

NEW GERMAN LEGISLATION ON GUARDIANSHIP IN THE LIGHT OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A GOOD MODEL TO FOLLOW?*

Summary

The objective of this paper is to assess the new German legislation on guardianship against the standards set by the Convention on the Rights of Persons with Disabilities (CRPD), with particular emphasis on Article 12 concerning the legal capacity rights of persons with disabilities. The author argues that, although the reformed legislation is not fully aligned with the CRPD, given certain exceptions to the supported decision-making “standard,” these exceptions may be necessary in specific situations, especially when the exercise of the right to decide conflicts with other fundamental human rights, such as the right to life. Furthermore, the legislative intent clearly demonstrates a commitment to fostering a range of supported decision-making mechanisms, which is also a step in the right direction. The reform process itself could also serve as an example for other countries, as it was carefully planned and grounded in extensive empirical and doctrinal research, and is undoubtedly a good model to follow.

Keywords: legal capacity, persons with disabilities, Germany, guardianship reform (2021).

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NOVI PRAVNI OKVIR O STARATELJSTVU U NEMAČKOJ U SVETLU KONVENCIJE O PRAVIMA OSOBA SA INVALIDITETOM: PRIMER ZA DRUGE ZEMLJE?

Sažetak

Cilj rada je analiza nove nemačke legislative o starateljstvu u odnosu na standarde postavljene Konvencijom o pravima osoba sa invaliditetom, sa posebnim naglaskom na član 12, koji se odnosi na prava osoba sa invaliditetom u pogledu poslovne sposobnosti. Autor ističe da je novi pravni okvir starateljstva u Nemačkoj u velikoj meri usklađen sa Konvencijom Ujedinjenih nacija o pravima osoba sa invaliditetom, posebno zbog toga što ne predviđa oduzimanje poslovne sposobnosti osoba sa invaliditetom. Sa druge strane, u novom zakonodavnom okviru i dalje postoje izuzeci u odnosu na „standard“ odlučivanja uz podršku. Autor smatra, međutim, da ti izuzeci jesu razumni, posebno u slučaju kada je pravo na donošenje odluka u suprotnosti sa drugim ljudskim pravima, kao što je pravo na život. Pored toga, u novom pravnom okviru postoji jasna namera zakonodavca da ojača individualna prava, stavi veći naglasak na promovisanje struktura odlučivanja uz podršku izvan instituta starateljstva, kao i na potrebu da se sve mere podrške moraju zasnivati na volji i željama pojedinca, što svakako predstavlja korak u pravom smeru. Sam proces reforme takođe može poslužiti kao primer drugim državama, jer je reforma bila pažljivo planirana i zasnovana na obimnim empirijskim i doktrinarnim istraživanjima postojećih nedostataka u pravnom sistemu i praksi, te nesumnjivo predstavlja dobar model na koji mogu da se ugledaju druge zemlje.

Ključne reči: poslovna sposobnost, osobe sa invaliditetom, nemačka reforma starateljstva 2021.

1. Introduction

Persons with disabilities often confront significant barriers in exercising their legal capacity rights.¹ The issue is particularly salient for individuals with intellectual disabilities, psychosocial disabilities, those with profound or multiple disabilities, persons who have sustained severe brain injuries, and individuals affected by advanced dementia (Callus, 2018, p. 3). Due to cognitive, emotional, or social factors associated with these disabilities, such individuals may experience difficulties in understanding, communicating, or making decisions in complex legal, financial, or personal contexts. Consequently, they may be subject to substituted decision-making regimes - such as guardianship - which may limit their autonomy.

The denial of legal capacity can have profound and wide-ranging implications, as it may deprive persons with disabilities of the ability to make essential life decisions. These include the right to choose one's place of a residence, to manage personal relationships - including the right to marry - and may affect their employment opportunities, management of personal finances, etc. The deprivation of legal capacity, coupled with the lack of accessible community-based support services, may further lead to their institutionalization in group homes or similar facilities, additionally isolating them from the society, and may also amount to serious violations of fundamental human rights (Škorić, 2020, p. 28).

