

**The American Experience: What Makes the ADA Work, and
What Are the Implications for Implementation of Germany’s Accessibility Laws?**

Reflections after the Conference on Legal Instruments for the
Enforcement of Accessibility for Disabled Persons
Kassel, Germany, November 2012

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February 2013

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Summary

The Federal Republic of Germany is working to advance the rights of persons with disabilities and to implement the United Nations' Convention on the Rights of Persons with Disabilities (CRPD or Convention) through the country's constitution, legislation, and enforcement mechanisms. At the Conference on Legal Instruments for the Enforcement of Accessibility for Disabled Persons in Kassel, Germany, in November 2012, presenters addressed the existing means of advancing those rights -- specifically, target agreements and organization lawsuits -- and whether reforms are needed in order to more effectively ensure those rights. Several presenters from Germany raised questions about the possibility of incorporating aggregate litigation such as American-style class action lawsuits and whether they would be appropriate and/or effective.

This paper addresses the broader conference topic: methods of enhancing physical accessibility. It briefly recounts the history of the Americans with Disabilities Act (ADA)¹ and its predecessors, the features that have contributed to its success, and the feasibility of including some of them in Germany's legislative and enforcement schemes. It draws on the author's experiences² and expresses her views only. None of the statements or views set out here represent those of any governmental or private entity.

Much of the ADA's positive and potential impact can be ascribed not only to the balanced approach of its substantive provisions, many of which are reflected in the CRPD, and the ADA's distinctly American enforcement mechanisms, but also to other factors. These include (1) the law's specific yet flexible regulations, including accessibility standards; (2) the ADA's requirement for federal technical assistance to covered entities; (3) the prospect of certification of state and local accessibility codes; and (4) effective compliance and enforcement steps by the federal government and advocates. It is clear that class actions have been an effective enforcement tool in the United States and serve as an incentive for compliance. But incorporating some or all of these four features into the German approach to accessibility -- to the extent that doing so is practical -- may advance the cause further than layering the American class action concept onto the existing German provisions. Suggestions for doing so are set out at the close of the paper.

1 The Americans with Disabilities Act, its implementing regulations, and guidance from the Department of Justice are available at www.ada.gov.

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Introduction

Until a few decades ago, people with disabilities in the United States and elsewhere were shunned, viewed as a burden, underserved, and often shut away in their homes or institutions. However, more recently societies around the world have taken steps to empower people with disabilities to lead independent and fulfilling lives by ensuring that their civil rights are protected. Most significantly, in 2006 the United Nations General Assembly adopted the Convention on the Rights of People with Disabilities. The Convention aims to promote, protect, and ensure full and equal enjoyment of all human rights for people with disabilities. As of February 2013, 155 parties had signed the Convention and 127 parties, including the European Union, had ratified it. The Convention has been binding on Germany, one of the first states to sign it, since March 2009.

The Convention was partly inspired by and largely based on the Americans with Disabilities Act of 1990, the first legislation in the world to address systematically and on a national level the discrimination, barriers, and challenges faced by people with disabilities. The core protections of the treaty are the same as the protections in the ADA, and the treaty's legal standards are consistent for the most part with U.S. disability law. Each member country sets its own enforcement procedures.

This paper explores the question of whether some features of the ADA and/or its compliance and enforcement mechanisms may be appropriate for adoption in Germany, especially with respect to the advancement of physical accessibility and the use of class actions. The analysis is presented with the caveat that whether these aspects of the ADA and/or the American version of class action lawsuits can be transferred to Germany's system must be evaluated in the context of Germany's own legislative and political structure and history, as well as its unique culture.

An assessment of the possible effectiveness of particular implementation schemes in Germany's legal environment starts with an examination of the development and central provisions of the ADA and parallel German laws.

I. The American and German laws, based on similar principles, diverge in their approaches to disability rights and emerge from differing histories and cultures

The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. sec. 12101 *et seq.*, is a civil rights statute that ensures that people with disabilities have equal access to the services and activities of state and local governments as well as most businesses and private organizations. It reaches widely and protects individuals with many types of physical and mental disabilities – almost one in five people living in the United States. It is broad in its scope (covering employment, transportation, education, physical accessibility, communication), deep in its detail, and implemented through strong regulations.

A profound and historic shift in disability public policy began in 1973 with the passage of section 504 of the Rehabilitation Act, 29 U.S.C. sec. 794(a) (section 504), which prohibited discrimination on the basis of disability by recipients of federal funds. This law traced its history to the independent living movement that began in the 1960s. The movement's slogan, "Nothing about us without us," promoted a policy of inclusion of people with disabilities, as its leaders and grass-roots members argued for a new model for the country's approach to its treatment of people with disabilities. At the time much of America's treatment of people with disabilities, as implemented in its laws, was based on a medical or social welfare model, which had reflected society's view that people with disabilities should be pitied, institutionalized, taken care of by others, or "cured." Section 504 embraced a new model, grounded in civil rights: it banned discrimination against a group newly perceived as a minority that had been denied an equal opportunity to access the benefits of the American way of life. In fact, section 504 was modeled after earlier laws that banned discrimination based on race, ethnic origin, and sex by federal fund recipients.³

Separate federal laws advancing the cause of inclusion and nondiscrimination in other areas of American life were enacted after section 504 and prior to the ADA. The Education for All Handicapped Children Act of 1973 (amended and strengthened in 1990 as the Individuals with Disabilities Education Act and again in 2008)⁴ guarantees a free, appropriate public education to children who, because of their disabilities, need special education and related services.⁵ The Air Carrier Access Act of 1986, 49 U.S.C. sec. 1374(c), ensures nondiscrimination in air travel. The Fair Housing Amendments Act of 1988, 42 U.S.C. sec. 3602 and 3604, mandates accessibility to public housing and much of the private housing sector.

