To Support and to Represent / Support and Representation

Position Paper (short version)

BGT – Betreuungsgerichtstag e. V. (German Adult Guardianship Law Association)

In Article 12 the UN Convention on the Rights of Persons with Disabilities obliges State parties to support disabled persons in exercising their legal capacity if they so require. This obligation has lead to a variety of conclusions. The recently published General Comment of the UN Committee on Article 12 CRPD provides a detailed outline of the paradigm shift. It requires that “substitute decision-making regimes”, i.e. interdiction, guardianship and curatorship are replaced by “supported decision-making regimes”. The “substitute decision-making regimes” which the CRPD opposes are characterized by constitutively removing legal capacity from persons with disabilities, ignoring their will or wishes and basing criteria for action on their objective best interest or even a third party’s interests or those of society. On the other hand, the “supported decision-making regime” called for by the CRPD allows the disabled person universal legal capacity and, if necessary, supports him/her in exercising it while complying with his/her will and preferences.

Many regard “Betreuung” and the statutory representation associated with it as a “substitute decision-making regime”, believing it is incompatible with the CRPD. However, this is incorrect. In effect, “Betreuung” and the (legal) representative’s power of representation are primarily a means of support for the person in care. What is crucial is the purpose “Betreuung” or legal representation is used for. The German Law of “Betreuung” ties the (legal) representative’s action to the identifiable or ascertainable self-determination of the person concerned and the principle of necessity (§§ 1901, 1901a BGB). Therefore the (legal) representative must primarily support the person in care in his/her own actions and may only represent him/her as far as this is necessary. Consequently, the representative’s function is to communicate and implement the will of the person in care and his/her wishes for an individual way of life. Hence the German Law of “Betreuung” is in compliance with the principles of the CRPD. It constitutes a “supported decision-making regime” which assists the person in care in exercising his/her legal capacity.

The precedence of support over representation (“principle of assistance”) is an integral part of the Law of “Betreuung”. However, the practice of “Betreuung” presents considerable deficits in its application. Therefore the German Adult Guardianship Law Association (Betreuungsgerichtstag e. V.) has compiled suggestions for an improvement. Much-needed among other things are structural reforms and legislative action.

Bochum, September 15, 2014

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