Over the past two decades, there has been a global shift towards legal reforms aimed at protecting the rights of persons with disabilities, with particular emphasis on the recognition and protection of their right to legal capacity. These efforts gained considerable momentum with the adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in 2006, which was introduced, *inter alia*, in response to the growing understanding that the existing international human rights framework failed to provide adequate protection for persons with disabilities in comparison to other individuals (Molović, 2023, p. 554).

The CRPD, for the first time, unequivocally guarantees legal capacity rights to all persons with disabilities, a provision that has sparked considerable debate in both academic circles and in practice (Arstein-Kerslake & Flynn, 2015; Scholten, 2018; Scholten, Gather & Vollmann, 2021; Duffy, 2023). A central issue in this debate is whether persons with intellectual and psychosocial disabilities can and

¹ Legal capacity refers to a person's ability to acquire rights and assume obligations through their own actions, and comprises two key components: legal standing - the capacity to hold rights (such as property ownership), and legal agency - the capacity to make legal decisions and transactions (for example, managing property and income, choosing living arrangements, or consenting to medical treatment). While legal standing is universally recognized and cannot be revoked, legal agency is often contested or restricted in the case of persons with intellectual or psychosocial disabilities.

should be able to make decisions with support, particularly in cases where they are unable to comprehend the consequences of their actions – when such actions may potentially cause them harm. The literature on legal capacity reform frequently reflects a tension between abolitionist positions – which, in accordance with the wording of the CRPD, call for the complete replacement of substituted decision-making with supported decision-making (Minkowitz, 2010; Quinn, 2010; UN CRPD Committee, 2014) – and regulatory approaches, which also advocate for supported decision-making, but acknowledge that tension may arise between respecting individual autonomy and preventing harm, thereby requiring careful balancing and procedural safeguards (Carney, 2017; Szmukler, 2019).

Since the ratification of the CRPD in 2009, a debate regarding the reform of the guardianship system has been initiated in the Republic of Serbia (Beker & Lepojević, 2021; Stefanović & Beauchamp, 2019; Krstić & Beker, 2017; Stanković, 2014; Marković, 2012), but has yet to yield significant results. Serbia has not yet aligned its legislation with the provisions of the CRPD and continues to seek appropriate models on for legislative reform that would ensure compliance with international standards.

The objective of this paper is to evaluate the recent German legislation on legal capacity in light of the standards set by the CRPD, with particular emphasis on Article 12, which concerns the legal capacity rights of persons with disabilities. While several scholarly contributions have examined the reform of the German guardianship system (Henking, 2022; Welti, 2021; Brosey, 2020), these analyses, in our view, have not adequately considered the compatibility of the reform with the CRPD framework. To address this gap, the paper will first provide an analysis of Article 12 CRPD, followed by an examination of the background to the guardianship reform and the new legal framework introduced in Germany in 2021. Ultimately, the paper aims to assess whether the reformed German model may serve as a potential “template” for other countries seeking to advance the recognition of legal capacity rights for persons with disabilities.

From a methodological standpoint, the paper adopts a normative legal approach, examining the structure and content, and underlying principles of the relevant provisions of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) in light of broader constitutional standards (i.e., the principles of proportionality and necessity). In addition, a comparative legal method will be used to place the German legal framework within a broader international context, drawing on the CRPD standards. The key criteria against which the German legislation will be assessed are those articulated in Article 12 CRPD and further elaborated in General Comment No. 1 of the CRPD Committee, as will be outlined in greater detail in the following section. These include, *inter alia*: the universal recognition of legal capacity for all persons with disabilities; the abolishment of substituted decision-making

regimes and their replacement with supported decision-making mechanisms; the obligation to respect the will and preferences of a persons with disabilities; ensuring equal rights in all domains; and the adoption of positive measures to create accessible systems – such as training of professionals, provision of accessible information, and the use of plain language materials.

