

## 1.1 INTRODUCTION

Across Europe, some adults cannot make important legal decisions about their own lives because authorities or others consider them unable to do so.<sup>1</sup> In Bulgaria, an older person was placed in a care facility against his wishes.<sup>2</sup> In Russia, a person was no longer able to make decisions about his money, home, work, or personal relationships after a court order, without having had the chance to defend himself.<sup>3</sup> In Finland, a person with intellectual disabilities was not allowed to move to a small town to live with his former foster parents, even though that was what he wanted.<sup>4</sup>

All of these cases came before the European Court of Human Rights in the past decade, and each involved an adult placed under guardianship. Behind these cases lies a wider challenge for legal systems: when should courts and authorities step in to protect individuals, and when should they step back to respect their choices?

Many adults in Europe live with conditions that can affect their ability to make decisions. For some, this is a lifelong reality, as with intellectual disabilities. For others, it develops gradually, as in the case of dementia, or suddenly, following an accident or stroke. More than nine million people in Europe live with dementia, and many more are affected by intellectual disabilities, mental health conditions, and acquired brain injuries.<sup>5</sup> As populations age and life expectancy rises, questions

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1 This research was funded by the Netherlands Organisation for Scientific Research (NWO). The empirical fieldwork in Germany and Ireland was made possible through a grant from Alzheimer Nederland.

2 ECHR 17 January 2012, no. 36760/06, ECLI:CE:ECHR:2012:0117JUD003676006 (*Stanev v. Bulgaria*).

3 ECHR 27 March 2008, no. 44009/05, ECLI:CE:ECHR:2008:0327JUD004400905 (*Shtukaturov v. Russia*).

4 ECHR 23 March 2017, no. 53251/13, ECLI:CE:ECHR:2017:0323JUD005325113 (*A.-M.V. v. Finland*).

5 Alzheimer Europe, *Dementia in Europe Yearbook 2019. Estimating the prevalence of dementia in Europe*, Luxembourg: Alzheimer Europe 2019.

about how adults can be supported in making decisions are becoming increasingly urgent.<sup>6</sup>

In everyday life, many people rely on informal support from family or others in their social network to help them make decisions. But choices with legal consequences – such as managing finances, signing a contract, or consenting to medical treatment – can require more formal arrangements. Some people prepare for these situations by setting up legal arrangements, such as a continuing power of attorney or an advance directive. These arrangements allow them to appoint someone to make decisions on their behalf or to record their wishes for future situations, for example regarding medical treatment.

Yet not everyone has informal support or legal arrangements in place, and in some cases, authorities may determine that the support available is insufficient. This is where adult guardianship can come into the picture. Adult guardianship may be applied by a court or a competent authority, allowing another person to make decisions with, or on behalf of, an adult who is considered incapable of making those decisions alone. Guardianship can provide support or protection, for instance, if someone is at risk of financial exploitation or needs medical care they cannot arrange themselves. At the same time, as the cases from Bulgaria, Russia, and Finland show, it can also limit a person's ability to make their own legal choices – their *legal capacity*.

## 1.2 THE HISTORICAL SHIFT

For centuries, European jurisdictions approached adult guardianship mainly as a way to protect people. Individuals were rendered either fully capable or incapable of making legal decisions.<sup>7</sup> Those under guardianship were often completely restricted in their legal capacity. Scholars described this as 'civil death', because these individuals could no longer vote, marry, enter into contracts, or decide where to live.<sup>8</sup>

6 See generally B. Rechel et al., *How Can Health Systems Respond to Population Ageing?*, World Health Organization Regional Office for Europe, *Health Systems and Policy Analysis Policy Brief* No. 10 (28 April 2009), and Y. Sakurai, 'The Ageing and Adult Protection Legislative System: A Comparative Law Study', *J. Aging & Soc. Change* 9(1) (2019), pp. 53–69.

7 E. Wood, 'History of Guardianship', in: M.J. Quinn (ed.), *Guardianship of Adults: Achieving Justice, Autonomy, and Safety*, New York: Springer Publishing Company 2005, pp. 17–47.

8 M. L. Perlin, 'Striking for the guardians and protectors of the mind: the convention on the rights of persons with mental disabilities and the future of guardianship law', *Penn St. L. Rev.* 117 (2012), p. 1159, A. Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?', *Syracuse J. Int'l L. & Com.* 34 (2007), pp. 563–569, A. Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?', *Syracuse J. Int'l L. & Com.* 34 (2007), pp. 429–445.

