Persons with Disabilities: Spain, ¶¶ 47-48, U.N. Doc. CRPD/C/ESP/CO/1 (Oct. 19, 2011) [hereinafter Concluding Observations: Spain] (stating that legal capacity is not a valid basis for excluding persons from the right to vote, particularly because judges decide such matters without standards of evidence, grounds, or explicit criteria).

deprived of their legal capacity.¹⁰⁹ The Committee recommended that the government amend its legislation to afford all persons the right to vote regardless of their legal capacity.¹¹⁰ The Committee also recommended this to Argentina, Peru, and Tunisia.¹¹¹ These recommendations confirm article 29 of the CRPD does not permit automatically excluding persons from electoral participation on the basis of “established mental incapacity.”

2. *Re-interpreting Article 25 of the ICCPR Through Article 29 of the CRPD*

As concluded above, article 29 of the CRPD does not accept “established mental incapacity” as a valid basis for restricting the right to vote. However, HRC Comment 25 finds that an “established mental incapacity” is a valid basis. Commentators have debated the relationship between these two instruments. Some argue that article 25 of the ICCPR explicitly allows restricting the right to vote on the basis of “established mental incapacity” and that article 29 of the CRPD cannot derogate from this valid restriction.¹¹² In a statement prepared for the German Parliament on suggested changes to FEL and persons with disabilities, Heinrich Lang contends article 29 of the CRPD does not automatically amend article 25 of the ICCPR because the *lex posterior* rule, which provides that a later law supersedes a prior law, does not apply in international law.¹¹³ Similarly, Strohmeier argues article 29 of the CRPD does not establish new rights for persons with disabilities because it is only intended to replicate the content of article 25 of the ICCPR.¹¹⁴ Therefore, he argues restricting the right to vote on the basis of “established mental capacity” is still permitted under

109. *Id.* ¶ 47.

110. *Id.*

111. U.N. Comm. on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Argentina as Approved by the Committee at its Eighth Session, ¶ 48, U.N. Doc. CRPD/C/ARG/CO/1 (Oct. 8, 2012) [hereinafter Concluding Observations: Argentina]; U.N. Comm. on the Rights of Persons with Disabilities, Concluding Observations of the Committee on the Rights of Persons with Disabilities: Peru, ¶ 45(a), U.N. Doc. CRPD/C/PER/CO/1 (Apr. 20, 2012) [hereinafter Concluding Observations: Peru]; U.N. Comm. on the Rights of Persons with Disabilities, Concluding Observations of the Committee on the Rights of Persons with Disabilities: Tunisia, ¶ 35, U.N. Doc. CRPD/C/TUN/CO/1 (May 13, 2011) [hereinafter Concluding Observations: Tunisia].

112. Lang, *Stellungnahme*, *supra* note 55, at 8; Strohmeier, *supra* note 92 at 8.

113. Lang, *Stellungnahme*, *supra* note 55, at 8.

114. Strohmeier, *supra* note 92 at 8.

article 25 of the ICCPR, regardless of article 29 of the CRPD.¹¹⁵

However, these arguments ignore the fact that article 25 of the ICCPR does not expressly stipulate that restricting the right to vote of persons with “established mental incapacity” is reasonable.¹¹⁶ Rather, it was the HRC that concluded that an “established mental incapacity” is a “reasonable restriction” under article 25 of the ICCPR.¹¹⁷ Thus, article 29 of the CRPD does not amend article 25 of the ICCPR but rather alters the HRC’s interpretation of “reasonable restrictions.” As the more recent and legally binding instrument, the CRPD has a higher legal status than the outdated HRC comment.¹¹⁸ In adopting article 29 of the CRPD, State parties have amended and further developed the earlier interpretation of “reasonable restrictions” and incapacity.¹¹⁹ In doing so, they have established that excluding persons from voting simply on the basis of their incapacity is no longer a “reasonable restriction” under article 25 of the ICCPR.¹²⁰

The High Commissioner for Human Rights (“High Commissioner”) affirmed that HRC’s Comment 25 is outdated because the “legal landscape” with respect to persons with disabilities changed when States adopted the CRPD.¹²¹ The High Commissioner called upon the HRC to reinterpret article 25 of the ICCPR and to revise its Comment 25 so that

115. *Id.*

116. See ICCPR, *supra* note 12, art. 25 (stating that every citizen has the right to vote without “unreasonable restrictions”).

