Law Reform on Legal Capacity & Supported Decision-Making: Initiatives

from Around the World

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# Introduction

The adoption of the Convention on the Rights of Persons with Disabilities (CRPD) in 2006 marked a momentous milestone for the disability rights movement.[[1]](#footnote-1) The United Nations Convention aims to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”[[2]](#footnote-2) The Convention breaks from historical conceptions of persons with disabilities as objects of charity, medical treatment, and social protection, and promulgates a vision of persons with disabilities as subjects of rights and involved members of society.[[3]](#footnote-3) The Convention has thus been said to have catalyzed a veritable “paradigm shift.”[[4]](#footnote-4)

Article 12 of the CRPD pertains to equal recognition before the law and has been described as the “core” of the Convention.[[5]](#footnote-5) It has also been maintained that this provision presents the most challenges for states during their internal ratification processes.[[6]](#footnote-6) Article 12(1) asserts the right of persons with disabilities to be recognized as persons before the law. Article 12(2) affirms the right of persons with disabilities to enjoy legal capacity on an equal basis with others in all areas of life, with the concept of legal capacity encompassing both the ability to hold rights and duties (legal standing) and the ability to exercise those rights and duties (legal agency).[[7]](#footnote-7) Article 12(3) asks states to provide persons with disabilities with access to support in the exercise of their legal capacity. Article 12(4) delineates the safeguards that must be in place in support systems, while Article 12(5) calls upon states to ensure the equal rights of persons with disabilities in relation to financial and economic matters.

Article 12 places four main obligations on states parties. Firstly, states must recognise legal capacity for all persons with disabilities in all aspects of life.[[8]](#footnote-8) Second, states must eliminate all systems of substituted decision-making.[[9]](#footnote-9) The Committee on the Rights of Persons with Disabilities describes substituted decision-making regimes as frameworks through which: (i) a person’s legal capacity is removed (even if only for one decision); (ii) a substitute decision-maker is designated by a third party; and (iii) a substitute decision-maker acts on the basis of what they deem to be in the given person’s “best interests,” even if that contradicts the person’s will and preferences.[[10]](#footnote-10) The third principal obligation incumbent upon states under the Convention is to establish supported decision-making mechanisms of differing kinds and intensities.[[11]](#footnote-11) The UN Special Rapporteur on the Rights of Persons with Disabilities has described the central characteristics of supported decision-making regimes as follows: “Contrary to substitute decision-making regimes, under a supported decision-making arrangement, legal capacity is never removed or restricted; a supporter cannot be appointed by a third party against the will of the person concerned; and support must be provided based on the will and preferences of the individual.”[[12]](#footnote-12) Finally, the Convention requires states to put in place safeguards to secure the respect for the rights, will, and preferences of individuals who receive support.[[13]](#footnote-13)

This report will discuss legal reforms undertaken by states from around the world in the area of legal capacity and supported decision-making. Many of these states were ostensibly inspired by the CRPD in the drafting of their legislation, although this report will cover a reform adopted in Canada prior to the adoption of the CRPD as well as a reform passed in the United States, where the CRPD is of questionable relevance due to the fact that this country has not ratified this Convention.

It should also be clarified that while some forms of supported decision-making may function on an informal basis without any particular legal regulation, this paper will focus on formal regimes of supported decision-making that are provided for by legislation.[[14]](#footnote-14) The UN Committee on the Rights of Persons with Disabilities has declared that “legal recognition of the support person(s) formally chosen by a person must be made available and accessible.”[[15]](#footnote-15) Then et al. affirm that although there is a “growing body of academic literature devoted to [supported decision-making] and the desirability of the practical process is recognised in many policies of government and non-government bodies,” […] *legal* recognition of supported decision-making is less prevalent, although is steadily increasing.”[[16]](#footnote-16) Many of the reforms outlined in this report have indeed been enacted very recently. This is a legislative area that has undergone great transformation worldwide of late. Moreover, some legislative reforms in this field are still underway, having yet to be successfully passed into law. This is the case in Colombia, where a bill that would recognize universal legal capacity for all persons with disabilities, abolish guardianship, and introduce supported decision-making awaits sanction by the President.[[17]](#footnote-17)

This report attempts to provide an overview of the substantive content of several recent legislative reforms in this field. For each jurisdiction discussed, the report will provide a description of the legislative history, with a special emphasis on the relevant local changemakers that played an active role in the reform process. The substance of each legislative reform will also be presented, with a focus on the details of the particular supported decision-making schemes contemplated. The report will also discuss the degree to which each law conforms to Article 12 of the CRPD. Finally, the discussion section reflects upon common themes discerned among the legislative schemes reviewed, while also highlighting some particularly innovative approaches. An analysis of different legislative initiatives in this field provides an opportunity for intra-jurisdictional comparison and has the potential to catalyze mutual learning and the sharing of best practices on the international stage.

# Overview

    

  

 



   

# Peru

In September 2018, the Peruvian Government issued a legislative decree recognizing and regulating the legal capacity of persons with disabilities.[[18]](#footnote-18) Legislative Decree No. 1384 institutes reforms to Peru’s Civil Code, Civil Procedural Code and Notary Act. It acknowledges full legal capacity for all persons with disabilities, eliminates the former guardianship regime for persons with disabilities, removes restrictions on legal capacity based on disability, and establishes measures for supported decision-making.[[19]](#footnote-19)

Peru ratified the CRPD in 2008.[[20]](#footnote-20) In 2008, Peruvian civil society organisations launched a citizen’s initiative for new legal capacity legislation pertaining to persons with disabilities.[[21]](#footnote-21) These efforts led to the enactment of the 2012 General Law on Persons with Disabilities (Law No. 29973), which guaranteed legal capacity for persons with disabilities on an equal basis with others.[[22]](#footnote-22) In order for this law to be fully implemented, however, amendments to the Peruvian Civil Code were needed. Law No. 29973 thus called for the establishment of a multi-stakeholder Special Committee in the Peruvian Congress to address Civil Code reform.[[23]](#footnote-23) The Special Committee prepared a draft bill which was ultimately not adopted, though it heavily inspired a 2016 multi-party bill drafted by civil society, which then served as the major input informing the government’s 2018 Legislative Decree.[[24]](#footnote-24)

Sodis-Sociedad y Discapacidad (Society and Disability) is the non-governmental organisation that is seen to have catalyzed Peru’s legal capacity reform. Sodis organized a coalition which assembled Peru’s central disability platform, academics, as well as smaller organizations such as Alamo (an organisation of mental health service users) and the Peruvian Down Syndrome Society.[[25]](#footnote-25) Sodis consistently advocated for legislative reform in line with the CRPD and supplied technical advice to achieve this end.[[26]](#footnote-26)

In terms of the substantive details of Peru’s reform, a new Civil Code provision recognizes that all individuals over the age of eighteen have full capacity to act, including “all persons with disabilities, on an equal basis with others and in all aspects of life, regardless of whether they use or require reasonable accommodation or support for the expression of their will.”[[27]](#footnote-27) The Code stipulates that support for the exercise of legal capacity can be designated by “any person of legal age.”[[28]](#footnote-28) According to the Code, support measures are “freely chosen” by those desiring assistance and may include “support in communication, in the understanding of legal acts and their consequences, and the expression and interpretation of the will of the one who requires the support.”[[29]](#footnote-29) Supports must not involve powers of representation, unless this has been explicitly requested by the person requiring support.[[30]](#footnote-30) When the will of the person being assisted necessitates interpretation, the principle of “best interpretation of the will” must be used.[[31]](#footnote-31)

The amended Peruvian Civil Code specifies that “the person requesting the supports determines their form, identity, scope, duration and number of supports.”[[32]](#footnote-32) Individuals requesting support are entitled designate natural persons, public institutions, or non-profit legal entities as their supporters.[[33]](#footnote-33) Supports are to be appointed before a notary or a judge.[[34]](#footnote-34) Additionally, under the new Peruvian legislative framework, persons are entitled to go before a notary to designate supports for the future, should they expect that they will need help in the exercise of their legal capacity at a later stage in their lives.[[35]](#footnote-35) The document must stipulate the point or circumstances upon which the support comes into force.[[36]](#footnote-36)

In exceptional cases where a person with a disability cannot express their will or when the person is in a coma, a judge can determine the support mechanisms needed.[[37]](#footnote-37) However, in so doing, the judge must make the “best possible interpretation of the will and preferences of the person.”[[38]](#footnote-38) In these exceptional situations, a judge is to appoint a support person, taking into consideration whether a relationship of “cohabitation, trust, friendship, care or kinship” exists.[[39]](#footnote-39) Individuals who have been convicted of family violence or sexual violence may not be appointed as support persons.[[40]](#footnote-40) In these “exceptional” cases, support may involve powers of representation.[[41]](#footnote-41)

Legislative Decree No. 1384 repealed former provisions of the Peruvian Civil Code which provided the designation of “absolute incapacity” for persons who “lack discernment” and the category of “relative incapacity” for “mentally retarded persons” and “those who suffer from mental deterioration that prevents them expressing their will.”[[42]](#footnote-42) The 2018 Legislative Decree also repealed a section of the Civil Code which stipulated the label of absolute incapacity for deaf, blind and deafblind persons who “could not express their will in an undoubtable manner.”[[43]](#footnote-43) Moreover, Legislative Decree No. 1384 repealed the codal provisions allowing for the appointment of guardians for persons with psychosocial and intellectual disabilities.[[44]](#footnote-44) Among other repealed provisions include those which restricted marriage for persons with psychosocial disabilities and those preventing people who “lack lucidity” from making a will.[[45]](#footnote-45)

American human rights lawyer Tina Minkowitz affirms that with this recent legislative reform, Peru has come closer to meeting the requirements of Article 12 of the CRPD than any other country.[[46]](#footnote-46) Spanish legal scholar Antonio Martinez-Pujalte shares this position, declaring Peru’s legal capacity regime to be “the first one in the world to comply substantially with the Convention.”[[47]](#footnote-47) Catalina Devandas Aguilar, the UN Special Rapporteur on the Rights of Persons with Disabilities, hailed the Peruvian legislative changes as a “milestone” and “an example for all states to follow.”[[48]](#footnote-48) Indeed, Peru’s current legislative scheme recognizes the capacity to act for all adults, with no possible restrictions on the basis of disability. Since the law guarantees persons with disabilities the capacity to act in “in all aspects of life,” it would seem to empower persons with disabilities with decision-making autonomy in marriage, parental relationships, voting, health, financial matters, and legal proceedings.

As called for by Article 12 of the CRPD, the law also provides for access to support for persons with disabilities in the exercise of their legal capacity. Given the flexibility of the language in the legislative provisions, persons are presumably able to request support measures with respect to decisions in all areas of life. One also may remark that Peru’s legislation allows for support in the form of advance planning mechanisms, whereby the person requesting support delineates the exact moment at which support arrangements should enter into effect.[[49]](#footnote-49) This advance planning framework which gives ample control the person with a disability would appear to be squarely in line with the vision of advance planning contemplated by Article 12.[[50]](#footnote-50)

The legislation notably empowers persons with disabilities to design their own supports for the exercise of their legal capacity. This feature would seem to be in keeping with Article 12, as it undoubtedly allows for supports of various types and intensities to be established, depending on a given person’s situation.[[51]](#footnote-51) Nonetheless, Martinez-Pujalte has in fact taken exception to this feature of the legislation, arguing that some people with disabilities might not be in a position to determine their own supports, if they lack a network of relatives or trusted individuals or because they merely are unsure of how to proceed. Thus, he suggests that the new legislative regime should have enabled the supported person or their relatives to request that the court arrange the support, with a guarantee that the person’s “will and preferences” would be respected.[[52]](#footnote-52) Peru’s legislation arguably fails to account for the fact that some persons might desire or need guidance in organising their supports.

Peruvian law also allows for support to entail representative functions in some cases.[[53]](#footnote-53) UN Special Rapporteur Devandas Aguilar has criticized legislative regimes in which “the role of supporters includes representation as a general rule,” as she contends that this “renders support as a de facto mechanism of substitute decision-making.”[[54]](#footnote-54) However, in Peru’s case representation is ostensibly not a “general rule” of support, as it is limited to circumstances in which it is requested by persons requiring support or in extremely difficult cases for those who cannot express their will or those who are in a coma.[[55]](#footnote-55) Therefore, the circumstances in which persons with disabilities will have a supporter with representative functions may be infrequent, but it is important to note that Peruvian law allows for this possibility for limiting the exercise of legal capacity through the appointment of a supporter with representative powers.

That said, the new Peruvian legislation continuously emphasizes respect for the “will and preferences” of the supported individual, in keeping with Article 12.[[56]](#footnote-56) It closely follows the dictates of Article 12 by providing that where it is difficult to ascertain a person’s will and preferences, the principle of “best interpretation of the will” must be resorted to.[[57]](#footnote-57) Also, in line with Article 12, Peru’s legislation provides for safeguards to prevent abuse of support measures. According to the reformed Peruvian Civil Code, the responsibility falls upon the person requesting the support (or on the judge in the “exceptional” cases under Article 659-E) to determine the safeguards that they consider to be appropriate in the given situation.[[58]](#footnote-58) All support arrangements must, however, include deadlines by which measures must be reviewed.[[59]](#footnote-59) The amended Code specifies that the judge is to carry out all necessary hearings and proceedings to assess whether the support person is acting in line with their mandate and the will and preferences of the person.[[60]](#footnote-60) Martinez-Pujalte contends that this framework for safeguards does not sufficiently address the risk that the supported person may be exposed to undue influence. According to this scholar, “it is not enough to allow the person receiving support to establish the safeguards he deems appropriate himself; the law must protect the weakest party in the relationship and has to provide these safeguards if the individual himself fails to do it.”[[61]](#footnote-61) He then proceeds to present additional safeguards that could have been included in Peru’s legislation, such as independent monitoring of the support relationship by a support supervisor.[[62]](#footnote-62) Indeed, Peruvian law seems to present safeguards as almost optional measures. The reformed Code of Civil Procedure reads that the final resolution outlining a person’s support measures should state “what are the safeguard measures, if necessary.”[[63]](#footnote-63) This language would seem to imply that it is possible for a judge or notary to accept a support plan with no safeguards at all (aside from an established deadline for review). One must ask whether allowing for the provision of support without substantial mandatory safeguards risks making some persons with disabilities susceptible to being taken advantage of by supporters.

In terms of other shortcomings to this reform, Minkowitz points to the need for further reforms to Peru’s Health Law, which still allows for forced medical interventions in the case of “emergencies” or where the person has addiction problems. She also notes the outstanding need for reforms to Peru’s criminal law, which allows for declarations of non-criminal responsibility based on disability and the imposition of psychiatric institutionalization as a “security measure.” The 2018 Legislative Decree did not call for changes to the country’s health or criminal law.[[64]](#footnote-64)

Finally, on the heels of Peru’s recent changes to its legal capacity regime, UN Special Rapporteur Devandas affirmed that “the justice system, notaries, public offices, universities and the private sector need to fully embrace this reform so that it becomes a reality.” In the opinion of the Special Rapporteur, “the paradigm shift should not be limited to the law but should be translated into a change in the attitudes and actions of all people concerned.”[[65]](#footnote-65) Despite this vital need to ensure adequate implementation of the reform, Peru’s legislative changes are undoubtedly the critical first step to ensuring that people with disabilities enjoy equality before the law in practice.

# Costa Rica

Costa Rica ratified the CRPD in 2008.[[66]](#footnote-66) With the entry into force of the CRPD-inspired Law for the Promotion of the Personal Autonomy of Persons with Disabilities (Law Number 9379),[[67]](#footnote-67) Costa Rica has wholly eliminated guardianship of all forms and introduced into law a system of supported decision-making centred upon a legal figure entitled “guarantor for the equality before the law of persons with disabilities.”[[68]](#footnote-68)

The civil society organization Movimiento de Vida Independiente (MVI) is considered to have been the central driver of the Costa Rican legislative reform on legal capacity.[[69]](#footnote-69) This organization participated in several forums in the Legislative Assembly, published press releases, orchestrated marches, and delivered talks in educational centers and other public and private institutions to raise awareness about the draft version of Law Number 9379.[[70]](#footnote-70) MVI also heavily lobbied several members of government.[[71]](#footnote-71) MVI interfaced with other Costa Rican organizations for people with disabilities to strengthen their advocacy efforts.[[72]](#footnote-72) MVI’s activism for legal reform culminated in 2016 when they organized an event known as “Try Costa Rica 2016.” This was a 287-kilometer march and wheelchair ride which began in San Isidro del General and ended outside the country’s Legislative Assembly in San José.[[73]](#footnote-73) One week after the completion of this journey in May 2016, the Costa Rican Parliament voted unanimously in favour of Law Number 9379 in a first hearing.[[74]](#footnote-74) The law was subsequently signed by the President of the Republic in August 2016, becoming effective from this point onwards.[[75]](#footnote-75)

The stated objective of Costa Rica’s new law is to “promote and ensure, for persons with disabilities, the full exercise and on equal terms with others, of the right to personal autonomy.”[[76]](#footnote-76) The law defines the “right to personal autonomy” as the “right of all persons with disabilities to build their own life project, independently, controlling, facing, taking and executing their own decisions in the public and private spheres.”[[77]](#footnote-77) Under the law, this right to personal autonomy encompasses respect for human rights, patrimonial rights, sexual and reproductive rights, and civil and electoral rights, among others.[[78]](#footnote-78)

In order to secure the right to personal autonomy for people with disabilities, the law creates the figure of the “guarantor for legal equality of persons with disabilities” and the regime of “human personal assistance.”[[79]](#footnote-79) The guarantor replaces the former figure of “curatela” (or guardian), with the law stipulating that all existing guardians are to become guarantors for legal equality.[[80]](#footnote-80) The guarantor constitutes a figure of assistance, whose involvement does not restrict the supported person’s legal capacity or transfer responsibilities away from the supported person.[[81]](#footnote-81) A guarantor must support a given person with a disability in the protection and promotion of all of their rights, especially the right to marry and found a family.[[82]](#footnote-82) The guarantor must assist the person with a disability in decision-making in legal, financial, and patrimonial matters.[[83]](#footnote-83) The guarantor must also make sure that the person with a disability has access to information pertaining to sexual and reproductive rights.[[84]](#footnote-84) The guarantor must “not act without considering the rights, will and abilities of the person with a disability.”[[85]](#footnote-85) The law also stipulates that the guarantor must “guarantee and respect the rights, will, preferences, abilities and capacities of persons with disabilities.”[[86]](#footnote-86) They must “not exercise any form of pressure, coercion, violence or undue influence on the decision-making process of the person with disabilities.”[[87]](#footnote-87)

The guarantor is appointed by a judge.[[88]](#footnote-88) The guarantor may be a person or a legal entity in the case of persons who are institutionalized in State entities.[[89]](#footnote-89) The person with a disability is entitled to request the appointment of a guarantor before a competent judge.[[90]](#footnote-90) However, if the person is unable to make the request themselves, their family members may initiate the request.[[91]](#footnote-91) Alternatively, in the absence of family members, the request may be launched by a non-governmental institution or organization that provides the person with services, supports, or social benefits.[[92]](#footnote-92) The judge is to give priority to the person’s preference as to the identity of the support person.[[93]](#footnote-93) If the person does not designate a preferred support person, the judge chooses the support person, considering first whether to appoint the relatives of the person with a disability.[[94]](#footnote-94) In all situations, the judge is to ensure that the guarantor is the “ideal” person to secure the proper exercise of the rights and obligations of persons with disabilities.[[95]](#footnote-95) Under the reformed Costa Rican law, the judge will designate a guarantor and determine the extent of support required after assessing the medical evidence of the person with disabilities, the opinion of the Department of Legal Medicine of the Judicial Investigation Agency, a social work report, as well as the interview with the affected person.[[96]](#footnote-96)

Costa Rica’s new law also establishes a regime of “human personal assistance.” A personal assistant provides support services for persons with disabilities in the context of “activities of daily living.”[[97]](#footnote-97) The law defines basic activities of daily life as elementary and daily actions taken by persons that foster autonomy and independence, such as matters pertaining to personal care, domestic activities, food, exercise, money management, medication consumption, work, and health.[[98]](#footnote-98) A person with a disability or their family member may apply to the Unit of Personal Autonomy and Independent Living at the National Council of Persons with Disabilities (Conapdis) to request personal assistance.[[99]](#footnote-99) In order to qualify as a recipient of personal assistance, a person must “require” these services in order to exercise their personal autonomy and they must have insufficient resources to pay for such support themselves.[[100]](#footnote-100) The application for personal assistance must include certification of the person’s disability.[[101]](#footnote-101) Persons who qualify for assistance must, independently or with the help of another person if required, prepare individual support plans laying out the kind of support that the person needs to carry out basic daily activities, as well as the appropriate intensity of support, and the number of hours needed.[[102]](#footnote-102) Individual support plans must be endorsed by the staff of Conapdis.[[103]](#footnote-103)

Conapdis will assign a support person to person with disabilities,[[104]](#footnote-104) and these individuals must be trained and certified by a designated national institute.[[105]](#footnote-105) Conapdis provides the person with a disability with a monthly benefit to cover the costs of a personal assistant.[[106]](#footnote-106)

The Costa Rican law critically recognizes legal personality and legal capacity for all persons with disabilities,[[107]](#footnote-107) as required by Article 12 of the CRPD. Moreover, as necessitated by Article 12, the law seemingly presents a supported decision-making framework by allowing for the appointment of guarantors and personal assistants to aid persons with disabilities in the exercise of their legal capacity.

Nevertheless, Arlene Kanter and Yotam Tolub contend that under this new scheme, “the role of the guarantor is still uncertain.”[[108]](#footnote-108) These authors argue that some portions of the new law would seem to portray the guarantor as a support person, while others would appear to represent the guarantor as an individual tasked with protecting the best interests of the person.[[109]](#footnote-109) Indeed, the law might have been clearer in whether they were creating the figure of the guarantor as a genuine support person. The definition of the figure of the guarantor contained in Article 2(l) affirms that the guarantor is responsible for guaranteeing the “safe and effective exercise of the rights and obligations” of persons with disabilities.[[110]](#footnote-110) This language would seem to endow the guarantor with a protective role in which they might be authorised to act in the person’s perceived “best interest” in order to ensure that rights and obligations are exercised “safely” and “effectively”. Furthermore, the stipulation in Article 11(a) that the guarantor must “not act without *considering* the rights, will and abilities of the person with a disability [emphasis added]”[[111]](#footnote-111) arguably does not eliminate the possibility that a guarantor could take a position that does not align with the will and preferences of the person with a disability. At first blush, that particular provision seems to clash with the obligation of the guarantor under Article 11(e) to “guarantee and respect the rights, will, preferences, abilities and capacities of people with disabilities.”[[112]](#footnote-112) Nevertheless, in the aforementioned provision, the Costa Rican legislator has notably decided to refer to “*persons* with disabilities” rather than the particular “*person* with a disability” whom the guarantor is assisting. Therefore, perhaps the guarantor’s obligation contained in Article 11(e) is more amorphous and less constraining than the obligation outlined in Article 11(a). It could thus be argued that the guarantor only owes one obligation to the specific person with a disability whom they are helping – namely, to consider their rights, will, and abilities before acting. If this is in fact the sole obligation incumbent on the guarantor, the guarantor could potentially choose to ignore the will and preferences of the person and act in their purported “best interest.” Article 12 of the CRPD clearly envisions a supported decision-making framework imbued in a “will and preferences” paradigm, and so it is problematic if the Costa Rican legislation does not completely embrace this model.

The Costa Rican law may lack safeguards to ensure that the “will and preferences” of the supported person are upheld. For instance, the law does not establish a complaint mechanism whereby the actions of guarantors can be challenged on the basis that they do not align with the will and preferences of the concerned person.[[113]](#footnote-113) The law does provide that the appointment of the guarantor should be reviewed by a judge every five years.[[114]](#footnote-114) Additionally, the law requires that the Unit of Personal Autonomy and Independent Living at Conapdis, *ex officio* or upon the request of a party, ensures that personal assistants are adhering to individual support plans and the provisions outlined in the law and its regulations.[[115]](#footnote-115)

According to a 2018 report prepared by the Costa Rican NGO Informe Alternativo, the new law has been met with some resistance by some parts of the legal community, especially in the area of family law. This report expresses the concern that a broad cultural change is still needed in Costa Rica to embrace the philosophy underlying the new law. The report warns that due to the weight of longstanding cultural attitudes and the history of guardianship in this country, there is a persistent risk that guarantors will act in practice as substitute decision-makers. Informe Alternativo’s representatives maintain that there is a pressing need to develop training programs to educate judges, prosecutors, public defenders and experts on the new law and its application. Moreover, the organization’s representatives argue that law school curricula should be reformed in order to ensure that law programs accurately impart to future lawyers the content of the new legislation.[[116]](#footnote-116)

In her 2017 Report, the Special Rapporteur on the Rights of Persons with Disabilities praised the new Costa Rican law as a “significant development” and urged Costa Rica to “promptly adopt the necessary regulations to effectively implement the reform in line with the principles and rights of the Convention.”[[117]](#footnote-117) Despite outstanding challenges that must be overcome to ensure the proper implementation of the new legislation on the ground, Costa Rica has undoubtedly made great strides towards securing equal recognition before the law for persons with disabilities. The new law has allowed Costa Rica to transition away from substitute decision-making through the creation of the guarantor and personal assistant, coupled with the abolition of guardianship and the elimination of declarations of mental insanity.

# Argentina

Argentina’s law on legal capacity has undergone significant changes with the entry into force of a new Civil and Commercial Code in 2015.[[118]](#footnote-118) The reformed Argentinian legislation critically sets out a versatile system of supported decision-making. Nevertheless, under Argentinian law, there remains the possibility for persons with disabilities to have their legal capacity restricted or removed by a judge.

Argentina ratified the CRPD in 2008.[[119]](#footnote-119) Argentinian civil society was actively involved in the preparatory work of the country’s legal capacity legislation reform. Representative organizations of persons with disabilities played a particularly important role in the process.[[120]](#footnote-120) The Association for Civil Rights (ADC) and the Center for Legal and Social Studies (CELS) constitute two examples of non-governmental organizations that have been heavily engaged in advocacy for Argentinian legal reform in the area of disability rights.[[121]](#footnote-121)

The new law in Argentina recognizes that all individuals possess the ability to hold and to exercise rights, but specifies that legal capacity may be restricted.[[122]](#footnote-122) Article 32 of the Code stipulates that “the judge may restrict the capacity for certain acts of a person over thirteen years of age who suffers from an addiction or permanent or prolonged mental disorder, of sufficient severity, whenever he/she considers that the exercise of the individual’s full capacity may result in damage to his/her person or property.”[[123]](#footnote-123) Capacity must only be restricted with respect to specific acts delineated by the court, such that with regards to other acts not addressed in the judgement, a person is presumed to have capacity.[[124]](#footnote-124) Under the Code, “personal autonomy must be affected as little as possible.”[[125]](#footnote-125) Thus, the extent of the deprivation of legal capacity must be minimized.[[126]](#footnote-126)

When a judge decides to limit a person’s legal capacity to exercise certain acts under Article 32 of the Code, the judge must then designate support measures.[[127]](#footnote-127) Support is defined broadly in the Code as “any measure of a judicial or extrajudicial nature that facilitates the person who needs it to make decisions to manage themselves, manage their assets or enter into legal acts in general.”[[128]](#footnote-128) According to the Code, the purpose of support measures are to promote autonomy, as well as to help a person’s will to be understood and expressed.[[129]](#footnote-129) Support measures should also “favour decisions that respond to the preferences of the protected person.”[[130]](#footnote-130) The precise nature, scope, and consequences of support measures are established on a case-by-case basis in a court judgment.[[131]](#footnote-131) Supports may relate to both personal and property matters.[[132]](#footnote-132) The court judgment establishes the particular conditions for the validity of legal acts in the areas in which legal capacity has been restricted.[[133]](#footnote-133) For instance, the judgment can stipulate that legal acts made by the person with a disability are valid if they had the assistance of the supporter in coming to the decision.[[134]](#footnote-134) Alternatively, the ruling may require the supporter’s consent for legal acts to be valid, or validity may be merely satisfied by the express will of the supporter, since the law indicates that the supporter may have representative functions with regards to certain acts specified in the judgment.[[135]](#footnote-135)

The affected individual can submit a request to the judge as to which particular trusted person or persons should be appointed to provide them with support.[[136]](#footnote-136) The Code appears to be silent, however, as to how much weight the judge should give such a nomination. The Code simply implies that the decision on the identity of the supporter ultimately lies in the hands of the judge, who must assess the scope of the appointment and take actions to protect the person in the event of the presence of a conflict of interest or the exercise of undue influence.[[137]](#footnote-137)

Despite introducing the concept of supported decision-making, the Argentinian law retains the possibility of a declaration of incapacitation and the imposition of substitute decision-making. Under Article 32 of the Code, “when a person is absolutely unable to interact with the environment and express his or her will in any appropriate way or format and the support system is ineffective, the judge may declare incapacity.”[[138]](#footnote-138) In such cases where incapacity is declared, a “curator” (or trustee) is appointed.[[139]](#footnote-139) The curator represents the affected person in property affairs[[140]](#footnote-140) and substitutes them in decision-making, with the caveat that judicial authorization may be needed for some legal acts.[[141]](#footnote-141)

With respect to the conformity of Argentina’s legislation with Article 12 of the CRPD, a few issues are apparent. Firstly, under Argentinian law, restrictions on legal capacity are possible. Furthermore, as argued by Professor Martinez-Pujalte, Argentinian law explicitly links the restriction of legal capacity with a “permanent or prolonged mental disorder,” such that persons with disabilities are stripped of legal capacity by reason of their disability.[[142]](#footnote-142) The Argentinian approach seems to combine the so-called “status” approach (where legal capacity is restricted based on the diagnosis of an impairment), with elements of a “outcome” approach, since the court’s assessment also appears to look into whether giving the person full legal capacity would bring harm to their person or their property (i.e. will the person make a decision with “bad” consequences).[[143]](#footnote-143) This process of limiting legal capacity based on a person’s disability and decision-making skills would seem to conflict with Article 12.[[144]](#footnote-144)

Argentina’s new law does introduce a framework of supported decision-making. That said, supported decision-making measures are only available to those who have had their legal capacity restricted by a court. This, according to Martinez-Pujalte is completely paradoxical, since a “correct understanding of the support model implies knowing that the support is aimed precisely at facilitating that the persons can make their own decisions and exercise their legal capacity.”[[145]](#footnote-145) Thus, as Martinez-Pujalte argues, it seems illogical to make a restriction of capacity a pre-requisite for supported decision-making.[[146]](#footnote-146) Supported decision-making as foreseen by the CRPD should empower individuals to make decisions, with their legal capacity intact.

Moreover, the flexibility of the form that supported decision-making may take may be problematic, given that the supporter may be authorized to have a “veto” over the affected person’s decisions, thus restricting the exercise of their legal capacity. Even more problematic is the allowance for supporters to take on representative functions, as in these cases, they arguably assume roles of de facto substitute decision-makers as opposed to genuine supporters.

In terms of safeguards against abuse of support measures, the law does provide for the periodic review of support mechanisms by the judge every three years or upon the request of the party concerned.[[147]](#footnote-147) Mechanisms to challenge the support person’s actions where there is a suspicion that they are not in conformity with the will and preferences of the person appear to be absent from the legislation. Moreover, the Code stipulates that supports should merely “favour”decisions aligned with the preferences of the concerned person,[[148]](#footnote-148) as opposed to requiring that supports “uphold” or “respect” decisions conforming to the given person’s preferences. Thus, the reformed Argentinian Code may not wholeheartedly espouse the “will and preferences” paradigm advanced by Article 12.

The retention of the notion of legal incapacity and substitute decision-making constitutes a critical shortcoming of the Argentinian legal regime from the perspective of Article 12. Furthermore, curators under Argentinian law are not under the same obligation as supporters to give priority to the preferences of protected persons.[[149]](#footnote-149)

It is therefore evident that although Argentina has established a legally-recognized supported decision-making system, the connection made between support mechanisms and the restriction of legal capacity is problematic, as is the law’s retention of substitute decision-making.

# Colombia

A bill recognizing full legal capacity for all persons with disabilities has been passed by both houses of the Colombian Parliament and presently awaits sanction by the President.[[150]](#footnote-150) This bill would abolish substitute decision-making and put forward a framework for supported decision-making encompassing support agreements, judicially-awarded supports, and advance directives.

