

A study on the Equal Recognition before the law

Contribution towards the Council of Europe Strategy on the Rights of Persons with Disabilities



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A study on the Equal Recognition before the law

Contribution towards
the Council of Europe Strategy on
the Rights of Persons with Disabilities

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Introduction

Overview of Aims and Objectives of this Study

This Study aims to identify ways and means of implementation of Article 12¹ of the UN Convention on the Rights of Persons with Disabilities (CRPD) which affirms the right to equal recognition before the law. It represents a paradigm shift from viewing persons with disabilities as objects of charity and medical treatment to identifying them as subjects with legal rights.²

This Study is divided into four operative parts. Firstly, the scope of the obligations contained in Article 12 will be analysed. This will include a brief overview of the negotiation history and context in which the provision was drafted, the jurisprudence of the Committee on the Rights of Persons with Disabilities to date, including its Concluding Observations and its General Comment on Article 12. The growing body of academic commentary on the latter will also be considered. This part will also include a summary of the approaches taken to date by various Council of Europe organs such as the Committee of Ministers, the European Court of Human Rights and the European Social Charter.

Secondly, the approaches taken by various member States of the Council of Europe to comply with Article 12 of the CPRD by way of law reform and shifts in policies and practices will then be surveyed. Here one can detect a steady trend away from substitute decision-making. Thirdly, good practice examples from member States will be drawn out to demonstrate approaches which show potential for fuller alignment with Article 12.

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1. Without prejudice to the monitoring of the implementation of the UNCRPD by the Committee on the Rights of Persons with Disabilities and its Parties-specific recommendations, this study aims at identifying ways and means with which to implement Article 12 of the UNCRPD on the Equal Recognition before the Law, including the capacity to hold rights and duties and the capacity to act on them.
 2. Statement by Louise Arbour, UN High Commissioner for Human Rights on the Ad Hoc Committee's adoption of the Convention on the Rights of Persons with Disabilities, 5 December 2006, <<http://www.un.org/esa/socdev/enable/rights/ahc8hrcmsg.htm>> (accessed 26 October 2016).

Finally, a recommended set of measures (a “checklist” of sorts) will be set out in order to provide guidance to member States on how best to reform their legal architecture in accordance with the requirements of Article 12 and in order to ensure that a holistic process of reform is achieved.

Definition of Key Terms in this Study

A number of terms require definition and/or clarification before delving into the substantive issues surrounding Article 12. While they will be examined in more detail as part of the jurisprudence of the UN Committee on the Rights of Persons with Disabilities (the relevant UN treaty monitoring body), it is important to make some initial observations regarding their scope and meaning.

“Legal capacity” is interpreted by the Committee on the Rights of Persons with Disabilities in their General Comment on Article 12 as including the capacity to be a holder of rights and also an actor under the law. Legal capacity to be a holder of rights entitles a person to full protection of his or her rights by the legal system and legal capacity to act under the law recognises that person as an agent with the power to engage in transactions and create, modify or end legal relationships.³ It is the recognition of the individual’s relationship with the state as an active subject.⁴ Legal capacity is the affirmation, at both a legal and societal level, of the personhood of an individual and the existence of certain rights and obligations which inhere in them as a result.

“Mental capacity” is the decision-making ability of an individual. The level of decision-making ability can vary from person to person depending on the type of decision to be taken and the context in which it is being taken. This variation in decision-making ability exists regardless of whether a person has a disability or not.

The separation of the concept of legal capacity (i.e., the universal right of every person to be recognised as being capable of holding and exercising their legal personality) and mental capacity (i.e. the varying ability of all people to make

3. Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, para. 12.

4. Arstein-Kerslake & Flynn, “The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law” *The International Journal of Human Rights* 20, No. 4 (2016) 471, 474.

certain decisions) is fundamental to Article 12 of the CRPD and its effective implementation.

Historically, the mental capacity of an individual has been inextricably linked to their right to legal capacity. As a result, if their decision-making ability was found to fall short of whatever “test” a court or other body applied, their legal capacity could be removed or restricted on that basis. Prior to the adoption of the CRPD, many States had adopted a “functional” approach to assessments of legal capacity which required a person to be able to understand the nature and consequences of a particular decision in order to be deemed to have legal capacity. While on its face this may seem to be a disability neutral approach to the issue, such assessments are almost invariably applied to individuals who are deemed to have a psychosocial or intellectual disability.

As will be examined in more detail below, Article 12 of the CRPD disentangles the two concepts of mental and legal capacity and affirms the irremovable right to legal capacity of all persons. The functional approach to capacity can therefore be seen as the “first wave” human rights approach to the question of legal capacity (ultimately amounting to discrimination itself),⁵ with Article 12 as the “second wave”.