Seventeen years after the passage of section 504, the ADA extended many of the protections of section 504 to almost all areas of American life, including state and local governments and places of public accommodations (generally, almost all private entities conducting business with the public).⁶ Congress passed the Act with an almost unanimous vote.

³ See title VI of the Civil Rights Act of 1964 (42 U.S.C. sec. 2000d to 2000d-4), which prohibits discrimination on the basis of race, color, or national origin in federally assisted programs.

⁴ 20 U.S.C. sec. 1400–1482.

⁵ The Architectural Barriers Act of 1968, 42 U.S.C. sec. 4151–4157, ensures that federal buildings or those constructed or altered with Federal funds meet accessibility standards.

But this victory had been long in coming and also resulted from an effective movement by people with disabilities. The first version of the bill that would eventually become the Americans with Disabilities Act was introduced in 1988 and was spurred by a broad-ranging draft bill prepared by the federal National Council on Disability. Once it was introduced, people with disabilities held hearings in all 50 states and gathered “discrimination diaries,” stories from people with disabilities about their experiences with exclusion, unequal treatment, and other forms of discrimination. These facts were used to create a record of the need for a nondiscrimination law and to prompt Congress to act. People with disabilities and parents of children with disabilities were closely involved with negotiating the details of the Act’s language, including its exceptions and limitations (discussed below in Section II).

The ADA adopts the general prohibitions of discrimination established under section 504, sets forth standards for what constitutes discrimination on the basis of mental or physical disability, provides a definition of “disability” and “qualified individual with a disability,” and requires reasonable modifications to policies, practices, and procedures where necessary, with certain limitations. All covered entities must follow ADA accessibility standards for new construction and alterations of buildings and facilities; make changes to existing buildings in some circumstances; and ensure effective communication with people with hearing, vision, or speech disabilities.

Of course the ADA has its detractors, including some who argue that it imposes unreasonable burdens or that it is too prescriptive (or, on the other hand, that it is not adequately clear in its requirements). In fact, progress has been slow in several areas. For example, people with disabilities experience unemployment at twice the rate of those without disabilities and continue to disproportionately experience significant obstacles in obtaining health care,⁷ including lack of access to diagnostic and treatment equipment. There are no ADA Standards for access to websites or other electronic communication by state, local, or private entities. Many public and private entities have not considered the needs of people with disabilities in emergency evacuation plans.⁸ However, it is the author’s view that the ADA has ushered in a new era of opportunity for individuals with disabilities and has dramatically changed the country’s physical landscape. Almost all buildings built or altered since 1992

⁶ See further description of the details of the ADA in section III. This paper does not address title I of the Act, which bans discrimination in employment.

⁷ See National Disability Policy: A Progress Report, National Council on Disability, September 2012, http://www.ncd.gov/rawmedia_repository/7f96ce1b_6ab9_45e0_8bfc_adbeaa29412b?document.pdf, at pages 30 and 73.

⁸ The ADA and other federal and state laws also create a large and sometimes confusing patchwork of accessibility statutes and regulations; for example, section 504, the Fair Housing Act, and the ADA, which have different requirements, may all apply to one project. Architects are not always familiar with the detailed specifications, and federal agencies have overlapping enforcement responsibilities.

have been subject to its standards. Many existing buildings have been modified for the sake of accessibility. New sidewalks and street crossings, and some pre-existing ones, have curb cuts. New transit stations and existing “key” stations are accessible. To a large degree the ADA has achieved many of its goals, as a result of a combination of factors that may be unique to the American experience.

The ADA was enacted in 1990 in a country with a relatively short history and young physical infrastructure (by most of the world’s standards), and a culture with a strong belief in self-determination and individualism. It reflects and embodies traditional values that pervade America’s heterogeneous society: equality of opportunity and nondiscrimination. Its terms protect a minority that is larger than any racial or ethnic minority in the United States, with at least 19% of all Americans reported as having disabilities.⁹ In a society that has been viewed, rightly or wrongly, as prone to resorting to litigation to resolve social issues affecting both individuals and identifiable groups of individuals, the ADA’s remedies have been pursued in a court system that is familiar with the other civil rights laws on which those remedies are based.

By contrast, Germany’s laws are more recently enacted and less sweeping in scope and remedy. In Germany, the shift from the welfare model to “one promoting a dignified, self-determined life in an inclusive society” began in the 1990s, with the ban on discrimination in Article 3 of the Basic Law (constitution) (Grundgesetz). This was followed by the 2001 adoption of Book IX of the Social Code¹⁰ (SGB IX); the Act on Equal Opportunities for Persons with Disabilities¹¹ (BGG) in 2002; and the General Anti-Discrimination Act of 2006 (AGG), protecting individuals from discrimination on the ground of race,¹² disability, and other bases.¹³ New and reconstructed buildings are subject to standards in the laws

