



National Agency for the Prevention of Torture

Report to the Committee against Torture and other inhuman or degrading treatment or punishment for the examination of the 6th periodic report of the Federal Republic of Germany

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Introduction

The National Agency for the Prevention of Torture Germany's designated National Preventive Mechanism (NPM). By establishing this Agency, the Federal Republic of Germany abided by its obligations under international law following from the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (OP-CAT). The National Agency is only responsible for places where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its explicit consent or acquiescence.

The following report focuses on structural challenges concerning the mandate of the National Agency as well as on major findings from its visits to places of deprivation of liberty.

I. Institutional challenges (para. 5)

1. Funding of the National Agency

In 2015, the number of members of the Joint Commission was doubled and the funding of the National Agency was increased. This represented a significant step for the National Agency, as it signalled the go-ahead for visits in areas of its remit which it had previously not been able to visit, or only infrequently, most especially residential care homes and nursing homes for the elderly, psychiatric clinics and youth welfare facilities. Due to price increases in the areas of rent and staff in the past years the National Agency is now facing the situation that it won't be able to fulfil its mandate in the near future, if no additional funding is provided by the Federation and the Federal States.

2. Legal basis for publication of reports concerning visits in privately run institutions

The National Agency only publishes the names of the institutions it visited if these are state-funded. This applies to the publication of both the visit reports and the respective statements made by the competent ministries. The reason for this is that there are considerable doubts as to whether the legal basis for the National Agency's work (the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in conjunction with the ratifying legislation of 26 August 2008) is specific enough to justify the publication of information pertaining to privately run institutions, particularly in view of their rights under Article 14 of the German Basic Law [*Grundgesetz*]. Such institutions are for example homes for the elderly and psychiatric hospitals. This impairs the National Agency's preventive work and reduces its effectiveness.

The National Agency therefore considers it necessary that a sufficient legal basis be established, allowing the National Agency to publish the names of all the institutions it visited as well as visit reports and statements, which would enable it to fulfil its mandate in terms of prevention as provided for in the Optional Protocol.

3. Selection of the members of the National Agency

The members of the Federal Agency are appointed by the Federal Ministry of Justice and Consumer Protection, while the members of the Joint Commission are appointed by the Conference of Ministers of Justice of the *Länder*.

In November 2017, the Conference of Ministers of Justice decided that, “in future, civil society organisations should be involved to a greater extent when appointing the members of the Joint Commission of the National Agency for the Prevention of Torture. Therefore, NGOs will be given the opportunity to propose to the Conference of Justice Ministers candidates for positions at the Joint Commission.” The National Agency itself was not involved in the process in the past.

4. Access to places of deprivation of liberty

Since the National Agency took up its work, there has only been one case in which the Agency was prevented from gaining access to an institution. The instance was discussed with the competent ministry afterwards and the National Agency conducted a visit to the institution in question several months later without hindrance.

II. Findings from visits to places of deprivation of liberty

1. Child and Youth welfare facilities

1.1 Possibilities for complaint

The National Agency noted during its visits in youth welfare facilities that there are internal contact persons available for complaints but that a number of facilities do not have an external, independent ombudsman. In facilities which did have an ombudsman, it was either not always possible to establish unimpeded and confidential contact, or there was insufficient awareness of the body's existence.

Children and juveniles must be in a position to submit complaints to a suitable complaint body. In addition to contact persons within the facility, it is important that an external ombudsperson exists who has no ties with the facility.

It must be guaranteed that children and juveniles can contact such an ombudsperson confidentially and without restrictions. The complaint channels and all necessary contact details should be provided in an information leaflet worded in a child-appropriate manner, or in the facility's house rules, and explained to them when they are first admitted to the facility.

1.2 CCTV Monitoring

One of the visited facilities used uninterrupted CCTV monitoring in corridors and common rooms.

Children and juveniles should not be subjected to uninterrupted and indiscriminate CCTV monitoring. Under no circumstances can CCTV monitoring replace the presence of members of staff. The reasons for CCTV monitoring must be documented. In addition, the persons concerned must be informed of the monitoring. The mere fact that the camera is visible is not sufficient. It must be possible for the person concerned to discern whether the camera is running.

2. Homes for the elderly

2.1 Deprivation of Liberty

Deprivation of liberty in Germany requires a judicial order unless the person concerned consents to the application of the measure or there is a justifiable exceptional situation. In practice, the use of deprivations of liberty is often flawed.