Colombia ratified the CRPD in 2011.[[151]](#footnote-151) Over the course of the past several years, many civil society groups including ASDOWN, LICA, and Profamilia vocally advocated to reform Colombia’s traditional guardianship legislation in line with international human rights standards.[[152]](#footnote-152) These civil society groups also received the backing of the Program of Action for Equality and Social Inclusion (PAIIS) at the University of Los Andes.[[153]](#footnote-153) The Ministry of Justice and Presidency of the Republic were also heavily involved in the law reform process, as were several key congress persons who promoted the initiative.[[154]](#footnote-154)

The Bill critically recognizes that all persons with disabilities have “legal capacity under equal conditions, without any distinction whatsoever and regardless of whether or not they use support for the performance of legal acts.”[[155]](#footnote-155) The Bill specifies that a person’s disability can never constitute grounds for restricting legal capacity.[[156]](#footnote-156)

The Bill proceeds to state that “all persons with disabilities of legal age have the right to carry out legal acts independently and to have support for their realization.”[[157]](#footnote-157) The Bill lists actions that may be performed by support persons, while indicating that this list is not exhaustive, as further support actions may be authorized depending on the needs and preferences of each individual.[[158]](#footnote-158) The Bill explains that supporters may assist supported persons to express their will and preferences, help supported persons to understand legal acts, represent supported persons via power or mandate, interpret supported persons’ will and preferences in situations where they cannot interact with their environment, and honour supported persons’ will and preferences set out in advance directives.[[159]](#footnote-159) Supports must be grounded in respect for the will of the supported person and where it is impossible to determine a person’s will, the criterion of the best interpretation of the will must be applied.[[160]](#footnote-160)

The Bill lays out three different support mechanisms: support agreements, judicially-awarded supports, and advance directives.[[161]](#footnote-161) With support agreements, the nature of the support may be determined by the person in need of support or by an assessment of support conducted at the person’s request by public or private entities observing guidelines issued by the governing body of the National Disability Policy.[[162]](#footnote-162) Where an assessment of support is conducted, the entity’s determination of supports must be approved by the person in need of support.[[163]](#footnote-163) Support agreements may be made by public deed or before extrajudicial conciliators in law.[[164]](#footnote-164) In both cases, the person in need of support is interviewed privately by either the notary or the conciliator in order to confirm that the support agreement aligns with their will.[[165]](#footnote-165) The notary or conciliator will also explain to the support person(s) what legal obligations are incumbent upon them.[[166]](#footnote-166) The supported person may terminate the support agreement at any moment and the agreement may be modified by mutual agreement between the supporter and the supported person.[[167]](#footnote-167)

Next, the Bill allows for judicially-awarded supports, although it emphasizes that judicial adjudication of support will be “exceptional.”[[168]](#footnote-168) The request for judicially-awarded supports must be filed by the person in need of support, unless this person is unable to express their will by any means.[[169]](#footnote-169) In cases where the person in need of support is unable to communicate their will, the application for judicially-awarded support must be launched by a person who is deemed to have a “legitimate interest” in the matter.[[170]](#footnote-170) It seems that in cases where the application for support has been launched by the prospective support recipient, the judge gives this person the opportunity to nominate support persons.[[171]](#footnote-171) In all processes of judicially awarded supports, the judge orders an assessment of support akin to the one described above.[[172]](#footnote-172) This assessment will indicate the level and degrees of support that a person needs for particular decisions as well as the people who form their support network and who can help with decision-making.[[173]](#footnote-173) If the person in need of support has launched the application for support themselves, then they must approve this assessment and if the application has been launched by another person, the assessment must then be approved by the judicial authority.[[174]](#footnote-174) The judge then issues a final judgement on the allocation of supports.[[175]](#footnote-175) The Bill specifies that in the process of awarding support, the judge must consider and promote the will and preferences of the prospective supported person and must take into account the relationship of trust between the prospective supported person and supporter(s).[[176]](#footnote-176) The judge may review supports at the request of the supported person, the supporter, or *ex officio,* in order to verify that they conform to the law.[[177]](#footnote-177) Where supports were requested by a person other than the supported person, a judge will review support measures ex officio on a yearly basis.[[178]](#footnote-178) Supported persons may request at any moment that judicially awarded supports be modified or terminated.[[179]](#footnote-179)

Support persons may be natural persons or legal entities.[[180]](#footnote-180) In situations where a person with disabilities needs support but has no person to nominate for this role, the judge will appoint a “personal defender” from the Ombudsman Office, who will provide the requisite support.[[181]](#footnote-181)

The Bill outlines obligations for all supporters. Namely, their actions should align with the will and preferences of the supported person, they should maintain a relationship of trust with the supported person and safeguard the confidentiality of the support person’s personal information.[[182]](#footnote-182) Supporters are entitled to take on representative functions if they have been expressly mandated to do so by the given person or in situations where a person is unable to express their will and a given act of representation is seen to conform to the best interpretation of their will and preferences.[[183]](#footnote-183) Article 30 lists other functions that support persons may be authorized to carry out, including the ability to make “recommendations” to the supported person about a relevant legal act.[[184]](#footnote-184)

The Bill also stipulates that support persons must prepare yearly reports in which they indicate the type of support that they have provided as well as a justification for the manner in which they have given support, with a focus on how their actions upheld the person’s will and preferences.[[185]](#footnote-185) In the case of support agreements, this report is to be submitted to the supported person and in the case of judicially awarded supports, this report is to be submitted to the supported person and the judge.[[186]](#footnote-186)

Finally, the Bill outlines a framework for advance directives, which must be made by public deed or before extrajudicial conciliators in law.[[187]](#footnote-187) The Bill describes advance directives as a kind of “formal support” through which persons can make decisions about the future.[[188]](#footnote-188) Advance directives must be followed by the support persons designated.[[189]](#footnote-189) The person requesting support indicates the circumstances under which the advance directive is to take effect.[[190]](#footnote-190) Advance directives may presumably cover a wide range of matters, as the Bill stipulates that they can pertain to “health issues, financial matters or personal matters, among others.”[[191]](#footnote-191) Advance directives may be modified, replaced or revoked by the affected person.[[192]](#footnote-192)

In terms of its conformity with Article 12 of the CRPD, the Bill critically recognizes legal capacity for all persons with disabilities on an equal basis with others,[[193]](#footnote-193) and does so in a categorical manner. The Bill eliminates the former regime of substituted decision-making which allowed persons with disabilities to be placed under guardianship through the legal figure of interdiction.[[194]](#footnote-194) The Bill specifies that people currently under guardianship in Colombia will be deemed to be persons with full legal capacity and will be brought before the court to establish whether the judicial awarding of supports is required.[[195]](#footnote-195)

The Bill also introduces several forms of supported decision-making, grounded in the “will and preferences” paradigm.[[196]](#footnote-196) Importantly, the Bill enables persons with disabilities to determine the exact moment at which advance directives enter into effect.[[197]](#footnote-197) Additionally, the Bill’s inclusion of the “best interpretation of the will” standard for cases in which a person’s will is impossible to discern is also a significant achievement with respect to compliance with Article 12.[[198]](#footnote-198)

The Bill allows for great flexibility in the form that supports may take.[[199]](#footnote-199) One may note the possibility for supports to encompass representative functions.[[200]](#footnote-200) This may be problematic with respect to Article 12, but representation would not seem to be presented as a “general rule” for support.[[201]](#footnote-201) Nevertheless, the Bill’s statement that supporters may “make recommendations” to supported persons[[202]](#footnote-202) may be cause for concern. This provision could provide supporters with authorization to exert pressure on supported persons and to sway them in the decision-making process. The potential functions of a supporter are quite broad, and this arguably leads to a risk of de facto substitute decision making.

Moreover, there may be a concern that where supports are determined by support assessments, support measures could be imposed against a person’s will, especially given the latitude that the entities conducting support assessments seem to have to determine the type and intensity of support, as well as the identity of support persons. Nevertheless, it appears that unless a person is incapable of expressing their will, they do need to approve of the support system proposed in the support assessment. The Bill does not detail the guidelines for the performance of these support assessments by private or public entities. Undoubtedly, any guidelines for such procedures would have to be grounded in respect for the person’s will and preferences.

In terms of safeguards to prevent abuse, one may point to the possibility for supported persons to freely terminate support agreements and advance directives,[[203]](#footnote-203) as well as the potential for supported persons to request the termination of judicially awarded supports.[[204]](#footnote-204) The provision allowing for review of judicially-awarded supports is also important.[[205]](#footnote-205) One may also highlight the reporting requirements incumbent upon supporters,[[206]](#footnote-206) although with support agreements, the supporter’s report presumably must only be submitted to the supported person, and thus there is no oversight of the supporter’s activities by a third party in these situations. The Bill also does not provide for mechanisms whereby the actions of support persons may be challenged if there is a belief that they are not upholding the will and preferences of the supported person.[[207]](#footnote-207)

Overall, Colombia’s Bill appears to make great strides towards securing legal capacity for persons with disabilities. Nevertheless, the legislative scheme may lack certain safeguards in order to ensure that support measures align with the will and preferences of the person concerned. Moreover, civil society actors maintain that great efforts will have to be exerted to train judges and public service personnel on the content of the new legislation.[[208]](#footnote-208) As well, civil society activists maintain that there will be a dire need to educate the general population on the exercise of rights of persons with disabilities according to the social model of disability.[[209]](#footnote-209) In the meantime, however, the Bill needs to receive Presidential sanction before it can duly enter into force as Colombian law.

# India

India ratified the CRPD in 2007.[[210]](#footnote-210) In 2016, the Indian Parliament passed The Rights of Persons with Disabilities Act.[[211]](#footnote-211) According to the text of the legislation, it constitutes “an Act to give effect to the United Nations Convention on the Rights of Persons with Disabilities and for matters connected therewith or incidental thereto.”[[212]](#footnote-212) The Act recognizes full legal capacity for persons with disabilities and references supported decision-making measures, but it also allows for the imposition of “limited guardianship.”

In 2010, the Indian Ministry of Social Justice & Empowerment struck a Committee to draft a new piece of legislation to implement India’s obligations under the CRPD.[[213]](#footnote-213) The Committee was led by Dr. Sudha Kaul of the Indian Institute of Cerebral Palsy and was comprised of experts, members of the NGO community, and bureaucrats.[[214]](#footnote-214) The drafting process was criticized by civil society for largely excluding persons with disabilities.[[215]](#footnote-215) In the aftermath of considerable pressure exerted by Indian civil society, the final version of the 2016 Act ultimately did away with plenary guardianship, while still providing for an institution of “limited guardianship.” Prior to the passage of the legislation, some civil society groups spoke out against the Act’s “limited guardianship” provision, but these criticisms went unanswered.[[216]](#footnote-216)

The Act stipulates that “the appropriate Government shall ensure that the persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and have the right to equal recognition everywhere as any other person before the law.”[[217]](#footnote-217) The Act also indicates that “the appropriate Government shall ensure that the persons with disabilities have right, equally with others, to own or inherit property, movable or immovable, control their financial affairs and have access to bank loans, mortgages and other forms of financial credit.[[218]](#footnote-218) The Act introduces the concept of “support,”[[219]](#footnote-219) though it does not define the term. Under the Act, persons with disabilities are authorized to “alter, modify, or dismantle any support arrangement and seek the support of another.”[[220]](#footnote-220) Furthermore, it stipulates that should there be a conflict of interest between a support person and the person with disabilities, the support person should refrain from providing support for that transaction.[[221]](#footnote-221) The Act also contains a provision prohibiting support persons from exercising undue influence and obliging support persons to respect the “autonomy, dignity and privacy” of the supported person.[[222]](#footnote-222)

The Act states that “the appropriate Government shall designate one or more authorities to mobilise the community and create social awareness to support persons with disabilities in the exercise of their legal capacity.”[[223]](#footnote-223) Furthermore, this authority “shall take up measures for setting up suitable support arrangements to exercise legal capacity by persons with disabilities living in institutions and those with high support needs and any other measures as may be required.”[[224]](#footnote-224)

The Act also establishes the regime of “limited guardianship,” which the Act defines as a “system of joint decision which operates on mutual understanding and trust between the guardian and the person with disability.”[[225]](#footnote-225) The Act also stipulates that “limited guardianship” appointments must be restricted to specific time periods and to particular decisions and situations.[[226]](#footnote-226) Moreover, limited guardianship “shall operate in accordance to the will of the person with disability.”[[227]](#footnote-227) Under the Act, where a district court or designated authority concludes that a person with a disability has been “provided with adequate and appropriate support but is unable to take legally binding decisions,” the court or authority may then render a decision allowing for the “further support of a limited guardian to take legally binding decisions on his behalf, in consultation with such a person.”[[228]](#footnote-228) The Act proceeds to mention that the court or designated authority may authorise a regime of “total support” for a person with disabilities under limited guardianship.[[229]](#footnote-229) Finally, the Act proclaims that all guardians previously appointed to persons with disabilities under any other provision of law will now be considered limited guardians.[[230]](#footnote-230)

The Act’s apparent recognition of full legal capacity for persons with disabilities and the provision pertaining to property and financial affairs would appear to be in keeping with Article 12 of the CRPD. That said, it is worthwhile noting that instead of simply enshrining these rights in their legislation, the Indian legislator has chosen to precede these two provisions with the words: “the appropriate Government shall ensure.”[[231]](#footnote-231) It is unclear whether this rather vague choice of language weakens the strength of the commitments contained in these provisions. Additionally, the legislation does not explain *how* the appropriate Government will ensure the realization of these rights.

There exist several other ambiguities in the Indian law that make assessing its compliance with Article 12 of the CRPD difficult. By failing to define what “support” entails, it is difficult to analyze whether the regime envisioned by the Act conforms to the CRPD. The Act does stipulate that the Central Government has the power to make rules for carrying out provisions of the Act,[[232]](#footnote-232) but the Indian government has not yet released any such rules that pertain to supported decision-making.[[233]](#footnote-233) The National Disability Network (NDN) and the National Committee on the Rights of Persons with Disabilities (NCRPD) have highlighted the fact that the government has yet to establish any form of guidelines or structures for support measures.[[234]](#footnote-234) The Act seems to call for making support measures available to “persons with disabilities living in institutions and those with high support needs,”[[235]](#footnote-235) but the Act is silent about whether support measures will be made available to persons with disabilities that do not fall into these situations.

Aside from the provision outlining the right of the supported person to change or undo support arrangements,[[236]](#footnote-236) the Act appears to lack safeguards against abuse as required by Article 12.

The Act has not introduced accountability mechanisms or mechanisms to challenge a support person’s actions where there is a belief that they have not acted in accordance with the will and preferences of the supported person. There are also seemingly no requirements that must be met in order to be a supporter.

Next, the regime of “limited guardianship” put forward by the Act is arguably in contravention of Article 12. The NDN and the NCRPD affirm that limited guardianship is contrary to the notion of full legal capacity and that it does conflict with the CRPD.[[237]](#footnote-237) In their communications with the UN Committee on the Rights of Persons with Disabilities, the Indian government characterizes limited guardianship as a “support system.”[[238]](#footnote-238) The Act itself also speaks of “support of a limited guardian.”[[239]](#footnote-239) However, it is uncertain as to whether the limited guardianship regime constitutes a genuine form of supported decision-making that would be in line with Article 12 of the CRPD. Firstly, a limited guardian is entitled “to take legally binding decisions on behalf [of the person with disabilities],”[[240]](#footnote-240) which could be said to resemble substitute decision-making. Moreover, in some situations, the limited guardian may be authorised to “grant total support” to the person with disabilities.[[241]](#footnote-241) “Total support” is not defined under the Act and the Act also seems to give the Court or designated authority great leeway to “determine the nature and manner of support to be provided.”[[242]](#footnote-242) If “total support” is a euphemism for substitute decision-making, this is cause for concern. The UN Committee on Rights of People with Disabilities has also cautioned against supported decision-making arrangements that “over-regulate” the lives of persons with disabilities[[243]](#footnote-243) and a system of “total support” might risk doing exactly this. Without a further description of the powers of the limited guardian, there is undoubtedly a risk that the limited guardian could sideline the supported person in the decision-making process. That said, however, the Act does stipulate that the “limited guardianship” regime should be a decision-making process grounded in trust and respect for the will of the person with disabilities.[[244]](#footnote-244) These aforementioned features of the “limited guardianship” institution seem in line with the CRPD.

Finally, it is critical to note that the National Trust Act (1999) remains in force in India to date.[[245]](#footnote-245) This legislation allows for the imposition of plenary guardianship for persons with specified disabilities (autism, cerebral palsy, mental retardation, or a combination thereof), thus in effect permitting the legal capacity of these people to be removed.[[246]](#footnote-246) Under this Act, relatives of persons with the aforementioned disabilities may request the institution of guardianship by applying to Local Level Committees of the National Trust (a body under the Ministry of Social Justice and Empowerment).[[247]](#footnote-247) The relative indicates in the application their choice of person to serve as the guardian of the person with disabilities.[[248]](#footnote-248) A Committee may then approve the application and authorise a guardian to make all legal decisions on behalf of the concerned person with respect to personal and property matters.[[249]](#footnote-249) Reports indicate that the regime of plenary guardianship is continuing to be imposed by Local Level Committees of the National Trust, despite the enactment of the 2016 law.[[250]](#footnote-250) The National Trust’s latest annual report reflects an arguably paternalistic vision endorsing plenary guardianship: “Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities are in a special situation as even after they have acquired 18 years of age, they may not always be capable of managing their own lives or taking legal decisions for their own betterment. Therefore, they may require someone to represent their interests in the legal areas throughout their lives.”[[251]](#footnote-251) The continued availability of plenary guardianship in India seems contrary to the 2016 Act which purportedly eliminated the option of plenary guardianship. Regardless, the retention of the institution of plenary guardianship under a separate act certainly violates Article 12 of the CRPD. Moreover, the denial of legal capacity to persons with listed disabilities under the National Trust Act undoubtedly constitutes a discriminatory status approach which is incompatible with Article 12.[[252]](#footnote-252)

To conclude, although India’s 2016 Act refers to support measures for persons with disabilities, there are several concerns with respect to this legislative scheme. The ambiguities surrounding the meaning of “limited guardianship” and “support” under the Act make it difficult to ascertain the law’s compliance with Article 12. The government’s failure to establish a framework of support mechanisms for facilitating the exercise of legal capacity also means that supported decision-making is not being made available to persons with disabilities on the ground. The NDN and the NCRPD have called upon the Indian government to collaborate with civil society to put in place support structures, guidelines, a budget and administrative measures, alongside proper safeguards.[[253]](#footnote-253)

# Israel

In March 2016, the Israeli Parliament passed Amendment Number 18 to the Legal Capacity and Guardianship Law 5776-2016.[[254]](#footnote-254) The law has now fully entered into effect, as the final stage came into force in April 2018.[[255]](#footnote-255) This amendment critically provides for supported decision-making as an alternative to guardianship in a piece of national legislation.[[256]](#footnote-256) The amendment does not, however, prohibit guardianship.[[257]](#footnote-257)

Israel ratified the CRPD in 2012.[[258]](#footnote-258) The Convention was one of the sources of inspiration for Amendment Number 18 to the Legal Capacity and Guardianship Law.[[259]](#footnote-259) Though it was the Israeli Ministry of Justice that first recommended the amendment, civil society was instrumental in devising the text of the amendment and advocating for its passage.[[260]](#footnote-260) The civil society organization at the forefront of the law reform process was Bizchut, the Israel Center for Human Rights of People with Disabilities.[[261]](#footnote-261) Bizchut devoted great efforts to raising awareness in Israel about the pitfalls of guardianship and proceeded to establish a coalition comprised of nineteen organizations committed to advocating for legal capacity reform.[[262]](#footnote-262) The coalition brought together organizations of people with disabilities, disability rights organizations, parents’ organizations, human rights organizations, and organizations representing elderly people.[[263]](#footnote-263) The civil society coalition played a critical role in pushing for the inclusion of supported decision-making in the legislative amendment. It is worth noting that the Israeli government’s first draft proposal for amending the Israeli Guardianship Law did not include supported-decision making.[[264]](#footnote-264) After the government issued this draft proposal, the civil society coalition proceeded to devise its own list of desired changes to the law, which included the introduction of supported decision-making mechanisms in law.[[265]](#footnote-265) The coalition’s efforts ultimately proved successful, as a system of supported decision-making was included in the final version of the law.

Amendment Number 18 outlines two alternatives to guardianship. The first is supported decision-making. The newly enacted section 67B of the Legal Capacity and Guardianship Law allows for the court to appoint one or more decision-making supporters to assist an adult who experiences difficulties making decisions, but who is able to make their own decisions regarding their affairs with help.[[266]](#footnote-266) Under the Israeli law, the decision-making supporter helps the person to obtain information,[[267]](#footnote-267) explains available alternatives in a manner that is understandable to the person,[[268]](#footnote-268) and aids the person to carry out their decisions and communicate them to third parties.[[269]](#footnote-269) The Amendment stipulates that “a decision-making supporter will not make decisions on behalf of the person he is supporting.”[[270]](#footnote-270) When the Court appoints a decision-making supporter, it must indicate in its judgment the particular matters with respect to which support is to be provided.[[271]](#footnote-271) The Court judgment also lays out the supporter’s functions and powers as well as the time period of the appointment.[[272]](#footnote-272) In their Report to the UN Committee on the Rights of Persons with Disabilities, the Israeli government affirms that the function of the decision-making supporter is to help the person to “make decisions according to her/his wishes,”[[273]](#footnote-273) but the provision on supported decision-making in the Legal Capacity and Guardianship Law does not make any kind of reference to upholding the supported person’s will and preferences.

The second alternative to guardianship presented in the Amendment is the “enduring power of attorney.” This option allows a person (while mentally competent) to designate a representative who will be allowed to act on their behalf and to make their decisions should that person eventually lose the ability to make decisions.[[274]](#footnote-274) The power of attorney can be restricted to specified matters – whether personal, medical or financial; or the power of attorney may pertain to all matters relating to a person.[[275]](#footnote-275) Enduring powers of attorney must be signed before attorneys who have received special training in the drafting of these documents and they must then be deposited with the Administrator-General (a governmental agency).[[276]](#footnote-276) The law also provides for a complaint mechanism with respect to enduring powers of attorney, that allows for possible judicial intervention.[[277]](#footnote-277)

With respect to its guardianship regime, Israeli law allows for a guardian to be appointed for a person who has been declared to be “legally incompetent.”[[278]](#footnote-278) The court can order this “legally incompetent” designation for a person with mental or intellectual disabilities whom they deem is unable to manage their own affairs.[[279]](#footnote-279) Guardians for persons who have been declared legally incompetent are charged with taking care of matters assigned to them by the court and with making decisions about the person under guardianship.[[280]](#footnote-280) This type of guardian must act to protect the given person’s rights, interests, and needs.[[281]](#footnote-281)

In addition, Israel’s legislative scheme provides for the appointment of a guardian for any individual who cannot manage their affairs. [[282]](#footnote-282) In these situations, such individuals retain their legal capacity.[[283]](#footnote-283) The Amendment puts forward a strict test for the appointment of a guardian in these circumstances. Firstly, the principle of “necessity” must be respected: that is, there must be a determination that without the appointment of a guardian, a “violation of the person’s rights, interests or needs” would be likely.[[284]](#footnote-284) Second, the principle of the “less restrictive measure” must also be fulfilled - .that is, the court must be satisfied that it is impossible to opt for a less restrictive alternative in the form of an enduring power of attorney or supported decision-making.[[285]](#footnote-285) Moreover, the Amendment stipulates that where a guardian is appointed for persons who cannot manage their affairs, a judge must choose the areas to which guardianship will apply: a specific affair, medical matters, personal affairs, property, or several areas.[[286]](#footnote-286) The former option which allowed for the appointment of such a guardian for all of a person’s affairs has now been removed.[[287]](#footnote-287)

The Israeli legislation outlines duties which are ostensibly incumbent upon all types of guardians. The Amendment specifies that a person’s wishes and not the “best interest” of the person must be the guiding principle of the guardian’s decision-making.[[288]](#footnote-288) That said, when it is not possible to discern the person’s wishes, the “best interest” principle may be resorted to.[[289]](#footnote-289) Finally, the Amendment lists other guiding principles for guardians’ actions, such as the guardian’s duty to supply the person with information, to uphold the person’s independence, to permit the person to make decisions about their own affairs, to take into consideration the changing capacity of the person and respect cultural issues.[[290]](#footnote-290) Israeli law also entitles guardians to “do whatever is necessary to fulfill [their] duties,” and also seems to allow guardians to assume representative functions, with some exceptions.[[291]](#footnote-291) Guardians must submit annual reports on their activities to the Guardian General (a governmental agency).[[292]](#footnote-292)

The amended Israeli Guardianship Law is not completely compliant with Article 12 of the CRPD.[[293]](#footnote-293) Firstly, the concept of legal incapacity still exists under Israeli law.[[294]](#footnote-294) Israel’s law would seem to allow for the denial of legal capacity based on the diagnosis of an impairment and a person’s decision-making skills,[[295]](#footnote-295) which is problematic from the point of view of Article 12.[[296]](#footnote-296)

The institution of guardianship has also been maintained. Although Israeli law provides for a type of guardianship in which persons are not stripped of their legal capacity,[[297]](#footnote-297) people in these situations may still having decisions made on their behalf,[[298]](#footnote-298) and potentially in their “best interest.”[[299]](#footnote-299) Moreover, guardians are appointed by the court, possibly against the will of the person concerned.[[300]](#footnote-300) Thus, the guardianship model contemplated under the Amendment incorporates critical features of substituted decision-making measures condemned by Article 12.[[301]](#footnote-301)

Nevertheless, the new Israeli law does provide for supported decision-making measures, which undoubtedly constitutes a positive step towards compliance with Article 12. That said, the Israeli legislative scheme does not seem to make supported decision-making available to all persons with disabilities as the court will only appoint a supporter in cases where it is deemed that with assistance, the person would be able to make their own decisions.[[302]](#footnote-302) Thus, the provision of support in Israel is presumably contingent on attaining a perceived degree of mental capacity, and this is problematic from the point of view of Article 12.[[303]](#footnote-303)

Furthermore, the Israeli law may be deficient in safeguards present in its supported decision-making system. For instance, the law does not stipulate requirements for being a supporter. It also appears that supporters could potentially be imposed against someone’s will, as it is merely stated that supporters are appointed by the court, with no provisions ensuring priority is given to a person’s preference regarding the identity of the support person. Additionally, the Amendment does not address how to guard against the possibility of risk or harms to the person by the decision-making supporter.[[304]](#footnote-304) There do not seem to be provisions for monitoring the supporter or for ensuring that their actions conform to the will and preferences of the supported person. The law does provide that the Minister of Justice may adopt further provisions regarding the “functions and powers of a decision-making supporter.”[[305]](#footnote-305)

Finally, the institution of “enduring powers of attorney” provided for in Israel’s amended legislation may not constitute a genuine form of supported decision-making in line with Article 12. It encapsulates features of substitute decision-making, as it empowers appointees to make decisions on behalf of persons with disabilities. The entry into force of enduring powers of attorney in Israel also hinges on a finding that persons are no longer able to understand the matter covered by the enduring power of attorney.[[306]](#footnote-306) The Committee on the Rights of Persons with Disabilities has emphasized that the affected person should determine the point at which advance directives enter into force.[[307]](#footnote-307)

In sum, although Israel has legally recognized supported decision-making, its reform falls short of securing a comprehensive system of supported decision-making that is equipped with the appropriate safeguards. The maintenance of the guardianship regime is also problematic from the perspective of Article 12.

# Georgia

In 2015, Georgia enacted a comprehensive reform to its laws on legal capacity, allowing for court-appointed supported decision-making arrangements, all the while retaining substituted decision-making.[[308]](#footnote-308)

Georgia ratified the CRPD in 2013.[[309]](#footnote-309) Prior to April 2015, the Georgian Civil Code listed “mental retardation” and “mental illness” as justifications that a court could use in order to declare a person to be without legal capacity.[[310]](#footnote-310) Following a court declaration of legal incapacity, a guardianship and custodianship authority (bodies under the purview of the Ministry of Labour, Health and Social Affairs) appointed a guardian to those persons deemed legally incapable.[[311]](#footnote-311)

Georgia’s legislation pertaining to legal capacity has been reformed in the wake of a 2014 decision rendered by the Constitutional Court of Georgia.[[312]](#footnote-312) This case was brought by a non-governmental organization called the Georgian Young Lawyers’ Association on behalf of Georgian citizens Irakli Kemoklidze and David Kharadze. Their lawsuit challenged the constitutionality of several legislative provisions in Georgian civil law which curtailed the rights of persons with disabilities. The case was funded through the East-West Management Institute’s Judicial Independence and Legal Empowerment Project.[[313]](#footnote-313) In a landmark decision, the Constitutional Court ruled that the right to legal capacity was protected by Article 14 of the Georgian Constitution (the equality clause) and by Article 16 of the Constitution which affirms that “[e]veryone has the right to free development of his/her personality.”[[314]](#footnote-314) The Court held that the legislative provisions denying legal capacity to persons with disabilities on the basis of mental illness were unconstitutional.[[315]](#footnote-315) The Court gave the Parliament six months to enact the necessary legislative changes.[[316]](#footnote-316)

In response to the Constitutional Court’s ruling, the Parliament of Georgia carried out a legislative reform in April 2015, which included changes to the Civil Code. The reformed Civil Code entitles persons to apply for to the court for eligibility to receive support.[[317]](#footnote-317) In order to qualify as a “person in need of psychosocial support,” an individual must have “fixed psychological, mental/intellectual disorder, which, when interrelating with other impediments, may prevent him/her from participating in public life fully and effectively on equal terms with others.”[[318]](#footnote-318) The application for support eligibility may also be launched by the person’s family member, legal representative, guardian and curator body, psychiatric or specialized institution.[[319]](#footnote-319) The application for designation as a “person in need of psychosocial support” specifies the area in which support is needed.[[320]](#footnote-320) The court then orders a psychosocial forensic examination. An authorized multidisciplinary group consisting of psychiatrists, psychologists, social workers and occupational therapists assess the person’s psychiatric, social, professional, employment and psychological data. [[321]](#footnote-321) The court considers the application for support eligibility in the presence of the person concerned and a representative of a guardianship and custodianship authority.[[322]](#footnote-322)

If the court is satisfied that a person qualifies as a “person in need of psychosocial support,” they will issue a decision designating the person as a “beneficiary of support.”[[323]](#footnote-323) In the same decision, the court will appoint a supporter (or supporters), establish the scope of support, and delineate the rights and duties of the supporter(s).[[324]](#footnote-324) The reformed Georgian Civil Code stipulates that a supporter may be a family member, relative, friend or expert.[[325]](#footnote-325) If it is not possible to appoint a supporter from this list of persons, the court will designate an authorized person from a guardianship and custodianship authority to act as a supporter and, if the person resides in a specialized institution, a representative from this institution will be named as the supporter.[[326]](#footnote-326) In choosing a supporter, the court must consider the “interests and will” of the person in need of support.[[327]](#footnote-327) In the selection process, the court must also take into account the personal qualities of the potential supporter, the ability of the potential supporter to carry out a duty, and the relationship between the potential supporter and supported persons.[[328]](#footnote-328)

The purpose of the supporter is to help recipients of support to make decisions[[329]](#footnote-329) and to help recipients understand conditions and legal consequences of a transaction in a specific area of decision-making.[[330]](#footnote-330) The Code stipulates that the supporter should determine the wishes and choices of the supported person and should provide them with relevant information for the decision-making process.[[331]](#footnote-331) Supporters are also tasked with overseeing the medical care of supported persons.[[332]](#footnote-332) A supporter may be appointed by the court to assist a person with performing work, concluding small contracts, conducting business activities, managing or disposing of real estate, identifying a place of residence, consenting to medical treatment, preventing damage and exercising other rights and responsibilities stipulated by the court as per an individual assessment.[[333]](#footnote-333) It is noteworthy that the Code of Civil Procedure allows supporters to be appointed for even a minor transaction.[[334]](#footnote-334)

The Court also establishes a deadline by which the supporter must report to a guardianship and custodianship authority and defines a deadline by which the support arrangement must be revised.[[335]](#footnote-335) A guardianship and custodianship authority is tasked with supervising the activities of a supporter and monitoring their adherence to their duties outlined in the court judgement and in Georgian legislation.[[336]](#footnote-336) The Code stipulates that through “scheduled checks,” a guardianship and custodianship authority will ascertain whether a supporter’s actions conform to the relevant court judgement.[[337]](#footnote-337) These checks are carried out once in every six month period, or when requested by the court.[[338]](#footnote-338) A guardianship and custodianship authority may also check on the supporter’s activities on its own initiative, when there exists information indicating a need for their intervention.[[339]](#footnote-339) The Code also allows a supported person to submit a request to the court should they want their supporter to be dismissed.[[340]](#footnote-340)

The reformed Civil Code also indicates that persons previously deemed legally incapable must have their status reviewed within 5 years.[[341]](#footnote-341)

The Georgian reforms eliminated a codal provision which allowed for court declarations of legal incapacity for reasons of “mental illness” or “mental retardation,” and the subsequent appointment of a guardian in such cases.[[342]](#footnote-342) Nevertheless, the current Georgian legislation appears to have retained some form of substitute decision-making. The amended Civil Code provides for the institution of custodianship to be put in place for an adult who is “capable of contracting,” but “unable to independently exercise his/her rights and perform his/her duties because of his/her health condition.”[[343]](#footnote-343) A custodian is to be appointed by a guardianship and custodianship authority,[[344]](#footnote-344) at the request of the concerned adult.[[345]](#footnote-345) Custodians are to protect the personal and property rights and interests of their wards.[[346]](#footnote-346) The Code stipulates that adults whom the court has placed under custodianship are to be considered persons with “limited legal capacity.”[[347]](#footnote-347)

It is worth noting that some ambiguity arguably exists in the text of the updated Georgian Civil Code. As mentioned, the provision allowing for declarations of incapacity and appointment of a guardian based on the diagnosis of an impairment has been eliminated. The provision of the Code entitled “Guardianship” now only describes the possibility of appointing a guardian for a child under the age of seven.[[348]](#footnote-348) Nevertheless, one article in the new Code provides that “guardianship” may be instituted for adults who are unable to exercise their rights and perform their duties independently due to a health condition.[[349]](#footnote-349) Thus, it arguably remains unclear whether the institution of guardianship still exists under Georgian law in the context of persons with disabilities. It is, however, presumably clear that persons with disabilities may still be placed under custodianship in Georgia. This overall lack of clarity, however, is further compounded by the fact that the Code provides sparse detail on the institution of custodianship. As persons under custodianship are deemed to be of “limited legal capacity,”[[350]](#footnote-350) it would seem that custodianship resembles a sort of partial guardianship arrangement under which the custodian plays a protective role,[[351]](#footnote-351) typical of a traditional substitute decision-maker.

With regards to compliance with Article 12 of the CRPD, Georgian law does not expressly recognize the right of persons with disabilities to full legal capacity. The Georgian Code grants legal capacity to all adults,[[352]](#footnote-352) but recognizes that legal capacity may be limited.[[353]](#footnote-353) The Code retains the institution custodianship, which restricts legal capacity on the basis of a person’s decision-making skills and the diagnosis of a “health condition.”[[354]](#footnote-354) This would seem to constitute a discriminatory restriction of legal capacity in contravention of Article 12.[[355]](#footnote-355) The Georgian regime of custodianship is grounded in the protection of a person’s rights and interests and ostensibly constitutes a pure form of substitute decision-making, making this institution out of step with Article 12.