9 U.S. Census Bureau figures, July 2012, <http://www.census.gov/prod/2012pubs/p70-131.pdf>.

10 Neuntes Buch des Sozialgesetzbuches.

11 Behindertengleichstellungsgesetz.

12 The term “race” is used here and elsewhere in this paper because it is the language of the statutes of both Germany and the U.S. The author realizes that the term is considered taboo by many in Germany today because of the difficult history of the Nazi era; its use is seen as inherently affirming the existence of different human races. The German government’s official comment on the bill clarified that use of the term was not intended as such an affirmation. See “There is NOT a Discrimination Problem in Germany;” The Contradictory Case of European Harmonization and Germany’s Ineffective Anti-discrimination Law by Felix Arnold, Zachariah Falconer-Stout, <http://www.humanityinaction.org/knowledgebase/104-there-is-not-a-discrimination-problem-in-germany-the-contradictory-case-of-european-harmonization-and-germany-s-ineffective-anti-discrimination-law>.

of the states (Länder).¹⁴ Major statutes have also been amended in the transportation field, aiming to bring about “optimally broad” accessibility.^{15 16}

Because a smaller portion of the population – reported to be 11.7% of Germans¹⁷ -- has a disability, and because the country has not pursued a program of integrating children with disabilities into mainstream

public education,¹⁸ the German population as a whole may be less accustomed to interactions with people with disabilities than are Americans. Germany’s version of the civil rights model incorporates German legal and cultural norms emphasizing social solidarity and state support for special needs. Its strong system of government-financed supports for people with disabilities, in the form of educational, vocational, and residential services, could be perceived negatively by many Americans as perpetuating a welfare state. The employment provisions of German law include quotas, which are disfavored in America and not part of U.S. laws.¹⁹ Thus the two countries’ approaches to legislation, regulation, and

13 Allgemeines Gleichbehandlungsgesetz, 2006, amended 2009. See United Nations Convention on the Rights of Persons with Disabilities First State Report of the Federal Republic of Germany, 3 August 2011.

14 At the conference, Horst Frehe, State Councillor of Bremen for Social Issues, Children, Youth and Women, explained that apart from construction standards for Federal buildings, most accessibility requirements are left to the states and only weak accessibility rules on air and rail traffic are enforced.

15 These include amendments to the Passenger Transportation Act (*Personenbeförderungsgesetz*) and to the Air Transport Act (*Luftverkehrsgesetz*).

16 Germany plans to make “an adequate number” of medical facilities accessible between 2011 and 2021. A short version of the National Action Plan from the Federal Ministry of Labour and Social Affairs is found at http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a740-short-en.pdf?__blob=publicationFile, page 7.

17 *Id.*, page 1.

18 Approximately 80% of German children with special education needs are educated in special education schools. Disability Policy and Social Compensation Law including Criminal Injuries Legislation in the EU, USA and Japan, An overview 2011, http://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a808e-Entschaedigungsrecht-eu-usa-japan-%20englisch.pdf?__blob=publicationFile, p. 107.

enforcement reflect each country's respective sociopolitical, judicial, and legislative structures as well as the culture, history, perspectives, and values of each.

For these reasons and others, the American experience with the ADA is not directly transferable to the German experience with its nondiscrimination statutes. However, there may well be ways in which Germany could move toward enhancing accessibility of its buildings and facilities by adopting and adapting some of the ADA's provisions and methods of implementation.

II. The ADA's nondiscrimination mandate and its regulations are broad and comprehensive, flexible and reasonable

An assessment of the transferability of some of the ADA's means of enforcement to Germany's implementation requires an understanding of not only the history and purpose of the ADA but the approach and terms of the statute itself.

One of the ADA's strengths lies in its comprehensiveness. Title II of the Act requires that state and local governments give people with disabilities²⁰ an equal opportunity to benefit from all of their programs, services, and activities (for example, education, employment, transportation, recreation, health care, social services, courts, voting).²¹ They also must comply with accessibility standards in new construction and alterations and in some circumstances relocate programs or otherwise provide access in inaccessible older buildings.²²

19 The 2002 BGG imposes an employment quota on private and public employers with a workforce of 20 or more, requiring them to ensure that at least five percent of their workforce is made up of people who are severely disabled or pay a relatively small compensatory levy.

20 The definition of "individual with a disability" is also broad; a person is protected if he or she has a physical or mental impairment that substantially limits one or more major life activities of the individual, has a history of having such an impairment, or is regarded as having one. 42 U.S.C. sec. 12102 (A). It is usually not necessary to analyze whether someone falls within this definition when evaluating accessibility issues. The definition is consistent with CRPD Article 1, which defines "persons with disabilities" as "persons 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."

21 The transportation provisions of title II cover public transportation services, such as city buses and public rail transit (e.g. subways, commuter rails, Amtrak). Transportation is not addressed in this paper.

22 See discussion of program accessibility in Section II.

Title III covers businesses and nonprofit service providers that are public accommodations, privately operated entities offering certain types of courses and examinations, privately operated transportation, and commercial facilities. Public accommodations are private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports stadiums and fitness clubs.²³ As is required of public entities under title II, public accommodations must comply with new construction and alterations standards. However, less is required of public accommodations in providing access to existing facilities.

Those covered by both titles must make reasonable modifications to policies and practices and ensure effective communication with people with disabilities. Services must be provided in the most integrated setting appropriate.

However, some entities are excluded from coverage, and the broad prohibitions are tempered by limitations. For example, private clubs and entities operated by religious organizations are not subject to title III.²⁴ Reasonable modifications to policies and practices are required by public and private entities only when they are necessary to prevent discrimination, and need not be made if they would fundamentally alter the nature of services or accommodations. Auxiliary aids and services necessary for effective communication are not required if providing them would create such an alteration or result in an undue burden. Damages are limited in employment cases and there are no monetary remedies available in private actions under title III.