2. Article 12 CRPD – An Impossible Standard to Achieve?

Article 12 CRPD affirms that all persons with disabilities should enjoy the right to legal capacity, regardless of the nature and a degree of their disability. The right to legal capacity includes elements of both legal standing² and legal agency.³ As legal capacity is framed as a universal right, some authors argue that the institute of legal capacity has shifted from being a matter of private law to one of public law, thereby elevating it to the status of a fundamental universal human right (Minkowitz, 2017, p. 2).

The CRPD's understanding of legal capacity departs from traditional models, which often denied or limited an individual's legal capacity on the basis of disability or perceived lack of competence (Scholten & Gather, 2017, p. 227). In contrast, the CRPD introduces a human rights-based model of legal capacity, where mental capacity is not regarded as a prerequisite for the enjoyment of legal capacity. This shift is widely regarded as a pivotal and transformative development in the international understanding of the legal capacity of persons with disabilities (Arstein-Kerslake & Flynn, 2015, p. 471).

It should not be surprising, perhaps, that the Article 12 has emerged as one of the most contested CRPD provisions, having sparked significant debate and controversy even during the CRPD negotiation process (Lewis, 2011, p. 703). For Inclusion International, an NGO that strongly advocated for its introduction, this provision was among the most challenging elements of the negotiations (Inclusion International, 2014, p. 53). Nearly two decades after the adoption of the CRPD, Article 12 remains the subject of ongoing debate, both within academic discourse and in the national policy-making discussions of State Parties to the CRPD (Duffy, 2023, p. 5).

² In Serbian language "pravna sposobnost" the right to legal standing assumes the right to be a bearer of rights, including, for example, the right to own property, to access medical care, and to obtain personal legal documents such as a birth certificate or a passport.

³ In Serbian language "poslovna sposobnost" the right to legal agency, in turn, assumes the capacity to exercise those rights through one's own decisions. This includes, for instance, the ability to dispose of one's property, to consent to or refuse medical treatment, to manage one's own financial affairs, to decide where and with whom to live, etc.

Carney (2015, p. 4) argues that the ongoing debate surrounding Article 12, and the limited progress in aligning national legislations with its requirements, may be interpreted in two ways. First, the content of Article 12 may be viewed as representing an aspirational ideal, one that may be unrealistic in practice and that consequently leaves States Parties unable to fully comply. Alternatively, the persistent failure to recognize persons with intellectual disabilities as full legal subjects may stem from misconceptions regarding their capacities and a misunderstanding of the concepts of autonomy and decision-making.

We contend that several factors are central to understanding why Article 12 has not yet been adequately reflected in academic discourse, nor fully incorporated into the legislation of many countries. First, extending the equal recognition of legal capacity to all individuals requires a fundamental paradigm shift – from substituted decision-making to supported decision-making models that respect and uphold an individual's choices and wishes, regardless of perceived cognitive limitations. Second, the implementation of supported decision-making in practice presents significant challenges, as it requires substantial resources, tailored and individualized forms of supports, and comprehensive reforms in professional training – changes that are both complex and time-intensive. Third, in cases when a person's decision-making capacity is significantly impaired – particularly in the context of serious mental health conditions – the person may struggle to determine which treatment option best serve their health and well-being (Scholten & Gather, 2018, p. 229). Such circumstances may place other fundamental values and human rights at risk, including the right to life. In these cases, an obvious tension may arise between Article 12 and Article 10 CRPD, which obliges State Parties to take all necessary measures to safeguard the right to life of persons with disabilities. And fourth, in cases of severe cognitive impairment – such as among persons with severe intellectual disabilities or those in advanced stages of dementia – the potential for facilitating meaningful decision-making may be limited, and the ability to express one's will and choices may likewise be significantly constrained (Craigie, 2015, p. 398). Nevertheless, the UN Committee on the Rights of Persons with Disabilities (hereinafter the Committee) in its General Comment No. 1 on interpretation of Article 12, emphasises that even in such circumstances best interpretation of choices and wishes of a person with disability must replace the traditional "best interests" model.