The law does set out a supported decision-making system, with safeguards including oversight of supporters by the authorities of guardianship and custodianship.[[356]](#footnote-356) Supported persons are also able to request to the court that their support person be relieved of their duties,[[357]](#footnote-357) but they are not endowed with the right to appeal the actions of supporters as persons under guardianship and custodianship are able to do.[[358]](#footnote-358)

Critically, some of the provisions in the Georgian Civil Code on supported decision-making would seem incompatible with Article 12 of the CRPD.[[359]](#footnote-359) For instance, if a supported person partakes in a transaction in which a court has deemed requires support and the person does not get the approval of the supporter, the transaction will be considered invalid, unless it is decided that the supported person “benefits” from the transaction.[[360]](#footnote-360) Moreover, when a supported person makes a written transaction with another party, it needs to be signed by the supporter as well.[[361]](#footnote-361) These provisions would seem to restrict the exercise of a supported person’s legal capacity by allowing a supporter to “veto” a transaction that aligned with the will and preferences of the supported person. Additionally, the exception for situations where the supported person “benefits” from a transaction appears to reflect the notion of upholding a person’s “best interest” rather than respect for the “will and preferences” of the individual. Finally, a support measure may only be terminated if the support recipient dies or “the reason for which the support was established ceases to exist.”[[362]](#footnote-362) Thus, although a supported person may apply to the court for to request the dismissal of their support person, they are presumably forced to maintain their supported decision-making framework (potentially continuing with another supporter should the court approve their request to relieve the original supporter of their duties). The Committee on the Rights of Persons with Disabilities has stated that supported persons should have “the right to refuse support and terminate or change the support relationship at any time”[[363]](#footnote-363) and one could argue that Georgian law does not totally fulfill this requirement.

Moreover, it is uncertain whether the amended Georgian law wholeheartedly embraces the “will and preferences” paradigm put forward by Article 12. The obligation incumbent on the supporter to merely “identify” the supported person’s wishes and choices seems ambiguous[[364]](#footnote-364) – the law does not appear to require that supporters follow these wishes and choices. The Code stipulates that supporters are to help supported person to take an “appropriate” decision, which might give supporters authorization to act in pursuit of what they deem to be the supported person’s “best interest.”

In addition, it is pertinent to recall the following advice issued by the Committee on the Rights of Persons with Disabilities: “systems of supported decision-making should not over-regulate the lives of persons with disabilities.”[[365]](#footnote-365) Since a support person can be designated in Georgia even for minor transactions, there is a risk that support systems could be applied in such a comprehensive way as to over-regulate the lives of persons with disabilities.

It is also of concern that Georgian legislation deprives recipients of support of certain rights including parental and related rights,[[366]](#footnote-366) the right to hold positions in public service;[[367]](#footnote-367) and the right not to become an object of medical research without informed and clear consent.[[368]](#footnote-368)

Finally, it is worthwhile noting that despite the changes to the legal framework, there have been reports of issues with the implementation of the legislative reforms in practice.[[369]](#footnote-369) There is some evidence that opinions on legal capacity and supported decision-making amongst professionals and within the community have not yet undergone the “paradigm shift” embodied in the legislative reform.[[370]](#footnote-370) For instance, a 2016 report prepared by the Ombudsman of Georgia analysed court decisions appointing support persons in this country. 85.82% of court judgments assessed by the report used language describing a “full transfer” of support in given areas, “the realization” of rights by a supporter, “on behalf of a support recipient.”[[371]](#footnote-371) This language employed by Georgian judges is reminiscent of descriptors of a substitute decision-making regime rather than a supported decision-making system. Indeed, the Georgian Ombudsman’s report affirms that such a construal of supported decision-making amounts in practice to the same substitution of will and denial of legal capacity that took place under the former plenary guardianship regime.[[372]](#footnote-372) If the judiciary does not sufficiently comprehend or embrace the supported decision-making model, there is a risk that persons with disabilities will not have access to genuine supported decision-making on the ground and that they will be disempowered in the decision-making process.

# Czech Republic

The Czech Republic’s legal capacity legislation underwent substantial changes when the country enacted a reform to its Civil Code in 2012.[[373]](#footnote-373) These amendments entered into force in 2014.[[374]](#footnote-374) Amongst other changes, the legislative reform eliminated plenary guardianship, established time

restrictions on limited guardianship appointments, and identified supported decision-making as the favoured alternative to guardianship.[[375]](#footnote-375)

The Czech Republic ratified the CRPD in 2009.[[376]](#footnote-376) It has been labelled “the first country to enact CRPD-inspired legal capacity law reform in the world.”[[377]](#footnote-377) Under the Czech Republic’s previous legislative regime, people with disabilities could be completely denied legal capacity and placed under full guardianship by the court.[[378]](#footnote-378) Prior to the legislative reform, Czech courts were removing the legal capacity of approximately 2,000 people per year.[[379]](#footnote-379) Prior to the 2012 reform, civil society had campaigned for seven years for amendments to the country’s guardianship laws. Non-governmental organizations including Mental Disability Advocacy Centre (MDAC) and League of Human Rights were heavily involved in the legislative reform process, commenting on the draft law and leading advocacy and capacity-building initiatives.[[380]](#footnote-380)

Under the reformed Czech Civil Code, a court may restrict a person’s legal capacity where a person is deemed unable to perform certain legal acts due to a “mental disorder, which is not only temporary.”[[381]](#footnote-381) When the court makes a decision on the restriction of legal capacity, “the extent and the degree of inability of the person to conduct her own affairs must be thoroughly taken into account.”[[382]](#footnote-382) In the decision relating to restriction of legal capacity, the court also appoints a guardian to act on behalf of the person concerned.[[383]](#footnote-383) The reformed Code indicates that before any restrictions of legal capacity may be imposed, two conditions must be satisfied. Firstly, it must be established that the individual would otherwise be to a “under a threat of serious harm”.[[384]](#footnote-384) Second, it must be the case that “milder and less restrictive measures” would not “suffice to protect his interests.”[[385]](#footnote-385) The new legislation stipulates that the court may only restrict a person’s legal capacity for a maximum of three years.[[386]](#footnote-386) The reformed Civil Code also specifies that “the decision to limit the legal capacity does not deprive an individual of the right to make juridical acts in ordinary matters of everyday life.”[[387]](#footnote-387) Thus, restrictions on legal capacity are limited to the specific area in which it has been deemed that the person “lacks” legal capacity.[[388]](#footnote-388) Guardians are to endeavour to promote the “best interests” of the represented person.[[389]](#footnote-389) The Code also allows for individuals who are close to the person under guardianship to form a guardianship council to monitor the guardian.[[390]](#footnote-390) The establishment of a guardianship council is not obligatory, and may be carried out upon the request of the guardian, the person under guardianship, or any close acquaintance of the person under guardianship.[[391]](#footnote-391)

Notably, Czech law also allows for the appointment of a guardian in situations where a person’s legal capacity has not been restricted by a court. Namely, the court is entitled to appoint a guardian for a “person state of health prevents her from managing property or protecting her own rights.”[[392]](#footnote-392) It is possible for such a guardian to be appointed at the request of the person concerned.[[393]](#footnote-393) Where persons submit such a proposal, the court will determine the scope of the guardian’s authority according to the person’s request.[[394]](#footnote-394) With this special type of guardianship arrangement, the guardian is to generally act jointly with the affected person, but if the guardian acts independently, they are to act in line with the person’s will.[[395]](#footnote-395)

The new Czech Civil Code also lays out a legislative framework for supported decision-making contracts for persons who “[need] support with decision-making due to mental illness,” which includes those who have not had their legal capacity limited.[[396]](#footnote-396) The reformed Code indicates that the role of the supporting person is to help the supported person obtain necessary information, to provide the supported person with advice, and to be present at legal transactions with the consent of the supported person.[[397]](#footnote-397) The supported person is bound by contract to provide support in this manner.[[398]](#footnote-398) The contract takes effect upon approval by a court.[[399]](#footnote-399) The court will refuse to approve the contract if there exists a conflict of interest between the supporting person and the supported person.[[400]](#footnote-400) Moreover, the law stipulates that the supporter must not exert undue influence on the supported person nor unjustly enrich themselves at the supported person’s expense.[[401]](#footnote-401) The supporter is to execute their duties “in accordance with the decisions of the supported person.”[[402]](#footnote-402) The Code stipulates, however, that “the supporting person also has the right to object to the validity of the legal acts of the supported person.”[[403]](#footnote-403) Finally, the court will dismiss the supporting person if they significantly breach their duties and the court will also dismiss the supporting person at the request of either the supported person or the supporting person.[[404]](#footnote-404)

The new Civil Code also allows for the creation of advanced directives for “a person who foresees her own legal incapacity.”[[405]](#footnote-405) In such a document, an individual can “express his or her will so that her affairs are conducted in a prescribed manner or by a designated person or that a designated person becomes his or her guardian.”[[406]](#footnote-406)

Additionally, the reformed Code provides for “representation by next of kin,”[[407]](#footnote-407) an arrangement whereby a court can appoint a family member to represent an adult who cannot perform legal acts independently due to a mental disorder.[[408]](#footnote-408) The representative is to act in conformity with the “best interests” of the represented person.[[409]](#footnote-409) Representation arrangements cover “everyday affairs,” such as the handling of routine financial matters.[[410]](#footnote-410)

Although undoubtedly a positive step towards conformity with Article 12 of the CRPD, the Czech legislation falls short of complete compliance. The Czech legislative regime does not guarantee full legal capacity to individuals with disabilities. In their Concluding Observations on the initial report of the Czech Republic, the Committee on the Rights of Persons with Disabilities remarked that “the new Civil Code still provides for the possibility of limiting a person’s legal capacity and placing a person with a disability under partial guardianship.”[[411]](#footnote-411) The Czech Civil Code allows for a court to restrict a person’s legal capacity based on an assessment of their perceived mental capacity (whether they can manage their own affairs) and based on a diagnosed “mental disorder, which is not only temporary.”[[412]](#footnote-412) This restriction of legal capacity on the basis of a person’s decision-making skills and disability would seem to contravene Article 12.[[413]](#footnote-413)

The new Czech legislative scheme does introduce supported decision-making measures that allow for the legal capacity of persons with disabilities to stay intact.[[414]](#footnote-414) The support system outlined in the legislation is also accompanied by some corresponding safeguards, such as the ability of the court to dismiss the support person.[[415]](#footnote-415) The requirement incumbent upon support persons to act “in accordance with the decisions of the supported person”[[416]](#footnote-416) no doubt also serves to secure adherence to the will and preferences of the individual receiving support. That said, the supporter’s power to contest the validity of the supported person’s legal acts is arguably not in harmony with the “will and preferences” paradigm.[[417]](#footnote-417) There is no description as to when supporters may resort to this power, and it could in effect serve as a sort of “veto,” restricting the exercise of a supported person’s legal capacity. Furthermore, the legislation appears to lack mechanisms for monitoring the support person or mechanisms for challenging the action of the support person if there is a concern that the support person is not carrying out their duties in line with the will and preferences of the affected person.

Next, it is debatable whether the advanced directives and representation by next of kin contemplated in the new Code constitute supported decision-making measures within the meaning of Article 12. Although they allow a person to convey their will, advanced directives under the Czech Code allow a person to name a guardian, a form of substitute-decision maker. Additionally, it would seem as though the appointer is not at liberty to determine the point at which their advance directive enters into force, with the entry into force of advance directive seemingly hinging on a declaration of legal incapacity.[[418]](#footnote-418) With respect to “representation by next of kin” arrangements, despite the fact that they do not involve a formal restriction of legal capacity by the court,[[419]](#footnote-419) these embody key features of substitute decision-making, as decisions are made on behalf of the person concerned in their perceived “best interests.”

Some might argue that the option of guardianship without restriction of legal capacity is compliant with Article 12 of the CRPD. The regime appears to give the affected person power over the appointment of the guardian and the scope of the arrangement, and it seems to be grounded in the “will and preferences” paradigm.[[420]](#footnote-420) Nevertheless, this option is scantly described in the legislation. It is unclear as to what exactly “joint” decision-making should look like in practice (for example, it is not stated whether the guardian possesses a “veto” power). Moreover, there may be a lack of corresponding safeguards.

In sum, although the Czech Republic has incorporated supported decision-making into its legal framework, the availability of partial guardianship and representation arrangements grounded in the “best interests” paradigm are cause for concern from the perspective of Article 12. In 2015, the Committee on the Rights of Persons with Disabilities called on the Czech Republic to “recognize the full legal capacity of all persons with all types of disability and improve access to supported decision-making, thus implementing the relevant provision of the Civil Code.”[[421]](#footnote-421) Finally, one may note that although restrictions of legal capacity are intended to be ordered as a “last resort,” civil society reports indicate that “courts still opt for extensive restriction of legal capacity impacting on most areas of life as prevailing practice.”[[422]](#footnote-422)

# Latvia

Latvia is a State Party to the CRPD, having ratified the Convention in 2010.[[423]](#footnote-423) In 2012, the Latvian Parliament passed legislation abolishing plenary guardianship and instituting a co-decision-making framework.[[424]](#footnote-424) The legislative reform was spurred by a 2010 decision by Latvia’s Constitutional Court which found the country’s legislation allowing for complete denial of legal capacity to be unconstitutional, on the grounds that complete denial of legal capacity unreasonably restricted a person’s right to a private life.[[425]](#footnote-425) The Court observed that the legislation in force at the time did “not allow for partial restrictions of legal capacity and other milder and more appropriate solutions.”[[426]](#footnote-426) The government was given a two-year deadline to amend the law.[[427]](#footnote-427) Despite missing this deadline by almost a full year, the Latvian Parliament adopted new legal capacity legislation at the end of 2012, with the amended provisions coming into effect at the start of 2013.[[428]](#footnote-428)

The seminal 2010 court case was filed by an NGO called Resource Center for People with Mental Disability, ZELDA (RC ZELDA) on behalf of an individual with an intellectual disability. RC ZELDA continued to be actively involved in the law reform process in 2011, launching a training event for policy makers and NGOs on legal capacity law reform, and providing the Ministry of Justice with suggestions as to how to change the legislation.[[429]](#footnote-429) RC ZELDA was joined by the Mental Disability Advocacy Centre (MDAC) in these initiatives.[[430]](#footnote-430) RC ZELDA and MDAC advocated for the inclusion of supported-decision making in Latvian legislation, as reflected in their written comments to the Latvian Parliament in 2011.[[431]](#footnote-431) Despite these advocacy efforts, however, Latvia’s new law ultimately does not consist of any provisions on supported decision-making.[[432]](#footnote-432)

Latvia’s new legislation eliminates full guardianship and allows for partial legal capacity restrictions in which only the exercise of “material” or “economic” rights can be limited.[[433]](#footnote-433) Such “material” rights relate to property, finances, establishment of enterprises, or the signing of contracts, for example.[[434]](#footnote-434) Under the new law, a court cannot restrict a person’s private non-economic rights,[[435]](#footnote-435) such as the right to marry, the right to found a family, the right to make decisions about medical care, the right to choose one’s place of residence, and the right to vote.[[436]](#footnote-436)

Under the Latvian Civil Code, the court may restrict the legal capacity of a “person with health disorders of mental nature or other” to the extent that the person “cannot understand the meaning of his or her activity or cannot control his or her activity.”[[437]](#footnote-437) Where the court restricts a person’s legal capacity and appoints a guardian, the court is required to first determine the areas in which the guardian and the person concerned will act together (known as “co-decision-making” or “shared decision-making”).[[438]](#footnote-438) After the court has established the areas for joint action, they will then determine the areas in which the guardian will act independently.[[439]](#footnote-439) Where the guardian makes decisions independently, they have no duty to consult with the affected person.[[440]](#footnote-440)

When appointing a guardian, the Code stipulates that the appropriate Orphan’s and Custody Court is to solicit the opinion of the person concerned regarding the identity of the person to be appointed as their guardian.[[441]](#footnote-441) The Orphan’s and Custody Court may name as guardian someone chosen by the person concerned, the spouse of the person concerned or one of their nearest relatives.[[442]](#footnote-442) Court judgments restricting legal capacity may be reviewed at any time, but must be reviewed at least once within seven years of their entry into force.[[443]](#footnote-443)

Additionally, the amended Code introduces the option of advanced directives, whereby a person can designate an authorised person to “conduct his or her matters in case when the authorising person due to health disorders or other reasons or condition will not be able to understand the meaning of his or her action and will not be able to control his or her action.”[[444]](#footnote-444) Such agreements must be made in the form of a notarial deed.[[445]](#footnote-445)

From the point of view of Article 12 CRPD, Latvia’s legislation is problematic. Legal capacity is not guaranteed to persons with disabilities across the board, though the protection of private non-economic rights from restriction undoubtedly represents an advancement.[[446]](#footnote-446) Since the Latvian Civil Code authorizes a judge to limit the legal capacity of a “person with health disorders of mental nature or other” to the extent that the person “cannot understand the meaning of his or her activity or cannot control his or her activity,”[[447]](#footnote-447) the Latvian law would seem to restrict legal capacity on the basis of a person’s disability and their decision-making skills. This is not in keeping with the spirit of Article 12.[[448]](#footnote-448)

As expressed by RC ZELDA in their report to the UN Committee on the Rights of Persons with Disabilities, “the new regulation is still not fully compliant with Article 12 of the UN CRPD, as full-fledged alternatives to the restriction of legal capacity were not included in the law.”[[449]](#footnote-449) In their “Concluding observations on the initial report of Latvia” published in 2017, the Committee on the Rights of Persons with Disabilities suggested that Latvia “restore the full legal capacity of all persons with disabilities through a supported decision-making regime that respects the autonomy, will and preferences of the person.”[[450]](#footnote-450)

The co-decision-making framework proposed may well fall short of constituting genuine supported decision-making in line with Article 12. Firstly, it seems as though guardians are entitled to act in the “best interests” of the person under guardianship in some situations. Latvian law stipulates that the opinion of the person under guardianship is to be merely “taken into account,” and only “provided that it does not endanger welfare, health, life or other interests of the person himself or herself.”[[451]](#footnote-451) Moreover, given the “joint” nature of the decision-making, the guardian effectively possesses a veto and so could potentially block decisions aligned with the will of the person.[[452]](#footnote-452) The process of co-decision-making is described in extremely sparse detail in the Code, further increasing the risk that this form of decision-making could be co-opted by the guardian. The Code also does not indicate how the court is to determine whether co-decision-making is possible in a given scenario.[[453]](#footnote-453) Without criteria for its application, it is possible that co-decision-making may not be resorted to by the court, and that independent decision-making by the guardian will merely be imposed. In addition, safeguards against abuse by co-decision-makers seem scant. The legislation does admittedly provide for review of court orders restricting legal capacity “at any time,” and at least within seven years.[[454]](#footnote-454) Nevertheless, the legislation does not appear to contain accountability mechanisms for monitoring the co-decision-makers themselves or mechanisms to challenge their action if there is a suspicion that it is not aligned with the will and preferences of the affected person.

Moreover, it is debatable whether the Latvian advanced directives could be deemed to be supported decision-making measures in conformity with Article 12. Under the new Latvian law, the entry into force of an advanced directive hinges on a finding that a person is “unable temporarily or permanently to understand the meaning of his or her action and is unable to control his or her action.”[[455]](#footnote-455) The Committee on Rights of Persons with Disabilities has explicitly stated that the “point at which an advance directive enters into force (and ceases to have effect) should be decided by the person and should not be based on an assessment that the person lacks mental capacity.”[[456]](#footnote-456)

Latvia’s legislation maintains the availability of substitute decision-making with its partial guardianship regime, which clearly violates Article 12. The UN Committee’s report urged Latvia to “repeal the legal provisions in civil law concerning substituted decision-making.”[[457]](#footnote-457) RC ZELDA has reported that in practice, Latvian courts tend to opt for substituted decision-making, without first contemplating whether a person could make decisions independently in some areas or whether co-decision-making could be implemented.[[458]](#footnote-458)

Overall, the failure to introduce full-blown supported decision-making into Latvian law is cause for concern from the point of view of Article 12 of the CRPD. Nevertheless, the Latvian reform undoubtedly represents a step towards embracing Article 12, with the abolition of plenary guardianship as well as the introduction of a co-decision-making mechanism that at least allows for person with disabilities to participate in the decision-making process. Furthermore, a supported decision-making pilot project financed by the European Social Fund and the Government of Latvia was launched in 2017 and is currently being implemented by RC ZELDA, supervised by the Ministry of Welfare.[[459]](#footnote-459) The project is experimenting with supported-decision making in five areas (legal issues, financial issues, acquiring and developing life skills, health care issues and social care issues).[[460]](#footnote-460) The government has expressed its intention to contemplate the “next steps” regarding supported decision-making upon competition of the pilot project in 2020.[[461]](#footnote-461)

# Croatia

With the adoption of a new Family Act in 2014, Croatia abolished plenary guardianship and integrated the broad concept of supported decision-making into its legislation.[[462]](#footnote-462) Croatia ratified the CRPD in 2007.[[463]](#footnote-463) The government declared that it was going to undertake a reform of Croatian family law in 2013.[[464]](#footnote-464) Subsequently, the Association for Social Affirmation of People with Psychosocial Disabilities (SHINE), the Mental Disability Advocacy Centre (MDAC), and several other civil society organizations engaged in public discussions and advised the government to reform its legislation in conformity with Article 12 of the CRPD.[[465]](#footnote-465)

The resulting 2014 Family Act eliminated full guardianship and the complete deprivation of legal capacity.[[466]](#footnote-466) The law demands that courts review all existing guardianships within five years in order to restore partial or complete legal capacity to the concerned individuals.[[467]](#footnote-467) Nevertheless, the new law still allows for Croatian courts to restrict legal capacity and impose partial guardianship to “ensure the protection of the rights and interests in an area where a person’s legal capacity has been limited by a court decision.”[[468]](#footnote-468) Restrictions on legal capacity in a given area rely on a medical expert’s evaluation of the given person’s health condition and “the impact the health condition has on the ability of the person concerned to protect or endanger their rights and interests of others.”[[469]](#footnote-469) The Act stipulates that persons can be deprived of legal capacity in actions relating to “personal matters” or “property.”[[470]](#footnote-470) The Act lists legal actions pertaining to name changes, marriage, parenthood decisions on health, place of residence and employment as examples of “personal matters,” and specifies that “property” relates to the management of property, salary or other regular income.[[471]](#footnote-471) Although the Family Act encourages guardians to embrace the wishes of the concerned person, it states that personal preferences shall be overridden when the guardian views them as inconsistent with the person’s “best interests” (with the “best interests” evaluated from the guardian’s perspective).[[472]](#footnote-472)

The Family Act asserts that “protection of persons with disabilities, if possible, should be secured by other means and measures… before a decision on deprivation of legal capacity and guardianship is made.”[[473]](#footnote-473) The law does not, however, describe what alternative protective measures should be resorted to.[[474]](#footnote-474)

The new Family Act does introduce the notion of supported decision-making for persons with disabilities, affirming that “there is a need to encourage and support people deprived of legal capacity in their enjoyment of the right to community participation and independent decision-making.”[[475]](#footnote-475)

The Family Act contravenes Article 12 of the CRPD in that it does not recognise full legal capacity for all persons with disabilities. It problematically allows for partial restrictions of legal capacity based on an assessment of a person’s mental capacity and their diagnosis of a certain “health condition”.[[476]](#footnote-476) Moreover, the Family Act’s retention of the institution of guardianship violates Article 12 of the CPRD. The Committee on the Rights of Persons with Disabilities has urged Croatia to eliminate substitute decision-making.[[477]](#footnote-477) The fact that the modified legislation is based on the “best interests” paradigm rather than the “will and preferences” model is also problematic from the point of view of Article 12.[[478]](#footnote-478)

In 2015, the UN Committee suggested that Croatia “introduce legislation to provide a wide range of measures that respect the autonomy, will and preferences of persons with disabilities, including their rights to give and withdraw from their individual informed consent for medical treatment, to access justice, to vote, to marry, to full parental rights and to work.”[[479]](#footnote-479) The Committee also recommended that Croatia put in place supported decision-making in line with the Convention and to train social workers, legal professionals and public authorities on the rights contained in the Convention in order to achieve this aim.[[480]](#footnote-480) The fact that Croatia has recognized supported decision-making in its national legislation is arguably a step towards meeting the requirements of Article 12 of the CRPD, but the concept of supported decision-making is not fleshed out in the legislation. The legislation does not define support or how it would be applied in practice in Croatia. The law does not present a framework for supported decision-making to be overseen by a specific body or the court.[[481]](#footnote-481) The law does not include safeguards against abuse in the supported decision-making process. Moreover, the law also limits the availability of supported decision-making to “people deprived of legal capacity.”[[482]](#footnote-482) This goes against the ethos of Article 12, as the very goal of Article 12 is to help people to exercise their legal capacity and to meaningfully empower them in the decision-making process. The Croatian legislator has thus not presented supported decision-making as an alternative to the deprivation of legal capacity.[[483]](#footnote-483)

The legislation is also silent as to who should provide support to persons with disabilities (i.e. who should “encourage and support people deprived of legal capacity in their enjoyment of the right to community participation and independent decision-making”).[[484]](#footnote-484) Human Rights Watch maintains that the ambiguous wording of this provision may have been intended to limit the provision of support to the institution of guardianship.[[485]](#footnote-485) “Support” provided by the guardian within a substitute decision-making framework is certainly not the type of supported decision-making scheme contemplated by Article 12.

In short, although the notion of support appears in Croatia’s legislation, this seems to be more of an aspirational statement about the desirability of providing support to persons with disabilities, rather than a provision with teeth that will lead to secure access to supported decision-making on the ground.

# Lithuania

The Lithuanian Parliament passed amendments to its Civil Code in 2015, which introduced supported decision-making, while concurrently retaining plenary guardianship.[[486]](#footnote-486) These amendments entered into effect in 2016.[[487]](#footnote-487)

Lithuania ratified the UN CRPD in 2010.[[488]](#footnote-488) The Lithuanian Disability Forum has been a key civil society actor engaged in the Lithuanian law reform process. Over the past decade, the Lithuanian Disability Reform has monitored the government’s implementation of the CRPD and has provided advice as to how the country’s legislation could be reformed to comply with the CRPD.[[489]](#footnote-489) The Lithuanian Disability Forum strongly advocated for legal capacity legislation reform and the introduction of supported decision-making in Lithuania.[[490]](#footnote-490) Beginning in 2012, the Lithuanian Disability Forum participated in a working group to draft amended provisions on legal capacity in the Civil Code and Code of Procedure.[[491]](#footnote-491)

In addition to the advocacy work of the Lithuanian Disability Forum, a 2012 ruling by the European Court of Human Rights against Lithuania[[492]](#footnote-492) is also considered to have been an impetus for Lithuania’s legislative reform.[[493]](#footnote-493) This case was brought by the Human Rights Monitoring Institution (a Lithuanian NGO) and Interights (a British NGO) on behalf of an individual who had been stripped of legal capacity, put under guardianship, and placed in a care home, without participating in any of the decisions pertaining to her legal capacity or her placement in a facility.[[494]](#footnote-494) The Court found that Article 5(4) of the ECHR had been breached, due to the fact that the applicant had no possible way to have her detention reviewed.[[495]](#footnote-495) The Court also held that Article 6(1) of the ECHR had been infringed given the way in which the guardianship proceedings had been carried out.[[496]](#footnote-496) The applicant’s legal capacity was afterwards restored by a Lithuanian district court.[[497]](#footnote-497)

Under the amended Lithuanian Civil Code, the court is authorized to declare someone to be legally incapacitated in a given area if they are unable to understand their actions in that sphere due to a “mental disorder.”[[498]](#footnote-498) The person is placed under guardianship for the area(s) in which they are deemed incapacitated.[[499]](#footnote-499) In the areas where capacity has been removed, guardians have the right to enter into all necessary transactions on behalf of the person concerned, in the person’s interests.[[500]](#footnote-500) The Court must specify in the exact areas in which a person is declared incapacitated.[[501]](#footnote-501) Although the court is now obliged to pinpoint the exact areas in which a person will be deprived of legal capacity, there is no bar on deeming someone incapable in all areas of life.[[502]](#footnote-502) Thus, with this new legislation, there exists a possibility for the imposition of “*de facto* full legal incapacity.”[[503]](#footnote-503) In fact, the Ministry of Justice has recognized that it would be theoretically possible to declare a person legally incapable in all areas of life under Lithuanian law.[[504]](#footnote-504) The law establishes that all previous court decisions imposing legal incapacity will be reviewed within two years.[[505]](#footnote-505)

The new Civil Code also allows for “limitations” of legal capacity in a particular area where a person is “partially unable to understand their actions due to a mental disorder.”[[506]](#footnote-506) When a person’s capacity is limited in this fashion in a particular area, they must make decisions jointly with a “caretaker,” who is tasked with “assisting” them in the decision-making process.[[507]](#footnote-507) The caretaker’s consent is needed for agreements to be valid.[[508]](#footnote-508) The caretaker must also protect the person’s rights and legitimate interests against abuse by third parties.[[509]](#footnote-509)

Critically, the amended Code allows for the creation of supported decision-making contracts.[[510]](#footnote-510) Under such arrangements, a person who is experiencing difficulties in decision-making makes an agreement with a trusted individual, who agrees to help them in the decision-making process. Persons whom have been declared to be incapacitated in a given area as well as those who have been deemed to have limited legal capacity in a given area may enter into supported decision-making contracts in areas in which they are capable.[[511]](#footnote-511) Contracts for support measures must be in notarial form and must be duly registered in a specialized registry.[[512]](#footnote-512) The amended Code provides for the possibility of voiding supported decision-making contracts in the event of conflicts of interest.[[513]](#footnote-513) Activities of supporters are to be monitored by municipal care institutions.[[514]](#footnote-514) Any party to a contract for supported decision-making may apply to a notary in order to file a notice of termination of the agreement.[[515]](#footnote-515)

The new legislation also provides that people may devise advance directives validated by a notary.[[516]](#footnote-516) With advance directives, a person specifies their will in the event of a future declaration of incapacity or limited capacity.[[517]](#footnote-517) In such an advance directive, persons may indicate who they wish to be appointed as their guardian or caregiver in the event of a future finding of incapacity or limited capacity,[[518]](#footnote-518) or provide other instructions.[[519]](#footnote-519) Advance directives are to be in notarial form and must be registered in a specific notarial registry.[[520]](#footnote-520) Advance directives enter into force when a court decision is rendered declaring a person to be either incapacitated in a given area or of limited capacity in a given area.[[521]](#footnote-521) Instructions in advance directives must be followed, unless there is a change of circumstances that makes it “clear that the order is no longer in the applicant’s best interests.”[[522]](#footnote-522)

With respect to its compliance with Article 12 of the CRPD, several issues are apparent. Lithuanian law does not guarantee legal capacity to persons with disabilities. In fact, it allows for people to be stripped of legal capacity in some areas and even permits complete deprivation of legal capacity in all areas of life. Limitations and denials of legal capacity under Lithuanian law are furthermore premised on a diagnosis of a “mental disorder,” coupled with an assessment of mental capacity. This is not in keeping with Article 12.[[523]](#footnote-523) In its Concluding Observations on Lithuania released in May 2016, the CRPD Committee criticized “the legal provisions permitting the denial or restriction of the legal capacity of persons with disabilities contrary to article 12 of the Convention, which thereby limit rights of persons with disabilities to give their free and informed consent for treatment, to marry, to found a family and to adopt and raise children.”[[524]](#footnote-524) Moreover, in Lithuania, there remain in existence constitutional provisions which deny people deemed legally incapable the right to vote and the right to run for parliamentarian elections.[[525]](#footnote-525)

The substitute decision-making regime of guardianship that has been maintained is also incompatible with Article 12. The position of caretaker outlined in the Lithuanian legislation is also problematic, as the “veto” power possessed by caretakers restricts the exercise of persons’ legal capacity. Moreover, the caretaker is not explicitly tasked with upholding the will and preferences of the person concerned.

Lithuania has introduced supported decision-making into its legislation, with the corresponding safeguard providing for oversight of support persons by designated municipal institutions.[[526]](#footnote-526) Parties to a supported decision-making contract may also apply to have it terminated,[[527]](#footnote-527) but the law does not appear to provide for mechanisms whereby the actions of a supporter could be challenged by third parties if there is a suspicion that they are not respecting the will and preferences of the person concerned. In fact, the legislation does not appear to make any reference to the “will and preferences” of supported persons. In addition, the legislation does not appear to address what particular form supported decision-making of contracts should take, nor what exactly acts of assistance “supported decision-making” may involve, nor what obligations are incumbent upon supporters.

While advance directives may provide a means through which persons can indicate their will and preferences, the coming into force of these directives problematically hinges on findings of legal incapacity or limited legal capacity.[[528]](#footnote-528) Under Lithuanian law, persons are not able to determine the moment at which these directives should come into force, which is problematic from the perspective of Article 12.[[529]](#footnote-529) Lithuanian advance directives also allow for the appointment of substituted decision-makers and not for supportive forms of assistance.[[530]](#footnote-530) Additionally, the law allows advance directives to be disregarded if following their provisions would be detrimental to the person’s “best interests.”[[531]](#footnote-531) This aspect of the law does not seem to be in line with Article 12, which puts forward the idea that supports are to further a person’s will and preferences. The Special Rapporteur on the Rights of Persons with Disabilities has highlighted that it is problematic from the point of view of Article 12 when advance directives may be overturned.[[532]](#footnote-532) Thus, it is arguable that the advance directives provided for under Lithuanian law could not be classified as supported decision-making measures using the criteria under Article 12.