The approach to accessibility is similarly moderated. The Act places higher expectations on new construction and alterations and lower ones on existing facilities.

New construction and alterations are to be fully accessible in accordance with accessibility standards issued by the U.S. Department of Justice (DOJ) (and, for transportation facilities and vehicles, by the U.S. Department of Transportation (DOT)).²⁵ Even here, the requirements are balanced by exemptions and exceptions. For example, privately-owned facilities that are considered "commercial facilities" and not places of public accommodation are subject to only the new construction and alterations provisions. Places of public accommodation that have two stories or less generally need not have an elevator unless

23 Transportation services provided by private entities are also covered by title III.

24 Employers of fewer than 15 people are not subject to the prohibitions on employment discrimination in title I. 42 U.S.C. sec. 12111 (5) (A).

25 See 42 U.S.C. sec. 12134 (a) and (c), 12146, 12147, 12149, 12162 (e), 12164, 12183, and 12186 (a) (3).

they house a health care provider, shopping center, or transportation facility. 42 U.S.C. sec. 12183 (b).²⁶ Accessibility features need not be incorporated in new construction of places of public accommodation if doing so is structurally impracticable. 42 U.S.C. sec. 12183 (a) (1). The accessibility requirements triggered by alterations to buildings covered by title II or title III must be met only to the maximum extent feasible.²⁷

A public entity's programs in existing facilities must achieve "program accessibility." This means that the program, when viewed in its entirety, must be accessible to people with disabilities. The DOJ regulations allow program accessibility to be achieved by making physical changes to facilities or in other ways (e.g., moving programs upon request or providing assistance or services through other means). However, these changes do not need to be made if they result in a fundamental alteration to the nature of a program or activity or impose an undue financial or administrative burden. To achieve program accessibility, state and local governments with 50 or more employees were required to conduct a self-evaluation of their facilities and develop a transition plan for any necessary changes to facilities in the early 1990s. "Small" entities (less than 50 employees) are not required to have transition plans. 28 C.F.R. sec. 35.149 and 35.150.

Private entities need not provide program accessibility but must remove architectural barriers to the extent that doing so is "readily achievable," 42 U.S.C. sec. 12182 (b) (2) (A) (iv), further defined by DOJ's regulations as meaning "easily accomplishable and able to be carried out without much difficulty or expense," in light of the public accommodation's resources. 28 C.F.R. sec. 36.304 (a).

III. Some of the ADA's features could be adapted for the purpose of increasing accessibility in Germany

An individual alleging a violation of the General Anti-Discrimination Act may sue for an injunction and compensation for any damage arising from the violation. However, he or she must assert the claim within two months and cannot be compensated for economic loss. AGG sec. 21. The Anti-discrimination Agency, established in 2006 to implement the AGG, is tasked primarily with providing information to potential plaintiffs and with receiving and processing complaints, but cannot give legal advice or advocate on behalf of complainants. See AGG sections 25 and 26. "Anti-discrimination organisations"

²⁶ Many of these limitations were extensively negotiated among legislators, people with disabilities, and businesses in order to ensure passage of the Act. For example, with respect to employment, negotiators incorporated a two-year delay of the effective date for businesses with 25 or more employees. National Council on Disability, Equality of Opportunity: The Making of the Americans with Disabilities Act, 1997, p. 5 (NCD report, Equality of Opportunity), App. D, "Chronology: Legislative History of the ADA," p. 208.

²⁷ See 42 U.S.C. sec. 12147(a), 12162 (e) (2) (B) (i), and 12183 (a) (2).

with at least 75 members or an association of at least seven organisations may act as legal advisor to an individual in court hearings. AGG section 23.

Section 4 of the BGG defines accessibility: “buildings and other facilities ... shall be barrier-free if they are accessible and usable for disabled persons in the usual way, without particular difficulties and, as a rule, without help from others.” The buildings to be designed without barriers include, according to section 8, “new buildings for civilian purposes and large alterations or extensions to such buildings of the Federal Government including Federal corporations under public law, statutory bodies and public law foundations.” One can deviate from these requirements if the requirements are “met in the same way on the basis of another solution.”

According to Prof. Dr. Felix Welti, University of Kassel, organizer of and presenter at the conference, the Act “does not yet state what has to be barrier-free and to what extent, and who can demand this of whom.” Although various laws apply to Federal, State, and quasi-governmental entities as well as hotels and restaurants, the term “accessible” has not been clearly defined, there are few requirements for existing buildings, and therefore what is “accessible” is often subject to negotiation on a case-by-case basis.

The BGG provides for two forms of remedies on an “aggregate” basis for violations of these provisions: target arrangements (also called target agreements) and legal actions by associations (organization lawsuits). However, according to several conference presenters, the availability and effectiveness of these instruments are limited and they have been pursued only infrequently.

First, section 5 of the Act provides for businesses and organizations representing people with disabilities to negotiate target agreements setting expectations for various business sectors. Negotiations are authorized only by associations that have been approved by the Ministry of Labour and Social Affairs for that purpose and have notified it of their intent to enter negotiations with a business sector. It appears that there is no means of requiring an agreement, no enforcement mechanism for such an agreement, and therefore no incentive for a business sector to negotiate; this means that an association (which may also be limited in funding) has little to gain from attempting to negotiate an agreement. In fact, it seems that this approach recasts a “remedy” as a regulation, but a voluntary regulation. In other words, a business sector can negotiate with an association representing people with disabilities and agree to what the sector considers a “barrier-free environment,” in effect setting the accessibility standards for that sector. Without any means of enforceability, this amounts to the establishment of an advisory committee of people representing people with disabilities. In addition, it can result in inconsistent measure of accessibility among business sectors based partly on the effectiveness of the negotiators.