117. CCPR General Comment 25, *supra* note 50, ¶ 4 (“The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.”).

118. See Int’l Disability Alliance, Contribution to OHCHR Thematic Study on “The participation of pers. with disabilities in political and pub. life”, 10, (Oct. 15, 2011) [hereinafter IDA Contribution to OHCHR Study], *available at* <http://www.ohchr.org/EN/Issues/Disability/Pages/StudyPoliticalAndPublicLife.aspx> (arguing that the “legal landscape has changed” since the HRC first adopted its Comment 25 because the CRPD was adopted).

119. PALLEIT, GLEICHES, *supra* note 54, at 5-7.

120. See Valentin Aichele, Stellungnahme der Monitoring-Stelle zur UN-Behindertenrechtskonvention anlässlich der öffentlichen Anhörung des Innenausschusses des Deutschen Bundestages, Jun. 3, 2013, AUSSCHUSSDRUCKSACHEN [AD] 17(4)744 D, 8-9 (Ger.).

121. Office of the United Nations High Comm’r for Human Rights, Thematic Study on participation in political and pub. life by pers. with disabilities, ¶ 7, U.N. Doc. A/HRC/18/36 (Dec. 21, 2011) [hereinafter OHCHR Thematic Study]; see IDA Contribution to OHCHR Study, *supra* note 118 (discussing the change in the “legal landscape”).

both reflect the evolution of the rights of persons with disabilities.¹²² Even a member of the HRC, Theresia Degener, adopted this view, opining that Comment 25 and the exclusion of the right to vote based on “incapacity” may no longer meet the modern understanding of voting capacity contained in the CRPD.¹²³

These arguments suggest that State parties can no longer legitimately rely on the HRC’s interpretation of article 25 of the ICCPR to justify legislation that automatically excludes persons from voting merely based on their incapacity. Consequently, Germany cannot insist that section 13(2) of the FEL complies with international human rights law.¹²⁴ The German CRPD Monitoring Body, *Deutsches Menschenrechtsinstitut*, has continuously expressed this view, arguing that section 13(2) of the FEL does not comply with international human rights law because it is discriminatory and arbitrary.¹²⁵

IV. ACTIONS THAT NATIONAL AND INTERNATIONAL ACTORS SHOULD TAKE TO FULLY COMPLY WITH INTERNATIONAL HUMAN RIGHTS LAW ON THE RIGHT OF PERSONS WITH DISABILITIES TO VOTE

A. CONDUCT ON THE NATIONAL LEVEL

To comply with international human rights standards, Germany must revise its current legislation so that it no longer *automatically* excludes individuals from voting solely based on established incapacity. One option may be to empower courts to individually assess a person’s capacity to make rational voting decisions during the process of ordering full custodianship. Alternatively, the legislators could repeal section 13(2) of

122. OHCHR Thematic Study, *supra* note 121, ¶ 71 (noting that Comment 25 should be reviewed in relation to “the right to participate in public affairs, voting rights and the right of equal access to public service”).

123. Degener, *The Right to Political Participation*, *supra* note 22, at 2 (“[T]his General Comment dates back to 1996, one decade before the CRPD was adopted and there is reason to believe that there is a growing readiness to revise the traditional understanding of voting capacity.”).

124. Meyer, *supra* note 59; *cf.* Degener, *From Exclusion to Universality*, *supra* note 22, at 1 (arguing that the *de facto* denial of voting rights of persons with disabilities is one of the most serious human rights violations).

125. Palleit, *Deutschland*, *supra* note 66, at 3.

the FEL and allow citizens to exercise the right to vote without any restrictions.