In short, Lithuania’s reformed legislation on legal capacity falls short of satisfying to the requirements of Article 12. The CRPD Committee has urged Lithuania to replace substitute decision-making measures with supported decision-making measures.[[533]](#footnote-533)

# Hungary

Hungary was the first country in Europe to ratify the CRPD in 2007.[[534]](#footnote-534) Mental Disability Advocacy Centre (MDAC) contends that Hungary was also the first country in the world to devise CRPD-inspired legislation on legal capacity.[[535]](#footnote-535) In 2009, the Hungarian Parliament voted to enact a new Civil Code which would have eliminated plenary guardianship and provided for supported-decision making.[[536]](#footnote-536) This new Code never entered into force, however, because an opposition member of parliament successfully challenged the law before the Constitutional Court.[[537]](#footnote-537) Nevertheless, Hungary ultimately enacted changes to its law on legal capacity through Act V of 2013 on the New Civil Code, which entered into force in 2014.[[538]](#footnote-538) Despite providing for the institution of guardianship and fully restricted legal capacity,[[539]](#footnote-539) Hungary’s new Civil Code introduces supported decision-making measures.[[540]](#footnote-540) Moreover, a separate act, Act CLV of 2013 on Supported Decision-Making, establishes detailed rules for supported decision-making in Hungary.[[541]](#footnote-541)

The Hungarian Disability Caucus (a coalition of disabled peoples organizations and their allies) contends that Hungary’s new Civil Code was “drafted by law professors behind closed doors without any meaningful consultation with the Hungarian disability movement.”[[542]](#footnote-542) When a draft version of the new Civil Code was distributed for public consultation in 2012, Hungarian civil society was merely provided with a period of one month to submit comments on the legislation.[[543]](#footnote-543) According to the Hungarian Disability Caucus, a single month “was insufficient for such an extensive new piece of legislation incorporating several conceptual changes.”[[544]](#footnote-544)

Civil society organizations like the Hungarian Autistic Society (AOSZ) expressed concerns that the proposed law did not sufficiently embrace the supported decision-making model, but these criticisms were ultimately disregarded by the Hungarian Parliament.[[545]](#footnote-545) The new Civil Code that was enacted allows for the “full limitation of legal capacity,” which, according to the Hungarian Disability Caucus, “maintains plenary guardianship under a different name.”[[546]](#footnote-546) A court may place a person under “guardianship that fully limits their competency in all matters of life” where a person’s “necessary discretionary ability for conducting their affairs – is owing to their mental disorder – completely lacking.”[[547]](#footnote-547) In addition to complete restrictions on legal capacity, partial restrictions of legal capacity are also possible under the new Code.[[548]](#footnote-548) Persons who are deemed to be “of partially limited capacity” if their “necessary discretionary ability for conducting their affairs is – owing to their mental disorder – permanently or persistently diminished.”[[549]](#footnote-549) Persons “of partially limited capacity” are placed under partial guardianship (“conservatorship”), which restricts their competency with regards to particular matters specified by the court.[[550]](#footnote-550)

It is worthwhile noting that the new Hungarian Civil Code also creates a new legal institution in the form of an advance legal statement.[[551]](#footnote-551) Through this mechanism, any person with legal capacity may designate a particular person or persons to act as their guardian in the event of any future restriction of their legal capacity.[[552]](#footnote-552) In the advance legal statement, a person may also set out instructions for the guardian to follow with regards to their personal and financial affairs.[[553]](#footnote-553)

Hungary’s new Code provides for supported decision-making measures, which are available to those who “due to a minor decrease in their mental capacity, need help in dealing with some of their affairs and in making decisions.”[[554]](#footnote-554) Support persons are appointed by the guardian authority, with the agreement of the person concerned.[[555]](#footnote-555) Support persons may be designated following the request of a person desiring support or upon the request of the court.[[556]](#footnote-556) With regards to the latter case, the Code states that in cases where a person has exhibited a relatively minor loss in discretionary ability, the court may reject an application for placing the person under guardianship and may recommend to the guardianship authority that a support person be appointed.[[557]](#footnote-557) The new Code stipulates that “the appointment of an advocate shall not affect the legal competency of a person of legal age.”[[558]](#footnote-558)

Act CLV of 2013 on Supported Decision-Making establishes precise rules pertaining to Hungary’s supported decision-making regime. The Act provides that the guardian authority will designate a supporter who has been nominated by the affected person, provided that this appointment is in line with the interests of the person requiring support.[[559]](#footnote-559) In the event that the person in need of support does not designate a preferred support person, the Act also allows for the guardianship authority to appoint a “professional” support person,[[560]](#footnote-560) such that persons employed by government-designated bodies, professional caregivers and legal entities catering to persons with mental disabilities may serve as support persons.[[561]](#footnote-561) The Act also stipulates that prior to the designation of a support person, the guardianship authority must hold hearings in order to interview both the person requiring support and the prospective support person.[[562]](#footnote-562) The Act specifies that support persons are to be appointed to assist persons either “in general” or in “specific groups of cases.”[[563]](#footnote-563) Supporters are to provide supported persons with information and assistance in the decision-making process.[[564]](#footnote-564) The Act also provides that support persons are to be appointed for an “indefinite period,”[[565]](#footnote-565) although their assignment is subject to review every five years.[[566]](#footnote-566) Under the Act, an “extraordinary review” may also be undertaken upon the request of the supported or the supporting person or should any circumstances justifying review arise (such as placement under guardianship or a report by a relevant authority of a conflict of interest between the supporting and supported person).[[567]](#footnote-567)

In terms of its respect for Article 12 of the CRPD, the Hungarian legislative framework does not recognize the full legal capacity of all persons with disabilities. Due to the continued availability of full and partial limitations on legal capacity on the basis of a person’s disability and mental capacity,[[568]](#footnote-568) Hungary’s legislation undoubtedly violates Article 12.[[569]](#footnote-569) Moreover, the maintenance of substitute decision-making through the institution of guardianship is problematic vis-à-vis Article 12. One may note that under Hungarian law, persons with disabilities whose legal capacity has been fully restricted do not have the right to marry,[[570]](#footnote-570) make a will,[[571]](#footnote-571) adopt children,[[572]](#footnote-572) give and withdraw informed consent for medical care,[[573]](#footnote-573) access justice,[[574]](#footnote-574) or select a place to live.[[575]](#footnote-575)

Furthermore, despite the fact that the new Civil Code introduces supported decision-making measures as demanded by Article 12, supported decision-making in Hungary is only available to people with a “minor decrease in their mental capacity.”[[576]](#footnote-576) This undoubtedly contradicts Article 12 which envisions making supports available to all persons with disabilities, regardless a the level of support required.[[577]](#footnote-577) Furthermore, the Mental Disability Advocacy Centre (MDAC) maintains that the Hungarian legislative provision limiting supported decision-making to those with slight reductions in mental capacity is inherently discriminatory, contravening the CRPD’s prohibition of discrimination on the grounds of disability.[[578]](#footnote-578)

Next, the actual support system envisioned by the Hungarian legislation is arguably not in conformity with Article 12. The Mental Disability Advocacy Centre (MDAC) contends that Hungary’s conception of supported decision-making is not grounded in the will and preferences of the person concerned and that supports can in fact be “imposed” by the guardianship authority.[[579]](#footnote-579) Indeed, the notion of respecting the given person’s “will and preferences” does not seem to feature explicitly in the new Civil Code or in the accompanying Act on supported decision-making. Such a framework arguably does not mesh with Article 12, which is grounded in upholding the “will and preferences” of persons receiving support. Additionally, one must also question whether the possibility of the appointment of a support person “in general”[[580]](#footnote-580) risks potential over-regulation of the lives of persons with disabilities.[[581]](#footnote-581)

Moreover, some civil society actors have criticized the fact that supported decision-making in Hungary has been placed under the purview of the guardianship authority. The Hungarian Civil Liberties Union (HCLU) deems it to be problematic that support persons are appointed by the state just as guardians are.[[582]](#footnote-582) HCLU affirms that “we can assume the paternalistic approach to supporting disabled people will continue.”[[583]](#footnote-583) Additionally, the Hungarian Association for People with Intellectual Disabilities has argued that the guardianship authority’s “rigid, administrative framework” is ill-suited to the flexibility required for an effective system of supported decision-making.[[584]](#footnote-584)

The Hungarian act on supported decision-making entitles a professional support person in government service to assist up to 45 people concurrently, and authorizes other professional supporters to help up to 30 people at a time.[[585]](#footnote-585) The Hungarian Association for People with Intellectual Disabilities (ÉFOÉSZ) asserts that if a support person is responsible for such high numbers of people, they cannot feasibly maintain frequent, personal contact with all of the supported individuals so as to provide each one with individualized help.[[586]](#footnote-586) Moreover, civil society groups have also expressed their concern regarding the fact that professional guardians may receive certification as professional supporters merely by taking a 22-hour retraining, despite the fact that the two positions entail drastically different roles.[[587]](#footnote-587)

The legislation does contain some safeguards to prevent abuse of supports, such as the requirement for review of the support person by the guardianship authority every 5 years as well as the possibility for conducting an “extraordinary review” upon request or in the event of an alleged conflict of interest between the supporter and supported person.[[588]](#footnote-588) Professional supporters must also submit annual reports to the guardianship authority.[[589]](#footnote-589) The guardianship authority is to maintain a register of all supporters and supported persons in order to review and oversee the activities of the supporter.[[590]](#footnote-590) Despite this framework for oversight by the guardianship authority, the legislation does not seem to provide supported persons with guarantees against undue influence or coercion exerted by their supporters, nor does it appear to contain provisions geared towards ensuring respect for the will and preferences of the individual receiving support. These deficiencies in the legislative scheme are doubtless problematic from the point of view of Article 12.

It is also critical to mention that people who receive support in Hungary are deprived of the right to be foster parents, and they are denied the right to hold office as notaries public, judicial executors, judges, and prosecutors.[[591]](#footnote-591) This curtailment of rights linked to receiving support conflicts with Article 12’s call to recognize the ability of persons with disabilities to hold and exercise rights and duties on an equal basis with others.

Finally, some commentators have also pointed to problems with the advance directive regime contemplated by the Hungarian legislation. Under the new Civil Code, advance legal statements are to be regarded as a mere “indication” of a person’s will, such that authorities are not obliged to adhere to advance directives as legally binding statements.[[592]](#footnote-592) Therefore, the advance directive framework outlined in the Code is not grounded in a genuine “will and preferences” paradigm. Additionally, the entry into force of advance directives appears to be at the discretion of the court (contingent on a future finding of limited legal capacity),[[593]](#footnote-593) which is inconsistent with the idea promulgated by the Committee on Rights of Persons with Disabilities that the person with disabilities themselves should determine the point at which advance directives should come into effect.[[594]](#footnote-594)

In short, although Hungary has taken the step of introducing supported decision-making into its national legislation, the continued availability of substitute decision-making as well as apparent flaws in the supported decision-making system itself, are cause for concern. It is also troubling to note that MDAC reports that “there is little awareness about the new options of obtaining support in decision-making, both among those working in the system and among people who might need it.”[[595]](#footnote-595) Thus, actual access to supported decision-making in Hungary may be limited.[[596]](#footnote-596) Mental Health Europe also reports that Hungary’s 2013 act on supported decision making is “rarely used by the court.”[[597]](#footnote-597) Data from the Hungarian Central Statistical Office indicates that the number of individuals under guardianship has risen continuously in recent years.[[598]](#footnote-598) Approximately 60 000 people are currently under guardianship in Hungary.[[599]](#footnote-599) The Hungarian government reported to the UN Committee on Persons with Disabilities that, as of 2016, only 149 individuals were participating in supported decision-making.[[600]](#footnote-600) This statistic would appear to support the contention that supported decision-making is under-utilized in Hungary. The Hungarian government has acknowledged that “a review of the law enforcement practices of courts and guardianship authorities is necessary regarding supported decision-making, and based on the results trainings have to be created and offered with the involvement of the affected advocacy organizations for judges, forensic examiners, guardianship authorities, social and health institutions professionals, child protection guardians, and professional helpers and professional guardians.”[[601]](#footnote-601) There evidently remains work to be done in Hungary for supported decision-making to be properly implemented on the ground.

# Ireland

Ireland’s Assisted Decision-Making (Capacity) Act was enacted in December 2015,[[602]](#footnote-602) but the vast majority of this statute’s provisions have not come into effect to date.[[603]](#footnote-603) As of yet, only a few minor administrative provisions are in force.[[604]](#footnote-604) The 2015 Act is designed to replace the “ward of the court” system outlined in the Lunacy Regulation Act, which has governed matters of legal capacity and guardianship in Ireland since 1871.[[605]](#footnote-605) The new Act lays out new options of “assisted decision-making agreements” and “co-decision-making agreements,” but equally includes substitute decision-making measures through the mechanism of “decision-making representatives.”

Although Ireland was quick to sign the CRPD in 2007, it only ratified the Convention in March 2018, becoming the last European Union Member State to do so.[[606]](#footnote-606) The Irish Government consistently indicated that it wished to execute the legislative reforms required by the Convention prior to ratifying it.[[607]](#footnote-607) Upon its ratification of the Convention, Ireland notably attached a reservation related to Article 12. Ireland’s reservation reads: “to the extent Article 12 may be interpreted as requiring the elimination of all substitute decision making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards.”[[608]](#footnote-608) The UN Special Rapporteur on the Rights of Persons with Disabilities has noted that by virtue of Article 19 of the Vienna Convention on the Law of Treaties and Article 46 of the CRPD, reservations incongruous with the object and purpose of the Convention are not allowed.[[609]](#footnote-609) The Special Rapporteur maintains that in light of the key importance of Article 12 in the enjoyment and exercise of all rights outlined in the Convention, reservations intended to restrict the implementation of Article 12 are at odds with the object and purpose of the Convention, as they impede the exercise of rights of persons with disabilities on an equal basis with others.[[610]](#footnote-610) According to the Special Rapporteur, such reservations should consequently be withdrawn.[[611]](#footnote-611) Regardless of the validity of the Irish reservation, it undoubtedly evidences the intention of the Irish legislator to retain the option of substitute decision-making.[[612]](#footnote-612)

Numerous interest groups and professionals were engaged in the Irish law reform process. Amnesty International Ireland and the Centre for Disability Law and Policy at National University of Ireland Galway gathered a host of other organisations and individuals to form a coalition in 2011.[[613]](#footnote-613) The coalition drafted a document outlining the requirements of the CRPD and their application in the Irish context.[[614]](#footnote-614) Many of the groups that produced this document participated in the Justice Committee’s oral hearings on the new legislation in 2012.[[615]](#footnote-615) The Justice Committee then issued a report on these hearings which recognized the need to transition from a “best interests” model of substitute decision-making to a supported decision-making model centred upon the “will and preferences” of the person.[[616]](#footnote-616) This shift in the Parliament’s focus from a “best interests” to a “will and preferences” model is attributed to the advocacy of the coalition.[[617]](#footnote-617)

According to the final text of the 2015 Act, respect for the “will and preferences” of the person constitutes one of the “guiding principles” of the piece of legislation.[[618]](#footnote-618) Other key guiding principles of the Act include a presumption of capacity.[[619]](#footnote-619) The Act stipulates that where a person’s capacity is in question, capacity is to be assessed functionally, that is, “on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision…”[[620]](#footnote-620)

Under the 2015 Act, “decision-making assistance agreements” and “co-decision-making agreements” are available to a “person who considers that his or her capacity is in question or may shortly be in question.”[[621]](#footnote-621) Both of these types of supported-decision making mechanisms are intended to help a person to make decisions relating to personal welfare or property and affairs, or both.[[622]](#footnote-622) With both these mechanisms, the support person is nominated by the individual in need of support, though the appointment of co-decision-makers is subject to approval by the Decision Support Service, an administrative body devoted to supported decision-making.[[623]](#footnote-623)

A “decision-making assistant” advises the supported person, helps them to access information, determines their will and preferences and helps them to express these, aids them in making and communicating decisions, and strives to ensure that their decisions are carried out.[[624]](#footnote-624) The Act stipulates that “a decision-making assistant shall not make a decision on behalf of the appointer.”[[625]](#footnote-625) The Act indicates that further regulations will be issued to delineate the form that a decision-making assistance agreement must take and to establish the procedure through which the appointer must notify the Decision Support Service of the execution, variation or revocation of a decision-making agreement.[[626]](#footnote-626) If any person believes that a decision-making assistant has acted outside of their mandate; that they are not able to perform their role; or that they have exerted fraud, coercion, or undue pressure to manipulate the appointer into making the agreement, they are entitled to launch a complaint before the Decision Support Service.[[627]](#footnote-627)

Next, the Act stipulates that “co-decision-makers” are to present the appointer with alternatives and probable outcomes of given decisions and are to make decisions “jointly” with the appointer.[[628]](#footnote-628) As with decision-making assistants, co-decision-makers also must also clarify relevant information and considerations for the appointer, determine the appointer’s will and preferences and help them to express these, aid with the collection of relevant information, and exert reasonable efforts to see to the execution of decisions.[[629]](#footnote-629) Under the Act, persons “suitable” to be co-decision-makers are relatives or friends of the appointer who have had “such personal contact with the appointer over such period of time that a relationship of trust exists between them.”[[630]](#footnote-630) The Act lists several categories of persons who are not eligible to serve as co-decision-makers, including persons who have committed offences implicating fraud or dishonesty, bankrupt persons, and employees of centres or mental health facilities where the appointer lives.[[631]](#footnote-631)

In order for a co-decision-making agreement to enter into effect, it must be duly registered with the Decision Support Service.[[632]](#footnote-632) Applications to register a co-decision-making agreement must include opinions from a medical practitioner and another healthcare professional affirming that the appointer has the capacity to make a decision to enter into the co-decision-making agreement as well as the capacity to make decisions specified in the agreement with the help of the co-decision-maker.[[633]](#footnote-633) The Decision Support Service will assess the application and will examine, *inter alia*, whether the co-decision-maker is a “suitable” individual who is eligible for appointment and whether the co-decision-making agreement aligns with the will and preferences of the appointer.[[634]](#footnote-634) Where the Decision Support Service deems that a co-decision-making agreement satisfies the requirements set out in the Act, this administrative body will register the agreement.[[635]](#footnote-635)

Co-decision-makers are required to submit yearly reports on the performance of their duties to the Decision Support Service.[[636]](#footnote-636) The Act also establishes penalties for co-decision-makers who resort to fraud, coercion, or undue influence to oblige a person to make, vary or revoke a co-decision-making agreement.[[637]](#footnote-637) The Act allows any person to file a complaint against the co-decision-maker with the Decision Support Service.[[638]](#footnote-638) Complaints may be launched on several grounds, namely on the basis that the co-decision-maker has acted outside of their mandate; that they are not “suitable”; that the agreement does not align with the will and preferences of the appointer; that the appointer did not have capacity to make a decision to enter into the agreement; that fraud, coercion or undue pressure was exerted to manipulate the appointer into making the agreement; that an appointer has capacity in relation to a decision without the help of a co-decision-maker; or that the appointer no longer has capacity relating to a decision, even with the help of the co-decision-maker.[[639]](#footnote-639)

Alongside the two aforementioned forms of supported-decision making, the Act provides that the court may appoint a decision-making representative to make decisions on behalf of a person when the court deems that a person lacks capacity in a given area.[[640]](#footnote-640) As with the decision-making assistance agreements and co-decision-making agreements, the decision-making representative is involved in decisions pertaining to an individual’s personal welfare or property and affairs, or both.[[641]](#footnote-641) It is worth noting that the Act stipulates that decision-making representatives must try to determine the will and preferences of the person and to try to help them express these.[[642]](#footnote-642)

The new legislation also specifies that there will be a review of all existing wards appointed under the previous legislative scheme within three years of the entry into force of the new Act.[[643]](#footnote-643) If the person is found to have capacity, the ward will be discharged, and their property returned to them, and if they are found to lack capacity, there will be an assessment as to whether either a co-decision-making agreement or decision-making representative is appropriate.[[644]](#footnote-644)

One may note as well that the Act allows for the creation of enduring powers of attorney[[645]](#footnote-645) and advance healthcare directives.[[646]](#footnote-646) With the enduring power of attorney, an adult may grant someone either general authority to act on their behalf with respect to all or part of their property and affairs or the give them authority to do specific things regarding their personal welfare or property and affairs, or both.[[647]](#footnote-647) The enduring power of attorney will only enter into effect in the event that the person lacks capacity with respect to a decision outlined in the power.[[648]](#footnote-648) Instruments creating powers of attorney must also be registered with the Decision Support Service.[[649]](#footnote-649) The advance healthcare directive is an instrument through which an individual who is deemed to have capacity may indicate in writing their will and preferences regarding healthcare treatment should they lack capacity in the future.[[650]](#footnote-650) Refusals of treatment are considered valid, even if the refusal appears unwise or may lead to death.[[651]](#footnote-651)

The Act fails to comply with the requirement under Article 12 that persons with disabilities are recognized as enjoying legal capacity on an equal basis with others.[[652]](#footnote-652) Flynn and Arstein-Kerslake maintain that the functional definition of capacity under the Act “reveals that the underlying premise of the legislation is that a certain standard of mental capacity is a prerequisite for the recognition of an individual’s legal capacity – a premise which is not, in our view, compatible with the CRPD’s interpretation of Article 12.”[[653]](#footnote-653) Under the 2015 Irish Act, there still remains the possibility that a person can be declared legally incapacitated and have a substitute decision-maker appointed to them.[[654]](#footnote-654) The Irish Human Rights Commission has criticized the Act for failing to conform to all of the requirements of Article 12 of the CRPD, and has contended that the provisions in the Act allowing for substitute decision-making are merely a “repackaging” of the previous system.[[655]](#footnote-655)

Despite these shortcomings, however, the new legislation’s introduction of support measures constitutes an important step towards compliance with Article 12 of the CRPD. That said, the fact that the availability of co-decision-making hinges on an evaluation of mental capacity is undoubtedly problematic from the point of view of Article 12,[[656]](#footnote-656) as this may in effect deny the provision of co-decision-making to persons with disabilities with higher support needs. Moreover, it is also pertinent to note that a co-decision-maker is entitled to refuse to agree with the wishes of the appointer if it is reasonably foreseeable that “serious harm” will befall the appointer or another person.[[657]](#footnote-657) Since this would seem to give a sort of “veto” power to the co-decision-maker, this may call into question whether the Irish co-decision-making scheme is a genuine form of supported decision-making that gives autonomy to the supported person, as contemplated by Article 12.[[658]](#footnote-658) As well, the Act seems to require that a person have a requisite level of “mental capacity” in order to be able to enter into an assisted decision-making agreement, [[659]](#footnote-659) and so the Irish legislator has not made supported decision-making available to all persons with disabilities.

Finally, one can note that the enduring powers of attorney and advanced healthcare directives may resemble substitute decision-making more than supported decision-making, due to the fact that these mechanisms allow decisions to be made on a person’s behalf. Moreover, the entry into force of these arrangements problematically hinges on findings that the person lacks mental capacity - appointers are not given the freedom to decide the exact point at which these arrangements come into effect.[[660]](#footnote-660) These measures do, however, provide a way for the will and preferences of individuals to be followed.

Overall, the Irish Act does seem to fall into line with Article 12 with respect to its emphasis on upholding the “will and preferences” of the individual. The fact that even substitute decision-makers under the Act are called upon to ascertain the will and preferences of the affected person demonstrates that even Ireland’s substitute decision-making model has been shifted away from the traditional “best interests” paradigm. Nevertheless, it would seem that representatives are not strictly bound to uphold the will and preferences of the given person.[[661]](#footnote-661)

Notably, the Irish Act does include safeguards geared towards ensuring respect for the rights, will and preferences of the person and preventing abuse. For instance, the UN Special Rapporteur on disability rights lauded the safeguard present in the Irish legislation allowing for any person to file an administrative complaint against a support person.[[662]](#footnote-662) Nevertheless, Ireland’s reform is undoubtedly incomplete, with the retention of court declarations of incapacity as well as a regime of substitute decision-making representing flaws from the perspective of Article 12.

# Austria

In 2017, Austria’s Parliament unanimously adopted the second Adult Protection Law (2.ErwSChG),[[663]](#footnote-663) a piece of legislation appearing to embody the spirit of supported decision-making.[[664]](#footnote-664) The new law is purportedly “centered on autonomy, self-determination and decision-making guidance of those concerned.”[[665]](#footnote-665) The new Adult Protection Law entered into force in 2018.[[666]](#footnote-666)

Austria ratified the CRPD in 2008.[[667]](#footnote-667) In 2013, the CRPD Committee referred to Austria’s guardianship laws as “old-fashioned and out-of-step with the provisions of Article 12 of the Convention.”[[668]](#footnote-668) The Ministry of Justice responded to these criticisms by initiating a process to reform Austria’s guardianship law in 2014.[[669]](#footnote-669) A variety of individuals and groups were included in this process, including persons with disabilities, the courts, lawyers and notaries, organisations representing persons with disabilities, senior citizens’ representatives, representatives of residential homes, guardians’ associations, the Austrian Ombudsman Board, as well as employer and employee associations.[[670]](#footnote-670) This range of stakeholders participated in discussions and working parties.[[671]](#footnote-671) In parallel to the legal reform work, the Ministry of Justice also started a pilot project called “Support for Self-determination,” which was executed between 2014 and 2015 at 18 courts in Austria.[[672]](#footnote-672) The goal was to try to avoid the appointment of guardians by engaging a range of professionals such as psychologists and social workers to investigate alternatives to guardianship for the affected person during a lengthy pre-appointment “clearing” procedure.[[673]](#footnote-673) The results of this pilot project were presented in a research paper prepared by the Austrian Institute for the Sociology of Law and Criminology, which is viewed to have influenced the legislative reform.[[674]](#footnote-674)

The Adult Protection Law stipulates that persons who are restricted in their decision-making capacity by reason of a mental illness or comparable impairment should be able to manage their affairs as independently as possible, with any support needed.[[675]](#footnote-675) The Act proceeds to explain that support may be provided by family members, care facilities, social service institutions, peer groups, and counselling centers, among other sources.[[676]](#footnote-676) The law specifies that a representative may only be appointed for persons if they provide for this themselves or if representation is required to protect their rights and interests.[[677]](#footnote-677) To the extent that a person receives adequate support, no adult representative will be appointed to act for them.[[678]](#footnote-678) The law also indicates that where representation is in place, representatives should also seek to uphold the autonomy of represented persons and to ensure that represented persons, within the scope of their abilities, are able to structure their living conditions according to their own wishes and ideas.[[679]](#footnote-679)

The new legislation introduces four “pillars” for representing adults needing assistance: the enduring power of attorney, elective representation, statutory representation, and court-appointed representation. Agreements under each of the four pillars must be recorded in a centralized national register managed by notaries (the Central Austrian Representation Register).[[680]](#footnote-680)

Those who have contractual capacity may create enduring powers of attorney whereby they appoint a representative to act for them.[[681]](#footnote-681) “Enduring powers of attorney” may cover a range of matters - Austrian law does not restrict the scope of powers that an attorney may detain.[[682]](#footnote-682) Enduring powers of attorney may be set up with the assistance of a lawyer, notary, or employee of an adult representation agency.[[683]](#footnote-683) An enduring power of attorney enters into effect when the given person must is deemed to have lost the ability to make their own decisions.[[684]](#footnote-684) A person under an enduring power of attorney is not stripped of their civil rights.[[685]](#footnote-685) Judicial supervision over enduring powers of attorney generally only occurs when there is a disagreement between the attorney and the appointer with regards to medical treatment.[[686]](#footnote-686)

Those who do not have the requisite contractual capacity to set up a power of attorney, but who are still able to comprehend the general meaning and consequences of a power of attorney and are able to express their will, may opt for “elective representation.”[[687]](#footnote-687) Under elective representation, a person selects one or more trusted people (friends or family members) to support and represent them. The representative’s powers may pertain to individual matters or specified types of affairs.[[688]](#footnote-688) An agreement must be made in writing before a notary, a lawyer or an employee of an adult representation agency.[[689]](#footnote-689) If a notary, lawyer or adult representation agency employee has any “justified doubts” about whether a given arrangement fulfils the requirements set out in law or should they have as any “justified doubts” about the suitability of a prospective representative, they must refuse registration and, if there is a reasonable risk to the well-being of the person concerned, they must notify the court.[[690]](#footnote-690) An elective representation agreement remains in force indefinitely.[[691]](#footnote-691) The courts supervise these agreements through annual reports.[[692]](#footnote-692)

Austrian law lays out three possible forms of elective representation agreements. Firstly, with the “informational support” option, a representative assists a person to come to an informed decision.[[693]](#footnote-693) The representative is provided with access to the individual’s personal information in the possession of clinics, schools, tax and welfare offices, banks and other third parties.[[694]](#footnote-694) Next, “co-decision-making” agreements may be signed, specifying that the representative cannot legally act without the consent of the concerned person.[[695]](#footnote-695) Finally, there is also a possibility to agree to a “representative’s veto,” in which a person is only entitled to make legally valid acts with their representative’s consent.[[696]](#footnote-696) The person concerned can terminate the agreement at any moment.[[697]](#footnote-697)

The third measure, “statutory representation” is intended for persons who are unable to manage their affairs without risk of harm to themselves as a result of a mental illness or other impairment in their decision-making capacity.[[698]](#footnote-698) Under statutory representation, a relative of the person concerned legally intervenes to aid and represent the person.[[699]](#footnote-699) Statutory representation can cover representation in administrative and court proceedings; administration of income, assets and liabilities; conclusion of legal transactions pertaining to care and support; decisions relating to medical treatment; decisions about place of residence; as well as other personal matters and other types of legal transactions.[[700]](#footnote-700) The statutory representation must be entered into the Central Austrian Representation Register by a notary, lawyer, or adult representation agency staff member.[[701]](#footnote-701) If a notary, lawyer or adult representation agency employee has any “justified doubts” about whether a given statutory representation arrangement fulfils the requirements as well as any “justified doubts” about the suitability of a prospective adult representative, they must refuse registration and, if there is a reasonable risk to the well-being of the person concerned, they must notify the court.[[702]](#footnote-702) Statutory representation measures may remain in force for up to three years, with the possibility for renewal.[[703]](#footnote-703) The affected person is not stripped of their civil rights.[[704]](#footnote-704) The new law puts into place measures for judicial supervision of statutory representatives through the submission of annual reports.[[705]](#footnote-705)

Finally, “court-appointed representation” replaces Austria’s previous guardianship regime.[[706]](#footnote-706) The court may appoint a representative at their own initiative or upon the request of the person concerned.[[707]](#footnote-707) This arrangement is intended for persons who cannot manage their own affairs due to a mental illness or other impairment in decision-making capacity.[[708]](#footnote-708) This is also a measure of last resort, to be applied where the person has no enduring power of attorney, is unable to select a representative and has no close relative who is able or prepared to intervene through statutory representation.[[709]](#footnote-709) The court will give priority to the individual’s will when choosing a representative, but will also consider the suitability of the prospective representative.[[710]](#footnote-710) Priority is given to appointing a person who has been previously designated in a power of attorney, elective representation, or court appointed representation, but if such a person is not available or suitable, the court will favour appointing a person who is close to the adult.[[711]](#footnote-711) Finally, if the person is socially isolated, the court will select an adult representation agency or a legal practitioner.[[712]](#footnote-712)

Court-appointed representatives are supervised by the court through the submission of reports.[[713]](#footnote-713) Court-appointed representation must be restricted to particular areas,[[714]](#footnote-714) which marks a shift from Austria’s previous legal regime that allowed for plenary guardianship.[[715]](#footnote-715) Court appointed representation measures may be in place for up to three years, with the possibility for renewal.[[716]](#footnote-716) The represented person is not stripped of their civil rights, although the court may grant the representative the ability to veto certain decisions made by the person in order to protect their fundamental interests.[[717]](#footnote-717) Court-appointed representatives are also entitled to annual compensation amounting to five percent of the income of the represented person.[[718]](#footnote-718)

The new legislation is grounded in respect for a person’s will and preferences. If a representative makes a decision that is not in line with the will of the person with disabilities, a complaint can be filed, with the possibility for the application of corrective actions.[[719]](#footnote-719)

In terms of its conformity with Article 12 CRPD, the Austrian law does stipulate that a person’s legal capacity can never be removed in certain areas - the legislation stipulates that making a will or advance healthcare directive, establishing an enduring power of attorney, getting married, adopting a child or acknowledging paternity can never be decided by someone other than the individual concerned.[[720]](#footnote-720) Moreover, none of the options described in the four pillars result in an “automatic” loss of legal capacity, although with respect to court-appointed representatives, where the court detects a major risk to the person concerned, the court is authorised to order that some legal acts will only be valid upon approval by the representative.[[721]](#footnote-721) The “representative’s veto” form of elective representation also seems to restrict the exercise of a person’s legal capacity as well. In fact, most of the forms of “representation” contemplated by the law (perhaps with the exception of informational support and co-decision-making) seem to embody features of substitute decision-making, in that decisions can presumably be made on a person’s behalf. As affirmed by the Austrian Disability Council, “the law by itself cannot grant full protection from heteronomous decision-making and thus guarantee the right to autonomy for persons with disabilities in accordance with the CRPD.”[[722]](#footnote-722)

The Austrian legislation mentions some informal forms of support, such as the provision of support by family members, peers, and social services, but does not guarantee access to support for persons with disabilities or explain how the state might be involved in facilitating access to any of these types of supports. Austria’s legislation seems to leave many forms of support outside the scope of regulation by law. The legislation arguably appears to provide for support mechanisms through the “co-decision-making” and “informational support” options. However, it is undoubtedly problematic that these measures of support are not available to all persons with disabilities (since “elective representation” is only a possibility for those who have an ability to understand the general meaning and consequences of a power of attorney and an ability to express their will and act accordingly[[723]](#footnote-723)). The UN Committee on the Rights of Persons with Disabilities has stated that the provision of supported decision-making should not be made contingent on an evaluation of mental capacity.[[724]](#footnote-724) Moreover, given the fact that informal support and co-decision-making are labelled as forms of “representation,” this calls into question whether these can truly be considered measures based on “support.” The Act appears to be grounded, however, in the notion that the will and preferences of represented persons should be respected.[[725]](#footnote-725) The Act’s guiding focus on the person’s “will and preferences” rather than “best interests” is undoubtedly a step towards fulfilling the requirements of Article 12.