A related question concerns whether the institution of guardianship may be understood as a mechanism of supported decision-making – particularly in cases when the guardian is legally obligated to respect and implement the individual's expressed wishes. Although Article 12 CRPD does not explicitly refer to an instrument of guardianship, its paragraph 4 does refer to "appropriate and effective safeguards to prevent abuse," a concept frequently used in legislation related to

guardianship. This raises the possibility of connection between certain forms of guardianship and supported decision-making models.

General Comment No. 1 of the CRPD Committee (2014, p. 6) provides an answer to this question by explicitly stating that guardianship is not compatible with Article 12 CRPD. It emphasises that guardianship – including plenary guardianship, judicial interdiction, or partial guardianship – constitutes a form of substituted decision-making. The Committee further asserts that all forms of substituted decision-making share three fundamental characteristics: (i) an individual's legal capacity is removed, even if only for a single decision; (ii) a substitute decision-maker may be appointed by a third party without the individual's consent; and (iii) decisions are made on the basis of what is considered to be in the individual's objective "best interests," rather than reflecting the person's own choices and preferences (CRPD, 2014, p. 6).

Finally, under the CRPD, States Parties are required to abolish substituted decision-making frameworks and establish supported decision-making mechanisms in their place (Article 12, para. 4 of the CRPD). States are obliged to develop appropriate mechanisms and safeguards for supported decision-making, which may take various forms. In practice, support decision-making processed may include support of family, friends, and civil society networks (Carney, 2015, p. 3). In some countries, civil society support in the decision-making process is legally recognized – for example, in Canada and Sweden (Carney, 2015, p. 3; Stefanovic & Beauchamp, 2019). The involvement of national human rights institutions may also play an important role in this regard (Glušac, 2022, p. 59).

3. Recent German Legislation on Guardianship of 2021: A Subtle or Paradigm Shift?

3.1. Background and Context of the Reform

Germany initiated a comprehensive reform of its guardianship system through the adoption of the Law on the Reform of Guardianship and Custody in 2021 (*Gesetz zur Reform des Vormundschafts- und Betreuungsrechts*, Gesetz vom 4.5.2021 – BGBl I 2021, Nr. 21 vom 12.05.2021, S 881), which entered into effect on 1 January 2023. This law introduces the most extensive overhaul of legal capacity rights and guardianship in Germany since 1992. Notably, it amended several related statutes, particularly the substantive provisions of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), especially Volume IV (Family Law), with a significant revision of the chapter on adult guardianship (paragraphs 1896–1908 BGB).

Furthermore, a new Care Organization Act was also adopted in 2021 (*Betreuungsorganisationsgesetz* – BtOG, (BGBl. I S. 882, 917), das zuletzt durch Artikel 2 des Gesetzes vom 20. Dezember 2023 (BGBl. 2023 I Nr. 391) geändert worden is).

It may be argued that the 2021 reform constitutes a “second wave” in the evolution of legal capacity rights for persons requiring assistance when making decisions in their every-day life. Namely, in 1992, Germany replaced the outdated adult guardianship model (*Vormundschaft für Volljährige*), which stripped persons with disabilities from legal capacity, with a more progressive *Betreuung* model (translated as “legal caretaking”). This new framework was grounded in the principles of self-determination and safeguarding of individual legal capacity rights (Brosey, 2020, p. 200). Under this model, persons in need of support are not deprived of legal capacity, which is a typical characteristic of the guardianship model. Instead, they keep their legal capacity rights, which they acquire at the age of 18, and are able to make decisions independently. Nevertheless, a court would appoint them a guardian, who would be their legal representative and would help them in decision-making, but they would also be able to make decisions autonomously.

Since 1992, the legal framework for guardianship has been based on the necessity principle (*Erforderlichkeitsgrundsatz*), which assumes that every person should be able to make his/her own decisions in all matters independently or with the support of family and friends, except in those circumstances when this is not possible, and hence it is necessary to appoint a formal guardian.⁴ The necessity principle has also been entrenched by the social care legislation, which requires local authorities to inform adults about available community-based social services, such as community psychiatric centres, assisted living facilities, youth welfare services, etc., that could then assist with managing their affairs, in order to avoid the appointment of a guardian (Brosey, 2016, p. 130).