1. Individual Assessment of the "Fitness to Vote"

Legislation mandating courts to individually assess a person's ability to make rational voting decisions in the custodianship process may arguably comply with international human rights law.¹²⁶ Such legislation would not automatically exclude persons with disabilities from voting because of their legal incapacity. Rather, it would require courts to assess a person's ability to vote and to deny a person's right to vote only if the court deems him "unfit." The European Court of Human Rights ("ECtHR") condoned this view on several occasions.¹²⁷

In *Kiss v. Hungary*, the ECtHR assessed Hungary's absolute voting ban, which had prevented persons with mental disabilities under partial custodianship from being included in the electoral register.¹²⁸ The ECtHR held that categorically excluding persons with disabilities from voting without individually assessing them violated article 3 of the First Optional Protocol to the European Convention on Human Rights ("ECHR").¹²⁹ Furthermore, the ECtHR did not suggest legislation mandating judicial and individual assessments of the right to vote would be incompatible with human rights.¹³⁰ On the contrary, it argued Member States may restrict the right to vote on a number of grounds.¹³¹ This suggests section 13(2) of the FEL could better comply with the rights of persons with disabilities if

126. See Sabine Jentsch, *Demokratie & Wahlrechtsausschluss: Kritische Anmerkungen zu § 13 Nr. 2 des deutschen Bundeswahlgesetzes*, 2 MOMENTUM Q. 150, 161 (2013) (Ger.) (summarizing the view of these commentators without agreeing with them).

127. See, e.g., *Kiss v. Hungary* (No.2), App. No. 38832/06, ¶¶ 42-44 (Eur. Ct. H.R. May 20, 2010) (HUDOC), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98800>; *Hirst v. United Kingdom* (No. 2), 2005-IX Eur. Ct. H.R. 681, 693 (stating that the principle of proportionality provides that disenfranchisement requires a sufficient link with the circumstances of the individual concerned).

128. *Kiss*, App. No. 38832/06 at ¶ 42-43.

129. *Id. Contra* PALLEIT, GLEICHES, *supra* note 54, at 13 (arguing that a voting eligibility test is inconsistent with the ECHR).

130. *Id.* ¶ 44 (stating that without an individualized judicial evaluation, an indiscriminate removal of voting rights cannot be considered a legitimate ground for restricting the right to vote).

131. *Id.* ¶ 38 ("[A] wide range of purposes [to restrict the right to vote] may . . . be compatible with Article 3 [of the ECHR]").

Germany mandated courts to individually assess a person’s fitness to vote when determining custodianship.¹³²

However, such legislation would not meet the HRC’s “objective” and “reasonable” threshold and would contradict the international human rights standards enumerated in article 25 of the ICCPR and article 29 of the CRPD. Requiring persons under full custodianship to show that they can make rational voting decisions to exercise the right to vote is not “objective” because it is indiscriminately applied in three ways. First, German electors have the right to vote in elections but also have the right to refrain from doing so.¹³³ Nonetheless, commentators have argued that comatose patients should not maintain their right to vote because they will not exercise it.¹³⁴ All other voters in Germany are free to refrain from voting without losing their right to do so; therefore, it is unclear why comatose patients should be treated differently.¹³⁵

Second, the right to vote in Germany does not preclude voters from voting spontaneously, irrationally, invalidly, or without political knowledge.¹³⁶ German voters are free to base their votes on non-rational political or personal reasons, such as sympathy or antipathy for certain political figures, or traditional voting inclinations of certain socio-economic groups.¹³⁷ Making voting decisions in this manner does not disqualify German electors from voting. It is discriminatory to require only persons under full custodianship to make valid and rational voting decisions and test them on it.

Third, testing the fitness of persons with disabilities to vote is a discriminatory practice in itself.¹³⁸ Assessing persons under full

132. *See id.* ¶ 41 (agreeing with the Hungarian government “that it must be permissible for the legislature to establish rules ensuring that only those who are capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs”).

133. *See* BASIC LAW, *supra* note 34, art. 38(2) (granting individuals the right to vote, rather than imposing a duty to do so).

134. Jentsch, *Demokratie & Wahlrechtsausschluss*, *supra* note 126 at 161; Lang, *Staatsbürgerliche*, *supra* note 78, at 136; Strohmeier, *supra* note 92, at 7.

135. Jentsch, *Demokratie & Wahlrechtsausschluss*, *supra* note 126 at 161-162.

136. Jentsch, *Behinderung*, *supra* note 58, at 8; Palleit, *Deutschland*, *supra* note 66, at 1; PALLEIT, GLEICHES, *supra* note 54, at 13.