2.1.1 Absence of judicial order

Measures of physical restraint were applied without judicial order on a number of occasions on the grounds that the subject person was immobile and the judicial order therefore not necessary. The supposed immobility was not always confirmed by a medical certificate. Sometimes measures were continued even though the judicial order had expired or had been repealed.

Every human being has a right to personal freedom. Provided the subject person hasn't given his or her consent and there is no state of emergency, judicial order is mandatory under national law for an involuntary commitment in a closed facility as well as for the application of measures of physical restraint.

2.1.2 Consent

Physical restraint, e.g. by using bed rails, can be applied at the request of those affected. Often proof of the subject persons' consent could not be presented or many years had passed without a regular renewal of said consent. Subject persons are predominantly neither informed of alternative methods; nor of their right to revoke a given consent at any given time.

The use of bed rails or lowering of low beds can constitute a deprivation of liberty for which subject persons can in principle submit their consent. Here it is mandatory that the subject person be able to submit consent for the given situation, the consent be valid, alternatives and the right to revoke consent at any given time have been discussed. Said formalities must be appropriately documented. Furthermore, the validity of the consent should be monitored on a regular basis (appr. every 3 months). The documented answer should be signed and dated by the subject person.

2.1.3 Prevention of exiting a certain area

Many facilities apply mechanisms which especially hinder dementia patients from leaving an area or the facility while the exit is not locked. Such measures include code-numbered locking mechanisms on doors or elevators as well as disguising exits with curtains, blinds or (scenic) wallpaper. Some people were equipped with transponders that trigger a ring tone when the exit door is opened and cause employees to actively prevent them from leaving the area. In principle, there were no judicial orders.

Deprivation of liberty prevails when a subject person is even given the illusion that departing the residence is physically not possible. This applies to complicated locking mechanisms or other measures which hinder the departing of an area.

It must be ensured that deprivation of liberty only takes place in compliance with the law.

2.2 Medication

Deficiencies in medication maintenance were found in a number of facilities.

2.2.1 Documentation

The documentation of medication is often incomplete or inexplicit, the current account not always absolutely identifiable. This is especially true for on-demand medications. In the case of on-demand medications, the reason for the need was often not clearly documented, which is why the nurse on duty has to decide whether the situation justifies the administration of on-demand medication.

The documentation must always encompass which medicine was issued by which doctor and in exactly what dosage it is to be administered. This applies to the doctor's decision of discontinuance of a medication as well. The documentation should be undersigned by the documenting person. With regard to on-demand medications, institutions should work towards fulfilling the requirements for the prescription of on-demand medication in order to be able to guarantee therapy safety. On-demand medications should also be reviewed regularly.

2.2.2 Legitimacy

Legal representatives responsible for the health welfare of persons unable to provide consent on their own were notified only afterwards or not at all to changes in treatment or medications. This

concedes in part to the wish of the legal representative. Cases in which the subject person personally gives consent were not documented.

The appointment of a legal representative responsible for health welfare aims at the active representation of interests of subject persons against third parties. For persons unable to submit personal consent, changes in treatment or medication require that the legal representative is informed in advance by the subject person's doctor and makes a decision on the basis of this consultation. The doctor's information should include the intention, the reason, the possible outcome as well as alternatives to the therapy chosen by the doctor. Facilities should enable and document this through appropriate procedures. In cases where persons can give their consent for themselves, this should be documented along with the existence of the ability to consent.

2.2.3 Administration of medication

Mistakes in, or failure to, administration of medication happened repeatedly. Prescription specifications are often not adhered to. It partially occurs that medicine is pulverized and mixed into the food even against specifications of the pharmaceutical manufacturer.

In order to avert damage to health, it must be ensured that residents receive only their prescribed medication and always in agreement with their doctor's orders. Instructions for administration must be respected.

2.3 Personnel

Regulatory personnel requirements in elderly and care homes decree that 50% of the employees be specially trained employees in the care and supervision of the elderly. This includes not only nursing staff but also other specialised personnel such as occupational therapists and physiotherapists. As a rule, a small discrepancy in this margin will not be sanctioned by supervisory authorities. Under economic aspects, this offers facilities financial saving potential. On the other hand, the shortage of skilled employees causes placements to remain empty for months.