As the 1992 model of guardianship in the BGB did not entail deprivation of legal capacity, there was academic and policy debate as to whether this model should be classified as a substituted or a supported decision-making, and whether it was aligned with Article 12 CRPD (Welti, 2021, p. 34). The debate also addressed how to strike an appropriate balance between the principle of self-determination and the State’s duty to protect its citizens (Welti, 2021, p. 34). The prevailing interpretation was that guardianship law did comply with the CRPD, as it did not assume deprivation of legal

⁴ The necessity principle in the context of German guardianship law can be interpreted as an expression of the broader principle of proportionality (Lurie, 2020, p. 175), but with a specific focus. It is not identical to proportionality in the constitutional sense, but it serves a similar function within the framework of personal autonomy and state intervention. This principle is used by the German courts, especially the Federal Constitutional Court (*Bundesverfassungsgericht*), as a basis to assess whether state interventions, including court-ordered custodianship, meet the requirements of subsidiarity and proportionality.

capacity and since it enabled individuals to make their own decisions with a support of their family and friends (Henking, 2022, p. 2). The opposing view, however, was put forward by the CRPD Committee in its *Concluding Observations on the Initial Report of Germany* (2015), which claimed that the existing German legislation on guardianship was incompatible with the Article 12 (CRPD, 2015, p. 5).

In order to comprehend the fundamental challenges associated with implementation of the guardianship system, the German Federal Ministry of Justice commissioned a study on the practical application of the principle of necessity (*Erforderlichkeitsgrundsatz*), which was conducted by the IGES Institute during the period 2016-2018 (IGES, 2018).⁵ The study found that, although the legal framework clearly supported the implementation of the necessity principle, the system of appointing a formal guardian still prevailed, with alternative forms of decision-making playing only a minor role in care law practice or not fully realizing their potential (IGES, 2018, p. 64). Guardianships were often established because those affected did not receive the level of support they individually required from the responsible social care authorities, compounded by the lack of social and psychosocial services that could act as alternatives to guardianship (IGES, 2018, p. 148). The establishment of guardianship enabled the initiating authorities, who were often themselves providers of social assistance, to relieve themselves of the burdensome tasks of providing assistance in decision-making by transferring this responsibility to a legal guardian, thereby shifting the associated costs from social services to the judicial budget (IGES, 2018, p. 148). The report further concluded that many citizens, not only people with disabilities, were increasingly overwhelmed by the complexity of social security systems, application procedures, appeal processes, and consequently called for the expansion of suitable support services to assist individuals in navigating these processes (IGES, 2018, p. 154).

The Ministry of Justice commissioned an additional report on the quality of guardianship, conducted in 2016, which indicated that, although the role of the guardian was generally assessed positively, there were important concerns regarding its implementation in practice (Brosey *et al*, 2016). It emerged that, in some cases, guardians failed to prioritize the individual's own will and choices, instead relying heavily on substituted decision-making justified by the individual's "best

⁵ The study included survey of guardianship courts and notaries (completed by 181 local courts and notaries), legal guardians (completed by 247 guardians), and qualitative interviews with persons under legal guardianship and representatives of guardianship authorities. Questionnaires were distributed to a total of 833 local courts and notaries for participation in the online survey. Under the survey, only 4.2% of all guardianship authorities described themselves as independent offices within their municipal organizational structure, 56.1% were affiliated with the Social Welfare Office, 12.1% with the Youth Welfare Office, 17.8% with the Public Health Office, and 9.8% reported another structure. Cf. IGES, 2018, p. 158.

interests.” Consequently, the system often continued to operate, in many instances, on the basis of a substituted decision-making model (Brosey, 2020, p. 209). The findings from both aforementioned studies had a significant influence on the legislative design of the 2021 guardianship reform.