137. *See* Redley et al., *supra* note 77, at 1027-28 (noting that voters often vote based on their “telegenic qualities” or “traditional loyalties associated with class, religion, ethnicity or tribe”); *see also* Jentsch, *Behinderung*, *supra* note 58, at 8.

138. *See, e.g.*, IDA Contribution to OHCHR Study, *supra* note 118, at 4 (arguing that testing for proper voting judgment is discriminatory because the

custodianship before allowing them to vote converts the right into a privilege a person can only exercise if he meets certain criteria. Moreover, the government does not test the capacity of other German voters to make rational political decisions before elections. As Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, contends, there is “no room for procedures in which judges or medical practitioners would assess the voting competence of a person and then give a green light—or not.”¹³⁹ He further elaborated that it would “amount to blatant discrimination” because the government does not test the capabilities of a person without disabilities.¹⁴⁰

In addition, individually assessing a person’s capacity is not “reasonable” because the specific selection criteria for such individualized assessments remain unclear. Supporters have not defined the requisite threshold that makes a person fit to make rational voting decisions and elect ‘better’ governments.¹⁴¹ Will persons under full custodianship be required to prove a rational understanding comparable to that of an “average” rational German voter? If so, who is an “average” rational German elector?

Legislation requiring the government to individually assess persons with disabilities’ fitness to vote in the custodianship process before granting them the right to vote is not based on “reasonable” and “objective” criteria and therefore does not comply with article 25 of the ICCPR. Indeed, article 29 of the CRPD and the Committee’s interpretation support this view.¹⁴² As discussed earlier, article 29 of the CRPD does not allow any

government only applies the test to persons with disabilities and not the whole general population).

139. *Hammarberg: “No Room” For Removing Right to Vote*, MENTAL DISABILITY ADVOC. CTR., <http://www.mdac.info/en/content/hammarberg-%E2%80%9Cno-room%E2%80%9D-removing-right-vote> (last visited Sept. 6, 2014).

140. *Id.*

141. *Cf.* Comm. on the Rights of Persons with Disabilities, Communication No. 4/2011, Views adopted by the Comm. at its tenth sess. (2-13 Sept. 2013), ¶ 5.8, U.N. Doc. CRPD/C/10/D/4/2011 (Sept. 20, 2013) [hereinafter Communication No. 4/2011] (noting that the Harvard Law School Project on Disability argues that “[t]here is no scientifically determinable cut-off point between persons having and those lacking capacity to vote[,]” and thus individualized “assessments will always result in disenfranchisement of at least some capable voters with disabilities.”); Concluding Observations: Spain, *supra* note 108, ¶ 47 (rejecting legal capacity as a basis for excluding persons from voting partially because judges do not follow a set standard when deciding these cases).

142. *See* Jentsch, *Behinderung*, *supra* note 58, at 4, 11 (affirming that excluding persons from political participation is not acceptable under both the ICCPR and CRPD).

differentiation of the right to vote on the basis of incapacity or other disabilities because the provision aims to create an inclusive electoral system.¹⁴³ In fact, the drafters intentionally omitted any differentiations in the CRPD because such differentiations would be arbitrary and discriminatory.¹⁴⁴ The Committee has requested specific States that permit restricting the right to vote based on incapacity to amend their respective legislation to ensure *all persons with disabilities* have the right to vote.¹⁴⁵

For instance, in 2013, the Committee was tasked with assessing Hungarian legislation excluded persons under guardianship from voting.¹⁴⁶ In what Human Rights Watch calls a “landmark” decision,¹⁴⁷ the Committee emphasized:

[a]rticle 29 does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Therefore, an exclusion of the right to vote on the basis of a perceived, or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention.¹⁴⁸

Similarly, the UN High Commissioner for Human Rights opined legislation restricting the right of persons with disabilities to vote is incompatible with current perceptions of democracy and non-discrimination.¹⁴⁹ Therefore, legislation that restricts voting based on individual assessments of persons with disabilities does not comply with

143. See *supra* Section III.

144. Cf. PALLEIT, GLEICHES, *supra* note 54, at 13 (arguing a blanket exclusion of persons with disabilities from voting violates the CRPD).

145. E.g., Concluding Observations: Argentina, *supra* note 111, ¶ 48; Concluding Observations: Peru, *supra* note 111, ¶ 45; Concluding Observations: Spain, *supra* note 108, ¶¶ 47–48; Concluding Observations: Tunisia, *supra* note 111, ¶ 35.