The term “substituted decision-making” describes a mechanism by which the ability of an individual to be an actor under the law in all areas of their life is removed by the State and the decision is made for them by others. Their legal capacity is therefore removed. They are not permitted to exercise their legal agency in respect of certain or all decisions.

“Supported decision-making” represents the new paradigm for the support of universal legal capacity. The UN Committee’s first General Comment States that a supported decision-making regime comprises various support options which give primacy to a person’s will and preferences and respect human rights norms. The General Comment makes clear that States Parties to the CRPD cannot maintain systems of substituted decision-making alongside newer models of supported decision-making.⁶

5. Council of Europe, Committee of Ministers (1999), Recommendation R(99)4 on principles concerning the legal protection of incapable adults, 23 February 1999 can be seen as emblematic of this “functional approach” to legal capacity.

6. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, para. 24.

Article 12 of the CRPD

Background and negotiation history of Article 12

The right to equal recognition before the law had appeared in various forms in a number of international declarations and treaties prior to the adoption of the CRPD.⁷ However, it is clear that some of these treaties only envisioned the right as guaranteeing the right to equal standing before the law, rather than also including the right to be viewed as a legal actor who could enforce rights.

It has been noted that little international attention was given the inherently discriminatory regimes of legal capacity (and incapacity) due to the paternalistic attitude of States to the issue of disability as well as the disability community itself focusing more on questions of discrimination (equal protection of the law) rather than on equal recognition before the law.⁸

The negotiation and drafting process which led to the adoption of the CRPD was unprecedented in terms of the involvement of persons with disabilities themselves both through their representative organisations and through the eventual creation of the International Disability Caucus (a grouping of various disability organisations). This direct involvement and consultation of persons with disabilities ensured a move away from a medical or charitable concept of disability towards a rights-based framework based on principles of equality and non-discrimination which recognises disability as a construct which occurs as a result of societal and environmental barriers. Nowhere is this more evident than in the drafting of Article 12, where those representing the disability community ensured that the concept of substituted decision-making was entirely absent from the construct of legal capacity contained in the CRPD.⁹

7. Article 6 of the Universal Declaration of Human Rights (1949), Article 16 of the International Covenant on Civil and Political Rights (1966), Article 15 of the Convention on the Elimination of All Forms of Discrimination Against Women (1979).
8. Arstein-Kerslake & Flynn, "The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law" *The International Journal of Human Rights* 20, No. 4 (2016) 471, 471.
9. Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities on its seventh session, (February 2006) A/AC.265/2006/2, available at <http://www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7report-e.pdf> (accessed 24 October 2016).

The adopted text of Article 12 reads as follows:

Article 12 – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this Article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

The core precepts that can be drawn from Article 12 are therefore:

- The recognition of persons with disabilities as being equal before the law and possessing legal capacity on an equal basis with others (i.e. both the capacity for rights and the capacity to act).
- The obligation on States Parties to provide supports which ensure that everyone is capable of exercising their legal capacity and to ensure that sufficient safeguards are in place which ensure that the will and preferences of the individual are the basis for such supported decision-making.
- The requirement of States Parties to uphold the financial and property rights of persons with disabilities on an equal basis with others.

The interpretation of Article 12 by the UN CRPD Committee

The Office of the High Commissioner for Human Rights had previously published a study which provided some detail on how Article 12 was to be implemented by States Parties¹⁰.

However, given its ground-breaking provisions and its potential to influence the interpretation of other provisions of the Convention, the UN CRPD Committee was conscious of the need to clarify the normative content of Article 12 from the outset. It therefore decided at its first session to devote its 2009 Day of General Discussion (which took place on 21 October 2009) to Article 12. This event was intended to provide States and other actors with more comprehensive guidance as to their obligations under the provision.¹¹

The Committee was also at pains to point out the clear obligations on States Parties regarding the implementation of Article 12 from its earliest Concluding Observations (CO). For example, in its first CO on Tunisia, the Committee recommended that Tunisia review its laws which permitted guardianship and trusteeship, and also recommended that it “take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making”.¹² It further clarified in its CO on Spain that regimes of supported decision-making should respect the person’s autonomy, will and preferences.¹³ These conclusions by the Committee to reform existing systems of substitute decision-making with those based on supporting individuals to give effect to their will and preferences were repeated in subsequent COs.