Several speakers at the conference reported that few target arrangements have been achieved. Those that have been concluded include ones for web sites, banks, hotels, and restaurants. Partly because of the hesitancy of associations of persons with disabilities to pursue the possibility of target agreements, the federal government is promoting development of them through assistance from the Federal Centre

of Excellence on Accessibility, which supports associations and enterprises in developing barrier-free environments.²⁸

The second remedy is an organization lawsuit. Pursuant to section 13 of the BGG, a recognized association also may, without having sustained a violation of its rights, take legal action for a declaratory judgement as to whether there has been an infringement of certain provisions of law. Horst Frehe, State Councillor of Bremen for Social Issues, Children, Youth and Women, characterized this right as a very controversial one. He asserted that its configuration as a declaratory judgement weakens the right's potential as an instrument of legal enforcement. Mr. Frehe maintained that although the nondiscrimination statutes have led to a change in consciousness, they are almost ineffective as substantive rules because they provide only a minimal basis for enforceable rights and duties.

It may be advisable to consider alternate approaches to establishing clear expectations, enforceable rights, and effective remedies. Supplemented by education of covered entities about the requirements and benefits of inclusion of people with disabilities, this method could set Germany on the road to greater accessibility of various aspects of its environment. Some highlights of the American experience in implementing the ADA may be instructive in this undertaking.

A. The ADA's regulatory provisions and standards concerning accessibility, developed in conjunction with people with disabilities and aligned with model, state, and local accessibility codes, increase the likelihood of compliance in new construction and alterations.

Consistent with the ADA's directions, DOJ and DOT have issued strict standards for new construction and alterations. The DOJ regulations, promulgated originally in 1991, were revised in significant ways, including through extensively amended and supplemented accessibility standards, in 2010.²⁹ They cover numerous types of facilities and spaces and include scoping provisions (stating how many parking spaces, entrances, toilet stalls, etc. must be accessible) as well as technical provisions (setting out details for what makes a particular space or element such as an auditorium, a parking space, or a door accessible). Beyond the statutory limitations set out in section II above (structurally impracticable, maximum extent feasible), the regulations allow the use of equivalent methods to achieve equal or greater access (equivalent facilitation) and tolerate some deviations from the standards for alterations, cases of technical infeasibility, and historic buildings.³⁰

²⁸ See 2009 Disability Report of the Ministry of Labour and Social Affairs, http://www.bmas.de/SharedDocs/Downloads/EN/PDF-Publikationen/a126-disability-report-2009.pdf?__blob=publicationFile.

²⁹ http://www.ada.gov/2010ADASTandards_index.htm.

³⁰ See 28 C.F.R. sec. 35.151 (b) (3), 35.151 (c) (1) and (2).

The 2010 Standards added specifications for several types of elements and spaces, including playgrounds, swimming pools, recreational boating facilities, correction facilities, golf courses, and housing in higher education. Standards are expected to be issued soon for equipment; sidewalks, pedestrian crossings, and on-street parking; and outdoor areas including trails.³¹

The U.S. Access Board, composed of officials from federal agencies as well as members of the public who are appointed by the President -- at least half of whom must be people with disabilities -- issues accessibility guidelines. The DOJ and DOT standards must be at least as strict as these guidelines,³² and the Board works actively with private (industry) groups to minimize inconsistency between the requirements imposed by the federal government and those set separately by state and local governments. Approximately half the states have adopted the International Building Code (IBC) and American National Standards Institute (ANSI) Standards as part of their accessibility standards.

People with disabilities participate in the federal rulemaking process at several stages. In addition to holding membership on the Access Board, they also serve as members of advisory committees to the Board, testify at public hearings on proposed Board guidelines, and submit comments on proposed guidelines. The Board's guidelines, as well as the proposed standards of DOJ and DOT, are subject to public notice and comment. Involvement of people with disabilities has continued to be critical to development of the Standards and to the regulations of which they are a part.

Similarly, German associations of people with disabilities were involved from the outset in developing the 2001 SGB IX. In addition, in September 2010 the Commissioner for Matters relating to Persons with Disabilities appointed, in close cooperation with the German Disability Council, an advisory board called the "inclusion committee," in order to ensure a long-term and strategic consultation process with civil society, particularly with organisations of and for persons with disabilities in implementing the Convention.³³

31 See www.access-board.gov.

32 See 42 U.S.C. sec. 12134, 12186 (c).

33 FOURTH DISABILITY HIGH LEVEL GROUP REPORT ON THE IMPLEMENTATION OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, May 2011, http://ec.europa.eu/justice/discrimination/files/dhlg_4th_report_en.pdf, p. 43.

B. A strong technical assistance program, carried out as a public/private partnership, and DOJ’s mediation program promote voluntary compliance.

“Educate, negotiate, litigate.” These words have summarized the ADA compliance and enforcement approach of the U.S. Department of Justice during most administrations since 1990. DOJ has striven first to educate the public and covered entities about the ADA, resolve complaints through negotiation whenever possible, and turn to litigation only as a last resort.