3.2. New Legal Framework Key Characteristics

A central development in the reformed legal framework is the reinforcement of the principle of necessity (*Erforderlichkeitsgrundsatz*) within the German Civil Code (BGB). The revised paragraph 3 of Section 1814 BGB now mandates that guardianship should be considered only as a measure of last resort, requiring courts to assess and formally document the absence of suitable alternatives, such as an “authorized representative” under the instrument of Lasting Power of Attorney, or other forms of assistance where no legal representative has been appointed, particularly support based on social rights or other regulations. It is further emphasized that a guardian may not be appointed against the free will of the adult concerned (Section 1814, para. 2 BGB). Appointing a guardian for “all areas of responsibility” is also not possible; instead, each individual area of responsibility must be separately assigned and assessed in advance with regard to its necessity (Section 1815, para. 1 BGB). The new legislation also explicitly stipulates that the primary purpose of a guardian is to *assist* the individual under guardianship in managing his/her own affairs, and that legal representational powers may only be exercised to the extent strictly necessary (Section 1821, para. 1 BGB). These provisions reflect both the principle of necessity and the principle of proportionality, as guardianship should be established only when necessary (*erforderlich*) and restricted to the minimal scope required, i.e., proportionate to the individual’s specific needs. This position is also supported by the German Federal Constitutional Court, which, in its judgment of 2014 (Federal Constitutional Court – *BVerfG*, Decision of 20 January 2015 – 1 BvR 1065/13) emphasized that guardianship must be strictly limited to the areas where it is genuinely necessary and proportionate. Otherwise, it constitutes a violation of Article 2 of the German Basic Law, as personal autonomy constitutes a core constitutional value.

Another significant improvement in the new legal framework is the requirement that the wishes of the person under guardianship, or his/her presumed will, must guide the actions of the guardian (Section 1821 BGB). The guardian is obliged to respect and follow the individual’s expressed wishes to the greatest extent possible, rather than independently determining what would constitute the person’s “best interests,” as was previously the case. This shift is fully aligned with Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). Furthermore, the guardian is also required to consider the wishes previously expressed by

the ward, unless it is clearly evident that the ward no longer wishes those earlier preferences to be followed (Section 1821, para 2. BGB).

When the wishes of a ward are not clearly articulated, the guardian is required to determine the presumed will of the person under guardianship based on concrete evidence and to act accordingly. Special attention should be paid to prior statements, ethical or religious beliefs, and other personal values of the individual (Section 1821, para. 4 BGB). When determining the presumed will, close relatives and other trusted persons of the person under guardianship should be given the opportunity to express their views (Section 1821, para. 4 BGB). These new provisions reflect the wording of the CRPD General Comment No. 1 on Equal Recognition before the Law, and are fully consistent with Article 12.

There is, however, still a limitation to the obligation to comply with the wishes of a person under guardianship. According to Section 1821, para. 3 BGB, a guardian must not comply with a wish if doing so would pose a substantive risk to the person under guardianship or their assets, and if the person under guardianship is unable to recognize this danger. For the guardian, this means examining whether a decision or its consequences would result in a significant risk to the person under guardianship or their assets, and whether the person under guardianship is acting independently at the time (Henking, 2022, p. 3). This inherent tension between the right to autonomy and legal capacity, on the one hand, and the protection of life, on the other, is also reflected in Article 12 CRPD (the right to legal capacity) and Article 10 CRPD (the right to life), and requires a careful balancing of protection and autonomy.

Another exception to the obligation to comply with a ward's wishes is a situation where such compliance cannot reasonably be expected of the guardian (Section 1821, para. 3 BGB). These provisions are clearly not in compliance with Article 12 CRPD, which insists on the best interpretation of the self-determined choices and preferences of persons with disabilities in all circumstances. The Government of Germany, however, contends that these provisions are consistent with the CRPD, invoking the position of the Federal Constitutional Court, which has held that the German State bears an obligation to provide protection to persons who require support (Decision of the Federal Constitutional Court of 26 July 2016, 1 BvL 8/15, point 88).