146. Communication No. 4/2011, *supra* note 141.

147. Hungary: Change Discriminatory Voting Law, HUM. RTS. WATCH (Oct. 3, 2013) <http://www.hrw.org/news/2013/10/01/hungary-change-discriminatory-voting-laws>.

148. Communication No. 4/2011, *supra* note 141, ¶ 9.4. See generally Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8, 9 (2012) (arguing that “even people with the most significant disabilities have legal capacity and are covered by the CRPD” pursuant to article 12 of the CRPD).

149. OHCHR Thematic Study, *supra* note 121, ¶ 7.

article 29 of the CRPD.¹⁵⁰ Accordingly, amending the German FEL to require individual assessments is not sufficient. International human rights law pursuant to article 25 of the ICCPR and article 29 of the CRPD requires Germany to revoke section 13(2) of the FEL and grant all persons under full custodianship the right to vote regardless of their capacity to rationally do so.¹⁵¹

2. An Unrestricted Right to Vote

Those who oppose repealing section 13(2) of the FEL have argued that doing so would compromise democratic elections and democracy in general.¹⁵² However, primary research studies do not support this assumption. While research in this particular area is neither extensive nor conclusive, two studies suggest that the participation of persons with disabilities in elections are unlikely to alter electoral results.¹⁵³ Klein and Grossmann, for example, analyzed the voting patterns of mental patients in a New York hospital through mock ballots and concluded that the results largely resembled those of the surrounding district.¹⁵⁴ Similarly, Wellner and Gaines conducted a subsequent study on the voting outcomes of

150. See Degener, *The Right to Political Participation*, *supra* note 22, at 2 (stressing that article 29 of the CRPD ensures that “all disabled persons, no matter what their impairment is, have an equal right to participate in the electoral process”). This article does not discuss the actual measures that must be taken to support persons under full custodianship when voting. Others, however, have discussed this issue. See, e.g. BREMISCHE BÜRGERSCHAFT: DRUCKSACHEN UND PROTOKOLLE [BT], Oct. 29, 2013, Drs. 18/1190 (Ger.) (assessing the possibility of writing electoral material in simpler language).

151. See BRK-Allianz Submission, *supra* note 61, at 15 (stating that section 13(2) of the FEL must be repealed and not replaced); Hellmann, *Der Ausschluss vom Wahlrecht*, *supra* note 61, at 6 (arguing that Germany is required to change its legislation because it is a signatory of the CRPD); Ulrich Hellmann, *Zur Vereinbarkeit des Wahlrechtsausschlusses nach § 13(2) BWG mit bestehenden völkerrechtlichen Verpflichtungen*, BETREUUNGSRECHTLICHE PRAXIS [BTPRAX] 208, 212 (2010) (Ger.) (calling on German legislators to amend the FEL so that it provides equal voting rights to persons with disabilities pursuant to the CRPD); Palleit, *Deutschland*, *supra* note 66, at 2 (agreeing that the discrimination under § 13(2) of the FEL must end).

152. See discussion *supra* Part III.A.

153. Morris M. Klein & Saul A. Grossman, *Voting Pattern of Mental Patients in a Community State Hospital*, 3 COMMUNITY MENTAL HEALTH J. 149, 149-52 (1967); Alfred M. Wellner & Lawrence S. Gaines, *Patients' Right to Vote*, 21 HOSP. & COMMUNITY PSYCHIATRY 163, 163-64 (1970).

154. Klein & Grossman, *supra* note 153, at 149-52 as discussed in Appelbaum, *supra* note 62, at 850.

patients in a psychiatric hospital in Maryland and the patients’ voting preferences also resembled those of their socio-economic counterparts in other parts of Maryland.¹⁵⁵

The experiences of Germany’s neighboring states, Austria and the Netherlands, also demonstrate that unrestricted voting participation does not automatically lead to the fall of the democratic state. Until 1987, Austrian electoral legislation provided that people under custodianship were automatically excluded from voting.¹⁵⁶ The Austrian Constitutional Court found the legislation violated the right to equality and held it unconstitutional.¹⁵⁷ Austria has not enacted any new legislation since then and, as such, all people in Austria have the right to vote now regardless of established incapacity or fitness to vote.¹⁵⁸ Similarly, the Dutch government repealed legislation that prohibited persons without legal capacity to vote in 2008 because it did not comply with the ICCPR.¹⁵⁹ Nothing indicates that elections in the Netherlands and Austria have become less democratic since their respective governments repealed these laws.