The ADA is the first civil rights statute to require federal agencies to provide free technical assistance (advice, assistance, and training) about the law to covered entities, people with disabilities, and the general public. The agencies offer webinars, manuals, and other guidance documents free of charge; post materials on their websites; answer thousands of telephone inquiries every year, and present at business and advocacy conferences. The Department of Education provides grants to ten regional centers, called ADATA Centers, most of which are led by people with disabilities, to help in disseminating DOJ’s documents, training, and answering questions by phone. The centers work closely with the federal government to provide assistance to the public, people with disabilities, businesses, and state and local governments. The centers have no enforcement authority.

For complaints filed with DOJ under both title II and title III, DOJ also operates a mediation program through a contract. The Department refers appropriate ADA disputes to trained professional mediators at no cost to the parties. The program has successfully resolved many disputes quickly and satisfactorily, without the expense and delay of formal investigation and litigation.³⁴

C. The process of certification of state and local codes, historically underutilized, holds significant potential for minimizing ADA-related litigation.

The U.S. government does not review building plans for new construction or alterations, nor does it issue occupancy permits. These are functions of the state or local governments, whose codes generally impose minimum safety and performance requirements for new construction and major alterations; these address electrical, plumbing, fire safety, accessibility, and other construction issues. Typically a city will review plans for new buildings, issue a permit for the work, and inspect final construction for compliance with plans and that jurisdiction’s code (not the ADA). It is understood that a similar process is generally followed in Germany.³⁵

³⁴ See examples of outcomes at <http://www.ada.gov/mediate.htm#anchor68130>.

³⁵ Germany – Country Report, PRC Y0602.01.01, Screening national building regulations, Feb. 14, 2011, http://ec.europa.eu/enterprise/sectors/construction/files/compet/national-building-regulations/prc-de_en.pdf.

Because in the United States this local review process is in place, and planners, designers, architects, and builders are familiar with their local codes, the ADA authorizes DOJ, upon request of state or local officials, to certify that state or local building accessibility codes meet or exceed the ADA Standards.³⁶ 42 U.S.C. sec. 12188 (b) (1) (A) (ii). This process is intended to operate as a bridge between the obligation to comply with the ADA standards in new construction and alterations, and the administrative schemes of State and local governments that regulate the design and construction process. It gives those who design and build to a certified code some assurance, in advance of construction, that the ADA requirements will be satisfied. When compliance problems are identified, they can be corrected early in the construction process. Furthermore, if a title III lawsuit is filed, compliance with a certified code may be offered as rebuttable evidence of compliance with the ADA.

Between 1991 and 2012, fewer than ten of the codes of the 50 states and the District of Columbia were certified by DOJ. Certification was not often sought, and the process of obtaining it (involving steps including a public hearing before submitting the request, public notice by DOJ, a preliminary determination by DOJ, and a DOJ hearing) was lengthy. This process was streamlined with the revision of the title III regulations in 2010, 28 C.F.R. subpart F, and it is hoped that more state codes will be certified.³⁷

Another promising state practice enhancing ADA compliance is the accessibility specialist certification program of the type initiated by the states of Texas and California. These states offer training and licensing to individuals as accessibility specialists, who are then authorized to perform review and inspection functions related to accessibility at the state level.³⁸

D. ADA compliance has been advanced effectively through class actions and other means.

1. Federal enforcement

³⁶ As mentioned in section III.A, the accessibility requirements of many state and local building codes are based on the ADA Standards or on the International Building Code (IBC).

³⁷ See Revised Final Title III Rule: A Compilation of Regulatory Provisions and Guidance -- Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf, discussion beginning on p. 180.

³⁸ See Texas Architectural Barriers Administrative Rules, <http://www.license.state.tx.us/ab/abrules.htm#r6870>; California's Voluntary Certified Access Specialist (CASp) program, <http://www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx>.

There are different enforcement schemes for title II and title III.³⁹ The Department of Justice coordinates federal ADA enforcement and is the only agency authorized to litigate cases under both titles for for the federal government.

Title II directs the federal government (including DOJ and several other agencies) to investigate complaints and to conduct compliance reviews of covered entities. If an agency finds violations, it will usually resolve the issue through a settlement agreement, without involvement of a court.⁴⁰ However, DOJ can sue on behalf of the United States and can intervene (become a plaintiff) in private enforcement actions under title II. Remedies include injunctive relief (including modifications to facilities, physical surveys by the entities, development of plans to increase accessibility), and compensatory damages for individuals (monetary awards to compensate for injury or other harm).⁴¹

Under title III, only DOJ can investigate complaints and conduct compliance reviews. As with title II, most matters are resolved through informal or formal settlement agreements.⁴² The statute does, however, authorize the Attorney General, who heads DOJ, to file litigation where he or she has reasonable cause to believe that a private entity is engaged in a pattern or practice of discrimination or where alleged discrimination raises an issue of general public importance. Remedies include injunctive relief, damages, and civil penalties (which go to the federal treasury). In some matters, entities have made donations to organizations of people with disabilities or paid into a fund that compensates those who can show that they have been aggrieved by the entities' actions.⁴³

The Department of Justice has pursued a thoughtful strategy of investigations and settlement agreements without court involvement, litigation, and filings in amicus briefs or statements of interest by participating in a mix of matters and cases – those affecting a single individual or a few individuals, as

39 See 42 U.S.C. sec. 12133 (title II) and 12188 (title III).

40 See, for example, agreements reached after compliance reviews under Project Civic Access, <http://www.ada.gov/civicac.htm>. All the DOJ settlement agreements under title II and title III can be found at www.ada.gov.

41 See consent decree with University of Michigan, <http://www.ada.gov/umichstadium.htm>.

42 See, most recently, agreements with Mills College, http://www.ada.gov/mills_college_sa/mills-college.htm, and Westgate Smoky Mountain Resort, http://www.ada.gov/westgate_sa.htm.

