

Berlin, 17.03.2022

## Report on the situation of older persons deprived of liberty in Germany

Depriving elderly people of their freedom (of movement) often requires only the slightest means. Measures such as: taking away glasses, shoes, clothing, keys or walking aids, fixing wheelchair wheels, raising bed side panels, significantly restrict freedom. The national agency to prevent torture reports that facilities use wallpaper to cover doors or elevators, place door handles in unusual positions or use pushbuttons for opening doors, that are not accessible for wheelchair users.<sup>1</sup> In addition, restraint devices on chairs or beds, body belts, restraint blankets, straitjackets or corresponding attachments to therapy tables, plus possibly sedative medications (especially sleeping pills and psychotropic drugs), prevent elderly people from exercising their constitutionally guaranteed rights to freedom.

### Regulations on deprivation of liberty

Under German law, the above-mentioned measures are considered to be "measures that restrict freedom" and, unless regulated in an advanced directive, require a court order. Measures restricting freedom are considered as deprivation of freedom (§ 239 StGB) or, if applicable, as assault (§ 240 StGB) and battery (§ 223 StGB). Deprivation of liberty is not considered if a measure is applied only once. But with recurring cause, it requires a judicial decision.

The Civil Code (BGB) guarantees personal freedom to all people. Any restriction requires a legal basis. Serious interventions are regulated by law. Measures involving deprivation of liberty are regarded as a serious encroachment on personal liberty and are therefore treated in the same way as legal placement. Even restraints and similar measures taken against the will of the person concerned for reasons of "social duty of care", always remain criminal offences. Care and nursing must not be used to restrict

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<sup>1</sup> Nationale Stelle zur Verhütung von Folter, Jahresbericht 2019, p. 61: [https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Jahresbericht\\_2019\\_Nationale\\_Stelle.pdf](https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Jahresbericht_2019_Nationale_Stelle.pdf)

fundamental rights in order to provide citizens with "an improvement from above" (BVerfGE 22; 180, 219).

On the one hand legal regulations of measures involving the deprivation of liberty are found in BGB: § 1906 (1) to (3) BGB refers to legal placement, while § 1906 (4) BGB refers to measures involving deprivation of liberty for those who are not in legal placement. Thus, deprivation of liberty is given: if a person is held against her or his will in a spatially demarcated area of a closed hospital or a closed facility for a certain period of time and contacts with persons outside are restricted. On the other hand, also the mental health laws of the federal states (Bundesländer) regulate legal placement and measures involving deprivation under public law. Beyond the provisions of § 1906 BGB and the federal mental health laws, encroachments on fundamental rights by means of measures involving deprivation of liberty cannot be justified.

As a consequence of Article 2 (2) German basic law (GG) and Article 104 (1) and (2) GG fixation guidelines widespread in practice (as a rule internal service instructions without law quality) cannot justify the freedom-depriving measures. Consents given only verbally by the person concerned are also not legally permissible.<sup>2</sup> The recourse to § 34 StGB in order to justify interventions is permissible only in an individual emergency situation to avert concrete danger to the person concerned.

### **Measures involving deprivation of liberty in an outpatient context**

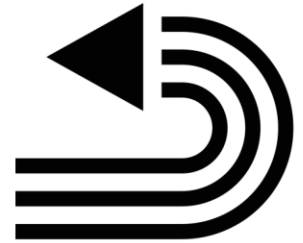
Case law and literature predominantly support the application of § 1906 (4) BGB to cases of measures involving deprivation of liberty in the person's own home. However, there are no specific regulations on the admissibility of custodial arrangements in a domestic or outpatient context. In fact, it is difficult to understand why the same measure should require approval in an (open) facility but not in the context of home or family care.<sup>3</sup> The total number of people over 65 who received care services in Germany (2021) is 76.3%, of which 4 out of 5 are in outpatient care and 1 out of 5 in inpatient care.<sup>4</sup> With the proportion of elderly people cared for at home being very high, a high number of cases of deprivation of liberty within home care can be assumed. Possible protection and control mechanisms are limited.

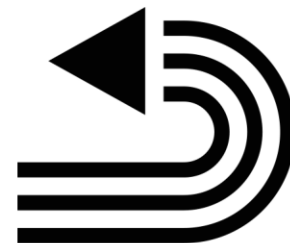
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<sup>2</sup> Nationale Stelle zur Verhütung von Folter, Jahresbericht 2019, p. 60: [https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Jahresbericht\\_2019\\_Nationale\\_Stelle.pdf](https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Jahresbericht_2019_Nationale_Stelle.pdf)

<sup>3</sup> This supposed contradiction becomes clear when one takes into account that measures depriving people of their right of movement are only legal in a clinical context. This progress in the 2017 legislation prevents the permissibility of coercive measures in an outpatient context.