Over recent decades, this approach has been increasingly challenged by the disability rights movement and international human rights law. A milestone was the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which calls for a paradigm shift in how people with disabilities are viewed and treated.<sup>9</sup> Rather than seeing them as objects of protection who need others to decide for them, the CRPD recognises that people with disabilities have legal capacity on an equal basis with others.<sup>10</sup> States are called upon to provide support that enables individuals to exercise their legal capacity and make decisions in line with their *will and preferences*.<sup>11</sup> The European Court of Human Rights (ECtHR, hereafter also the Court) has reinforced this shift, stating that limitations of individuals' legal capacity can interfere with their right to private life under the European Convention on Human Rights (ECHR).<sup>12</sup> The Court has emphasised that guardianship systems should include *procedural safeguards*, such as the right to be heard in court and challenge decisions made about them.<sup>13</sup>

Nearly all European jurisdictions have ratified both the CRPD and the ECHR, creating obligations to align their guardianship systems with these human rights standards.<sup>14</sup> In response, many European jurisdictions have recently reformed their

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- 9 See, e.g., P. Harpur, 'Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities', *Disability & Society* 27(1) (2011), pp. 1–14 and K. Booth-Glen, 'Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond', *Columbia Human Rights Law Review* 44 (2012), pp. 93–169.
- 10 *Convention on the Rights of Persons with Disabilities (CRPD)*, UN General Assembly Resolution A/RES/61/106, adopted 13 December 2006, entered into force 3 May 2008, art. 12(2).
- 11 CRPD, art. 12(3).
- 12 Council of Europe, *European Convention on Human Rights (ECHR), as amended by Protocols Nos. 11, 14 and 15*, ETS No. 005, Rome, 4 November 1950, entered into force 3 September 1953.
- 13 On the right to a personal hearing, see ECHR 3 November 2011, *X and Y v. Croatia*, no. 5193/09, paras 81–84, ECLI:CE:ECHR:2011:1103JUD000519309 and ECHR 13 October 2009, *Salontaji-Drobnjak v. Serbia*, no. 36500/05, paras 127–128, 144, ECLI:CE:ECHR:2009:1013JUD003650005. On the right of individuals to challenge guardianship decisions and request a review, see ECHR 17 January 2012, *Stanev v. Bulgaria*, no. 36760/06, para 245, ECLI:CE:ECHR:2012:0117JUD003676006, ECHR 16 October 2012, *Kędzior v. Poland*, no. 45026/07, para 85, ECLI:CE:ECHR:2012:1016JUD004502607, and ECHR 3 October 2019, *Nikolyan v. Armenia*, no. 74438/14, paras 98–103, ECLI:CE:ECHR:2019:1003JUD007443814.
- 14 See the list of signatories and States Parties to CRPD, available at: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD) (accessed 7 November 2025), and to the ECHR, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures> (accessed 7 November 2025). At the time of writing, all of the 28 jurisdictions included in this research are States Parties to the ECHR and CRPD, apart from Russia, which ceased to be a party to the ECHR in September 2022.

guardianship systems to make them less restrictive and to strengthen individuals' autonomy.<sup>15</sup>

### 1.3 ACADEMIC DEBATE AND RESEARCH GAPS

The CRPD, and in particular the interpretations of the Committee on the Rights of Persons with Disabilities (hereafter CRPD Committee), has given rise to substantial academic debate. Some authors have welcomed the CRPD's standards on legal capacity and will & preferences as a step towards recognising the rights of adults with disabilities.<sup>16</sup> Others have questioned whether these standards can be fully implemented in practice, particularly for individuals with severe cognitive impairments.<sup>17</sup> How can a legal system respect a person's choices when they have severe dementia or cannot clearly communicate their views? What if someone wants to make a decision that others consider risky?<sup>18</sup>

These issues are becoming more pressing as Europe's population ages. The number of adults living with conditions such as dementia is expected to double by 2050.<sup>19</sup> This creates a tension. Human rights law requires that each person receives support for making legal decisions, tailored to their needs and preferences.<sup>20</sup> At the same time,

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15 Recent reforms include Austria (2018), Germany (2023), Ireland (2023), Norway (2013), and Spain (2021). For details on CRPD and ECHR influence on these reforms, see the FL-EUR reports prepared by expert from these jurisdictions, available at: Country reports | Family Law in Europe: Academic Community (fl-eur.eu). All subsequent references to FL-EUR reports in this dissertation refer to this source.

16 L. Series, 'Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms', *International Journal of Law and Psychiatry*, vol. 40, 2015, pp. 80–91, J. Stavert, 'The Exercise of Legal Capacity, Supported Decision-Making and Scotland's Mental Health and Incapacity Legislation: Working with CRPD Challenges', *Laws*, vol. 4, no. 2, 2015, pp. 296–313, and P. Harpur & P. Gooding, *A New Era for Mental Health Law and Policy: Supported Decision-Making and the UN Convention on the Rights of Persons with Disabilities*, Cambridge: Cambridge University Press, 2017.