3. *The Likelihood that Germany will Review the FEL*

While Germany would need to repeal section 13(2) of the FEL to comply with the international human rights law on disabilities, this appears to be an unrealistic goal for three reasons. First, politicians are not optimistic about the effects of repealing the law. In early 2013, the German Green Party and Social Democratic Party called on Parliament to amend FEL to establish an inclusive electoral system that complies with international human rights law.¹⁶⁰ Parliament rejected both initiatives.¹⁶¹

155. Wellner & Gaines, *supra* note 153 at 164 as discussed in Appelbaum, *supra* note 62 at 850.

156. Eur. Union Agency for Fundamental Rts., *The Right to Political Participation of Persons with Mental Health Problems and Person with Intellectual Disabilities*, 19 (2010) [hereinafter *The Right to Political Participation*], available at http://fra.europa.eu/sites/default/files/fra-2010-report-vote-disability_en.pdf.

157. Verfassungsgerichtshof [VfGH] [Constitutional Court] Oct. 7, 1987, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFS [VFSLG] No. 11489 G109/87 (Austria) (holding that the Austrian law that excluded persons with disabilities from voting is unconstitutional).

158. Palleit, *Deutschland*, *supra* note 66, at 4.

159. *Id.*; *The Right to Political Participation*, *supra* note 156, at 18.

160. DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT], Jan. 16, 2013, 17/12068 (4) (Ger.) (Green Party); DEUTSCHER BUNDESTAG: DRUCKSACHEN

An article in *Frankfurter Allgemeine Zeitung*, a leading German newspaper, suggested that Parliament's lack of interest in amending the electoral legislation may be related to the small amount of votes that parliamentarians could gain from such an amendment.¹⁶² In a statement prepared for the German Parliament on suggested changes to FEL and persons with disabilities, Hans Meyer agreed and concluded that granting persons under full custodianship voting rights is not politically "attractive."¹⁶³

Second, Germany has not faced much international pressure to repeal its electoral legislation. Germany reported to the Committee on the Rights of Persons with Disabilities ("Committee") that section 13(2) of the FEL prevents persons under full custodianship from voting.¹⁶⁴ However, Germany stated that the number of people excluded is kept "as small as possible" and that the provision only covers people who are unable to make "a highly-personal decision on who to vote for" on their own.¹⁶⁵ The Committee has not commented on section 13(2) of the FEL and its compliance with international human rights law.

Third, the German Government has asserted that the electoral legislation complies with international human rights law because the HRC's Comment 25 finding "established mental incapacity" is a "reasonable" and "objective" criterion for excluding persons from voting is not outdated.¹⁶⁶ German academics have supported this view and contend that the Committee's decisions do not necessarily affect the HRC's interpretation in

UND PROTOKOLLE [BT], Feb. 19, 2013, 17/12380 (Ger.) (Social Democratic Party). The Bundesrat (Federal Council) has also called for a similar initiative in favor of an inclusive electoral system. BUNDESRAT DRUCKSACHEN [BR], Jan. 29, 2013, 49/13 (Ger.).

161. DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT], Oct. 19, 2011, 17/132 (15637) (Ger.) (rejecting the Green Party's concern about the FEL's incompatibility with the CRPD, but agreeing to initiate a study to assess the need to improve the right of persons with disabilities to vote); DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT], June 27, 2013, 17/250 (31929) (Ger.) (rejecting the Social Democrat Party's bill to amend the FEL).

162. Oliver Tolmein, *Stimmen Schenken!*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 27, 2013, <http://www.faz.net/aktuell/feuilleton/debatten/wahlrecht-fuer-behinderte-stimmen-schenken-12546362.html>.

163. Meyer, *supra* note 59, at 4.

164. U.N. Comm. on the Rights of Persons with Disabilities, Initial Reports of State Parties: Ger., U.N. Doc. CRPD/C/DEU/1 (May 7, 2013).