<sup>4</sup> The proportion of persons receiving outpatient care changes with age, but among those over 90 still two third of all requiring care are outpatient. Bundesministerium für Gesundheit: Soziale Pflegeversicherung Leistungsempfänger nach Altersgruppen und Pflegegraden am 31.12.2020: [https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3\\_Downloads/Statistiken/Pflegeversicherung/Leistungsempfaenger/31.12.20\\_Leistungsempfaenger-nach-Altersgruppen-und-Pflegegraden-insgesamt\\_bf.pdf](https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Statistiken/Pflegeversicherung/Leistungsempfaenger/31.12.20_Leistungsempfaenger-nach-Altersgruppen-und-Pflegegraden-insgesamt_bf.pdf)





## **Reasons for measures involving deprivation of liberty for the elderly**

Among other reasons, the reduction of the potential risk of falls <sup>5</sup> and the prevention of (self-)endangerment count as reasons for measures that deprive the elderly of their freedom. In this way, employees and legal guardians try to prevent possible liability damages. Unawareness of alternative measures, the lack of professional nursing staff, so called “good intentions” <sup>6</sup> and the routinization of proven methods of movement restriction or even the wishes of relatives, play a decisive role, too.

However, there are no nationwide statistics on measures restricting freedom in a clinical or in an outpatient context.<sup>7</sup>

## **Deprivation of liberty in times of pandemics**

Due to the isolation of elderly people rights of self-determination are restricted very unilaterally: including the free choice of residence, massive reduction of social participation (no visits from relatives or leisure activities outside the facility - whereby these activities have also been massively restricted within the facilities due to hygiene measures) or the reduced possibility of making use of medical services outside the facility. Additionally, home and outpatient care services and caring relatives complained, not having received sufficient supply of protective materials or specific regulations, which guarantee full care in times of massive restriction of personal contact.

Many people in nursing homes or homes for the disabled were almost completely isolated for months due to bans on visiting or even going out. Major advocacy groups criticized the drastic measures which were not demanded by any other group of citizens. In some federal states (Bundesländer) walks, shopping or other undertakings outside the facility were not permitted for several weeks in 2020. Hardly anyone was prepared for the high consumption of personal and vital protective equipment. As a result, in house teams or outpatient care givers and relatives had to take care of procurement on their own, due to a lack of supplies from the federal and state governments. In addition, a wide variety of state decisions and lacking transparency and communication between states authorities and facilities led to great uncertainty within individual facilities. <sup>8</sup> Despite these heavy interventions and restrictions, large Corona outbreaks had occurred in special housing settings. About half of all corona deaths in 2020 in Germany concerned people living in facilities who died alone. <sup>9</sup>

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<sup>5</sup> Even if studies show that physical restraints do not reduce falls, e.g.: Koczy P, Becker C, Rapp K, Klie T, Beische D, Büchele G, et al. Effectiveness of a multifactorial intervention to reduce physical restraints in

nursing home residents. J Am Geriatr Soc. 2011;59:333–9.

<sup>6</sup> Bettengitter und Fixiergurte in Kliniken – Muss das sein? (2021): <https://www.kma-online.de/aktuelles/medizin/detail/bettengitter-und-fixiergurte-in-kliniken-muss-das-sein-a-46021>

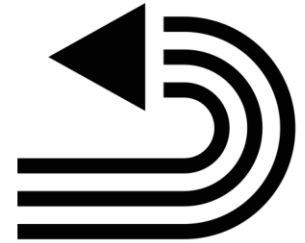
<sup>7</sup> Except a register on legal basis in Baden – Württemberg (§ 10 (3) PsychKHG, implemented 2015), which only covers hospitals, but not outpatient settings or facilities for elderly people: <https://www.bw-melderegister.de/>

<sup>8</sup> National Stelle zur Verhütung von Folter, Jahresbericht 2020, p. 29: [https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Nationale\\_Stelle\\_-\\_Jahresbericht\\_2020.pdf](https://www.nationale-stelle.de/fileadmin/dateiablage/Dokumente/Berichte/Jahresberichte/Nationale_Stelle_-_Jahresbericht_2020.pdf)

<sup>9</sup> Pflege in Zeiten von Corona: Zentrale Ergebnisse einer deutschlandweiten Querschnittsbefragung vollstationärer Pflegeheime (2020):

In addition, elderly persons were particularly encouraged to adhere to hygiene and protective measures. However, a blanket assessment of older people as a risk group tends to lose sight of the heterogeneity of older people in terms of their health conditions, life situations and resources. Moreover, it can contribute to a generalized view on elderly as in need of protection and leads to the idea, that their isolation is the only solution for the younger part of society.