The law does provide for some important safeguards against abuse, including the establishment of a central registry and the judicial supervision of representatives.[[726]](#footnote-726) The possibility for the filing of complaints on the grounds that representatives are not acting in accordance with the affected person’s will and preferences also constitutes an important safeguard.

While Austria has eliminated its plenary guardianship regime, Austria’s reform arguably does not go far enough to secure legal capacity for persons with disabilities in all areas of life through a genuine and accessible supported decision-making system.

# Belgium

Belgium ratified the CRPD in 2009.[[727]](#footnote-727) Belgium has since adopted the “Act of 17 March 2013, reforming the arrangements with regard to incapacitation and introducing a new protection status in line with human dignity.”[[728]](#footnote-728) One of the purported objectives of the legislative reform was to align Belgian legislation with the CRPD.[[729]](#footnote-729) The legislative reform establishes a new regime of assisted decision-making, while also providing for the possibility of substituted decision-making.

The legislative text was drafted with the input of central players in the disability field.[[730]](#footnote-730) The law reform was “long awaited” by Belgian civil society organizations as well as by the country’s Advisory Structures of Persons with Disabilities (advisory bodies operating at different levels of government).[[731]](#footnote-731) The new law was passed by the Belgian Parliament in 2013 and entered into force in 2014.[[732]](#footnote-732)

Belgium’s legislative reform replaces its former regimes of extended minority, guardianship, judicial advisory and temporary administration with two systems aimed at safeguarding the rights of vulnerable peoples (persons with intellectual disabilities, persons with mental disorders, and some elderly people).[[733]](#footnote-733) The two regimes outlined in Belgium’s new legislation are extra-judicial protection and judicial protection.

With extra-judicial protection, a person who is capable of expressing their will can sign a contract to authorize someone to represent them in matters pertaining to their person or property, or in administrative actions.[[734]](#footnote-734) The person requesting extra-judicial protection can chose whether the contract will take effect either immediately or at the moment when the person is incapable (in fact) of carrying out certain acts.[[735]](#footnote-735) Such contracts must be registered via a notary or a clerk of the justice of the peace.[[736]](#footnote-736)

The new legislation also outlines two forms of judicial protection: assistance and representation. The amended Belgian Civil Code allows a justice of the peace, upon consideration of “health status” and “personal circumstances,” to declare a person incapable of accomplishing one or more acts relating to their person or property and to impose a measure of judicial protection upon this person in these areas.[[737]](#footnote-737) A justice of the peace can impose measures of “assistance” when the person is able to carry out a certain act themselves, but is not able to do so autonomously.[[738]](#footnote-738) With the regime of assistance, a judge appoints an administrator tasked with “perfecting the validity of an act posed by the protected person themselves.”[[739]](#footnote-739) Ostensibly, assistance consists of the administrator giving prior written consent to the performance of certain acts.[[740]](#footnote-740) The administrator is tasked with assisting the protected person when they are carrying out a specified act, “unless the act envisaged is manifestly prejudicial to the interests of the protected person.”[[741]](#footnote-741) The Code establishes a preference for assistance over representation: representation can only be ordered where assistance in the carrying out of a certain act “does not suffice.”[[742]](#footnote-742)

A justice of the peace can opt for measures of representation where a person can neither carry out a certain act autonomously nor themselves in any way.[[743]](#footnote-743) With the regime of representation, a justice of the peace designates an administrator to intervene in the name of and on behalf of the protected person.[[744]](#footnote-744) The representative acts in the personal or property matters in which the justice of the peace has declared the person incapable.[[745]](#footnote-745)

Administrators in both assistance and representation arrangements are subject to judicial oversight through the submission of reports to the justice of the peace.[[746]](#footnote-746) Moreover, the justice of the peace is authorized to replace the administrator or modify their powers, either on justice of the peace’s own initiative or at the request of a prosecutor, the protected person, the trusted person, the administrator, or any interested person.[[747]](#footnote-747)

With both types of judicial protection, the protected person also has the right to be supported by a “trusted person.”[[748]](#footnote-748) The trusted person serves as an intermediary between the administrator and the protected person (they are to stay in close contact with each).[[749]](#footnote-749) The trusted person is tasked with expressing the opinion of the protected person if they are not able to do so themselves or to help them to express their opinion if she cannot do so autonomously.[[750]](#footnote-750) They are also supposed to sees to the smooth functioning of the administration.[[751]](#footnote-751) The trusted person receives all reports relating to the administration and may request pertinent information from the administrator.[[752]](#footnote-752) The administrator must keep them the trusted person up to date regarding all acts relating to the administration regime.[[753]](#footnote-753)

With both assistance and representation, the affected person themselves can make a declaration before a justice of the peace or a notary as to their preference regarding who should be appointed as both their administrator and their trusted person.[[754]](#footnote-754) If the persons designated as administrators or trusted persons accept these positions, the justice of the peace homologates the designation, unless they deem that serious reasons regarding the best interests of the protected person prevent them from following the choice.[[755]](#footnote-755) If the protected person did not indicate a preference as to their administrator or their choice was not followed, the justice of the peace will select an administrator, appointing in order of preference: the parents or a parent, the spouse, the legal cohabitant, the person living maritally with the person to be protected, a close family member, a person in charge of the daily care of the person, a private foundation dedicated exclusively to the person to be protected.[[756]](#footnote-756) The justice of the peace is to make this choice taking into account the personal situation, the life conditions and the familial situation of the person be protected. [[757]](#footnote-757) If the protected person did not suggest an individual to act as their trusted person, the justice of the peace may look into designating a trusted person.[[758]](#footnote-758)

With respect to its degree of compliance with Article 12 of the CRPD, Belgium’s legislative scheme does not recognize universal legal capacity for persons with disabilities. Restrictions on legal capacity based on “health status” and “personal circumstances” are possible.[[759]](#footnote-759) While these criteria appear to be vague, this may problematically allow for restrictions of legal capacity based on the diagnosis of an impairment.[[760]](#footnote-760) The availability of representation, seemingly a form of substitute decision-making, is also problematic from the point of view of Article 12.

Moreover, it is debatable whether the act lays out supported decision-making in conformity with Article 12. The regime of assisted decision-making does empower the person with disabilities in that it gives them the power of initiative to propose to carry out a certain act. However, it would seem that the assisting administrator effectively possesses a “veto” power over the protected person’s decisions, as the administrator’s prior consent is required for the assisted person’s actions to be valid in law.[[761]](#footnote-761) The UN Special Rapporteur on the rights of persons with disabilities has criticized such veto powers inherent in co-decision arrangements, maintaining that they restrict the exercise of a person’s legal capacity.[[762]](#footnote-762) Moreover, the law authorises administrators to withdraw their assistance if they deem an act would be contrary to the interests of the protected person.[[763]](#footnote-763) This would appear to go against the “will and preferences” paradigm characterising Article 12 of the CRPD, as the administrator is entitled to act in the person’s perceived “best interest” rather than being required to uphold their will and preferences.

Additionally, the assisted decision-making scheme outlined in the act is problematic with respect to Article 12, as assistance is only available to those who have been deemed incapacitated with respect to a given matter.[[764]](#footnote-764) Supports envisaged by the CRPD are intended to help a person to exercise their legal capacity. Thus, the fact that assisted decision-making is made contingent on a restriction of legal capacity by the court is cause for concern. Additionally, in order to have access to assistance measures under Belgian law, the court must be satisfied that the person would have the ability to carry out a certain act themselves with help.[[765]](#footnote-765) If the court does not come to this conclusion, then the person is relegated to the regime of representation.[[766]](#footnote-766) Thus, the Belgian legislative regime appears to make the provision of assistance measures contingent on fulfilling a certain level of mental capacity, which is problematic with respect to Article 12.[[767]](#footnote-767) Moreover, the amended Code also calls for the establishment of a list of health conditions known to “seriously and persistently” impair a person’s ability to manage patrimonial interests, even with assistance.[[768]](#footnote-768) If a person has one of these listed conditions, they must be represented in all matters relating to their property and thus are not eligible for assistance.[[769]](#footnote-769) This provision would seem to deny people the right to assistance in a discriminatory fashion, based solely on the diagnosis of a listed health condition. This could potentially serve to prevent people with higher support needs from accessing assistance.

While the new figure of the “trusted person” under Belgian legislation could be said to encompass certain elements of a support person (as they help persons with disabilities to communicate their will),[[770]](#footnote-770) they cannot be said to be genuine supported decision-makers, since they do not partake in the formal decision-making process. Moreover, it would seem that the appointment of a “trusted person” is not mandatory, given that the Code states that the protected person has the “right” to be supported by a trusted person, [[771]](#footnote-771) and that if the protected person does not suggest a trusted person, the justice of the peace “can” examine the possibility of designating a trusted person.[[772]](#footnote-772) It also does not appear that the court is required to verify the authenticity of the relationship of trust between a protected person and a proposed “trusted” person, although the law does admittedly stipulate that if the justice of the peace deems that the appointment of the proposed trusted person would seriously contravene the best interests of the protected person, they may refuse to appoint this person.[[773]](#footnote-773)

The new legislation does incorporate certain safeguards against abuse such as the court’s oversight of administrator’s through the submission of reports,[[774]](#footnote-774) and arguably, the “trusted person” could be viewed as a sort of safeguard as well, monitoring the administrator and ensuring that the opinion of the protected person is properly communicated.[[775]](#footnote-775) Moreover, the Belgian legislation establishes another important safeguard by entitling the justice of the peace to replace the administrator or modify their powers following a request of a wide range of individuals.[[776]](#footnote-776)

It is also debatable whether the extra-judicial protection measures contemplated in Belgium’s legislation could be deemed to be a form supported decision-making in keeping with Article 12. It could be argued that Belgium’s extra-judicial protection is a measure that functions to ensure the will and preferences of a person are respected, as a person with disabilities can stipulate principles for their appointed representative to follow in the exercise of the mandate.[[777]](#footnote-777) Additionally, the person with disabilities is given some freedom in determining the moment at which the measures are to enter into force (either immediately or at a time at which they are later deemed to lack capacity).[[778]](#footnote-778) However, with extra-judicial protection, a person authorizes someone to *represent* them,[[779]](#footnote-779) and so this resembles a form of substitute decision-making where a third party is acting on the person’s behalf, rather than a genuine form of supported decision-making.

Thus, although the provisions regarding extra-judicial protection, assisted decision-making, and trusted persons encompass some of the essence of Article 12, the Belgian legislation seems to fall short of compliance with Article 12. In 2014, the Committee on the Rights of Persons with Disabilities acknowledged Belgium’s legal capacity reform, but stressed that “the new law continues to adhere to a substitute decision-making model and does not provide for the right to supported decision-making.”[[780]](#footnote-780) Additionally, one might also contend that the use of the terms “*protected* person,” “extra-judicial *protection*,” and “judicial *protection*” indicate that Belgian legislation is grounded in paternalistic attitudes focused on safeguarding the interests of the person with disabilities, rather than empowering the person with disabilities in the decision-making process, in the spirit of Article 12.

# Canada: British Columbia

Canada ratified the CRPD in 2010, entering a reservation regarding Article 12.[[781]](#footnote-781) Canada reserved the right to maintain substitute decision-making measures in certain situations and subject to corresponding safeguards and regulations.[[782]](#footnote-782) Canada’s implementation of Article 12 of the CRPD is made difficult by the Canadian Constitution, which grants jurisdiction over “property and civil rights” to the provincial and territorial governments.[[783]](#footnote-783) Thus, in Canada, jurisdiction over matters of legal capacity generally belongs to the provinces rather than to the federal government.[[784]](#footnote-784) Several Canadian provinces have enacted legislation referencing supported decision-making, with some of these efforts even preceding the CRPD.[[785]](#footnote-785) In fact, Article 12 of the CRPD is said to have been spurred by British Columbia’s Representation Agreement Act.[[786]](#footnote-786) Kanter and Tolub proclaim that “Canada is the country with the longest history of developing alternatives to guardianship.”[[787]](#footnote-787) Nevertheless, no provincial legislative scheme in Canada universally recognizes the legal capacity of all persons with disabilities on an equal basis with others nor has any province totally abolished the institution of guardianship.[[788]](#footnote-788)

British Columbia has been dubbed one of the world’s “leading jurisdictions” in the area of supported decision-making.[[789]](#footnote-789) British Columbia’s Representation Agreement Actentered into force in 2000,[[790]](#footnote-790) introducing one of very first legally-recognized supported decision-making systems.[[791]](#footnote-791)

The Representation Agreement Actwas drafted by the Project to Review Adult Guardianship (PRAG), an alliance comprised of the Alzheimer Society, the Association for Community Living, the Coalition of People with Disabilities and the Community Legal Assistance Society, with funding provided by the Law Foundation of British Columbia.[[792]](#footnote-792) PRAG enabled significant community participation in the drafting of the legislation, soliciting input from legal and health professionals, hospitals and care facilities, self-advocacy groups, and seniors.[[793]](#footnote-793) A member of the BC legislature at the time described the legislation as “a people’s Bill, with government’s co-operation.”[[794]](#footnote-794) After the passing of the legislation, PRAG was superseded by the Community Coalition for the Implementation of Adult Guardianship Legislation, through which the same community groups that had formed PRAG shifted their efforts to ensuring the proper implementation of the Act.[[795]](#footnote-795)

British Columbia’s legislative schemeenables an adult to appoint a representative to “help the adult make decisions, or to make decisions on behalf of the adult.”[[796]](#footnote-796) A representation agreement may cover a broad range of areas, namely: personal care, health care, the routine management of financial affairs (such as the payment of bills, receipt and deposit of pension and other income, purchases of food, accommodation and other services necessary for personal care, and the making of investments), as well as the procurement of legal services and the instruction of counsel during legal proceedings.[[797]](#footnote-797) The Act stipulates that it is possible to authorize a representative to make decisions regarding the adult’s placement in a family care home, group home for the mentally handicapped, or mental health boarding home.[[798]](#footnote-798) The Act states that a representative may not be authorized “to help make, or to make on the adult’s behalf, a decision to refuse health care necessary to preserve life,”[[799]](#footnote-799) nor may they be authorized “despite the objection of the adult, to physically restrain, move or manage the adult, or authorize another person to do these things.”[[800]](#footnote-800)

The legislation demands that representatives “act honestly and in good faith,” that they “exercise the care, diligence and skill of a reasonably prudent person,” and “act within the authority given in the representation agreement.”[[801]](#footnote-801) The Act further specifies that when assisting in the decision-making process or when making a decision on the affected adult’s behalf, a representative must “consult, to the extent reasonable, with the adult to determine his or her current wishes, and comply with those wishes if it is reasonable to do so.”[[802]](#footnote-802)

An adult may choose to designate as their representative any consenting individual over 19 years of age, provided that this individual does not supply the adult with personal or health care services for remuneration and that they do not work in a facility that provides the adult with such services.[[803]](#footnote-803) Alternatively, the Public Guardian and Trustee may be appointed as a representative, as can a credit union or trust company (as long as the representation agreement does not cover health care or personal care).[[804]](#footnote-804) Representation agreements pertaining to finances must designate a monitor tasked with supervising the representative, unless the representative is the adult’s spouse, the Public Guardian and Trustee, a trust company or a credit union, or the adult has named two or more representatives who are required to act unanimously.[[805]](#footnote-805)

Representation agreements under the Act constitute private contracts and will only appear before a court should a representative apply to the court for guidance as to the interpretation of an agreement,[[806]](#footnote-806) or should the Public Guardian and Trustee pursue a person’s objection to an agreement.[[807]](#footnote-807)

The Act is grounded upon a presumption of capability.[[808]](#footnote-808) Furthermore, a person’s capacity to enter into a representation agreement is not assessed by a standard status or functional test. Instead, a subjective and holistic evaluation is made, examining whether the person has communicated a desire to have a representative, whether the adult can demonstrate choices and preferences as well as feelings of approval or disapproval of others, whether the adult is aware that the representation agreement will affect them, and whether the adult has a relationship of trust with the representative.[[809]](#footnote-809)

In terms of its conformity to Article 12 of the CPRD, BC’s legislation does provide for a form of supported decision-making whose availability is not restricted based on a rigid assessment of mental capacity. UN’s Handbook for Parliamentarians on the CRPD praises this aspect of BC’s legislation, noting that in order to enter into a representation agreement, “a person does not need to prove legal competency under the usual criteria, such as having a demonstrated capacity to understand relevant information, appreciate consequences, act voluntarily and communicate a decision independently.” [[810]](#footnote-810) That said, supported decision-making may not be available to all persons with disabilities in BC. Indeed, Malcolm Parker poses a key question regarding the factors contained in BC’s legislation for assessing a person’s capacity to enter into a representation agreement: “how much more flexibility than the traditional threshold concept of capacity do these considerations represent?”[[811]](#footnote-811) This author contends that “to demonstrate choices and preferences, indicate approval or disapproval of others (in relation to the supporting *role*, not just whether the other person was liked or not), be aware of what that role involves, and to trust the support person, together comprise something that closely aligns with what a threshold concept of capacity requires.”[[812]](#footnote-812) Thus, we must question whether the BC legislative scheme actually makes supported decision-making universally available to persons with disabilities, including those with high support needs. Nevertheless, there is “no specific up-front test of mental capability” that must be passed in order to make a representation agreement.[[813]](#footnote-813) Perhaps if the factors are not applied rigidly, support may in fact be made widely available to persons with disabilities.

The Representation Agreement Act does contain some safeguards as required by Article 12, such as the appointment of a monitor in cases where the agreement touches upon financial matters.[[814]](#footnote-814) The monitor must ensure that the representative is adhering to the agreement and acting honestly and in good faith, while exercising appropriate care, diligence and skill.[[815]](#footnote-815) Monitors may require the representative to provide accounts, records, and reports and may inform the Public Guardian and Trustee if they believe that a representative is not respecting their duties.[[816]](#footnote-816) Notably, however, the legislation does not appear to require monitors where the agreement touches upon non-financial matters and it also does not appear to provide for any mechanisms to challenge the representative’s actions.

One potential incompatibility between the Representation Agreement Act and Article 12 might be found with regards to the possibility that a representative may “make decisions on behalf of the adult.”[[817]](#footnote-817) Due to this provision, representation agreements arguably encapsulate qualities of substitute decision-making, which takes decisions out of the hands of persons with disabilities. Additionally, even where the representative is “helping” the adult as opposed to making decisions on their behalf, there is a potential for a representative to make decisions that conflict with the will and preferences of the adult. The Act only obliges representatives to try to ascertain the adult’s wishes “to the extent reasonable.”[[818]](#footnote-818) Moreover, representatives must only comply with these wishes “if it is reasonable to do so.”[[819]](#footnote-819) These stipulations would appear to give a representative authorization to disregard the will and preferences of the adult at their discretion. This is problematic from the point of view of Article 12, which puts forward a vision of supported decision-making that is staunchly committed to upholding the will and preferences of the individuals receiving support.

It is critical to emphasize that the substitute decision-making in the form of guardianship remains available under BC law, which is in clear contravention of Article 12. The Patients Property Act allows for a person to apply to the BC Supreme Court to be designated as a person’s private committee (or guardian).[[820]](#footnote-820) A person can be appointed as committee of estate to manage the person’s financial and legal affairs, as committee of person to take charge of an individual’s personal care, or as both committee of estate and person.[[821]](#footnote-821) After weighing medical evidence pertaining to the person’s capability of handling their finances and/or their person, the judge may then make a declaration that the person is incapable of managing their finances and/or their person,[[822]](#footnote-822) and then proceed to appoint a person as committee.[[823]](#footnote-823) The committee is to act in the best interests of the affected person and their family.[[824]](#footnote-824) Another BC law, the Adult Guardianship Act, allows the Public Guardian and Trustee (a government official) to be appointed as a person’s statutory property guardian.[[825]](#footnote-825) In this case, the Public Guardian and Trustee assumes responsibility for a person’s financial and legal affairs through a bureaucratic procedure that takes place outside of the courts.[[826]](#footnote-826) This process necessitates a Certificate of Incapability signed by an authorized health care provider.[[827]](#footnote-827) As with committees, statutory guardians have a duty to act in the best interest of the person concerned and their family.[[828]](#footnote-828) With both adult guardianship and committeeship, the affected person loses their decision-making rights, and the person will probably remain under this arrangement for the entirety of their lives, as these measures are complicated to rescind.[[829]](#footnote-829) BC’s legislation on adult guardianship and committeeship thus problematically allows for restrictions of legal capacity on the basis of mental capacity, as well as substitute decision-making in the person’s “best interests”.

Finally, it may also be pertinent to note that other BC laws allow for enduring powers of attorney covering financial and legal matters as well as advance directives for health care matters. It is of interest to assess whether these measures could be construed as supported decision-making within the meaning of Article 12. In order to enter into an enduring power of attorney, an individual must be capable of “understanding the nature and consequences of the proposed enduring power of attorney.”[[830]](#footnote-830) Thus, the provision of these arrangements hinge on an assessment of mental capacity, which goes against Article 12. An attorney is required to “act in the adult’s best interests,”[[831]](#footnote-831) which is also potentially problematic from the perspective of Article 12, but the Power of Attorney Act does also stipulate that the attorney must “tak[e] into account the adult’s current wishes, known beliefs and values, and any directions to the attorney.”[[832]](#footnote-832) Another notable feature of BC’s enduring powers of attorney which would seem to line up with Article 12 is that these arrangements may enter into force at a date or moment stipulated by the affected person.[[833]](#footnote-833) In order to make an advance directive under BC law, a similar threshold level of mental capacity is required.[[834]](#footnote-834) The advance directive constitutes written instructions about health care that a person consents to or refuses.[[835]](#footnote-835) The Act stipulates that health care providers “may provide health care to an adult if the adult has given consent to that health care in the adult’s advanced directive” and that they “must not provide health care to an adult if the adult has refused consent to that health care in the adult’s advance directive.”[[836]](#footnote-836) Thus, seemingly, health care providers must follow the will and preferences of the person who has made the directive, in keeping with Article 12. Advance health care directives are applicable when the person is “incapable of giving or refusing consent to the health care,” so the entry into force of these directives problematically hinges on an assessment of mental capacity in decision-making.[[837]](#footnote-837)

Alongside British Columbia, other provinces and territories in Canada have also enacted legislation that encompasses supported decision-making. Manitoba (1993), Saskatchewan (2001), the Yukon (2003), and Alberta (2008) have each implemented supported decision-making legislation.[[838]](#footnote-838)

At the close of her recent visit to Canada, the UN Special Rapporteur for Persons with Disabilities urged Canada to withdraw its reservation with respect to Article 12 and to accelerate efforts to abolish substitute decision-making nationwide.[[839]](#footnote-839) Other solutions to facilitate the implementation of Article 12 in Canada have been put forward, such as the suggestion that the federal and provincial/territorial governments collaborate to establish an inter-provincial task force to coordinate policy and legislation in the area of legal capacity.[[840]](#footnote-840) The McGill Centre for Human Rights and Legal Pluralism has proposed that such a task force could review the various legal and policy regimes across Canada and investigate how they could be made compliant with Article 12.[[841]](#footnote-841) This organization has suggested that particular goals could be set for each province and territory and that a national monitoring system could be created to ensure the timely fulfilment of these objectives. [[842]](#footnote-842) Such provincial-federal cooperation could help Canada to establish “a consistent framework for recognizing legal capacity and to enable access to the support needed to exercise legal capacity,” as was recommended by the Committee on the Rights of Persons with Disabilities in 2017.[[843]](#footnote-843)

# United States of America: Texas

The United States of America signed the CRPD in 2009, but has never ratified the Convention.[[844]](#footnote-844) Thus, Article 12 does not have the force of law in the American context.[[845]](#footnote-845) Nevertheless, supported decision-making has been the subject of increased attention by US lawmakers of late.[[846]](#footnote-846) Legal capacity in the United States falls under state and not federal jurisdiction.[[847]](#footnote-847) Several states have recently enacted legislation introducing supported decision-making, such as Texas, Delaware, Wisconsin, and Washington, D.C.[[848]](#footnote-848) Eliana Theodorou argues that we must not “overstat[e] the salience of international human rights law in accounting for interest in supported decision-making in the United States.”[[849]](#footnote-849) This author contends that United States’ relationship with international human rights law has often been “fraught,”[[850]](#footnote-850) and suggests that “it is far from clear that invoking international human rights norms is a persuasive tactic in many state legislatures.”[[851]](#footnote-851) Indeed, Texas, the first state in the US to recognize supported decision-making in law,[[852]](#footnote-852) also passed an “anti-international law” in 2017.[[853]](#footnote-853) Moreover, many consider that the US Senate’s rejection of the CRPD was partly due to conservative misgivings about the United Nations and the international human rights regime.[[854]](#footnote-854) Therefore, in Theodorou’s opinion, impetuses apart from the CRPD may well explain recent legislative action on supported decision-making in the United States.[[855]](#footnote-855)

In 2015, the Texan legislature passed a new law presenting supported decision-making as an alternative to guardianship.[[856]](#footnote-856) Activism for supported decision-making in Texas began in 2004 when individuals from advocacy organizations, state government, and local organizations joined forces and formed the “Texas Self-Determination State Policy Team.”[[857]](#footnote-857) The “Alternatives to Guardianship Subcommittee” was then formed under the auspices of this Team, and the work of this subcommittee eventually led to the passage of Bill H.B. 1454 in 2009, which called upon the Texas Health and Human Services Commission to launch a supported decision-making pilot project.[[858]](#footnote-858) The pilot project was ultimately carried out by the Arc of San Angelo, a local chapter of a national grassroots not-for-profit organization.[[859]](#footnote-859)

In parallel to the pilot project, activists from organizations like G.R.A.D.E. (Guardianship Reform Advocates for the Disabled and Elderly) started to speak out against the Texan guardianship regime as mercenary and inhumane.[[860]](#footnote-860) Activists assembled outside guardianship court proceedings and captured the attention of the local media.[[861]](#footnote-861) In 2015, policy specialists and activists from disability rights organizations came together to form the Guardianship Reform and Supported Decision-Making Workgroup (GRSDM). A plethora of organizations were involved in the GRSDM coalition, including the Arc of Texas, the Autistic Self-Advocate Network, the Coalition of Texans with Disabilities, Disability Rights Texas, Texas Parent to Parent, the Texas Association of Centers for Independent Living, the Mental Health Association of Texas, and AARP.[[862]](#footnote-862) GRSDM developed several bills, which were eventually passed by the Texan Legislature: The Supported Decision-Making Agreement Act, the Texas Judicial Guardianship Reforms, and the Ward’s Bill of Rights.[[863]](#footnote-863)

The Supported Decision-Making Agreement Act outlines the framework for supported decision-making agreements under Texan law. The Act defines “supported decision-making” as a “process of supporting and accommodating an adult with a disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult.”[[864]](#footnote-864) According to the Act, supported decision-making is intended to constitute “a less restrictive alternative to guardianship for adults with disabilities who need assistance with decisions regarding daily living but who are not considered incapacitated persons for the purposes of establishing a guardianship…”[[865]](#footnote-865) Persons with disabilities are to enter into supported decision-making agreements “voluntarily, without undue influence or coercion” and they may authorize a supporter to “provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult’s life decisions, without making those decisions on behalf of the adult with a disability.”[[866]](#footnote-866) The supported decision-making agreement may also authorize the supporter to help the person to obtain and understand information (such as medical, psychological, financial, educational or treatment records) and may also entitle the support person to aid the person to communicate their decisions to other parties.[[867]](#footnote-867) Supported decision-making agreements must be signed in front of at least two witnesses or a notary public.[[868]](#footnote-868) Agreements may be terminated by either party, on a given date outlined in the agreement, and they may also be terminated if the Department of Family and Protective Services concludes that the person with a disability has been “abused, neglected, or exploited by the supporter.”[[869]](#footnote-869) Finally, the Act provides a template supported decision-making agreement, to which all supported decision-making agreements in Texas must “substantially” conform.[[870]](#footnote-870)

H.B. 39, referred to as the Texas Judicial Council Guardianship Reforms, stipulates that before imposing a guardianship, the court must “find by clear and convincing evidence that […] alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible.”[[871]](#footnote-871) Under the Texan law, “alternatives to guardianship” include a range of options such as powers of attorney, representative payee agreements, and management and special needs trusts, in addition to supported decision-making.[[872]](#footnote-872) According the new law, attorneys who represent applicants in guardianship proceedings must partake in one hour of mandatory training on alternatives to guardianship and supports and services.[[873]](#footnote-873)

The Ward’s Bill of Rights lays out a comprehensive list of rights guaranteed to wards under guardianship. The Ward’s Bill of Rights opens by proclaiming that “a ward has all the rights, benefits, responsibilities and privileges granted by the constitution and laws of this state and the United States, except where specifically limited by a court-ordered guardianship or where otherwise lawfully restricted.”[[874]](#footnote-874) Amongst other guarantees, the law affirms that a ward is entitled to “consideration of the ward’s current and previously stated personal preferences, desires, medical and psychiatric treatment preferences, religious beliefs, living arrangements, and other preferences and opinions.”[[875]](#footnote-875)

Despite the fact that the US is not a State Party to the CRPD, the Texan legislation’s conformity to Article 12 of the CRPD can still be discussed. The legislation does provide for a system of supported decision-making allowing for the exercise of legal capacity. The Act seems to present a genuine form of supported decision-making rather than a sort of *de facto* substitute decision-making, as it is stipulated that the supporter may not make decisions on the person’s behalf.[[876]](#footnote-876)

Nonetheless, Texan law does not appear to make supported decision-making accessible to all persons with disabilities, given that supported decision-making is only available to those who are “not considered incapacitated persons.”[[877]](#footnote-877) This would suggest that supported decision-making is intended only for those with less intense support needs, which would not be in keeping with the CRPD’s call to provide access to support to *all* persons with disabilities. Indeed, the Committee on the Rights of Persons with Disabilities has stated that the provision of support measures should not be made contingent on an evaluation of mental capacity.[[878]](#footnote-878)

The Act does contain certain safeguards to prevent abuse such as the oversight exercised over the supporter by the Department of Family and Protective Services.[[879]](#footnote-879) The Act provides that any person who receives a copy of a supported decision-making agreement or who knows of the existence of a supported decision-making agreement and suspects that the person with disabilities is being abused, neglected or exploited by the supporter should report these allegations to the Department of Family and Protective Services.[[880]](#footnote-880) Nevertheless, the Act does not make explicit reference to upholding the “will and preferences” of persons with disabilities. Thus, the Act does not appear to provide for complaint mechanisms by which the actions of a support person can be challenged on the basis that they do not respect the will and preferences of the concerned person. Additionally, the Act does not seem to stipulate any requirements for being a supporter.

The Texan legislative regime is problematic from the point of view of Article 12 given that it still allows for substitute decision-making in the form of guardianship. Under existing guardianship laws, the court may rely on medical evidence to declare that a proposed ward is an “incapacitated person,” which, under Texan law, is a designation given to an “adult who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself; or care for the person’s own physical health; or manage the person’s own financial affairs.”[[881]](#footnote-881) Once this finding of incapacitation is made, the court then proceeds to appoint a guardian for a given person.[[882]](#footnote-882) Guardianship proceedings may be initiated by any person or by the court.[[883]](#footnote-883) Thus, Texan law allows for restrictions of legal capacity based on some combination of the diagnosis of an impairment and an assessment of decision-making skills.[[884]](#footnote-884)

In spite of its shortcomings, the Texan legislative reform undoubtedly makes strides towards the empowerment of persons with disabilities. Additionally, as asserted by Theodorou, the passage of this legislation in Texas demonstrates that “the concept of self-determination for people with disabilities is resonating broadly, even when the UN and international community’s stamp of approval is not emphasized.”[[885]](#footnote-885) The Texan case demonstrates that it is possible for there to be a groundswell of support for legislative change in the area of disability rights without the pressure of the CRPD.