43 See consent decree with QuikTrip Corporation (\$1,500,000 fund), http://www.ada.gov/quiktrip_consent.htm.

well as “impact litigation” that will affect a broad group of people, an entire industry, or a specific covered entity with numerous facilities. For example, through litigation --

- It argued that public entities have an obligation to ensure equal access and integrated emergency management planning and preparations, including accessible facilities, for persons with disabilities.⁴⁴
- It argued that jails must ensure physical access for prisoners with disabilities.⁴⁵
- It sued the University of Michigan to correct alleged violations of the alterations standards at the largest university football stadium in the country.⁴⁶
- It supported plaintiffs’ private right of action to challenge a city’s failure to provide accessible curb cuts at sidewalk and street crossings.⁴⁷
- It established several principles concerning access to theaters, hotels, convenience stores, and other types of facilities.⁴⁸

Through investigations, compliance reviews, and out-of-court agreements --

- It reviewed plans for and achieved corrections to the design of several facilities constructed or altered for use at the 1996 Olympics in Atlanta.⁴⁹

44 CALIF v. City of Los Angeles, United States' Statement of Interest, October 8, 2010, http://www.ada.gov/briefs/calif_interest_br.pdf.

45 Miller v. Smith, amicus curiae brief of the United States, http://www.ada.gov/briefs/miller_amicus.pdf.

46 See consent decree with University of Michigan, <http://www.ada.gov/umichstadium.htm>.

47 See brief in The Ability Center of Greater Toledo v. The City of Sandusky, <http://www.ada.gov/briefs/sanduskbr.doc>.

48 See consent decree in footnote 43 (QuikTrip Corporation), and decrees with Hilton Worldwide, Inc., <http://www.ada.gov/hilton/hilton.htm>, AMC Theaters, http://www.ada.gov/AMC-Entertainment/AMC-Entertainment_Consent_order.htm, and National Amusements, <http://www.ada.gov/national.htm>.

49 See <http://www.ada.gov/stadiumo.htm>, <http://www.ada.gov/aquatic.htm>.

- It has reviewed and reached agreements with more than 200 cities, towns, and counties through Project Civic Access.⁵⁰
- It reviewed and reached settlement agreements with several colleges and universities about access to new, altered, and existing facilities.⁵¹
- It ensured the right to vote at accessible polling places.⁵²
- It guaranteed access to several hospitals⁵³ and to homeless shelters in the District of Columbia.⁵⁴
- It secured access to restaurants, convenience stores, and theaters.⁵⁵

2. *Private enforcement*

Both titles II and III may also be enforced through private lawsuits by individuals with disabilities, people who allege discrimination on the basis of association with an individual with a disability, people acting on behalf of an individual with a disability, and organizations.⁵⁶

⁵⁰ <http://www.ada.gov/civicac.htm>.

⁵¹ See Mills College, http://www.ada.gov/mills_college_sa/mills-college.htm, McNeese State University, Louisiana System, <http://www.ada.gov/mcneese.htm>, University of Chicago, <http://www.ada.gov/unichicagosa.htm>.

⁵² Flint, Michigan, http://www.ada.gov/flint_mi_sa.htm, Philadelphia, Pennsylvania, <http://www.ada.gov/philadelphia/philadelphiasa.htm>.

⁵³ See Beth Israel Deaconess Medical Center, <http://www.ada.gov/bidmsa.htm>, Washington Hospital Center, <http://www.ada.gov/whc.htm>.

⁵⁴ http://www.ada.gov/dc_shelter.htm.

⁵⁵ See Pizza Hut (nationwide chain), <http://www.ada.gov/npcinter.htm>, Sunoco gas stations and convenience stores, <http://www.ada.gov/sunocooptima.htm>, Cineplex Odeon theaters (assistive listening systems), <http://www.ada.gov/cineplex.htm>.

The ADA grants a right to relief to individuals alleging discrimination on the basis of disability.⁵⁷ An organization may assert standing (1) on its own behalf because it has suffered a palpable injury as a result of a defendant's alleged actions (organizational standing) or (2) as the representative for its members (associational or representative standing).⁵⁸

Compensatory damages are available under title II but for intentional discrimination only.⁵⁹ Punitive damages (intended not to compensate for injury but to "punish" an entity for its actions or to deter it from future violations) are not available under title II.⁶⁰

Under title III, attorneys can recover their fees, but there are no damages available in private actions⁶¹ unless an action includes a claim under a state law that provides for them. However, attorneys can recover their fees. In some states these factors have combined to lead to what some consider unnecessary litigation, through which attorneys demand payment of fees from small businesses at an early stage of litigation to resolve alleged inaccessibility of buildings. Some small businesses feel that they have no choice but to pay the plaintiff and agree to make changes, to avoid the costs and time involved in litigation. Although many people and organizations criticize these "professional plaintiffs," who are often attorneys with disabilities, for taking these actions, others argue that these plaintiffs are acting legitimately in bringing litigation as "private attorneys general," in ways critical to successful enforcement of the law where federal enforcement resources are limited.⁶²

56 See 42 U.S.C. sec. 12188.

57 See 42 U.S.C. sec. 12133 and 12188.

58 See brief of United States in Equal Rights Center v. Abercrombie & Fitch Co., http://www.ada.gov/briefs/interest_equalrightscenter_%20hollister_br.pdf.