Some of the facilities have not enough personnel. In others fluctuation and sick leaves remain permanently high. This results in shortcomings in proper and professional care and support. Necessary activities are provided unreliably or not at all. Lack in personnel is partially compensated by substitute personnel who do not have sufficient German language skills. Care assistants cannot not always be instructed and supervised. Despite a high proportion of dementia patients of the residing population, many facilities do not have nurses with an additional qualification of geriatric psychiatry. This poses the question of whether or not the active personnel are suitable for the subject persons requiring care.

The individual care and support of the residential population require a fundamental care relationship. This requires a certain amount of personnel consistency as well as sufficient quality of the staff both under technical as well as under occupation-ethical criteria. Additionally, the communication between staff and residents as well as among the staff itself must be ensured and not obstructed by language barriers. Frequent personnel fluctuation proves to be a high pressure point for persons in need of long-term care. Moreover, it requires increased educational and control effort on behalf of the skilled personnel at the expense of other responsibilities. In order to ensure proper and professional care and support, working conditions for staff must be designed in such a way as to avoid permanent overburdening and high levels of sick leave.

3. Police

3.1 Physical restraints (para. 24)

In a number of police stations in the *Länder* Bavaria, Brandenburg, Bremen, Hamburg and North Rhine-Westphalia, physical restraint¹ is still used.

The use of physical restraint constitutes a serious interference with a person's freedom, and also poses considerable health risks. Therefore, the use of physical restraints must be subject to special requirements such as the appropriate and correct application of a strap-based system.

In accordance with the decision of the Federal Constitutional Court of 24 July 2018 (BVerfG Az: 2 BvR 502/16, Rn. 69) a person subject to physical restraint must also be supervised one-to-one by a therapist or caregiver who is in the immediate vicinity of the person being restrained. The detainee must also be examined regularly by a doctor. For measures of physical restraint which take longer than a short period of time a judicial decision is necessary.

Physical restraints are not used at all, for example, by the Federal Police or by the *Länder* Police in Baden-Württemberg, Berlin, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia. In cases where these police forces find that a person does need to be physically restrained, the person is transferred to a psychiatric clinic. In its latest report on its visit to Germany, the CPT also calls upon the police authorities to put an end to the practice of physical restraint.²

Physical restraints should not be applied in police stations any more.

3.2 Notice of rights (para. 4)

In police stations in Brandenburg, Hamburg and Mecklenburg-Western Pomerania, persons who have been taken into custody under the Police Acts of those *Länder* are not informed of their rights in writing. Information leaflets are only provided in cases of deprivation of liberty under the Code of Criminal Procedure. In one police station in Lower Saxony, information leaflets for persons taken into custody under the Police Act were only available in German.

Regardless of the legal basis on which persons are taken into custody, they must be informed of their rights in writing, immediately and in a language they understand.

4. Prisons

4.1 Multiple-occupancy cells

In several prisons in Baden-Württemberg cells are shared by multiple prisoners, even though the cells do not have a fully partitioned toilet with separate ventilation. This constitutes a violation of human dignity according to the past decisions of the Federal Constitutional Court.³ Whether or

¹ The National Agency defines physical restraint ("Fixierung") as the act of depriving a person of their freedom to move by binding their arms, legs and in some cases the centre of the body, with the result that they are unable to change their sitting or lying position independently.

² See CPT report on its visit to Germany in 2015, CPT/Inf(2017)13, margin no. 33.

³ Federal Constitutional Court, decision of 22/02/2011, 1 BvR 409/09, margin no. 30.

not prisoners have agreed to be detained together is irrelevant, as the fundamental right to human dignity is a protected legal interest that cannot simply be dispensed with.⁴

According to the case law of the German Federal Constitutional Court⁵, prison cells accommodating more than one person must have a completely separate toilet with separate ventilation. Multiple-occupancy without such a separation constitutes a violation of human dignity. The type of occupancy found in Baden-Württemberg must be stopped as a matter of urgency.

4.2 Conditions of the cells

The conditions of cells in several prisons especially in Baden-Württemberg, Bavaria and Berlin raise doubts as to the buildings suitability as a place to hold prisoners in detention.