# Australia: Victoria

Australia ratified the CRPD in 2009, accompanied by a declaration whereby the country affirmed its “understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as last resort and subject to safeguards.”[[886]](#footnote-886)

In 2014, the Australian Law Reform Commission issued a report entitled “Equality, Capacity and Disability in Commonwealth Laws,” which put forward guiding principles to reform Australian law in line with the CRPD.[[887]](#footnote-887) This report recommended that national, state and territory laws be changed “to ensure that supported decision-making is encouraged, representative decision-makers are appointed only as a last resort; and the will preferences and rights of persons direct decisions that affect their lives.”[[888]](#footnote-888) The report was prepared by the independent body of commissioners and an advisory committee comprised of academics, members of the judiciary, and members of civil society. The report has not been officially “endorsed” by the Australian Government.[[889]](#footnote-889)

In 2012, the Victoria Law Reform Commission (VLRC) undertook a review of Victoria’s guardianship legislation at the behest of the Attorney-General.[[890]](#footnote-890) A number of community organisations participated in consultations and advanced submissions to the Commission, including the Victorian Equal Opportunity and Human Rights Commission, Seniors Rights Victoria, and Communication Rights Australia.[[891]](#footnote-891) Part of the mandate of the Victorian Law Reform Commission was to assess Victoria’s laws having regard to the General Principles and provisions of the CRDP.[[892]](#footnote-892) Inter alia, the VLRC recommended the establishment of supported decision-making and co-decision-making measures, all while maintaining the existing alternative of substitute decision-making.[[893]](#footnote-893)

In the wake of the VLRC’s report, the Powers of Attorney Act (2014) was enacted, allowing for the appointment of a “supportive attorney.”[[894]](#footnote-894) The supportive attorney “supports the person making the appointment to make and give effect to the person’s own decisions.”[[895]](#footnote-895) The supportive attorney may assist with decisions relating to “personal or financial or other matters specified in the appointment.”[[896]](#footnote-896) Thus, the supportive attorney does not make decisions on behalf of the principal, as is the case with the general or enduring powers of attorney which continue to be available under the Act.[[897]](#footnote-897) A principal may authorise a supportive attorney to access, collect or obtain information;[[898]](#footnote-898) to communicate or help them to communicate supported decisions;[[899]](#footnote-899) or to do “anything that is reasonably necessary to give effect to a supported decision.”[[900]](#footnote-900)

In order to appoint a supportive attorney, a person must have the decision-making capacity with regards to making the appointment.[[901]](#footnote-901) Notably, the supportive attorney appointment ceases to have effect during times in which the principal does not have decision-making capacity for the matters which the supportive attorney appointment covers.[[902]](#footnote-902) According to the Act, a person has “decision-making capacity” with regards to a particular decision if they can understand, retain, and use or weigh information relevant to the decision; comprehend the effect of the decision; and express the decision and their opinions and needs regarding the decision in some manner.[[903]](#footnote-903)

The Act outlines the duties and obligations of supportive attorneys, including the obligation to act honestly, diligently and in good faith, to exercise reasonable skill and care, to not use the position for profit, to avoid conflicts of interest, and to communicate with the principal in a manner in which is understandable and helpful to the principal.[[904]](#footnote-904) Persons who are insolvent or under administration cannot be appointed as supportive attorneys, nor can care workers, health providers or accommodation providers for the principal.[[905]](#footnote-905) The appointment is executed through the signing of an appointment form by the principal and by a second individual at the principal’s direction, in the presence of two witnesses.[[906]](#footnote-906) The supportive attorney then accepts the appointment by signing a statement of acceptance prescribed in the form.[[907]](#footnote-907) The principal can specify in the form a particular time, circumstance or occasion upon which an appointment begins, but if no such specification is made, the appointment begins immediately.[[908]](#footnote-908) The appointment may be revoked by the principal at any time where the principal has decision making capacity in relation to making the supportive attorney appointment.[[909]](#footnote-909)

The Victorian Civil and Administrative Tribunal (VCAT) is empowered to make orders pertaining to supportive attorney appointments on their own initiative, or on the application of the principal, the supportive attorney, the Public Advocate, the principal’s nearest relative, or any person whom VCAT deems has a “special interest” in the principal’s affairs.[[910]](#footnote-910) These orders made by VCAT may pertain to a variety of matters, including the principal’s decision-making capacity over the matters covered by the appointment, the consequences of failures to comply with obligations under the Act, the supportive attorney’s adherence to the terms of the appointment, and undue influence exerted by the supportive attorney over the principal.[[911]](#footnote-911) VCAT may revoke the supportive attorney appointment or the designation of a particular supportive attorney, change the effect of the supportive attorney appointment, suspend the supportive attorney appointment for a given time, or make any other order it deems necessary with respect to the supportive attorney appointment.[[912]](#footnote-912) Finally, the Act lays out penalties for supportive attorneys who dishonestly obtain or use a supportive attorney appointment.[[913]](#footnote-913)

It is also worth mentioning that Victoria’s Medical Treatment Planning and Decisions Act 2016 introduced provisions allowing for the appointment of support persons.[[914]](#footnote-914) Under this Act, any person with decision-making capacity may appoint a support person,[[915]](#footnote-915) whose role is “to support the person to make, communicate and give effect to the person’s medical treatment decisions,” and “to represent the interests of the person in respect of the person’s medical treatment, including when the person does not have decision-making capacity in relation to medical treatment decisions.”[[916]](#footnote-916) The Act stipulates that support persons are not authorised to make a person’s medical treatment decisions.[[917]](#footnote-917) Appointments must be made in writing, signed by the affected person, witnessed, and duly certified.[[918]](#footnote-918) Appointments come into effect immediately.[[919]](#footnote-919) Persons may revoke appointments of their support persons so long as they retain decision-making capacity with respect to the revocation decision.[[920]](#footnote-920) People may apply to VCAT to contest the validity of the appointment or revocation of the appointment of a support person or request an order for “any other matter in relation to an appointment,” with the permission of VCAT.[[921]](#footnote-921)

The state of Victoria continued in this trend of recognizing supported decision-making in law with amendments to its Guardianship and Administration Act enacted in 2019.[[922]](#footnote-922) Under this amended legislation, a person may now apply to VCAT for the appointment of “supportive guardians” and “supportive administrators” for a person with disabilities.[[923]](#footnote-923) Supportive guardians assist with personal matters (defined as “any matter[s] relating to the person’s personal or lifestyle affairs”), while supportive administrators help with financial matters (defined as “any matter[s] relating to the person’s financial or property affairs”) .[[924]](#footnote-924) The order establishing the supportive guardianship or the supportive administration specifies the particular matters with respect to which the supportive guardian or the supportive administrator has powers.[[925]](#footnote-925) The orders can grant the supportive guardian or supportive administrator with a range of powers, such as the power to access, collect or obtain information; the power to communicate or to help the supported person to communicate decisions that they make, as well as the power to do anything that is reasonably necessary to give effect to decisions.[[926]](#footnote-926)

Supportive guardians and supportive administrators are subject to specific duties and obligations, including the obligation to act honestly, diligently and in good faith; to exercise reasonable skill and care; to not use the position for profit; to avoid conflicts of interest; to not coerce, intimidate or unduly influence the supported person; and to communicate with the supported person in a manner in which is understandable and helpful to the supported person.[[927]](#footnote-927) Supportive guardians and supportive administrators must also respect the general principles of the Act, including the provision which affirms that “the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person.”[[928]](#footnote-928)

Under the Act, VCAT will only agree to designate a supportive administrator or supportive guardian if they conclude that that with support, the person would have decision-making capacity with respect to the given personal or financial matter.[[929]](#footnote-929) The Act employs the same definition of “decision-making capacity” as outlined in the 2014 Powers of Attorney Act and the 2016 Medical Treatment Planning and Decisions Act.[[930]](#footnote-930)

VCAT will only appoint a supporter if they believe that the person will comply with the aforementioned duties and obligations and if they deem the person to be “suitable” for the role.[[931]](#footnote-931) In assessing a potential supporter’s suitability, VCAT considers: “the will and preferences of the proposed supported person (so far as they can be ascertained); the desirability of preserving existing family relationships and other relationships that are important to the proposed supported person; the nature of the relationship between the person and the proposed supported person, in particular whether the relationship is characterised by trust; whether the person will be available to the proposed supported person and able to meet and communicate with the proposed supported person; the capacity of the person to recognise and give due regard to the importance of the relationship the proposed supported person has with any companion animal of the proposed supported person.”[[932]](#footnote-932)

VCAT is required to reassess orders for supportive administration and supportive guardianship within a year of making the order and at least once every three years afterwards.[[933]](#footnote-933) The Act also lays out penalties for supportive guardians and supportive administrators who use orders dishonestly.[[934]](#footnote-934)

Alongside these regimes of supportive guardianship and supportive administration, the Act also retains regimes of guardianship and administration, under which appointed persons are authorised to make decisions about particular personal or financial matters concerning the represented person.[[935]](#footnote-935) The Act specifies that VCAT may only appoint a guardian or administrator where they deem that a person does not have decision-making capacity with respect to a given personal or financial matter due to a disability.[[936]](#footnote-936) According to the Act, guardians and administrators should “give all practicable and appropriate effect to the represented person’s will and preferences.”[[937]](#footnote-937) If they are unable to ascertain the represented person’s will and preferences, a representative should pursue what they believe the represented person’s will and preferences are “likely to be, based on all the information available, including information obtained by consulting the represented person’s relatives, close friends and carers.”[[938]](#footnote-938) If a representative is unable to ascertain the represented person’s likely will and preferences, then they “should act in a manner which promotes the represented person’s personal and social wellbeing.”[[939]](#footnote-939) The Act also stipulates that the represented person’s will and preferences may be overridden to avoid “serious harm” to the represented person.[[940]](#footnote-940)

When appointing a guardian or administrator, VCAT assesses the potential representative’s suitability for the role by considering, inter alia, “the will and preferences of the proposed represented person (so far as they can be ascertained); the desirability of preserving existing relationships that are important to the proposed represented person; the desirability of appointing a person who is a relative of the proposed represented person, or who has a personal relationship with the proposed represented person, rather than appointing a person with no such relationship; whether the person will be available to the proposed represented person and able to meet and communicate with the proposed represented person.”[[941]](#footnote-941)

Victoria has undoubtedly made great strides towards complying with Article 12 of the CRPD by introducing various forms of supported decision-making into its legislation, allowing persons with disabilities to exercise their legal capacity in personal and financial matters. The support measures proposed seem largely imbued in the “will and preferences” paradigm. Notably, for instance, the principal making a supportive attorney appointment can choose the moment at which it enters into force,[[942]](#footnote-942) which seemingly aligns with Article 12. Despite this innovation, however, supportive powers of attorney cease to have effect when a person is deemed to lack mental capacity in a given area,[[943]](#footnote-943) and this is problematic from the point of view of Article 12.[[944]](#footnote-944) Additionally, the “will and preferences” paradigm features among general principles which supportive guardians and supportive administrators must abide by.[[945]](#footnote-945) Nevertheless, this provision is rather ambiguous, as it directs support persons to uphold the supported person’s will and preferences “as far as practicable,”[[946]](#footnote-946) which risks authorizing supporters to disregard a person’s will where it is difficult to discern.

It is critical to note that all three pieces of legislation discussed make the provision of supported decision-making contingent on satisfying a requisite level of “decision-making capacity.”[[947]](#footnote-947) This framework would seem to grant or deny supported decision-making on the basis of an assessment of mental capacity, which is not in conformity with Article 12.[[948]](#footnote-948)

The three legislative schemes do lay out certain safeguards, such as the powers of oversight vested in VCAT to receive complaints from a wide range of people and then make orders with respect to supportive attorney appointments and support persons for medical treatment.[[949]](#footnote-949) Moreover, VCAT’s regular reassessment of supportive guardianship and supportive administration orders constitutes a notable safeguard.[[950]](#footnote-950) Other safeguards may also be found in the long list of considerations that VCAT must take into account when determining the suitability of a potential supportive guardian or supportive administrator.[[951]](#footnote-951) Nevertheless, it is possibly troublesome from the perspective of Article 12 that supportive guardians and supportive administrators are appointed by VCAT and not by the person with disabilities themselves. Although when evaluating the suitability of a potential supporter, VCAT must “take into account […] the will and preferences of the supported person,”[[952]](#footnote-952) they are not required to adhere to the person’s will and preferences and therefore there is undoubtedly a risk that a support person could be imposed on an individual against their will. This risk is compounded by the fact that persons other than the person with disabilities themselves may apply to VCAT in the first place to request supportive guardianship and supportive administration orders.[[953]](#footnote-953)

Victoria’s legislation does not explicitly recognize universal legal capacity to all persons with disabilities, as demanded by Article 12. Victoria’s legislation also maintains what arguably constitute measures of substitute decision-making in the form of guardianship and administration, arrangements under which decisions are made on behalf of a person with disabilities[[954]](#footnote-954) and potentially against their will.[[955]](#footnote-955) Moreover, guardianship and administration orders in Victoria are made on the basis of a person’s “disability” and their “decision-making capacity,”[[956]](#footnote-956) thus restricting the exercise of legal capacity for persons with disabilities in a manner contrary to Article 12.[[957]](#footnote-957) Therefore, although Victoria has introduced detailed support systems into several pieces of legislation, eliminating substituted decision-making would be a critical step towards satisfying the requirements of Article 12. This may be a difficult goal to achieve, however, in light of Australia’s declaration asserting that the CRPD allows for substituted decision-making measures.

# Discussion

This overview of legislative reforms pertaining to legal capacity evidences a considerable diversity in the approaches adopted. The substantive content of the reforms varies significantly, as does the level of detail in which the reforms are described. The “progressiveness” of the language employed in each approach undoubtedly reveals different visions of disability rights and signals diverse degrees of compliance with Article 12 of the CRPD. The following section will pinpoint some common trends in the legislative reform processes, with a focus on shared challenges encountered. As well, this discussion will highlight innovations contained in certain legislative schemes, with the idea that these could provide solutions to some of the common pitfalls.

## The Role of Civil Society

Firstly, one may observe the central role of civil society in the initiation of legislative reforms. In the jurisdictions studied in this report, civil society organizations were generally heavily involved in drafting legislation and advocating for governmental enactment of legal capacity reforms. Even in the countries where seminal court judgements are seen to have catalyzed the legislative reforms, civil society played an instrumental part, bringing these cases on behalf of persons with disabilities.[[958]](#footnote-958)

The CRPD has been at the heart of many civil society efforts. In numerous countries, civil society actors pressed for legislative reform in line with the UN Convention.[[959]](#footnote-959) Many civil society organizations expressed their ultimate dissatisfaction with legislative changes that in their view fell short of compliance with the Convention.[[960]](#footnote-960) Nevertheless, the reforms enacted in Canada prior to the adoption of the CRPD, as well as the legislative developments in the United States which took place in the absence of the CRPD, suggest that the Convention is not the sole force spurring civil society endeavours in this sphere. In these episodes in which the CRPD was not at play, civil society actors were nonetheless a key impetus behind legislative change. Perhaps the work of civil society in this field gains part of its strength and longevity from the close engagement with persons with disabilities themselves, through protests, pilot projects, and strategic litigation, for instance. Thus, in addition to being inspired by the CRPD framework, civil society groups have no doubt also been galvanized by the *people*, whom they have then advocated for on a broader scale, in a genuinely grassroots, bottom-up fashion. The activities of civil society organizations worldwide demonstrate that legislative reforms in the area of legal capacity are not simply about implementing the CRPD on the domestic scale – they are also fundamentally about people with disabilities themselves and upholding their human rights.

## Recognizing Full Legal Capacity for Persons with Disabilities

In terms of the substance of legislative reforms adopted, several common challenges may be discerned. Many legislative schemes do not contain provisions explicitly recognizing full legal capacity for persons with disabilities as demanded by Article 12.[[961]](#footnote-961) The Peruvian legislation, however, does enshrine such a guarantee in unequivocal terms, specifying that all adults have full legal capacity, including “all persons with disabilities, on an equal basis with others and in all aspects of life, regardless of whether they use or require reasonable accommodation or support for the expression of their will.”[[962]](#footnote-962) The Colombian Bill similarly recognizes legal capacity for all persons with disabilities “under equal conditions,” “without any distinction whatsoever and regardless of whether they use support for the performance of legal acts.”[[963]](#footnote-963) Costa Rican law encompasses a provision that is arguably less categorical than the Peruvian and Colombian guarantees, but which nonetheless acknowledges the “full legal equality” of persons with disabilities, which entails recognition of their “legal personality” and “legal capacity.”[[964]](#footnote-964)

Next, it is worth noting that many legislative schemes continue to allow for limitations of legal capacity based on assessments of mental capacity,[[965]](#footnote-965) on the grounds of disability status,[[966]](#footnote-966) or on some combination thereof.[[967]](#footnote-967) The UN Committee on the Rights of Persons with Disabilities has stated that Article 12 does not allow for the discriminatory removal of legal capacity on the grounds of disability and/or decision-making skills.[[968]](#footnote-968)

## Substitute Decision-Making

Despite introducing supported decision-making into their legislation, many of the countries analyzed have maintained parallel regimes of substituted decision-making, in contravention of Article 12.[[969]](#footnote-969) More subtly, several states have incorporated elements of substituted decision-making into what they label as “supported decision-making” regimes. For instance, systems in which supporters may be routinely authorized to exercise representative powers provide a case in point.[[970]](#footnote-970) As well, co-decision-making arrangements in which a co-decision-maker is endowed with a veto power may in effect restrict the legal capacity of persons with disabilities by placing the final decision-making power out of the hands of the person with a disability.[[971]](#footnote-971)

An examination of the legislative approaches included in this report reveals the challenge of laying out a framework of supported decision-making that genuinely empowers persons with disabilities in the decision-making process. One may look for inspiration to the Israeli legislation, which contains the explicit stipulation that “a decision-making supporter will not make decisions on behalf of the person he is supporting.”[[972]](#footnote-972) The Texan legislation on supported decision-making contains a similar statement, clarifying that a supporter should provide assistance in the making of life decisions, “without making those decisions on behalf of the adult with a disability.”[[973]](#footnote-973) The Irish legislation also categorically insists that “a decision-making assistant shall not make a decision on behalf of the appointer.”[[974]](#footnote-974) Furthermore, one may also point to the specification provided under Peruvian law that as a general rule, “supports must not involve powers of representation.”[[975]](#footnote-975)

## Making Supported Decision-Making Accessible to All Persons with Disabilities

One may remark that many of the legislative schemes studied do not make supported decision-making accessible to all persons with disabilities. In fact, some legislation denies the provision of supported decision-making to those who do not satisfy a requisite threshold level of mental capacity.[[976]](#footnote-976) As discussed elsewhere in this report, the UN Committee on the Rights of Persons with Disabilities has maintained that “the provision of support to exercise legal capacity should not hinge on mental capacity assessments.”[[977]](#footnote-977) Additionally, some countries limit the availability of supported decision-making to those who have had their legal capacity formally restricted,[[978]](#footnote-978) which seems to miss the very goal of supported decision-making, which is to empower persons with disabilities in the decision-making process, while critically leaving their legal capacity intact. Peru’s scheme demonstrates how legislation might be crafted to allow for supports to be made available in an inclusive fashion. Peruvian law liberally allows for “any person of legal age who requires support for the exercise of their legal capacity” to designate supports.[[979]](#footnote-979) Peruvian law is free of any discriminatory language that might prevent some persons with disabilities from accessing support measures.

Most of the legislative regimes assessed do not appear to explicitly address the situation of those with high support needs. India’s legislation notably recognizes the need to provide for support measures tailored to the situation of persons with disabilities with high support needs.[[980]](#footnote-980) The Indian law, however, does not elaborate on what form these measures could take nor how exactly they will be developed and made available in this country. The UN Special Rapporteur on the Rights of Persons with Disabilities has commented on the desirability of enabling access to a variety of support mechanisms in order to accommodate different levels of support needs.[[981]](#footnote-981) Similarly, the Committee on the Rights of Persons with Disabilities has affirmed that “the type and intensity of support to be provided will vary significantly from one person to another owing to the diversity of persons with disabilities.”[[982]](#footnote-982)

It may well be desirable, therefore, to provide for a flexible framework for supported decision-making in which supports can be “custom-made” to suit the particular needs of a given person. It is noteworthy that the Peruvian, Argentinian, and Colombian legislative schemes allow for considerable freedom in designing individualized support measures. In Peru, the form of support is freely determined by the person requesting support measures,[[983]](#footnote-983) and in Argentina, a judge determines the nature of supports on a case-by-case basis, making appropriate “adjustments depending on the needs and circumstances of the person.”[[984]](#footnote-984) The Colombian Bill allows for the form of support to be determined by either the prospective supported person or through an individualized assessment conducted by a public or private entity.[[985]](#footnote-985) The Colombian Bill also recognizes that support can take on many forms and that new types of support not contemplated for in the legislation may be created in accordance with the needs and preferences of each individual.[[986]](#footnote-986) Allowing for malleability in the form of supported decision-making can undoubtedly facilitate the provision of a wide range of support mechanisms, of different types and intensities. The Committee on the Rights of Persons with Disabilities has called for embracing such a “broad” conception of support measures.[[987]](#footnote-987)

In addition, it is worthwhile noting that some legislative regimes allow the court to determine the form and scope of support to be provided.[[988]](#footnote-988) One must ask whether such arrangements are truly respectful of the will of the supported person. In light of this concern, a legislative scheme like Peru’s, which empowers the supported person to determine the form of support, may well be desirable. Nevertheless, some persons with disabilities might need guidance in the designation of supports.

## Advance Directives

Legislation in numerous states allows for the preparation of advance directives. The Committee on the Rights of Persons with Disabilities has recognized that “the ability to plan in advance is an important form of support.”[[989]](#footnote-989) Nevertheless, most of the frameworks for advance directives outlined in this report arguably fail to conform with Article 12, as the entry into force of these directives often hinges on findings that a person lacks mental capacity,[[990]](#footnote-990) or on formal court declarations of legal incapacity or limited capacity,[[991]](#footnote-991) instead of giving the affected person the ability to pinpoint the moment at which the directives should take effect.[[992]](#footnote-992) Although Belgium’s legislation does not give persons with disabilities complete leeway to determine the point at which advance directives should enter into force, it does allow persons to choose whether the directives should enter into force immediately or at a later date when they are deemed to lack mental capacity.[[993]](#footnote-993) The Peruvian and Colombian legislative schemes give persons with disabilities even greater control over the implementation of advance directives, as they give persons the liberty to pinpoint the precise moment at which advance directives should come into force.[[994]](#footnote-994) Additionally, many of the advance directives assessed allow for the future appointment of substitute decision-makers,[[995]](#footnote-995) a feature which would seem to distance such measures from the model of *supported* decision-making. Here, one may highlight the innovative approach adopted by the legislator in Victoria, Australia, whereby “supportive attorneys” may be appointed. In contrast to traditional powers of attorney arrangements, these supportive attorneys do not make decisions on behalf of the principal, but rather perform supportive functions by gathering information, assisting with communication, and executing the principal’s own decisions.[[996]](#footnote-996) Peru’s new legislation also provides for the designation of “*supports* for the future.”[[997]](#footnote-997) Similarly, the Colombian Bill clarifies that advance directives constitute a type of “formal *support*.”[[998]](#footnote-998)

## Appointment of Supporters

It is also worth commenting on the diverse appointment procedures for support persons. Peru gives persons with disabilities complete control over the appointment process: persons desiring support designate a supporter of their choice before a judge or notary.[[999]](#footnote-999) Under legislative frameworks that allow for supporters to be appointed via contracts, persons with disabilities may also be provided with the ability to select their supporter.[[1000]](#footnote-1000) Nevertheless, in some of these cases, the contract for support or the identity of the supporter is subject to approval by a court or agency.[[1001]](#footnote-1001) Finally, other legislative regimes allow for a support person to be appointed by a court or an administrative agency.[[1002]](#footnote-1002) Many schemes of the latter nature include provisions affirming priority will be given to the person’s choice of support person.[[1003]](#footnote-1003) However, some legislative regimes do not account for the possibility that some persons with disabilities may be socially isolated and thus may not have the option of designating a trusted friend or relative to act as their supporter.[[1004]](#footnote-1004) Additionally, some regimes favour the appointment of relatives in situations where persons have not indicated a preferred candidate to serve as their supporter.[[1005]](#footnote-1005) Such provisions would seem to ignore the fact that some people may have relationships with family members that are characterized by manipulation or abuse, just as these provisions would appear to disregard the possibility that some people might simply prefer not to be supported by relatives or friends.[[1006]](#footnote-1006)

Some frameworks allow for the appointment of a “professional” support person in situations where the person concerned has not nominated a support person.[[1007]](#footnote-1007) While providing for the option of professional support might constitute a solution for those who are socially isolated and for those that would rather not be assisted by a relative or friend, there is doubtless a need to ensure that such professional supporters receive adequate training so that they may provide thorough, individualized support. Civil society actors in Hungary have expressed their unease with the possibility for professional supporters in this country to help dozens of people concurrently.[[1008]](#footnote-1008) It might well be difficult for an individual supporting 45 people in a professional capacity to undertake a personalized approach with each of their supported persons and to have the time to foster meaningful relationships with each. Nevertheless, the Special Rapporteur on the Rights of Persons with Disabilities has pointed to research demonstrating that it is possible for people to establish relationships of trust with volunteers and paid workers.[[1009]](#footnote-1009) The Special Rapporteur maintains that legislation should be flexible with regards to the possible types of supporter and should not prioritize the appointment of one category of supporter over another.[[1010]](#footnote-1010) Here, one may turn to the Peruvian legislation as a model, as it merely stipulates that support may be provided by natural persons, public institutions or non-profit legal entities,[[1011]](#footnote-1011) without indicating, for instance, any kind of preference for a particular category of natural person (e.g. family members) and without denoting any sort of hierarchy between persons, public institutions, and non-profit legal entities.

Analysis of the various procedures for appointing support persons also brings to light the importance of establishing a rigorous appointment procedure that incorporates appropriate safeguards. Some states have put into place various criteria that must be satisfied before a particular person can be successfully appointed as a supporter. For instance, Costa Rican legislation requires a judge in all situations to ensure that the guarantor is the “ideal” person to secure the exercise of the rights and obligations of the given person.[[1012]](#footnote-1012) Victoria’s legislation includes a list of considerations that the tribunal must contemplate when assessing the suitability of a proposed support person, such as “will and preferences of the proposed represented person,” “the desirability of preserving existing relationships that are important to the proposed represented person,” “the desirability of appointing a person who is a relative of the proposed represented person, or who has a personal relationship with the proposed represented person, rather than appointing a person with no such relationship,” and “whether the person will be available to the proposed represented person and able to meet and communicate with the proposed represented person.”[[1013]](#footnote-1013) Additionally, certain legislative regimes contain provisions barring specific categories of individuals from serving as supporters. For instance, Irish law precludes those who have committed offences implicating fraud or dishonesty, bankrupt persons, as well as employees of centres or mental health facilities where the appointer lives from acting as support persons.[[1014]](#footnote-1014) British Columbia’s legislation prevents people from appointing their personal or health care service providers as their support persons.[[1015]](#footnote-1015) One might contend that all of these provisions are geared towards preventing the appointment of a support person who might abuse their position. Arguably, these provisions preventatively guard against conflicts of interest, coercion, and undue influence by preventing a potentially problematic supporter from being appointed in the first place.

One must question whether schemes without such safeguards embedded in the appointment process risk leaving persons with disabilities vulnerable to abuse right from the outset. In Peru’s legislation for instance, it would seem that unless the person cannot express their will or is in a coma, the notary or judge must merely accept the person’s nominated support person, without scrutinising the background of the supporter or the characteristics of the relationship between the potential supporter and supported person. Under Colombia’s bill, when a support person is appointed through a support agreement, they assume their position upon the satisfaction of the requisite formalities,[[1016]](#footnote-1016) without having to fulfill any substantive requirements or having to undergo any vetting process. Nevertheless, during the appointment stage, there is undoubtedly a delicate balance to be struck between respecting the will and preferences of the person requesting support and ensuring that they are also sufficiently protected from abuse. Perhaps this can be accomplished by a regime like Belgium or Hungary’s that prioritizes the person’s particular choice of support person, while reserving the right of the court to reject this choice if the person’s interests are deemed to be imperiled by this designation.[[1017]](#footnote-1017) That said, some might argue that such provisions are too closely aligned with the paternalistic “best interests” paradigm.

## Other Safeguards

The legislative frameworks outlined in this report include a variety of safeguards for monitoring the activities of the supporter once they have been duly appointed to assist a person with a disability. Some schemes noticeably lack concrete measures for challenging the actions of support persons where there is a belief that they have not respected the will and preferences of the concerned person.[[1018]](#footnote-1018) The possibility under Irish legislation for anyone to lodge a complaint about a supporter before an administrative body no doubt constitutes a novel solution in this area.[[1019]](#footnote-1019) Some countries have also provided for periodic reviews of supporters’ appointments,[[1020]](#footnote-1020) others have imposed reporting requirements on supporters,[[1021]](#footnote-1021) while still others have assigned the monitoring of supporters to designated institutions[[1022]](#footnote-1022) or to third persons known as “monitors.”[[1023]](#footnote-1023) The Colombian bill notably requires supporters to prepare annual reports in which they must outline, *inter alia,* how their actions have upheld the supported person’s will and preferences, as well as how they have maintained a relationship of trust with the supported person.[[1024]](#footnote-1024) This innovative approach could arguably be strengthened even further. In the case of support agreements, it would seem that the Colombian bill only requires supporters to share this report with the supported person.[[1025]](#footnote-1025) The function of this type of report as an accountability mechanism would undoubtedly be fortified if these reports had to be shared with a third-party monitor.

It is also perhaps worthwhile mentioning that Belgium’s legislation innovatively allows for the appointment of a “trusted person” to serve as an intermediary between the person with a disability and their administrator.[[1026]](#footnote-1026) Although not implemented within a regime that corresponds perfectly to the model of supported decision-making contemplated by Article 12,[[1027]](#footnote-1027) the Belgian figure of the “trusted person” could doubtless constitute a safeguard that other countries could consider integrating into their supported decision-making legislation. The trusted person provides for a means by which the supporter may be monitored and held accountable for their actions. Furthermore, the trusted person can help to ensure that the will and preferences of the supported person are upheld, as they aid the supported person to express their wishes. Although this is not called explicitly for in the Belgian legislation, the trusted person could potentially also be tasked with reviewing the conformity of the supporter’s actions with the will and preferences of the supported person. The position of trusted person might provide an extra layer of protection to ensure that supported decision-making measures are being carried out as intended – that is, in line with the supported person’s will and preferences and free of abuse and undue influence on the part of the supporter.

Although Article 12 presents a framework of supported decision-making that is fundamentally embedded in the “will and preferences” paradigm,[[1028]](#footnote-1028) under some of the laws presented, “supporters” are not unequivocally obliged to uphold the “will and preferences” of the supported person. Namely, some legislative schemes make no reference to the supported person’s will and preferences.[[1029]](#footnote-1029) Other laws mention the supported person’s will and preferences, but do not stipulate that these should be respected. For instance, Georgian law merely directs supporters to “identify” the person’s will and preferences,[[1030]](#footnote-1030) Argentina’s law simply requires supporters to “favour” decisions in keeping with the supported person’s preferences,[[1031]](#footnote-1031) and BC’s law only asks supporters to adhere to the supported person’s will and preferences where it is “reasonable” to do so.[[1032]](#footnote-1032) Also, Belgium’s law explicitly allows supporters to withdraw their assistance where they judge that an act would go against the interests of the person concerned.[[1033]](#footnote-1033) Arguably, vestiges of the paternalistic “best interests” model have been transplanted into some countries’ schemes for “supported decision-making.”

Next, the UN Committee on Rights of Persons with Disabilities has affirmed that where “it is not practicable to determine the will and preferences of an individual, the ‘best interpretation of will and preferences’ must replace the ‘best interests’ determinations.”[[1034]](#footnote-1034) Peru’s legislation precisely follows these directions, indicating that in these kinds of difficult situations in which a person’s will is not readily ascertainable, support must be provided based on the “best interpretation of the will” of the person concerned.[[1035]](#footnote-1035) The Colombian bill contains a similar provision.[[1036]](#footnote-1036) The other legislative regimes studied, however, do not follow the lead of the CRPD’s guidance in this respect. In fact, Victoria’s legislation only authorises supporters to uphold the will and preferences of supported persons “as far as practicable.”[[1037]](#footnote-1037)

## Similar Challenges Ahead?

Despite the variety in the substance of the reforms ultimately adopted, countries will likely encounter many similar challenges ahead as they strive to implement their new legislation. In cases where frameworks for supported decision-making have not been extensively fleshed out in the legislation,[[1038]](#footnote-1038) questions linger about whether persons will actually have access to supported decision-making on the ground. Some jurisdictions will undoubtedly need develop further regulations and guidelines on supported decision-making in order to secure genuine access to supports.

Governments will need to ensure that adequate resources are deployed such that reforms may be properly implemented. The UN Special Rapporteur on the Rights of Persons with Disabilities has asserted that states should make certain that sufficient programmes and services for supported decision-making are in place in order to assist persons with disabilities of varying support needs.[[1039]](#footnote-1039) It is also pertinent to recall here that the CRPD requires governments to ensure that persons with disabilities can access support at a minimal cost or free of charge.[[1040]](#footnote-1040)

Moreover, civil society organizations, governments, and the Special Rapporteur on the Rights of Persons with Disabilities have all expressed concerns regarding the dire need to provide judicial actors with training on the Convention and the new legal capacity laws.[[1041]](#footnote-1041) Next, in order to assuage concerns that support people may act like *de facto* substitute decision-makers,[[1042]](#footnote-1042) there is arguably also a need for outreach and education targeted at support persons. Difficulties may lie ahead in some countries with regards to reactions from families of persons with disabilities. In India, for example, civil society actors have pointed to the fact that many parent groups of persons with disabilities continue to push for substituted decision-making.[[1043]](#footnote-1043) Furthermore, it may also be desirable to implement sensitization programs aimed at persons with disabilities themselves, in order to educate this population on the benefits of supported decision-making. Indeed, a representative from a Colombian civil society organization has highlighted the fact that in her country, there has been some resistance to supported decision-making among persons with disabilities, who consistently lack awareness of the advantages of supported decision-making.[[1044]](#footnote-1044) This representative stresses that persons with disabilities and their caregivers may well not yet have embraced the social and human rights-based approach to disability.[[1045]](#footnote-1045)

The following question looms large: how can societies around the world extricate themselves from the confines of long histories of guardianship and execute a paradigm shift on the ground? Changing the legislation is arguably only the first step. Next, a cultural shift will be required in practice. Societies’ perceptions of persons with disabilities and disability rights may not yet be aligned with the visions underpinning these legislative reforms. A report prepared by the Ombudsman of Georgia refers to a lingering “stigma-based attitude towards persons with disabilities” that is prevalent amongst players in this country’s judicial system.[[1046]](#footnote-1046) Such attitudes undoubtedly prevail elsewhere, within other judicial systems and in societies at large. The process of sensitization and training to dismantle these mindsets may be long and laborious, but this concern warrants urgent attention and planning.

For the many states that have maintained parallel systems of substitute decision-making alongside their newly introduced supported decision-making measures, the consequences of such “halfway reforms” may prove to be troubling. For instance, where judges have the option of resorting to substitute decision-making or supported decision-making, there may be a risk that they will follow former practice and opt for substitute decision-making, thus under-utilizing supported decision-making. Notably, civil society actors report that in Hungary, the new act on supported decision-making is seldom used by the court.[[1047]](#footnote-1047) Similarly, in the Czech Republic, civil society organizations have reported that partial guardianship continues to be the most popular regime resorted to by the courts, despite the availability of alternative measures under the new law.[[1048]](#footnote-1048)

Perhaps even more critically, however, preserving substitute decision-making risks maintaining a way of seeing persons with disabilities as unable to manage their own affairs and in need of protection. This antiquated lens through which to view persons with disabilities fundamentally clashes with Article 12 of the CRPD, which is premised upon the notion that all persons with disabilities are able to take part in their own decision-making and need to be supported in this process. The retention of substitute decision-making may well prevent the full realization of the revolutionary paradigm shift that is needed in order to wholly embrace supported decision-making as *the* new model. With substitute decision-making regimes still intact, the full empowerment and attainment of human rights for persons with disabilities may never be fulfilled.