59 See, for example, Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001).

60 Barnes v. Gorman, 536 U.S. 181 (2002).

61 This limitation on remedies was the result of a bipartisan compromise during negotiations prior to passage of the ADA that facilitated agreement on other issues; Senate leaders agreed to forego the possibility of compensatory and punitive damages, in exchange for the Administration's consent to apply the ADA to a broad spectrum of public accommodations. See NCD report cited in footnote 26, at pages 5, 118, 119.

Private litigation can also be brought under either title as a class action. A particular statute such as the ADA need not “authorize” class action litigation; one or several plaintiffs can file on behalf of a class and obtain relief for a group of individuals if the court certifies that the class consists of a group of individuals and/or organizations that have suffered a common injury and meet other prerequisites. The modern “opt-out” class action, which is the most commonly used in civil rights cases, binds all members of the class with the exception of those who formally object. It has been part of the fabric of litigation in the United States since major revisions to the Federal Rules of Civil Procedure (FRCP) in 1966 (specifically, Rule 23).

A class action can proceed if the court certifies the class as meeting the requirements of FRCP Rule 23.⁶³ Accessibility cases will often fit the requirements of the rule, because under the alleged facts there will generally be numerous individuals who experience discrimination because of common barriers, they can be shown to represent the interests of the class, and the relief is appropriate for the class as a whole. Classes have been certified, for example, in accessibility cases against prison systems, state transportation departments, universities, theaters, and fast food chains.⁶⁴

Advocacy groups have built strong, focused, strategic, and effective enforcement efforts, primarily through class actions and, more recently, through “structured negotiations,” a collaborative approach that they have applied to disability discrimination cases for the purpose of resolving issues without litigation. Generally the process begins with a letter that describes the details of problems that people with disabilities have encountered with a private entity, the legal basis for the group’s complaint, and the importance of accessibility to people with disabilities; and suggests potential solutions. If the entity is willing to attempt to resolve the issue without litigation, an agreement is signed to protect the interests of all parties during negotiations. This approach has met with significant success as to the accessibility of web sites, pedestrian signals, and automated teller machines for people with vision disabilities; video description in movie theaters; and physical access to health care.⁶⁵

62 See Implementation of the Americans with Disabilities Act: Challenges, Best Practices, and New Opportunities for Success,” National Council on Disabilities, July 26, 2007 at 192-193, <http://www.ncd.gov/publications/2007/July262007>, and How Courts are Undermining the American with Disabilities Act’s Private Enforcement Provision (which also includes a discussion of “standing” requirements), http://www.rutgerspolicyjournal.org/how-courts-are-undermining-american-disabilities-act%E2%80%99s-private-enforcement-provision-0#_ftn8.

63 http://www.law.cornell.edu/rules/frcp/rule_23.

64 See discussion of the legal requirements and collected cases in Plaintiffs’ Motion for Class Certification in *Castaneda et al. v. Burger King*, <http://www.foxrob.com/pdfs/burgerking/PlaintiffsMotionforClassCertification.pdf>.

65 See examples at <http://iflegal.com/negotiations/>.

Conclusion

In the United States, litigation by private individuals and groups, as well as the Department of Justice, has driven change. Successful litigation has been based on enforcement of clear provisions of law and/or regulations or on the use of the ADA's comprehensive yet flexible language and/or regulations to blaze new ground.

But litigation (or the threat of consequences from it) has not been the only impetus to change. The increased accessibility brought about by the ADA can also be ascribed to the comprehensive, reasonable, and flexible language of the statute; the specificity of the regulations; and other factors. These include active participation of people with disabilities in the rulemaking process and in enforcement actions; efforts by the federal government to reconcile its standards with those of model, state, and local building codes; the requirement that public entities evaluate their policies and practices and develop plans for any necessary changes to existing facilities; a strong public/private partnership to provide education and training to advocates, businesses, and state and local governments (technical assistance); a program of federal certification of state and local codes; and alternatives to litigation including mediation facilitated by the federal government and federal investigations that are resolved through formal settlement agreements with no court involvement.

However, these approaches reflect a long history of similar civil rights statutes, the specific provisions of the ADA, and America's legal system and culture. To the extent it is feasible to adopt them, any introduction of these provisions and means of enforcement into German law must of course take into account Germany's own history, culture, laws, and legal structures and must be done on a gradual and measured basis. Suggestions include the following:

- Develop specific federal accessibility standards for new and altered facilities by bringing together involved parties, including the public and private sector and individuals with disabilities. Specify when and how they apply to various buildings or facilities.

- Consider a program similar to the one used in the U.S. to certify state codes for equivalency with the federal standards, as a means of promoting compliance at the early stages of design and construction.

- Allow individuals to bring actions about inaccessible facilities and allow an adequate time frame for them to bring the actions (for example, one to two years from the date on which they learn of the existence of the barriers).

- Empower a federal agency (perhaps the Anti-Discrimination Agency) to investigate and resolve complaints and to bring enforcement actions.
- Authorize some form of aggregate litigation – not simply by those recognized officially by the federal government – and with meaningful remedies. This type of litigation could perhaps be modeled on the type that is already established in other fields of German law, such as environmental and consumer protection law.
- Once these means of ensuring access to new and altered buildings and facilities are in place, consider legislation that addresses existing facilities.

A strong program of education would bolster public acceptance of any changes and promote compliance with them.

It is hoped that some or all of the measures can be incorporated in order to align German laws, regulations, and procedures more closely with the goal of ensuring accessibility for people with disabilities, as one facet of ensuring an equal opportunity to benefit from what German society offers to everyone.