Furthermore, the reformed version of the German Civil Code (BGB) has retained important exceptions to the legal capacity rules. First, an exception is set out in Section 104 BGB, which provides that if, due to a mental condition, an adult is not able to understand or make decisions, their actions are deemed legally invalid, and they cannot be held legally accountable for them. Second, Section 1825 BGB introduces a specific mechanism that restricts the legal capacity of an adult under guardianship to act, known as "reservation of consent" (*Einwilligungsvorbehalt*). Namely, in cases where there is a substantive risk to his/her life or property,

a person under guardianship requires the guardian's consent for any declaration of intent concerning an area falling within the guardian's scope of responsibility. However, such a reservation of consent may not be imposed against free will of the individual concerned (Article 1825, para 1. BGB). Furthermore, a reservation of consent cannot apply to the following areas of personal affairs: declaration of intent related to entering into marriage; dispositions *mortis causa*; the contestation of an inheritance contract; and the cancellation of an inheritance contract (Article 1825, para 2. BGB). These provisions are not fully aligned with Article 12 CRPD, as they are based on the competence-based model, which requires mental capacity as a precondition for participation in decision-making processes.

The second strand of the reform focuses on strengthening the Lasting Power of Attorney as a support decision-making instrument. A Lasting Power of Attorney (*Vorsorgevollmacht*) is a legal instrument that allows an individual to authorize another person – usually a trusted relative or friend, referred to as the “authorized representative” – to act on their behalf should they become incapacitated and unable to make decisions independently, due to illness, accident, or disability. The provisions regarding the Lasting Power of Attorney, which were previously scattered throughout the German Civil Code (BGB) – for example, consent to medical procedures in Section 1904 (5) BGB; measures depriving a person of their freedom in Section 1906 (5) BGB; and coercive medical interventions in Section 1906a (5) BGB) – are now consolidated in Section 1820 BGB. Unlike in the case of guardianship, when the Lasting Power of Attorney is used, there are no exceptions to a requirement to comply with the principal's wishes. On the contrary, the obligation to follow the principal's wishes is further strengthened. Thus, according to Section 1820 (4) of the revised BGB, a court may order that the authorized representative be prohibited from exercising the power of attorney and return his/her powers to a guardian if there is an urgent risk that he/she will act contrary to with the principal's wishes thereby posing a significant threat to the principal or his/her assets. Furthermore, there is a possibility of appointing a supervisory guardian to the authorized representative in case of non-compliance with the principal's wishes, in cases when there is no immediate urgency but there is an assumption of jeopardy to the principal's assets (Section 1820 (3) BGB).

Lastly, it is important to note that the reform process extended beyond the substantive requirements of the German Civil Code (BGB) to include procedural aspects of the appointment and operation of guardians and the role of local government social care authorities, which advise citizens on various forms of decision-making support. Thus, the new Care Organization Act (BtOG), in Article 5, defines the responsibilities of the guardianship authority, including the provision of information and advice on available support options and other forms of assistance,

particularly in relation to social rights. Furthermore, according to Section 8 BtOG, the authority is required to offer the person concerned advice and support aimed at avoiding the appointment of a guardian. The BtOG further regulates the procedure for the appointment and registration of professional guardians with the relevant care authority, and sets out minimum personal and professional appointment requirements and disciplinary measures to ensure compliance with the law (Schnellenbach *et al.*, 2023).

In spite of a comprehensive set of legislative changes introduced by the Act on the Reform of Child and Adult Guardianship Law, the Committee did not issue a positive assessment of the reforms relating to guardianship. In its 2023 Report, the Committee welcomed the enactment of the Act on the Reform of Child and Adult Guardianship Law, but was of the view that the new legislation fails to abolish all forms of substituted decision-making and, as such, is not aligned with Article 12 CRPD. The Committee further noted that, at the national level, there is a lack of a coherent and comprehensive strategy for the implementation of supported decision-making mechanisms (CRPD, 2023, p. 6). Accordingly, the Committee recommended that Germany should abolish all forms of substituted decision-making and adopt a national strategy for the implementation of supported-decision making (CRPD, 2023, p. 7).