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35. *Ibid*, art 659-F. [↑](#footnote-ref-35)
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150. See Congreso de la Republica de Colombia, *supra* note 17; *Bill 236/19, By means of which the regime for the exercise of the legal capacity of persons with disabilities of legal age is established*, Colombia 18 June 2019, online (in Spanish): < http://www.camara.gov.co/sites/default/files/2017-08/PLCAPA~1.PDF>. [↑](#footnote-ref-150)
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152. ### Andrea Lili Cortés, “Nuevo regimen de capacidad jurídica en Colombia: La lucha no ha terminado” (9 July 2019), online: *Documenta* <https://documenta.org.mx/blog-documenta/2019/07/09/nuevo-regimen-de-capacidad-juridica-en-colombia-la-lucha-no-ha-terminado/>.

     [↑](#footnote-ref-152)
153. *Ibid.* [↑](#footnote-ref-153)
154. *Ibid.* [↑](#footnote-ref-154)
155. *Bill 236/19, supra* note 150, art 5. [↑](#footnote-ref-155)
156. *Ibid.* [↑](#footnote-ref-156)
157. *Ibid,* art 11. [↑](#footnote-ref-157)
158. *Ibid,* art 12. [↑](#footnote-ref-158)
159. *Ibid*. [↑](#footnote-ref-159)
160. *Ibid,* art 13(2). [↑](#footnote-ref-160)
161. *Ibid,* art 14. [↑](#footnote-ref-161)
162. *Ibid,* art 15. [↑](#footnote-ref-162)
163. *Ibid.* [↑](#footnote-ref-163)
164. *Ibid,* arts 17-18. [↑](#footnote-ref-164)
165. *Ibid.* [↑](#footnote-ref-165)
166. *Ibid.* [↑](#footnote-ref-166)
167. *Ibid,* art 21. [↑](#footnote-ref-167)
168. *Ibid,* art 23. [↑](#footnote-ref-168)
169. *Ibid,* art 43. [↑](#footnote-ref-169)
170. *Ibid.* [↑](#footnote-ref-170)
171. *Ibid,* art 42. [↑](#footnote-ref-171)
172. *Ibid,* arts 15 & 24. [↑](#footnote-ref-172)
173. *Ibid,* art 24. [↑](#footnote-ref-173)
174. *Ibid,* art 15. [↑](#footnote-ref-174)
175. See *Ibid,* arts 42-43. [↑](#footnote-ref-175)
176. *Ibid,* art 44. [↑](#footnote-ref-176)
177. *Ibid,* art 25. [↑](#footnote-ref-177)
178. *Ibid.* [↑](#footnote-ref-178)
179. *Ibid,* art 26. [↑](#footnote-ref-179)
180. *Ibid,* art 28(a). [↑](#footnote-ref-180)
181. *Ibid,* art 16. [↑](#footnote-ref-181)
182. *Ibid,* art 27. [↑](#footnote-ref-182)
183. *Ibid,* art 29. [↑](#footnote-ref-183)
184. *Ibid,* art 30(a). [↑](#footnote-ref-184)
185. *Ibid,* art 32. [↑](#footnote-ref-185)
186. *Ibid.* [↑](#footnote-ref-186)
187. *Ibid,* art 33. [↑](#footnote-ref-187)
188. *Ibid*. [↑](#footnote-ref-188)
189. *Ibid.* [↑](#footnote-ref-189)
190. *Ibid,* art 3(9). [↑](#footnote-ref-190)
191. *Ibid,* art 33. [↑](#footnote-ref-191)
192. *Ibid,* art 36. [↑](#footnote-ref-192)
193. *Ibid,* art 5. [↑](#footnote-ref-193)
194. *Alternate Report from the Colombian Coalition for the Implementation of the Convention on the Rights of People with Disability* (3 April 2016) at para 70, online: < https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/COL/INT\_CRPD\_CSS\_COL\_24626\_E.doc>. [↑](#footnote-ref-194)
195. *Bill 236/19, supra* note 150,art 51. [↑](#footnote-ref-195)
196. *Ibid,* art 13(2). [↑](#footnote-ref-196)
197. *Ibid,* art 3(9); see Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 17. [↑](#footnote-ref-197)
198. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 21. [↑](#footnote-ref-198)
199. *Bill 236/19, supra* note 150, art 12. [↑](#footnote-ref-199)
200. *Ibid,* art 29. [↑](#footnote-ref-200)
201. *Ibid,* art 41. [↑](#footnote-ref-201)
202. *Ibid,* art 30. [↑](#footnote-ref-202)
203. *Ibid,* arts 21 & 36. [↑](#footnote-ref-203)
204. *Ibid,* art 26. [↑](#footnote-ref-204)
205. *Ibid,* art 25. [↑](#footnote-ref-205)
206. *Ibid,* art 32. [↑](#footnote-ref-206)
207. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29(d). [↑](#footnote-ref-207)
208. Cortés, *supra* note 152. [↑](#footnote-ref-208)
209. *Ibid.* [↑](#footnote-ref-209)
210. “Convention on the Rights of Persons with Disabilities,” *supra* note 20. [↑](#footnote-ref-210)
211. *The Rights of Persons with Disabilities Act, 2016,* India, 27 December 2016, online: <http://www.disabilityaffairs.gov.in/upload/uploadfiles/files/RPWD%20ACT%202016.pdf>. [↑](#footnote-ref-211)
212. *Ibid* at 1. [↑](#footnote-ref-212)
213. Equals Centre for Promotion of Social Justice, India, *Information for Committee on the Rights of Persons with Disabilities* (n.d.) at 11, online: < <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwihjfCH1MjjAhVQ1qYKHXXdA1MQFjAAegQIARAC&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FDisability%2FDecisionMaking%2FCSOs_DPOs%2FCSOs%2520-%2520EQUALS_India_ENG.docx&usg=AOvVaw1RCHWNYsE62xvK3GPwZZMo>>. [↑](#footnote-ref-213)
214. *Ibid.* [↑](#footnote-ref-214)
215. *Ibid.* [↑](#footnote-ref-215)
216. Zubeda Hamid, “Disabilities Rights Bill: Activists worried over guardianship” (17 June 2015), online: *The Hindu* <https://www.thehindu.com/news/cities/chennai/disabilities-rights-bill-activists-worried-over-guardianship/article7322999.ece>. [↑](#footnote-ref-216)
217. *The Rights of Persons with Disabilities Act, supra* note 211, art 13(2). [↑](#footnote-ref-217)
218. *Ibid,* art 13(1). [↑](#footnote-ref-218)
219. See *Ibid,* arts 13(3)-(5), 14, 15. [↑](#footnote-ref-219)
220. *Ibid,* art 14(5). [↑](#footnote-ref-220)
221. *Ibid,* art 14(3). [↑](#footnote-ref-221)
222. *Ibid,* art 14(5). [↑](#footnote-ref-222)
223. *Ibid,* art 15(1). [↑](#footnote-ref-223)
224. *Ibid,* art 15(2). [↑](#footnote-ref-224)
225. *Ibid,* art 14(1). [↑](#footnote-ref-225)
226. *Ibid.* [↑](#footnote-ref-226)
227. *Ibid.* [↑](#footnote-ref-227)
228. *Ibid.* [↑](#footnote-ref-228)
229. *Ibid.* [↑](#footnote-ref-229)
230. *Ibid,* art 14(3). [↑](#footnote-ref-230)
231. *Ibid,* arts 13(1)-(2). [↑](#footnote-ref-231)
232. *Ibid,* art 100. [↑](#footnote-ref-232)
233. A set of rules was issued in 2017, but it did not touch upon SDM. See *The Rights of Persons with Disabilities Rules, 2017,* India, 15 June 2017, online: <https://upload.indiacode.nic.in/showfile?actid=AC\_CEN\_25\_54\_00002\_201649\_1517807328299&type=rule&filename=Rules\_notified\_15.06.pdf>. [↑](#footnote-ref-233)
234. National Disability Network (NDN) & National Committee on the Rights of Persons with Disabilities (NCRPD), *Parallel Report of India on the Convention on the Rights of Persons with Disabilities (CRPD),* February 2019, at para 17, online: < https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/Ind/INT\_CRPD\_ICO\_Ind\_33881\_E.docx>. [↑](#footnote-ref-234)
235. *The Rights of Persons with Disabilities Act, supra* note 211, art 15(2). [↑](#footnote-ref-235)
236. *Ibid,* art 13(4). [↑](#footnote-ref-236)
237. NDN & NCRPD, *supra* note 234 at paras 13 & 47(1). [↑](#footnote-ref-237)
238. *List of issues in relation to the initial report of India– Addendum - Replies of India to the list of issues* (7 June 2019)at para 62, online: < <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsmcRCScUCudOHc8Goa6B5KEkL6YUtTPLTOUD66rERh6KEGfKVWTxI5AfzkloITNfgT5HMb5VMk3dAc8OQXVFSy9OFbu57wXSawf15nY8EVQa%2bdZPt0VvYglHaZoMaUHyNQ%3d%3d>>. [↑](#footnote-ref-238)
239. *The Rights of Persons with Disabilities Act, supra* note 211, art 14(1). [↑](#footnote-ref-239)
240. *Ibid.* [↑](#footnote-ref-240)
241. *Ibid.* [↑](#footnote-ref-241)
242. *Ibid.* [↑](#footnote-ref-242)
243. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29. [↑](#footnote-ref-243)
244. *The Rights of Persons with Disabilities Act, supra* note 211, art 14(1). [↑](#footnote-ref-244)
245. *The National Trust Act, 1999 (No. 4 of 1999),* India, 30 December 1999, online: < http://thenationaltrust.gov.in/upload/uploadfiles/files/act-englsih.pdf>. [↑](#footnote-ref-245)
246. National CRPD Coalition-India, *CRPD Alternate Report for India* (11 February 2019) at 22, online: < https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/Ind/INT\_CRPD\_ICO\_Ind\_33886\_E.docx>. [↑](#footnote-ref-246)
247. *The National Trust Act*, *supra* note 245, art 14(1). [↑](#footnote-ref-247)
248. *Ibid.* [↑](#footnote-ref-248)
249. *Ibid,* art 15; see The National Trust, “Guardianship” (last updated: 3 July 2019), online: <http://www.thenationaltrust.gov.in/content/innerpage/guardianship.php>. [↑](#footnote-ref-249)
250. NDN & NCRPD, *supra* note 234 at para 17. [↑](#footnote-ref-250)
251. National Trust, *Empowering Abilities, Creating Trust: Annual Report 2017-18* at 20, online: <http://www.thenationaltrust.gov.in/upload/uploadfiles/files/Annual\_Report\_2017-18\_English.pdf>. [↑](#footnote-ref-251)
252. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-252)
253. NDN & NCRPD, *supra* note 234 at para 47(2). [↑](#footnote-ref-253)
254. *Capacity and Guardianship (Amendment No. 18) Law, 5776-2016,* Israel, 29 March 2016, online: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiw8aTE753jAhVPcZoKHVhHCLgQFjAAegQIBhAC&url=http%3A%2F%2Fwww.supporteddecisionmaking.org%2Fsites%2Fdefault%2Ffiles%2Fnew-Israeli-law-on-supported-decision-making.docx&usg=AOvVaw2GHHKZxFP3lz3iNO-L7mkL>. Full text of the law (in Hebrew): <https://www.nevo.co.il/law\_html/law01/192\_001.htm>. [↑](#footnote-ref-254)
255. *Initial report submitted by Israel under article 35 of the Convention, due in 2014* (8 March 2019) at para 91, online: < http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsmEWpNSvYdhzky41dt2u3U783dwysUXaXnVrhJif7y0NFg79ZX3ivJfoAFC6oIz7jUXf6N3Sq5wdFC6OPZEFfQWga5je%2bazE5L%2bIHvpbyUys>. [↑](#footnote-ref-255)
256. Kanter & Tolub, *supra* note 108 at 559. [↑](#footnote-ref-256)
257. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254, s 33. [↑](#footnote-ref-257)
258. “Convention on the Rights of Persons with Disabilities,” *supra* note 20. [↑](#footnote-ref-258)
259. *Initial report submitted by Israel, supra* note 255 at para 90. [↑](#footnote-ref-259)
260. Kanter & Tolub, *supra* note 108 at 589-90. [↑](#footnote-ref-260)
261. *Ibid* at 590. [↑](#footnote-ref-261)
262. *Ibid.* [↑](#footnote-ref-262)
263. *Ibid.* [↑](#footnote-ref-263)
264. *Ibid.* [↑](#footnote-ref-264)
265. *Ibid.* [↑](#footnote-ref-265)
266. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254, s 67B(d). [↑](#footnote-ref-266)
267. *Ibid,* s 67B(a)(1). [↑](#footnote-ref-267)
268. *Ibid,* s 67B(a)(2). [↑](#footnote-ref-268)
269. *Ibid,* s 67B(a)(3). [↑](#footnote-ref-269)
270. *Ibid,* s 67B(c). [↑](#footnote-ref-270)
271. *Ibid,* s 67B(e). [↑](#footnote-ref-271)
272. *Ibid.* [↑](#footnote-ref-272)
273. *Initial report submitted by Israel, supra* note 255 at para 94(b). [↑](#footnote-ref-273)
274. See *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254, ss 32A-33. Note: enduring power of attorney is to come into effect on the date at which the person is no longer able to understand the matter in which the power of attorney has been granted (s 32:19A1). [↑](#footnote-ref-274)
275. *Initial report submitted by Israel, supra* note 255 at para 94(a). [↑](#footnote-ref-275)
276. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254, ss 32N(A) & 32A. [↑](#footnote-ref-276)
277. *Ibid,* s32A; see also s 32:29B (possibility for limiting or cancelling enduring power of attorney by the court). [↑](#footnote-ref-277)
278. *Ibid,* s 33(a)(3). [↑](#footnote-ref-278)
279. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254, s 8. [↑](#footnote-ref-279)
280. *Ibid,* s 38(A). [↑](#footnote-ref-280)
281. *Ibid.* [↑](#footnote-ref-281)
282. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254, s 33(a)(4). [↑](#footnote-ref-282)
283. *Initial Report submitted by Israel, supra* note 255 at para 88. [↑](#footnote-ref-283)
284. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254*,* s 33A(1); see Bizchut, “Introduction to the new Legal Capacity and Guardianship Law” (4 April 2016) at 2, online: <

     http://www.supporteddecisionmaking.org/sites/default/files/Introduction-to-new-guardianship-law.docx&gt>. [↑](#footnote-ref-284)
285. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254*,* ss 33A(2)-(3); See Bizchut, *supra* note 284 at 2. [↑](#footnote-ref-285)
286. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254*,* s 33A(d). [↑](#footnote-ref-286)
287. Bizchut, *supra* note 284 at 2. [↑](#footnote-ref-287)
288. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254*,* s 67F(b). [↑](#footnote-ref-288)
289. *Ibid.* [↑](#footnote-ref-289)
290. *Ibid,* s 67(e). [↑](#footnote-ref-290)
291. See *Ibid,* s 47(a). [↑](#footnote-ref-291)
292. *Ibid,* s 53. [↑](#footnote-ref-292)
293. Kanter & Tolub, *supra* note 108 at 593. [↑](#footnote-ref-293)
294. *Initial report submitted by Israel, supra* note 255 at para 89. [↑](#footnote-ref-294)
295. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254, s 8. [↑](#footnote-ref-295)
296. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-296)
297. Persons under guardianship by virtue of s 33 of the *Legal Capacity and Guardianship Law* are not stripped of their legal capacity – see *Initial report submitted by Israel, supra* note 255 at para 88. [↑](#footnote-ref-297)
298. See *Legal Capacity and Guardianship (Amendment No. 18) Law, supra* note 254, s 67F(B). [↑](#footnote-ref-298)
299. See *Ibid:* “best interest principle” may apply where a person’s will is not ascertainable. [↑](#footnote-ref-299)
300. See *Ibid,* s 35(a). [↑](#footnote-ref-300)
301. See Devandas Aguilar, *supra* note 8 at para 26. [↑](#footnote-ref-301)
302. See *Legal Capacity and Guardianship (Amendment No. 18) Law, supra* note 254, s 67B(d). [↑](#footnote-ref-302)
303. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29(i). [↑](#footnote-ref-303)
304. Kanter & Tolub, *supra* note 108 at 593. [↑](#footnote-ref-304)
305. *Capacity and Guardianship (Amendment No. 18) Law, supra* note 254, s 67B(f). [↑](#footnote-ref-305)
306. *Ibid,* s 32:19A1. [↑](#footnote-ref-306)
307. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 17. [↑](#footnote-ref-307)
308. *Law of Georgia No 3339 of 20 March 2015,* online: < https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/90468/118660/F999089720/GEO90468 Geo.pdf>. [↑](#footnote-ref-308)
309. “Convention on the Rights of Persons with Disabilities,” *supra* note 20. [↑](#footnote-ref-309)
310. Former *Civil Code of Georgia,* art 12(5), online: < https://www.wipo.int/edocs/lexdocs/laws/en/ge/ge012en.pdf>. [↑](#footnote-ref-310)
311. *Initial report submitted by Georgia under article 35 of the Convention, due in 2016* (29 November 2018) at para 60, online: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgkVjqUCiEeI%2bdQbbet6WG9rv2v19bytl9e041%2baf2j%2bKbYm41Dgyk0bkRyT3ZQ%2bAtQqp6ND2VKrc0L1NGHbe41Q08k%2b7ahqlHtwKotMR%2biQ>. [↑](#footnote-ref-311)
312. *Citizens of Georgia – Irakli Kemoklidze and David Kharadze v Parliament of Georgia,* Case No. 2/4/532,533 (Judgment of 8 October 2014). [↑](#footnote-ref-312)
313. “GYLA wins in the Constitutional Court case expanding the rights of individuals with disabilities” (10 October 2014), online: *United States Agency for International Development* < http://ewmi-prolog.org/en/news/471-2014-10-10-01>. [↑](#footnote-ref-313)
314. See Council of Europe, *A study on the Equal Recognition before the law: Contribution towards the Council of Europe Strategy on the Rights of Persons with Disabilities* (Council of Europe, March 2017) at 42. [↑](#footnote-ref-314)
315. *Initial report submitted by Georgia under article 35 of the Convention*, *supra* note 311 at para 61. [↑](#footnote-ref-315)
316. “GYLA wins in the Constitutional Court case,” *supra* note 313. [↑](#footnote-ref-316)
317. *Civil Code of Georgia, supra* note 308, art 12(4). [↑](#footnote-ref-317)
318. *Ibid*, art 12(4). [↑](#footnote-ref-318)
319. *Initial report submitted by Georgia*, *supra* note 311 at para 62. [↑](#footnote-ref-319)
320. *Ibid.* [↑](#footnote-ref-320)
321. *Ibid* at paras 63-64. [↑](#footnote-ref-321)
322. *Ibid* at para 65. [↑](#footnote-ref-322)
323. *Civil Code of Georgia, supra* note 308, art 1280(1). [↑](#footnote-ref-323)
324. *Ibid.* [↑](#footnote-ref-324)
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326. *Ibid,* art 1280(5). [↑](#footnote-ref-326)
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328. *Ibid.* [↑](#footnote-ref-328)
329. *Ibid,* art 1278(3). [↑](#footnote-ref-329)
330. *Ibid,* art 1293(3). [↑](#footnote-ref-330)
331. *Ibid,* art 1289(2). [↑](#footnote-ref-331)
332. *Ibid*. [↑](#footnote-ref-332)
333. *Law of Georgia No 3340 of 20 March 2015, The Civil Procedure Code of Georgia,* art 36315(3),online: <https://matsne.gov.ge/en/document/view/29962?impose=translateEn&publication=132>; see *Initial report submitted by Georgia*, *supra* note 311 at para 66. [↑](#footnote-ref-333)
334. *Ibid.* [↑](#footnote-ref-334)
335. *Civil Code of Georgia, supra* note 308*,* art 1289(2). [↑](#footnote-ref-335)
336. *Ibid,* art 13051(2); *Initial report submitted by Georgia*, *supra* note 311 at para 67. [↑](#footnote-ref-336)
337. *Civil Code of Georgia*, *supra* note 308, art 13051(3). [↑](#footnote-ref-337)
338. *Ibid,* arts 13052a-b. [↑](#footnote-ref-338)
339. *Ibid,* art 13052c. [↑](#footnote-ref-339)
340. *Ibid,* art 1301(2). [↑](#footnote-ref-340)
341. *Ibid,* art 1508. [↑](#footnote-ref-341)
342. Former *Civil Code of Georgia, supra* note 310, arts 12(5) & 1276. [↑](#footnote-ref-342)
343. *Civil Code of Georgia, supra* note 308, art 1277(1). [↑](#footnote-ref-343)
344. *Ibid,* art 1281(1). [↑](#footnote-ref-344)
345. *Ibid,* art 1277(1)*.* [↑](#footnote-ref-345)
346. *Ibid,* arts 1275(2) & 1289. [↑](#footnote-ref-346)
347. *Ibid,* art 14(2). [↑](#footnote-ref-347)
348. *Ibid,* art 1276. [↑](#footnote-ref-348)
349. *Ibid,* art 1275(2). [↑](#footnote-ref-349)
350. *Ibid,* art 14(2). [↑](#footnote-ref-350)
351. see *Ibid,* art 1289(1). [↑](#footnote-ref-351)
352. *Ibid,* art 12(1). [↑](#footnote-ref-352)
353. *Ibid,* arts 13-14. [↑](#footnote-ref-353)
354. See *Ibid* art 1277(1). [↑](#footnote-ref-354)
355. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-355)
356. See *Civil Code of Georgia, supra* note 308*,* art 13051(2). [↑](#footnote-ref-356)
357. See *Ibid,* art 1301(2). [↑](#footnote-ref-357)
358. *Ibid,* art 1298. [↑](#footnote-ref-358)
359. See Council of Europe, *supra* note 314 at 44. [↑](#footnote-ref-359)
360. *Civil Code of Georgia, supra* note 308*,* art 1293(4). [↑](#footnote-ref-360)
361. *Ibid,* art 69(3). [↑](#footnote-ref-361)
362. *Ibid,* art 1304(1); Council of Europe, *supra* note 314 at 44. [↑](#footnote-ref-362)
363. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29(g). [↑](#footnote-ref-363)
364. See *Civil Code of Georgia, supra* note 308, art 1289(2). [↑](#footnote-ref-364)
365. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29. [↑](#footnote-ref-365)
366. Public Defender (Ombudsman) of Georgia, *Legal Capacity – Legislative Reform Without Implementation: Study Report* (2016) at 34, online: <110http://www.ombudsman.ge/res/docs/2019040412214254520.pdf