165. *Id.* ¶ 253.

166. DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT], Nov. 8, 2008, 16/10808 (63-64) (Ger.).

Comment 25.¹⁶⁷ They argue that Committee recommendations calling on State parties to abandon legislation disqualifying persons under guardianship or lacking legal capacity from voting does not directly impact Germany’s compliance with international human rights law.¹⁶⁸

B. CONDUCT ON THE INTERNATIONAL LEVEL

Conduct on the international level may persuade Germany to review section 13(2) of the FEL. Germany is one of many States that prohibits persons under full custodianship from voting. The European Union Agency for Fundamental Rights identified sixteen Member States in which persons lacking legal capacity were automatically denied the right to vote.¹⁶⁹ Ten Member States individually assessed persons with disabilities’ fitness to vote to determine their eligibility.¹⁷⁰ Only ten member states granted persons with disabilities the unrestricted right to vote.¹⁷¹ These figures suggest that other member states, like Germany, may argue that the HRC’s Comment 25 is still applicable and continue to uphold their restrictive electoral laws with respect to persons with disabilities.

Germany and these other European countries could be influenced to reassess their electoral laws should the HRC review and amend its interpretation of article 25 of the ICCPR regarding incapacity.¹⁷² Amending Comment 25 would ensure State parties, like Germany, no longer legitimately rely on the outdated interpretation of that document to uphold their discriminatory electoral legislation and foster the shift from a “welfare” approach to a “rights-based” approach with respect to persons with disabilities on the international level. In revising its interpretation of

167. Strohmeier, *supra* note 92, at 7-8.

168. Lang, *Stellungnahme*, *supra* note 55, at 8.

169. *The Right to Political Participation*, *supra* note 156, at 16 (including Ireland, Portugal, Belgium, Luxembourg, Germany, Denmark, Czech Republic, Poland, Slovakia, Hungary, Lithuania, Latvia, Estonia, Romania, Bulgaria, and Greece, and noting that certain countries fall into more than one of these categories because “persons with health problems and persons with intellectual disabilities can be treated differently according to the national law of the respective member state.”)

170. *Id.* at 18 (Spain, France, Denmark, Czech Republic, Slovenia, Malta, Slovakia, Finland, Estonia, and Cyprus).

171. *Id.* at 20 (Spain, Ireland, United Kingdom, France, Netherlands, Italy, Austria, Sweden, Finland, and Cyprus).

172. See Degener, *From Exclusion to Universality*, *supra* note 22, at 4 (suggesting that the HRC has begun to re-examine the issues of political participation and incapacity).

article 25 of the ICCPR, the HRC could contribute to promoting and protecting the rights of persons with disabilities and create an inclusive electoral system in State parties.

V. CONCLUSION

In adopting the CRPD, the international community explicitly recognized the importance of the non-discriminatory and inclusive treatment of persons with disabilities. This development ensured that disabilities are no longer “an invisible element of international human rights law.”¹⁷³ Nevertheless, while disability rights are now prominent on the international level, domestic laws do not always comply with “modern” international human rights standards on disabilities. Article 13(2) of FEL, for example, does not comply with article 25 of the ICCPR and article 29 of the CRPD because it automatically excludes persons under full custodianship from voting.

To remedy this, Germany would have to repeal section 13(2) of the FEL, without replacing it with another legislation. However, this is unlikely because the German government has shown little interest in making such changes and has consistently relied on the HRC’s interpretation of article 25 of the ICCPR to argue that FEL complies with international human rights law. Many other States have similar electoral laws and may also rely on the HRC’s outdated interpretation of the right to vote and refuse to amend their legislation.

For these reasons, it is important to reassess the HRC’s interpretation of article 25 of the ICCPR and amend Comment 25 to further inclusive electoral systems in State parties. “[C]halleng[ing] common deep rooted stereotypes about intellectually and psycho-socially impaired individuals” is only possible if States continuously recognize the importance of persons with disabilities in all areas of social life.¹⁷⁴ Ultimately, excluding persons with disabilities from political participation will only end when States abandon such stereotypes.

173. Kayees & French, *supra* note 17, at 12; *see* Stein, *supra* note 17, at 12.

174. Degener, The Right to Political Participation, *supra* note 22, at 3.