Cells are extremely cramped, while the furniture shows considerable signs of wear and tear. Furthermore, the toilet in single-occupancy cells is often not shielded from view. Windows in the prison cells are located in the upper third of the outer wall and covered by perforated sheets. This greatly limits the amount of daylight in the cells and makes any view outside practically impossible. In one prison, the windows of multiple-occupancy cells for six detainees could only be opened slightly because of the inadequate security level of the old building. Due to poor ventilation and air circulation in the cells prisoners also complained of extremely high temperatures in some of the cells, particularly during the summer months. Such conditions are all the more problematic because there is only very short out-of-cell time (for example only two hours a day where one hour outdoor exercise is already included), coupled with the lack of opportunities for work and recreation. This means that prisoners are forced to spend the vast majority of the day inactive, in cells which are structurally unsuitable.

It is highly recommended to end this situation as a matter of urgency. The fact that some prison buildings in Bavaria are under monument protection do not constitute a ground for such inadequate detention conditions.

5. Psychiatric hospitals

5.1 Physical restraints

In several psychiatric hospitals, the National Agency noted that persons under physical restraint were not always supervised by a trained member of staff in their immediate vicinity. Staff merely carried out regular checks on the restraining measure or monitored it via CCTV. Only the personal supervision of a therapist or caregiver in the immediate vicinity of the person being restrained can ensure comprehensive care and assistance while reducing the significant risk of injury (decision of the Federal Constitutional Court of 24 July 2018, BVerfG Az: 2 BvR 502/16, Rn. 69). The guidelines of the German Society for Psychiatry, Psychotherapy and Nervous Diseases (Deutsche Gesellschaft für Psychiatrie und Psychotherapie, Psychosomatik und Nervenheilkunde e.V., DGPPN) call for one-to-one supervision with personal contact for patients under physical

⁴ Federal Administrative Court, judgment of 17/10/2000, file no. 2 WD 12/00.

⁵ Federal Constitutional Court, decision of 22/02/2011, file no. 1 BvR 409/09, margin no. 30.

restraint as well.⁶ Furthermore, direct supervision enables staff to identify the earliest point at which the restraint can be ended.

The decision of the Federal Constitutional Court regarding the use of physical restraints must be implemented. Under no circumstances can CCTV monitoring replace the presence of members of staff.

5.2 Segregation

In forensic psychiatry clinics, patients can be segregated in crisis situations. In some psychiatric clinics it was clear from the patient files that some patients had been segregated without interruption for a period of several months, with no access to the clinic's wider community. One facility had segregation rooms containing only a bed and a non-partitioned toilet. The amount of daylight entering the room is limited by frosted glass. Furthermore, segregated patients had nothing with which to occupy themselves – like a book, for example.

In psychiatric institutions in particular, it is important to avoid any negative effects on mental health which might arise when patients have insufficient social contacts and are in constant isolation – particularly when they have no way of occupying themselves. Interpersonal contact helps achieve the aim of rehabilitating criminal patients.

Segregation constitutes a huge interference with rights of personality and should be limited to the shortest possible period of time. This matter must be reviewed closely in order to bring about a relaxation of the measure as soon as possible.

5.3 Outdoor exercise

Not all of the visited facilities gave patients the opportunity to exercise outdoors on a daily basis. Due to an unsuitable building design and the lack of suitable outdoor areas, only a small balcony was available for spending time outdoors in facilities in Baden-Württemberg and Bavaria when staff was unable to accompany patients outside.

As is the case in prisons, all patients deprived of their liberty must be given at least one hour of outdoor exercise per day.⁷

6. Deportation

6.1 Illegal deprivation of liberty

The National Agency witnessed that deportees at Berlin Tegel Airport are locked into detention rooms for up to several hours while waiting for their flight. The staff considered that the detention of persons did not constitute deprivation of liberty as it was necessary to enforce the deportation.

However, according to rulings by the highest courts the deportation process includes the pick-up and waiting time at the airport, for example at the gate, but not the additional confinement of the

⁶ DGPPN, S2-Leitlinie "Therapeutische Maßnahmen bei aggressivem Verhalten in der Psychiatrie und Psychotherapie" (2009), URL: https://www.dgppn.de/_Resources/Persistent/f4128e27b086d7a72813034b7532cee62c025848/S2-LL_Aggres.Verhalten_Kurzversion_21.10.2009.pdf (retrieved on 04/01/2018).

⁷Cf. CPT/Inf (2007) 18, paragraph 161 (Neustadt Psychiatric Centre) and, most recently, CPT/Inf (2014) 25, paragraph 139.

person.⁸ In the event of deprivation of liberty, a court order in accordance with Article 104 (2) of the German Constitution is required.

Judicial orders for the deprivation of liberty were not obtained according to information provided by the office. Thus, in practice, this was an unlawful deprivation of liberty.