4. Conclusion

The German guardianship and care system reform of 2021, which has been implemented from 2023, is an example of a serious attempt to align the guardianship system with international human rights standards, particularly Article 12 CRPD. Although the Committee has found that the revised legislation has not been fully aligned with the CRPD, given the exceptions to the supported decision-making “standard” that still remain, there is nonetheless a clear legislative intent to strengthen individual rights, enhance procedural safeguards, place greater emphasis on promoting support structures outside the formal guardianship framework, and affirm that both guardianship and support measures must be guided by the individual’s self-determined choices and preferences. This development undoubtedly constitutes a step in the right direction. It may also be argued that the current German guardianship system satisfies all three criteria outlined in the General Comment No. 1 to Article 12 CRPD: 1) individuals are not deprived of their legal capacity rights; 2) a guardian cannot be imposed against a person’s will; 3) decisions made by a guardian have to be aligned with the preferences and choices of the person under guardianship.

There remain, however, slight deviations from the wording of Article 12 CRPD, related to the situation when the actions of a person under guardianship pose a substantive risk to himself/herself or his/her assets, and when a person under guardianship is unable to recognize this danger. In such cases, the guardian is obliged to intervene and act contrary to the person's wishes. In accordance with the regulatory approach to legal capacity reform (Carney, 2017; Szmukler, 2019), we are of the view that, although these exceptions carry a potential risk of abuse, they are nonetheless reasonable and may be necessary in any legal system to safeguard persons with cognitive impairments, particularly in situations where they are unable to understand the nuances, complexities, and potential dangers arising from their actions.

Key features of the German guardianship system, established as early as 1992, show that the appointment of a guardian does not necessarily entail the abolishment of the legal capacity rights of the individual under guardianship.⁶ This characteristic of the German guardianship model represents a notable difference in comparison with guardianship systems in other European countries, and may serve as a valuable model for nations seeking to reform their own guardianship frameworks, including Serbia and other countries in South-East Europe.

Furthermore, the German case shows that instruments of supported decision-making, such as a Lasting Power of Attorney, should be available to all individuals requiring support in decision-making and, we would argue, ought to be a part of any legal system without exception. Where national policymakers remain inclined to retain certain elements of the guardianship model, such arrangements could be preserved "on a parallel track," albeit in a revised form – without depriving individuals of their legal capacity – and ensuring that guardianship is established only when genuinely necessary, limited to the minimum scope required, proportionate to the person's needs, and subject to regular review to assess its continued appropriateness.

The German experience with both the 1992 and 2021 reforms illustrates that creating an effective system for supported decision-making for persons with disabilities entails far more than a mere legislative amendment. The comprehensive background analyses, as presented in the analytical reports preceding the reform process, have shown that the success of such reforms depends equally on the development of appropriate conditions for their implementation. This includes strengthening the capacity of social services, ensuring that guardians and support personnel are properly trained, integrating civil society and informal networks, and fostering a cultural shift towards respecting the autonomy, will, and preferences of persons with disabilities. Additionally, effective implementation requires ongoing

⁶ For this reason, some authors contend that the term "guardianship" may not be the most appropriate in this context; nevertheless, we have retained its use to facilitate understanding among international academic audience (Brosey, 2015, p. 126).

monitoring, evaluation, and continuous adjustments based on empirical evidence to ensure that legal rights are translated into meaningful everyday practices.

The German reform process itself may also serve as a good example for other countries, as the reform was carefully planned and grounded in extensive empirical and doctrinal research addressing existing shortcomings both within the legal system and in practice. This provides an important lesson for other countries considering reforms of legal capacity rights for persons with disabilities: commence with thorough research; study comparative models, and carefully evaluate their suitability within the national context prior to amending domestic legislation. Equally crucial – if not more so – is a need to develop strong support structures by enhancing the capacity of existing social protection institutions and civil society organizations of persons with disabilities, while also establishing new supported decision-making mechanisms accompanied by clear accountability safeguards to prevent misuse. Finally, significant efforts must be directed toward fostering a societal culture that recognizes and safeguards the autonomy of persons with disabilities, challenges entrenched stereotypes, and enables individuals to lead meaningful and dignified lives.

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