17 M. Browning, C. Bigby & J. Douglas, 'Supported Decision Making: Understanding How Its Conceptual Link to Legal Capacity Is Influencing the Development of Practice', *Research and Practice in Intellectual and Developmental Disabilities*, vol. 1, no. 1, 2014, pp. 34–45, A.D. Ward, 'Abolition of All Guardianship and Mental Health Laws', *Elder Law Journal*, 2014, p. 71, M. Scholten & J. Gather, 'Adverse Consequences of Article 12 of the UN Convention on the Rights of Persons with Disabilities for Persons with Mental Disabilities and an Alternative Way Forward', *Journal of Medical Ethics*, vol. 44, no. 4, 2018, pp. 226–233.

18 See generally J. Dawson, 'A Realistic Approach to Assessing Mental Health Laws' Compliance with the UNCRPD', *International Journal of Law and Psychiatry*, vol. 40, 2015, pp. 70–79, and M.C. Freeman, et al., 'Reversing Hard Won Victories in the Name of Human Rights: A Critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities', *The Lancet Psychiatry*, vol. 2, no. 9, 2015, pp. 844–850.

19 Alzheimer Europe, *Dementia in Europe Yearbook 2019. Estimating the prevalence of dementia in Europe*, Luxembourg: Alzheimer Europe 2019.

20 CRPD, Art. 12(4), ECHR 18 May 2021, no. 51746/18, paras 61–62 (*M.K. v. Luxembourg*), ECHR 6 July 2023, no. 46412/21, paras 97 & 108 (*Calvi and C.G. v. Italy*).

more adults will need support with legal decision-making in the future, placing pressure on courts and authorities that may lack adequate resources.<sup>21</sup> This raises questions about how these human rights standards can be applied in a realistic and feasible way.

These questions call for closer examination of how the CRPD and ECHR standards for adult guardianship are currently being applied in Europe. While many jurisdictions have introduced reforms inspired by these human rights standards, there is limited research on how they are implemented in practice.<sup>22</sup> Some comparative studies have examined how European jurisdictions align with the CRPD standards for adult guardianship, but they are narrow in scope. The European Union Agency for Fundamental Rights (2013) provides a helpful overview of guardianship laws across European Union member states, yet it predates many recent reforms.<sup>23</sup> More recent work by Domański and Lackoroński (2024) examines national legal systems in detail, but offers little cross-country comparison.<sup>24</sup> Other studies, including Nachtschatt (2018) and Fallon-Kund and Bickenbach (2017) cover only a few European countries.<sup>25</sup> Notably, these studies focus on CRPD-related standards. There is little comparative

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- 21 See generally B. Rechel, Y. Doyle, E. Grundy & M. McKee, *How Can Health Systems Respond to Population Ageing?* (Policy Brief No. 10, Health Systems and Policy Analysis, World Health Organization 2009), and European Commission, *European Economy. Long-Term Care: Need, Use and Expenditure in the EU-27* (Publications Office of the European Union 2012).
  - 22 C. Bigby, M. Whiteside & J. Douglas, *Supporting People with Cognitive Disabilities in Decision Making – Processes and Dilemmas*, Melbourne: Living with Disability Research Centre, La Trobe University, 2015, pp. 1-96, N.A. Kohn & J.A. Blumenthal, 'A Critical Assessment of Supported Decision-Making for Persons Aging with Intellectual Disabilities', *Disability and Health Journal*, vol. 7, no. 1, 2014, pp. 40–41, T. Carney, 'Clarifying, Operationalising, and Evaluating Supported Decision Making Models', *Research and Practice in Intellectual and Developmental Disabilities*, vol. 1, no. 1, 2014, pp. 46–50.
  - 23 European Union Agency for Fundamental Rights, *Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems*, Publications Office of the European Union, 2013. Recent reforms include Austria (2018), Germany (2023), Ireland (2023), Norway (2013), and Spain (2021).
  - 24 M. Domański & B. Lackoroński (red.), *Models of Implementation of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD): Private and Criminal Law Aspects*, London: Routledge 2023. The same is true for A.K. Dayton (red.), *Comparative Perspectives on Adult Guardianship*, Durham: Carolina Academic Press 2014.
  - 25 E. Nachtschatt, *Die rechtliche Handlungsfähigkeit im Erwachsenenschutz. Ein Rechtsvergleich zwischen Österreich, Deutschland und Australien (New South Wales)*, Dissertation, Rechtswissenschaftliche Fakultät, Universität Innsbruck 2018, M. Fallon-Kund & J.E. Bickenbach, 'New Legal Capacity Laws and the United Nations Convention on the Rights of Persons with Disabilities: An Overview of Five Countries in Europe', *Eur. J. Health Law* 2017, 24(3), pp. 285–310.