This practice is urgently to be terminated.

6.2 Meals

The National Agency observed charter operations, i.e. deportations in which persons are deported separately from public air transport. During these operations, sufficient food and drinks are usually available at the airport for the persons being deported. The National Agency observed that food is generally not provided during transport from the place of residence to the airport. However, it should be borne in mind that most journeys to the airport begin with no prior notification late at night, and can take several hours.

Sufficient amounts of food and drink must be available during the entire deportation procedure.

6.3 Effective protection and access to a lawyer

In most of the deportation procedures observed, the National Agency saw that it was routine practice to confiscate mobile phones from persons being deported for the duration of the procedure. People were not always informed about their right to contact a lawyer and the possibility to use a phone of the authorities.

Any unsettled legal questions should be resolved before deportation. The ability to contact a lawyer during the deportation procedure is an important safeguard to protect deportees from unlawful treatment.⁹ Where an application has been submitted during deportation procedures for a temporary suspension of deportation, the procedures must be halted until a decision is issued.¹⁰

During the deportation procedure, persons awaiting deportation must be allowed to contact legal counsel. Such contact must be made possible at the beginning of the deportation procedure so that any necessary legal measures can be taken in due time. In case the person concerned has so far had no contact with a lawyer, they must be given contact details for emergency legal services.

6.4 Personal Belongings

The National Agency observed many cases where persons awaiting deportation were apprehended outside of their accommodation and brought straight to the airport, with no opportunity to pack their luggage. The National Agency also observed the deportation of a family with children where nobody was responsible for the children's luggage, with the result that not even nappies or food had been packed for one of the children.

⁸ Federal Constitutional Court, Order from 15. May 2002, file number: 2 BvR 2292/00; Federal Administrative Court, judgement from 23. June 1981, file number: 1 C 78.77.

⁹ APT (“Association for the Prevention of Torture”), “Legal Safeguards to Prevent Torture – The Right of Access to Lawyers for Persons Deprived of Liberty”, p. 16.

¹⁰ Regulations to this effect exist in Brandenburg (no. 6.9.6. of the Organisational Decree of the Ministry of the Interior on the Implementation of the Asylum Procedure Act in Brandenburg of 6 March 1997), Berlin, North Rhine -Westphalia, Saxony-Anhalt and Schleswig-Holstein.

To ensure a dignified return, the person concerned should at least be given the opportunity to pack whatever personal belongings they need.¹¹

Deportation procedures should not lead to the person concerned losing their personal belongings. One of the staff-members carrying out the deportation should be responsible for ensuring that luggage is also packed for children facing deportation.

The National Agency observed a deportation during which a lady suffered from involuntary incontinence. The same woman was also not wearing any shoes during the procedure. Deporting people in clothing they have involuntarily urinated in is inhumane and degrading.

Steps must be taken to ensure that the person being deported is dressed appropriately for the procedure and for the country of destination, and that identity documents, necessary medication, provisions for children, and any necessary medical aids (e.g. glasses) can be packed. A supply of basic hygiene products and sufficient clothing should be kept at the airport and issued as necessary.

7. Custody awaiting deportation and custody to secure departure

7.1 Detention Conditions

In most of the detention centres visited, the persons concerned were subject to conditions comparable to those in prisons. E.g. for most of the day, the persons concerned were locked up in their rooms. Opportunities for employment and recreational activities were insufficient.

The detention conditions of persons in custody awaiting deportation and custody to secure departure must differ from those of sentenced prisoners.¹²

7.2 Psychological care

Most of the facilities do not provide any in-house psychological care. Where there are indications that treatment may be necessary, it must therefore be ensured that a psychologist visits the person in question without delay.

Moreover, in some facilities discussions with psychologists are sometimes translated by other detainees awaiting deportation. For reasons of confidentiality, translations should always be performed by a professional interpreter.

7.3 Contact with legal counsel

The National Agency talked to people who wanted to obtain legal advice but did not have knowledge of the contact information. Furthermore, they did not know that certain organisations offer free legal advice.

People in custody awaiting deportation and custody to secure departure must be provided with information about legal counsel.

¹¹ Council of Europe, Twenty Guidelines on Forced Return, September 2005, Guideline no. 15, page 44.

¹² ECJ, Judgement from 17. July 2014, file number: C-473/13 and C-574/13. Cf. Article 16 para. 1 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008.