     >. [↑](#footnote-ref-366)
367. *Ibid* at 35. [↑](#footnote-ref-367)
368. *Ibid.* [↑](#footnote-ref-368)
369. Council of Europe, *supra* note 314 at 44. [↑](#footnote-ref-369)
370. *Ibid*. [↑](#footnote-ref-370)
371. Public Defender (Ombudsman) of Georgia, *supra* note 366 at 28. [↑](#footnote-ref-371)
372. *Ibid.* [↑](#footnote-ref-372)
373. *Act No. 89/2012 Coll. Civil Code,* Czech Republic, 3 February 2012, online: <https://www.mdac.org/sites/mdac.info/files/final\_czechcivilcode.doc>. [↑](#footnote-ref-373)
374. Mental Disability Advocacy Centre (MDAC), “Czech Republic Enacts Legal Capacity Reform” (21 February 2012), online: *MDAC* <https://www.mdac.org/en/news/czech-republic-enacts-legal-capacity-law-reform>. [↑](#footnote-ref-374)
375. Kanter & Tolub, *supra* note 108 at 600. [↑](#footnote-ref-375)
376. “Convention on the Rights of Persons with Disabilities,” *supra* note 20. [↑](#footnote-ref-376)
377. MDAC, “Czech Republic Enacts Legal Capacity Reform,” *supra* note 374. [↑](#footnote-ref-377)
378. *Ibid.* [↑](#footnote-ref-378)
379. *Ibid.* [↑](#footnote-ref-379)
380. *Ibid.* [↑](#footnote-ref-380)
381. *Czech Civil Code*, *supra* note 373, s 57(1). [↑](#footnote-ref-381)
382. *Ibid,* s 55(1). [↑](#footnote-ref-382)
383. *Ibid,* s 62. [↑](#footnote-ref-383)
384. *Ibid,* s 55(2). [↑](#footnote-ref-384)
385. *Ibid*. [↑](#footnote-ref-385)
386. *Ibid,* s 59. [↑](#footnote-ref-386)
387. *Ibid,* s 64. [↑](#footnote-ref-387)
388. Council of Europe, *supra* note 314 at 37. [↑](#footnote-ref-388)
389. *Czech Civil Code*, *supra* note 373, s 450. [↑](#footnote-ref-389)
390. *Ibid,* ss 465-477. [↑](#footnote-ref-390)
391. *Ibid,* s 465(1). [↑](#footnote-ref-391)
392. *Ibid,* s 458. [↑](#footnote-ref-392)
393. *Ibid,* s 462(1). [↑](#footnote-ref-393)
394. *Ibid.* [↑](#footnote-ref-394)
395. *Ibid,* s 462(2). [↑](#footnote-ref-395)
396. *Ibid,* s 45. [↑](#footnote-ref-396)
397. *Ibid,* s 46(1). [↑](#footnote-ref-397)
398. *Ibid.* [↑](#footnote-ref-398)
399. *Ibid,* s 46(2). [↑](#footnote-ref-399)
400. *Ibid*. [↑](#footnote-ref-400)
401. *Ibid,* s 47(1). [↑](#footnote-ref-401)
402. *Ibid,* s 47(2). [↑](#footnote-ref-402)
403. *Ibid.* [↑](#footnote-ref-403)
404. *Ibid,* s 48. [↑](#footnote-ref-404)
405. *Ibid,* s 38(1). [↑](#footnote-ref-405)
406. *Ibid.* [↑](#footnote-ref-406)
407. *Ibid,* s 49. [↑](#footnote-ref-407)
408. *Ibid,* ss 49(1) & 50. [↑](#footnote-ref-408)
409. *Ibid,* s 51. [↑](#footnote-ref-409)
410. *Ibid,* s 52. [↑](#footnote-ref-410)
411. Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the Czech Republic* (15 May 2015) at para 22, online: < http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsptzG4Xu%2fHsX6HwedSMgeQqyXsBGn6EQyTf4J0uTxoU9cjcDq9a7%2btyVrui2k3vyyEBNR1%2fW75IX8MrrwyMPVx524zIdcTseMG5SkGoLqG8B>. [↑](#footnote-ref-411)
412. See *Czech Civil Code*, *supra* note 373, ss 55(1) & 57(1). [↑](#footnote-ref-412)
413. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-413)
414. Mental Disability Advocacy Center (MDAC), *Legal Capacity in Europe: A Call to Action to Governments and to the EU* (October 2013) at 49, online:<<http://mdac.info/sites/mdac.info/files/legal_capacity_in_europe.pdf>>. [↑](#footnote-ref-414)
415. See *Czech Civil Code*, *supra* note 373, s 48. [↑](#footnote-ref-415)
416. *Ibid*, art 47(2). [↑](#footnote-ref-416)
417. See *Ibid,* art 47(2). [↑](#footnote-ref-417)
418. *Ibid,* art 38 (advance directives may be made for a “person who foresees her own legal incapacity”); see Devandas Aguilar, *supra* note 8 at para 44. [↑](#footnote-ref-418)
419. MDAC, *Legal Capacity in Europe, supra* note 414 at 49. [↑](#footnote-ref-419)
420. See *Czech Civil Code*, *supra* note 373, art 462. [↑](#footnote-ref-420)
421. Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the Czech Republic, supra* note 411 at para 23. [↑](#footnote-ref-421)
422. Quip, *Inclusive Training About Article 12: Reference Document of IDEA 12 project* (2017) at 34, online: < <https://www.kvalitavpraxi.cz/res/archive/033/004202.pdf?seek=1527587379>>. [↑](#footnote-ref-422)
423. “Convention on the Rights of Persons with Disabilities,” *supra* note 20. [↑](#footnote-ref-423)
424. *The Civil Law of Latvia*, Latvia, 29 November 2012, online: <https://likumi.lv/ta/en/en/id/225418-the-civil-law>. [↑](#footnote-ref-424)
425. Judgment of the Constitutional Court, Case No. 2010-38-01. Announced on 27 December 2010. [↑](#footnote-ref-425)
426. Mental Disability and Advocacy Center (MDAC), “Latvia Abolishes Plenary Guardianship” (5 December 2012), online: *MDAC* <http://www.mdac.info/en/05/12/2012/latvia-abolishes-plenary-guardianship>. [↑](#footnote-ref-426)
427. *Ibid.* [↑](#footnote-ref-427)
428. MDAC, *Legal Capacity in Europe, supra* note 414 at 61. [↑](#footnote-ref-428)
429. MDAC, “Latvia Abolishes Plenary Guardianship,” *supra* note 426. [↑](#footnote-ref-429)
430. *Ibid.* [↑](#footnote-ref-430)
431. Resource Centre for People with Mental Disability (RC ZELDA), *Letter to Legal Affairs Committee of Latvian Parliament* (24 November 2011), online: <<http://zelda.org.lv/wp-content/uploads/Opinion-concerning-the-amendments-to-Civil-Law-and-Civil-Procedure-Law-regarding-legal-capacity1.pdf>>; Mental Disability and Advocacy Center (MDAC), *Letter to Legal Affairs Committee of Latvian Parliament* (7 December 2011), online: < <http://mdac.org/sites/mdac.org/files/2011_12_06_Comments_LC_Latvia.doc>>. [↑](#footnote-ref-431)
432. MDAC, “Latvia Abolishes Plenary Guardianship,” *supra* note 426. [↑](#footnote-ref-432)
433. *The Civil Law of Latvia*, *supra* note 424, art 3561; *Consideration of reports submitted by States parties under article 35 of the Convention: Latvia,* (29 October 2015) at para 125, online: < <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiyaiCIuQzff7FUjD97cNmkHsu4cusE6f7aAm30Zc651pKNDvv%2f4hPnZxGkUWu12qrrOzsXgrLnk6S5gmUDBGEpu57TeyIqDnR5kWd7YYOGy>>. [↑](#footnote-ref-433)
434. RC ZELDA, *Thematic report of the Resource centre for People with mental disability “ZELDA” to the UN Committee on the Rights of Persons with Disabilities* (27 February 2017) at 5, online: < https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/LVA/INT\_CRPD\_ICO\_LVA\_26871\_E.doc>. [↑](#footnote-ref-434)
435. *The Civil Law of Latvia, supra* note 424, art 3561. [↑](#footnote-ref-435)
436. RC ZELDA, *Thematic report,* *supra* note 434 at 5*.* [↑](#footnote-ref-436)
437. *The Civil Law of Latvia*, *supra* note 424, art 3581. [↑](#footnote-ref-437)
438. *Ibid,* arts 358 & 1411. [↑](#footnote-ref-438)
439. *Ibid,* art 358. [↑](#footnote-ref-439)
440. *Ibid;* RC ZELDA, *Thematic report,* *supra* note 434 at 6. [↑](#footnote-ref-440)
441. *The Civil Law of Latvia*, *supra* note 424, art 355. [↑](#footnote-ref-441)
442. *Ibid.* [↑](#footnote-ref-442)
443. *Ibid,* art 364. [↑](#footnote-ref-443)
444. *Ibid,* art 2317. [↑](#footnote-ref-444)
445. *Ibid.* [↑](#footnote-ref-445)
446. See *Ibid,* art 3561. [↑](#footnote-ref-446)
447. *Ibid,* art 358. [↑](#footnote-ref-447)
448. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-448)
449. RC ZELDA, *Thematic report, supra* note 434 at 6. [↑](#footnote-ref-449)
450. Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Latvia* (10 October 2017) at para 21, online: < <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiyaiCIuQzff7FUjD97cNmlMwHPw42Pi74CX9nqtwZb5qlEktwaQ2x8FfTttXJ0XRXWKqzZxg9%2fh7C25wlyrQ7Z84yHwWFin%2fZGIu%2bHYTWea>>. [↑](#footnote-ref-450)
451. *The Civil Law of Latvia*, *supra* note 424, art 355. [↑](#footnote-ref-451)
452. MDAC, “Latvia Abolishes Plenary Guardianship,” *supra* note 426; See Devendas Aguilar, *supra* note 8 at para 45. [↑](#footnote-ref-452)
453. See *The Civil Law of Latvia*, *supra* note 424*,* art 358. [↑](#footnote-ref-453)
454. *Ibid,* art 364. [↑](#footnote-ref-454)
455. *Ibid,* art 2317. [↑](#footnote-ref-455)
456. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 17. [↑](#footnote-ref-456)
457. Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Latvia, supra* note 450 at para 21. [↑](#footnote-ref-457)
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459. “Committee on the Rights of Persons with Disabilities considers the initial report of Latvia” (22 August 2017), online: *United Nations Human Rights Office of the High Commissioner* <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21989&LangID=E>. [↑](#footnote-ref-459)
460. *Ibid.* [↑](#footnote-ref-460)
461. *Ibid.* [↑](#footnote-ref-461)
462. *Family Act* (2014), Croatia, 1 November 2015, online (in Croatian): <https://www.zakon.hr/z/88/Obiteljski-zakon>. See also Human Rights Watch, *Human Rights Watch Submission to the United Nations on Croatia* (30 March 2015), online: <https://www.refworld.org/pdfid/552fb1854.pdf>. [↑](#footnote-ref-462)
463. “Convention on the Rights of Persons with Disabilities,” *supra* note 20. [↑](#footnote-ref-463)
464. MDAC, *Legal Capacity in Europe, supra* note 414 at 47. [↑](#footnote-ref-464)
465. *Ibid.* [↑](#footnote-ref-465)
466. Human Rights Watch, *supra* note 462 at 2. [↑](#footnote-ref-466)
467. *Ibid* at 1. [↑](#footnote-ref-467)
468. *Family Act*, *supra* note 462, art 219. [↑](#footnote-ref-468)
469. *Ibid,* art 234(3). [↑](#footnote-ref-469)
470. *Ibid,* art 234(4). [↑](#footnote-ref-470)
471. *Ibid,* arts 234(5)-(6). [↑](#footnote-ref-471)
472. Human Rights Watch, *supra* note 462 at 4. [↑](#footnote-ref-472)
473. *Family Act*, *supra* note 462, art 233, para 1. [↑](#footnote-ref-473)
474. Human Rights Watch, *supra* note 462 at 3. [↑](#footnote-ref-474)
475. *Family Act*, *supra* note 462, art 233, para 4. [↑](#footnote-ref-475)
476. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-476)
477. Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Croatia* (15 May 2015) at para 18, online: < http://daccess-ods.un.org/access.nsf/Get?Open&DS=CRPD/C/HRV/CO/1&Lang=E>. [↑](#footnote-ref-477)
478. *Ibid* at para 17. [↑](#footnote-ref-478)
479. *Ibid* at para 18. [↑](#footnote-ref-479)
480. *Ibid* at para 18. [↑](#footnote-ref-480)
481. See Irena Majstorović & Ivan Šimović, “The Scope of the Deprivation of Legal Capacity as a Precondition for the Protection of Rights and Dignity of Persons” (2018) 25:1 Ljetopis socijalnog rada 65 at 71. [↑](#footnote-ref-481)
482. *Family Act* (2014), *supra* note 462, art 233, para 4. [↑](#footnote-ref-482)
483. Human Rights Watch, *supra* note 462 at 3. [↑](#footnote-ref-483)
484. *Family Act* (2014), *supra* note 462, art 233, para 4. [↑](#footnote-ref-484)
485. Human Rights Watch, *supra* note 462 at 3. [↑](#footnote-ref-485)
486. *Law No XII-1566,* Lithuania, 10 April 2015, online (in Lithuanian): <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/b75c13a1d84711e49a8e8a8aa8141086>*.* See Council of Europe, *supra* note 314 at 56ff. [↑](#footnote-ref-486)
487. Council of Europe, *supra* note 314 at 56. [↑](#footnote-ref-487)
488. “Convention on the Rights of Persons with Disabilities,” *supra* note 20. [↑](#footnote-ref-488)
489. “Lithuanian Disability Forum,” online: *Idea 12* < https://www.idea12.eu/project-partners/lithuanian-disability-forum/>. [↑](#footnote-ref-489)
490. *Ibid.* [↑](#footnote-ref-490)
491. *Ibid.* [↑](#footnote-ref-491)
492. *D.D. v Lithuania* (Application No. 13469/06, judgment of 14 February 2012). [↑](#footnote-ref-492)
493. Council of Europe, *supra* note 314 at 56. [↑](#footnote-ref-493)
494. *Ibid.* [↑](#footnote-ref-494)
495. *Ibid.* [↑](#footnote-ref-495)
496. *Ibid.* [↑](#footnote-ref-496)
497. *Ibid.* [↑](#footnote-ref-497)
498. *Lithuanian Civil Code*, *supra* note 486, art 2.10(1). [↑](#footnote-ref-498)
499. *Ibid.* [↑](#footnote-ref-499)
500. *Ibid,* art 3.240(2). [↑](#footnote-ref-500)
501. *Ibid,* art 2.10(2). [↑](#footnote-ref-501)
502. Council of Europe, *supra* note 314 at 56. [↑](#footnote-ref-502)
503. *Ibid.* [↑](#footnote-ref-503)
504. The Lithuanian Disability Forum, *Replies to the List of Issues* (17 March 2016) at 3, online: < https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/LTU/INT\_CRPD\_CSS\_LTU\_23329\_E.doc>. [↑](#footnote-ref-504)
505. *Lithuanian Civil Code, supra* note 486, art 72(2). [↑](#footnote-ref-505)
506. *Ibid*, art 2.11(1). [↑](#footnote-ref-506)
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508. *Ibid,* art 2.11(2). [↑](#footnote-ref-508)
509. *Ibid,* art 3.240(3). [↑](#footnote-ref-509)
510. *Ibid,* art 3.2791(1). [↑](#footnote-ref-510)
511. *Ibid.* [↑](#footnote-ref-511)
512. *Ibid,* art 3.2791(2). [↑](#footnote-ref-512)
513. *Ibid,* arts 3.2791(3) & 2.135(1). [↑](#footnote-ref-513)
514. *Ibid,* art 3.2791(4) (note that these institutions also monitor the activities of guardians and caretakers). [↑](#footnote-ref-514)
515. *Ibid,* art 3.2793(1). [↑](#footnote-ref-515)
516. *Ibid,* art 2.1371. [↑](#footnote-ref-516)
517. *Ibid,* art 2.1371(1). [↑](#footnote-ref-517)
518. *Ibid,* art 2.1371(2)(1). [↑](#footnote-ref-518)
519. *Ibid,* art 2.1371(2)(5). [↑](#footnote-ref-519)
520. *Ibid,* art 2.1371(3). [↑](#footnote-ref-520)
521. *Ibid,* art 2.1371(4). [↑](#footnote-ref-521)
522. *Ibid,* art 2.1371(5). [↑](#footnote-ref-522)
523. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-523)
524. Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Lithuania* (11 May 2016) at para 25. [↑](#footnote-ref-524)
525. The Lithuanian Disability Forum, *Proposal for the List of issues in relation to the initial report of the Republic of Lithuania* (3 August 2015) at 5, online: < https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/LTU/INT\_CRPD\_ICO\_LTU\_21462\_E.docx>. [↑](#footnote-ref-525)
526. See *Lithuanian Civil Code, supra* note 486*,* art 3.2791(4). [↑](#footnote-ref-526)
527. See *Ibid,* art 3.2793(1). [↑](#footnote-ref-527)
528. See Devandas Aguilar, *supra* note 8 at para 44. [↑](#footnote-ref-528)
529. *Ibid.* [↑](#footnote-ref-529)
530. See *Lithuanian Civil Code, supra* note 486, art 2.1371(2)(1). [↑](#footnote-ref-530)
531. *Ibid,* art 2.1371(5). [↑](#footnote-ref-531)
532. See Devandas Aguilar, *supra* note 8 at para 44. [↑](#footnote-ref-532)
533. Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Lithuania, supra* note 524 at para 26. [↑](#footnote-ref-533)
534. MDAC, *Legal Capacity in Europe, supra* note 414 at 55. [↑](#footnote-ref-534)
535. *Ibid.* [↑](#footnote-ref-535)
536. MDAC, “Hungary,” online: *MDAC* <<https://www.mdac.org/en/Hungary>>. [↑](#footnote-ref-536)
537. *Ibid.* The argument was that the law should not come into effect since local governments had received insufficient training. [↑](#footnote-ref-537)
538. *Act V of 2013 on the Civil Code,* Hungary, 26 February 2013, online: < <https://tdziegler.files.wordpress.com/2014/06/civil_code.pdf>>. [↑](#footnote-ref-538)
539. See *Hungarian Civil Code, supra* note 538, s 2:21(1). [↑](#footnote-ref-539)
540. See *Ibid,* s 2:38. [↑](#footnote-ref-540)
541. *Act CLV of 2013 on Supported Decision-Making,* Hungary, online (in Hungarian): <https://net.jogtar.hu/jogszabaly?docid=A1300155.TV>. See also *Information received from Hungary on the follow-up to the concluding observations* (28 October 2013) at para 17, online: < <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsmg8z0DXeL2x2%2fDmZ9jKJsn%2bvgDgQamIHh2by41iKdtBqX6%2fmcK7LAx1cVgfXGMMwJn3718zD3IMIjnCsqay3rkyHzOhuK5uyHrTCGRxaeBIQkmHcCe7%2bKCjPDB4KLjsfA%3d%3d>>. [↑](#footnote-ref-541)
542. Hungarian Disability Caucus, *List of issues submissions* (2 April 2012) at 5, online: < <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwj6xpu84crjAhWRXsAKHduZCfQQFjAAegQIABAC&url=http%3A%2F%2Fwww2.ohchr.org%2FSPdocs%2FCRPD%2F7thsession%2FHungarianDisabilityCaucus.doc&usg=AOvVaw1UIBa2ErwyfNMCpiX6SZLy>>. [↑](#footnote-ref-542)
543. *Ibid.* [↑](#footnote-ref-543)
544. *Ibid.*  [↑](#footnote-ref-544)
545. *Ibid.* [↑](#footnote-ref-545)
546. *Ibid,* see *Hungarian Civil Code, supra* note 538, s 2:21. [↑](#footnote-ref-546)
547. *Ibid,* s 2:21(2). [↑](#footnote-ref-547)
548. See *Ibid,* s 2:19. [↑](#footnote-ref-548)
549. *Ibid,* s 2:19(2). [↑](#footnote-ref-549)
550. *Ibid,* s 2:19. [↑](#footnote-ref-550)
551. *Ibid,* s 2:39. [↑](#footnote-ref-551)
552. *Ibid,* s 2:39(2)(a). [↑](#footnote-ref-552)
553. *Ibid,* s 2:39(2)(c). [↑](#footnote-ref-553)
554. *Ibid,* s 2:38(1). [↑](#footnote-ref-554)
555. *Ibid.* [↑](#footnote-ref-555)
556. *Ibid,* ss 2:38(1)-(2). [↑](#footnote-ref-556)
557. *Ibid,* s 2:38(2). [↑](#footnote-ref-557)
558. *Ibid,* s 2:38(3). [↑](#footnote-ref-558)
559. *Act CLV of 2013 on Supported Decision-Making*, *supra* note 541 at s 2(2). [↑](#footnote-ref-559)
560. *Ibid,* s 6. [↑](#footnote-ref-560)
561. *Ibid,* s 6(3). [↑](#footnote-ref-561)
562. *Ibid,* s 2(2). [↑](#footnote-ref-562)
563. *Ibid,* s 2(1). [↑](#footnote-ref-563)
564. *Ibid,* ss 4(1)(d)-(e). [↑](#footnote-ref-564)
565. *Ibid,* s 2(1). [↑](#footnote-ref-565)
566. *Ibid,* s 5(1). [↑](#footnote-ref-566)
567. *Ibid,* s 5(2). [↑](#footnote-ref-567)
568. See *Ibid,* ss 2:19(2) & 2:21(2). [↑](#footnote-ref-568)
569. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-569)
570. *Hungarian Civil Code, supra* note 538, s 4:10(1). [↑](#footnote-ref-570)
571. *Ibid,* s 7:11 & s 2:22(1). [↑](#footnote-ref-571)
572. *Ibid,* s 4:121(1). [↑](#footnote-ref-572)
573. Section 15(2) of the Act CLIV of 1997 on Health. Section 16 (2) and Section 21 of the Act CLIV of 1997 on Health. [↑](#footnote-ref-573)
574. Section 49(1)-(2) of the Act III of 1952 on the Code of Civil Procedure; Section 15 (7) of the Act CXL of 2004 on the General Rules of Administrative Proceedings and Services. [↑](#footnote-ref-574)
575. *Hungarian Civil Code, supra* note 538, s 2:22(1) (3); Mental Disability Advocacy Centre (MDAC), *Recommendations for Hungary – UN Universal Periodic* *Review* (21 September 2015) at 2-3, online: < <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiO6eeX8crjAhWHiVwKHca8CKMQFjAAegQIABAC&url=https%3A%2F%2Fuprdoc.ohchr.org%2Fuprweb%2Fdownloadfile.aspx%3Ffilename%3D2610%26file%3DEnglishTranslation&usg=AOvVaw3g4c_Bav4mYf2tjCi4f7Tl>>. [↑](#footnote-ref-575)
576. *Hungarian Civil Code, supra* note 538, s 2:38(1). [↑](#footnote-ref-576)
577. ### Hungarian Association for People with Intellectual Disabilities, *Periodic reporting of HUNGARY to the Committee on the Rights of Persons with Disabilities under the simplified reporting procedure* (1 May 2018) at 10, online: < <https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/HUN/INT_CRPD_ICS_HUN_31035_E.docx>> ; The UN Committee on Rights of Persons with Disabilities has emphasized that the availability of supported decision-making should not be based on evaluations of mental capacity: Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29(i).

     [↑](#footnote-ref-577)
578. MDAC, *Recommendations for Hungary – UN Universal Periodic* *Review*, *supra* note 575 at 3. [↑](#footnote-ref-578)
579. MDAC, *My Home, My Choice in Hungary: The right to community living for people with mental disabilities in 2014* (MDAC, September 2014) at 15, online: <<https://www.globaldisabilityrightsnow.org/sites/default/files/related-files/262/My%20Home%2C%20My%20Choice%20in%20Hungary%20-%20Community%20living%20for%20people%20with%20mental%20disabilities.pdf>>. [↑](#footnote-ref-579)
580. *Act CLV of 2013 on Supported Decision-Making*, *supra* note 541, s 2(1). [↑](#footnote-ref-580)
581. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29. [↑](#footnote-ref-581)
582. Hungarian Civil Liberties Union (HCLU), *Sentenced to Legal Death: People with Disabilities Can be Stripped of their Right to Decide in Hungary* (HCLU, January 2015) at 9, online: <https://hclu.hu/files/tasz/imce/2015/sentenced\_to\_legal\_death\_rev\_1.pdf>. [↑](#footnote-ref-582)
583. *Ibid.* [↑](#footnote-ref-583)
584. ### Hungarian Association for People with Intellectual Disabilities, *supra* note 577 at 11.

     [↑](#footnote-ref-584)
585. With the maximum increasing to 35 or 45 people in some cases. See *Act CLV of 2013 on Supported Decision-Making*, *supra* note 541, ss 7(5)-(6). [↑](#footnote-ref-585)
586. Hungarian Association for People with Intellectual Disabilities, *supra* note 577 at 10. [↑](#footnote-ref-586)
587. *Joint DPO and CSO submission to the Committee on the Rights of Persons with Disabilities for consideration when compiling the List of Issues Prior to Reporting for the Second Periodic Report of HUNGARY* (22 February 2017) at 11, online: < <https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/HUN/INT_CRPD_ICS_HUN_26895_E.doc>>. [↑](#footnote-ref-587)
588. *Act CLV of 2013 on Supported Decision-Making*, *supra* note 541, s 5. [↑](#footnote-ref-588)
589. *Ibid,* s 10(2). [↑](#footnote-ref-589)
590. *Ibid,* s 11(1). [↑](#footnote-ref-590)
591. Mental Disability Advocacy Centre (MDAC), *NGO information to the United Nations Committee on the Rights of Persons with Disabilities For consideration when compiling the List of Issues Prior to Reporting on the Second Periodic Report of HUNGARY under the Convention on the Rights of Persons with Disabilities* (27 February 2017) at 6, online: <https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/HUN/INT\_CRPD\_ICS\_HUN\_26852\_E.doc>. [↑](#footnote-ref-591)
592. HCLU, *supra* note 582 at 9; see Devandas Aguilar, *supra* note 8 at para 44. [↑](#footnote-ref-592)
593. *Hungarian Civil Code, supra* note 538, s 2:40(1). [↑](#footnote-ref-593)
594. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 17. [↑](#footnote-ref-594)
595. MDAC*, NGO information to the United Nations Committee on the Rights of Persons with Disabilities supra* note 591 at 6. [↑](#footnote-ref-595)
596. *Ibid.* [↑](#footnote-ref-596)
597. Mental Health Europe, *Autonomy, choice and the importance of supported-decision making for persons with psychosocial disabilities: MHE Position Paper on Article 12 UN CRPD on legal capacity* (January 2017) at 15, online: <https://mhe-sme.org/wp-content/uploads/2017/11/Article\_12\_Position\_paper.pdf>. [↑](#footnote-ref-597)
598. The number of people placed under guardianship was 56 151 in 2013, 56 245 in 2014, 56 151 in 2015 , 57 039 in 2016, 57 983 in 2017, and 58 242 in 2018: see Hungarian Central Statistical Office (2018), online: <<http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_fsg004.html>>. [↑](#footnote-ref-598)
599. *Ibid.* [↑](#footnote-ref-599)
600. *Hungary: Annex to state party report* (30 April 2018) at 27, online: <https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/HUN/INT\_CRPD\_ADR\_HUN\_31034\_E.docx>. [↑](#footnote-ref-600)
601. *Ibid.* [↑](#footnote-ref-601)
602. *Assisted Decision-Making (Capacity) Act 2015,* Ireland, 30 December 2015, online: <http://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/pdf>. [↑](#footnote-ref-602)
603. See Martinez-Pujalte, *supra* note 47 at 12; “Assisted Decision Making (Capacity) Act 2015,” online: *Health Service Executive* <<https://www.hse.ie/eng/about/who/qid/other-quality-improvement-programmes/assisteddecisionmaking/assisted-decision-making.html>>. [↑](#footnote-ref-603)
604. Martinez-Pujalte, *supra* note 47 at 12. [↑](#footnote-ref-604)
605. Dr Charles O’Mahoney, School of Law National University of Ireland Galway, *Impact of Human Rights approach in Member States’ legislation: Legal capacity in Ireland* at 26,online: < <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjrpemG_MrjAhXOiVwKHVTJAxEQFjAAegQIABAC&url=https%3A%2F%2Fec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D15773%26langId%3Den&usg=AOvVaw0WHW3CWubT__TYSkPkHqRI>>. [↑](#footnote-ref-605)
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607. *Ibid.* [↑](#footnote-ref-607)
608. “Convention on the Rights of Persons with Disabilities,” *supra* note 20. [↑](#footnote-ref-608)
609. Devandas Aguilar, *supra* note 8 at para 37. [↑](#footnote-ref-609)
610. *Ibid.* [↑](#footnote-ref-610)
611. *Ibid.* [↑](#footnote-ref-611)
612. Martinez-Pujalte, *supra* note 47 at 12. [↑](#footnote-ref-612)
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616. Elionóir Flynn & Anna Arstein-Kerslake, “The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?” (2014) 32:1 Berkeley Journal of International Law 124 at 133, online: < https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1450&context=bjil>. [↑](#footnote-ref-616)
617. Anna Arstein-Kerslake, *Restoring Voice to People With Cognitive Disability* (Cambridge, UK: Cambridge University Press, 2017) at 172. [↑](#footnote-ref-617)
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637. *Ibid,* s 34(1). [↑](#footnote-ref-637)
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721. *Ibid.* [↑](#footnote-ref-721)
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782. *Ibid.* [↑](#footnote-ref-782)
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793. *Ibid.* [↑](#footnote-ref-793)
794. # *Ibid*.

     [↑](#footnote-ref-794)
795. *Ibid.* [↑](#footnote-ref-795)
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797. *Ibid*. [↑](#footnote-ref-797)
798. *Ibid,* s 7(2). [↑](#footnote-ref-798)
799. *Ibid,* s 7(2.1)(a). [↑](#footnote-ref-799)
800. *Ibid,* s 7(2.1)(b). [↑](#footnote-ref-800)
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807. *Ibid,* s 30; James & Watts, *supra* note 791 at 24-25. [↑](#footnote-ref-807)
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818. *Ibid,* s 16(2)(a). [↑](#footnote-ref-818)
819. *Ibid,* s 16(2)(b). [↑](#footnote-ref-819)
820. *Patients Property Act,* RSBC 1996, c 405, online: <http://www.bclaws.ca/civix/document/id/complete/statreg/96349\_01>. [↑](#footnote-ref-820)
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826. See Nidus, “Adult Guardianship in BC,” *supra* note 821. [↑](#footnote-ref-826)
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828. See Nidus, “Adult Guardianship in BC,” *supra* note 821. [↑](#footnote-ref-828)
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841. *Ibid.* [↑](#footnote-ref-841)
842. *Ibid.* [↑](#footnote-ref-842)
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847. *Ibid* at 978. [↑](#footnote-ref-847)
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850. *Ibid.* [↑](#footnote-ref-850)
851. *Ibid* at 979. [↑](#footnote-ref-851)
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859. *Ibid*. [↑](#footnote-ref-859)
860. *Ibid* at 991. [↑](#footnote-ref-860)
861. *Ibid.*  [↑](#footnote-ref-861)
862. *Ibid* at 999. [↑](#footnote-ref-862)
863. *Ibid* at 995-996. [↑](#footnote-ref-863)
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865. *Ibid,* s 1357.003. [↑](#footnote-ref-865)
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873. *Ibid,* s 1054.201. [↑](#footnote-ref-873)
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876. *Ibid,* s 1357.051(1). [↑](#footnote-ref-876)
877. *Ibid,* s 1357.003. [↑](#footnote-ref-877)
878. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29(i). [↑](#footnote-ref-878)
879. See *Supported Decision-Making Agreement Act, supra* note 852, ss 1357.053(a)-(b)(1). [↑](#footnote-ref-879)
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     [↑](#footnote-ref-881)
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883. *Ibid,* ss 1101.101 & 1002.001. [↑](#footnote-ref-883)
884. See Committee on the Rights of Persons with Disabilities, “General Comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-884)
885. Theodorou, *supra* note 845 at 1007. [↑](#footnote-ref-885)
886. “Convention on the Rights of Persons with Disabilities,” *supra* note 20. [↑](#footnote-ref-886)
887. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (Commonwealth of Australia, 21 August 2014), at 24, online: <<https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf> >. [↑](#footnote-ref-887)
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899. *Ibid,* s 88. [↑](#footnote-ref-899)
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902. *Ibid,* s 102. [↑](#footnote-ref-902)
903. *Ibid,* s 5. [↑](#footnote-ref-903)
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906. *Ibid,* s 95. [↑](#footnote-ref-906)
907. *Ibid,* s 99. [↑](#footnote-ref-907)
908. *Ibid,* s 101. [↑](#footnote-ref-908)
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912. *Ibid,* s 120. [↑](#footnote-ref-912)
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915. *Ibid,* s 31 (same definition of decision-making capacity is employed as in the 2014 Powers of Attorney Act) [↑](#footnote-ref-915)
916. *Ibid,* s 32(1). [↑](#footnote-ref-916)
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926. *Ibid,* s 90(1). [↑](#footnote-ref-926)
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931. *Ibid,* s 88(1)(b). [↑](#footnote-ref-931)
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944. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-944)
945. See *Guardianship and Administration Act 2019, supra* note 922, s 8(b). [↑](#footnote-ref-945)
946. *Ibid*. [↑](#footnote-ref-946)
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949. See *Powers* *of Attorney Act 2014, supra* note 894, s 122; *Medical* *Treatment Planning and Decisions Act 2016, supra* note 914, s 43. [↑](#footnote-ref-949)
950. See *Guardianship and Administration Act 2019, supra* note 922, s 159(2). [↑](#footnote-ref-950)
951. See *Ibid,* s 88(2). [↑](#footnote-ref-951)
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953. See *Ibid*, ss 79-80. [↑](#footnote-ref-953)
954. See *Ibid,* ss 38 & 46. [↑](#footnote-ref-954)
955. See *Ibid,* s 9(1). [↑](#footnote-ref-955)
956. See *Ibid,* s 30(2)(a). [↑](#footnote-ref-956)
957. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-957)
958. See sections on Georgia, Latvia, and Lithuania. [↑](#footnote-ref-958)
959. E.g. Sodis-Sociedad y Discapacidad (Peru), *supra* note 19; Lithuanian Disability Forum, *supra* note 489; ASDOWN, LICA, & Profamilia (Colombia), *supra* note 152. [↑](#footnote-ref-959)
960. See for e.g. Remarks of a representative from Equals, Centre for Promotion of Social Justice (India), *supra* note 216; Written comments issued by RC ZELDA and MDAC (Latvia), *supra* note 431; remarks issued by Irish Human Rights Commission, *supra* note 605. [↑](#footnote-ref-960)
961. See Devandas Aguilar, *supra* note 8 at para 24. [↑](#footnote-ref-961)
962. *Peruvian Civil Code, supra* note 18, art 42. [↑](#footnote-ref-962)
963. *Bill 236/19, supra* note 150, art 5. [↑](#footnote-ref-963)
964. *Law Number 9379, supra* note 67*,* art 41. [↑](#footnote-ref-964)
965. E.g. Ireland, British Columbia. [↑](#footnote-ref-965)
966. E.g. India, Belgium. [↑](#footnote-ref-966)
967. E.g. Argentina, Israel, Georgia, Czech Republic, Latvia, Croatia, Lithuania, Hungary, Texas; See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-967)
968. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 15. [↑](#footnote-ref-968)
969. E.g. Argentina, India, Israel, Georgia, Czech Republic, Latvia, Croatia, Lithuania, Hungary, Ireland, Belgium, British Columbia, Texas, Victoria. [↑](#footnote-ref-969)
970. E.g. Argentina, Austria. [↑](#footnote-ref-970)
971. E.g. Latvia, Ireland, Argentina, Georgia (note: Argentina & Georgia allow for supporters to exercise a “veto” power, although they do not label these measures as “co-decision-making” *per se*). [↑](#footnote-ref-971)
972. *Capacity and Guardianship (Amendment No. 18) Law*, *supra* note 254, s 67B(c). [↑](#footnote-ref-972)
973. *Supported Decision-Making Agreement Act, supra* note 852, s 1357.051(1). [↑](#footnote-ref-973)
974. *Assisted Decision-Making (Capacity) Act 2015, supra* note 602, s 14(2). [↑](#footnote-ref-974)
975. *Peruvian Civil Code, supra* note 18, art 659B. [↑](#footnote-ref-975)
976. E.g. Austria, Ireland, Hungary, Israel, Belgium. [↑](#footnote-ref-976)
977. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29(i). [↑](#footnote-ref-977)
978. E.g. Argentina, Belgium. [↑](#footnote-ref-978)
979. *Peruvian Civil Code, supra* note 18, art 659-D. [↑](#footnote-ref-979)
980. *The Rights of Persons with Disabilities Act*, *supra* note 211, art 15(2). [↑](#footnote-ref-980)
981. Devandas Aguilar, *supra* note 8 at para 55. [↑](#footnote-ref-981)
982. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 18. [↑](#footnote-ref-982)
983. *Peruvian Civil Code, supra* note 18, art 659-C. [↑](#footnote-ref-983)
984. *Argentina Civil and Commercial Code, supra* note 118, art 32. [↑](#footnote-ref-984)
985. *Bill 236/19, supra* note 150, art 15. [↑](#footnote-ref-985)
986. *Ibid,* art 12. [↑](#footnote-ref-986)
987. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 17. [↑](#footnote-ref-987)
988. E.g. Costa Rica, Argentina, Israel, Georgia, Victoria. [↑](#footnote-ref-988)
989. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 17. [↑](#footnote-ref-989)
990. E.g. Israel, Latvia, Ireland, Austria. [↑](#footnote-ref-990)
991. E.g. Lithuania, Hungary, Czech Republic. [↑](#footnote-ref-991)
992. See Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 17. [↑](#footnote-ref-992)
993. “Protection extrajudiciare: le mandat,” *supra* note 735. [↑](#footnote-ref-993)
994. *Peruvian Civil Code, supra* note 18, art 659-F; *Bill 236/19, supra* note 150, arts 3(9) & 33. [↑](#footnote-ref-994)
995. E.g. Czech Republic, Lithuania, Hungary, Israel, Latvia, Ireland. [↑](#footnote-ref-995)
996. See *Powers of Attorney Act, supra* note 894, ss 85-89. [↑](#footnote-ref-996)
997. *Peruvian Civil Code, supra* note 18, art 659-F. [↑](#footnote-ref-997)
998. *Bill 236/19, supra* note 150, art 33. [↑](#footnote-ref-998)
999. *Ibid*, art 659-D. [↑](#footnote-ref-999)
1000. E.g. Colombia, Czech Republic, Lithuania, Ireland, Austria, Belgium, British Columbia, Texas. [↑](#footnote-ref-1000)
1001. E.g. Czech Republic, Ireland (co-decision-making). [↑](#footnote-ref-1001)
1002. E.g. Costa Rica, Argentina, Colombia, Israel, Georgia, Hungary, Victoria. [↑](#footnote-ref-1002)
1003. E.g. Costa Rica, Georgia, Hungary, Belgium, Victoria. [↑](#footnote-ref-1003)
1004. E.g. Ireland: persons “suitable” to be co-decision-makers limited to relatives or friends who have a relationship of trust with the appointer. [↑](#footnote-ref-1004)
1005. E.g. Costa Rica and Belgium. [↑](#footnote-ref-1005)
1006. Devandas Aguilar, *supra* note 8 at para 57. [↑](#footnote-ref-1006)
1007. E.g. Hungary, Colombia. [↑](#footnote-ref-1007)
1008. HCLU, *supra* 582 at 9. [↑](#footnote-ref-1008)
1009. Devandas Aguilar, *supra* note 8 at para 57; see Brenda Burgen, “Reflections on the Victorian Office of the Public Advocate supported decision-making pilot project” (2016) 3:2 *Research and Practice in Intellectual and Developmental Disabilities* 165. [↑](#footnote-ref-1009)
1010. Devandas Aguilar, *supra* note 8 at para 57. [↑](#footnote-ref-1010)
1011. *Peruvian Civil Code, supra* note 18, art 659-C. [↑](#footnote-ref-1011)
1012. *Law Number 9379, supra* note 67, art 10. [↑](#footnote-ref-1012)
1013. *Guardianship and Administration Act 2019, supra* note 922, s 32(3). [↑](#footnote-ref-1013)
1014. See *Assisted Decision-Making (Capacity) Act 2015, supra* note 602, s 18. [↑](#footnote-ref-1014)
1015. *Representation Agreement Act*, *supra* note 790, s 5(1)(a). [↑](#footnote-ref-1015)
1016. *Bill 236/19, supra* note 150, art 28(b). [↑](#footnote-ref-1016)
1017. See *Act CLV of 2013 on Supported Decision-Making*, *supra* note 541, s 2(2); *Belgian Civil Code, supra* note 728, arts 496/2 & 501. [↑](#footnote-ref-1017)
1018. See Devandas Aguilar, *supra* note 8 at para 30; Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29(d). [↑](#footnote-ref-1018)
1019. Devendas Aguilar, *supra* note 8at para 47, see *Assisted Decision-Making (Capacity) Act 2015, supra* note 602, ss 15, 30, 47. [↑](#footnote-ref-1019)
1020. E.g. Costa Rica, Argentina, Colombia, Victoria. [↑](#footnote-ref-1020)
1021. E.g. Colombia, Hungary, Austria, Belgium, Ireland (for co-decision-makers). [↑](#footnote-ref-1021)
1022. E.g. Lithuania, Georgia. [↑](#footnote-ref-1022)
1023. E.g. British Columbia. [↑](#footnote-ref-1023)
1024. *Bill 236/19, supra* note 150, art 32. [↑](#footnote-ref-1024)
1025. *Ibid.* [↑](#footnote-ref-1025)
1026. *Belgian Civil Code, supra* note 728, art 501. [↑](#footnote-ref-1026)
1027. See previous discussion on Belgium’s legislation. [↑](#footnote-ref-1027)
1028. See e.g. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 17. [↑](#footnote-ref-1028)
1029. E.g. Israel, Lithuania, Hungary. [↑](#footnote-ref-1029)
1030. *Civil Code of Georgia*, *supra* note 308, art 1289(2). [↑](#footnote-ref-1030)
1031. *Argentina Civil and Commercial Code, supra* note 118 at 32. [↑](#footnote-ref-1031)
1032. *Representation Agreement Act*, *supra* note 790, s 16(2). [↑](#footnote-ref-1032)
1033. *Belgian Civil Code, supra* note 728, art 498/2. [↑](#footnote-ref-1033)
1034. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 21. [↑](#footnote-ref-1034)
1035. *Peruvian Civil Code, supra* note 18, art 659-B. [↑](#footnote-ref-1035)
1036. *Bill 236/19, supra* note 150, art 13(2). [↑](#footnote-ref-1036)
1037. *Guardianship and Administration Act 2019, supra* note 922*,* s 8(b). [↑](#footnote-ref-1037)
1038. E.g. India, Croatia. [↑](#footnote-ref-1038)
1039. Devandas Aguilar, *supra* note 8 at para 29. [↑](#footnote-ref-1039)
1040. Committee on the Rights of Persons with Disabilities, “General comment No.1,” *supra* note 7 at para 29(e). [↑](#footnote-ref-1040)
1041. See e.g. Informe Alternativo (Costa Rica), *supra* note 116 at 5, 2018; The Lithuanian Disability Forum, *Alternative Report Prepared for the UN Committee on the Rights of Persons with Disabilities for the discussion of the Initial Report of the Republic of Lithuania on the implementation of the UN Convention on the Rights of Persons with Disabilities* (16 March 2016) at para 37(2), online: < https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/LTU/INT\_CRPD\_CSS\_LTU\_23330\_E.doc>; Cortés, Documenta (Colombia), *supra* note 152; *Hungary: Annex to state party report*, *supra* note 600 at 27; Public Defender (Ombudsman) of Georgia, *supra* note 366 at 39; Devandas Aguilar, *supra* note 8 at para 76. [↑](#footnote-ref-1041)
1042. See e.g. Informe Alternativo, *supra* note 116 at 5. [↑](#footnote-ref-1042)
1043. National CRPD Coalition-India, *supra* note 246 at para 98. [↑](#footnote-ref-1043)
1044. Cortés, *supra* note 152. [↑](#footnote-ref-1044)
1045. *Ibid.* [↑](#footnote-ref-1045)
1046. Public Defender (Ombudsman) of Georgia, *supra* note 366 at 39. [↑](#footnote-ref-1046)
1047. See also Mental Health Europe, *supra* note 597 at 15. [↑](#footnote-ref-1047)
1048. See Quip, *supra* note 422 at 34. [↑](#footnote-ref-1048)