Instead, it is vital to listen to the actual views of elderly people in order to align political and professional measures with their needs and life situations and to avoid paternalism. <sup>10</sup> The federal and state governments failed to develop adequate concepts over the summer of 2020 and 2021. In other words, they failed to implement protection strategies that did not rely on isolation. Within homes, mechanisms for preventing violence were also undermined, as the home supervisors hardly ever monitored the facilities - even though violence in inpatient facilities is demonstrably a major problem. <sup>11</sup>



### **Proposed low-threshold solutions to protect the highest possible freedom are <sup>12</sup>:**

- reserved shopping hours for elderly and disabled people
- enable contacts, for example through video telephony and to provide detailed information about the meaning and purpose of protective measures
- technical solutions (e.g. accessible PCs with Internet access in homes including proper instruction)
- separate visiting rooms with protective devices in the homes for the elderly
- fixed contact and contact persons and protective clothing for all parties involved
- free cab rides
- sufficient staff in health care offices and intensive care units
- systematic and financed testing strategies (also for employees in in-housing settings)
- participation of the persons concerned in specifying measures
- establishment of independent bodies to ensure independent complaint handling in in- and outpatient settings

The previous list shows that the possibilities to prevent isolation are manifold. Analyzing the causes of their inadequate (state) implementation is complex. Without question, the insufficient participation of older people plays a decisive

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<sup>10</sup> Die Corona-Pandemie aus der Sicht alter und hochaltriger Menschen (2020):

[https://www.erziehungswissenschaft.uni-mainz.de/files/2020/11/Die-Corona-Pandemie-aus-der-Sicht-alter-Menschen\\_Nov\\_2020.pdf](https://www.erziehungswissenschaft.uni-mainz.de/files/2020/11/Die-Corona-Pandemie-aus-der-Sicht-alter-Menschen_Nov_2020.pdf)

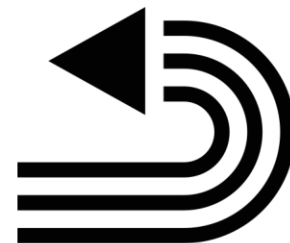
<sup>11</sup> Gewaltschutzstrukturen für Menschen mit Behinderungen – Bestandsaufnahme und Empfehlungen (2021):

[https://www.bmas.de/SharedDocs/Downloads/DE/Publikationen/Forschungsberichte/fb-584-gewaltschutzstrukturen-fuer-menschen-mit-behinderungen.pdf?\\_\\_blob=publicationFile](https://www.bmas.de/SharedDocs/Downloads/DE/Publikationen/Forschungsberichte/fb-584-gewaltschutzstrukturen-fuer-menschen-mit-behinderungen.pdf?__blob=publicationFile)

<sup>12</sup> Schutzschirme für Menschen mit hohem Risiko, Corinna Ruffer (2020):

<https://www.corinna-rueffer.de/pm-schutzschirme-fuer-menschen-mit-hohem-risiko/>

role. Plus, there are currently no official numbers on the amount of people in Germany being under legal guardianship or experiencing deprivation of their freedom.<sup>13</sup> As a consequence, it is not possible to have an overview of the quantities of isolation, treatments against a persons will, deprivations of freedom or other violations of fundamental rights of elderly persons.



[Kellerkinder e.V.](#) is a nationwide operating self-advocacy organization of people with psychosocial disabilities. The [Commissioner for Human Rights of the Council of Europe reported](#) on an [association's project](#) as a very successful approach to equal participation.

[ISL e.V.](#) is the umbrella organization of the Centers of Independent Living of people with disabilities in Germany. It was founded in 1990 by disabled women and men. For us disability is a human rights issue. Our guiding ideas are „Independent Living – Self representation – Inclusion – Empowerment“! ISL e.V. is the German branch of the international organization of people with disabilities "Disabled Peoples´ International - DPI".

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<sup>13</sup> The available figures are out of date. As of 2015, around 1,280,900 people were under legal care. For 2016 and the following years, no more nationwide figures are available. The lack of data is highly problematic. Germany is obligated to collect data that can be used to implement human rights (Art. 31 UNCRPD): Deutsches Institut für Menschenrechte (2021): Entwicklung der Menschenrechtssituation in Deutschland Juli 2020 – Juni 2021. Bericht an den Deutschen Bundestag gemäß § 2 Absatz 5 DIMRG. Berlin, p. 95: [https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Menschenrechtsbericht/Menschenrechtsbericht\\_2021.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Menschenrechtsbericht/Menschenrechtsbericht_2021.pdf)