10. OHCHR, Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities (A/HRC/10/48, 26 January 2009), available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf> <last accessed 25 October 2016>.
11. For further details on the 2009 Day of General Discussion, see here: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD2009.aspx> <last accessed – 25 October 2016>.
12. Committee on the Rights of Persons with Disabilities, Consideration of Reports Submitted by States Parties under Article 35 of the Convention, Concluding Observations, Tunisia, Apr. 11-15, 2011, U.N. Doc. CRPD/C/TUN/CO/1, para. 23. Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTUN%2fCO%2f1&Lang=en <last accessed 25 October 2016>.
13. Committee on the Rights of Persons with Disabilities, Consideration of Reports Submitted by States Parties under Article 35 of the Convention, Concluding Observations, Spain, 19–23 September 2011, U.N. Doc. CRPD/C/ESP/CO/1, para. 34. Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fESP%2fCO%2f1&Lang=en <last accessed 25 October 2016>.

Ultimately a working group on Article 12 was created internally within the Committee in order to draft a General Comment on Article 12. The process of consultation which had begun during the drafting of the CRPD was continued by the working group by requesting submissions on a draft version from civil society groups as well as States Parties. All of these submissions were considered by the working group and some of the suggested changes/additions were incorporated into the final version of the General Comment.¹⁴ The result was the first international document to provide detail on the nature and significance of the right to equal recognition before the law for people with disabilities.¹⁵

The introduction to the General Comment States that it is premised on the general principles of the CRPD as outlined in Article 3. These principles comprise respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons, non-discrimination, full and effective participation and inclusion in society, respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, equality of opportunity, accessibility, equality between men and women and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.¹⁶

It is then divided into four sections: normative content, obligations of States Parties, the relationship of Article 12 with other provisions of the CRPD and requirements for implementation at the national level. It has been noted that this distinction between normative content and state obligations is significant in that it makes clear that a State obligation cannot exist in the absence of a corresponding right.¹⁷

In the section on normative content, the Committee delves into the five sub-sections of Article 12 in turn in order establish general principles of

14. Arstein-Kerslake & Flynn, "The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law" *The International Journal of Human Rights* 20, No. 4 (2016) 471, 473.

15. Arstein-Kerslake & Flynn, "The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law" *The International Journal of Human Rights* 20, No. 4 (2016) 471, 473.

16. Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, para. 4.

17. Arstein-Kerslake & Flynn, "The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law" *The International Journal of Human Rights* 20, No. 4 (2016) 471, 474.

interpretation. Regarding Article 12(1), the Committee emphasises that the recognition of every individual's legal personality is a prerequisite for the recognition of a person's legal capacity.¹⁸

Moving on to Article 12(2), the Committee reiterates the interpretation of legal capacity as comprising the individual as both a holder of rights and as an actor under the law who is capable of creating, modifying or ending legal relationships.¹⁹ The distinction between legal capacity and mental capacity is also affirmed with the Committee noting that legal capacity (comprising the elements of both legal standing and legal agency) is an inherent right accorded to all people whereas mental capacity "is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity."²⁰ The Committee States that the conflation of these two concepts has led to the denial of "a core human right – the right to equal recognition before the law" since a person's disability and/or decision-making skills "are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law".²¹

The Committee then articulates how Article 12(3) is the logical extension of the principle of universal legal capacity. It States that this provision requires States Parties to provide persons with disabilities with access to support in the exercise of their legal capacity and that that support must respect the rights, will and preferences of the individual and should never amount to substitute decision-making.²² The Committee elaborates a broad interpretation of support to exercise legal capacity which "encompasses both informal and formal support arrangements, of varying types and intensity".²³ The Committee also acknowledges that some people may not wish to exercise their right to support.²⁴

State obligations which flow from the above rights are then set out in the second substantive section of the General Comment. Three primary obligations emerge from this section. States must:

- a. Abolish regimes of substituted decision-making.

18. Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, para. 11.

19. *Ibid*, para. 12.

20. *Ibid*, para. 14.

21. *Ibid*, para. 15.

22. *Ibid*, paras. 16 & 17.

23. *Ibid*, para. 17.

24. *Ibid*, para. 19.

- b. Develop supported decision-making alternatives.
- c. Ensure that safeguards exist which ensure respect for the rights, will and preferences of the individual who is availing of the support.

The General Comment recognises that while substitute decision-making regimes which violate Article 12 can take many different forms, they also share certain common characteristics:

- i. capacity is removed from a person, even if this is in respect of a single decision;
- ii. a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and
- iii. decisions made by a substitute decision-maker are based on what is believed to be in the objective “best interests” of the person concerned, rather than on the person’s own will and preferences.²⁵

Article 12 requires States to abolish systems and structures which correspond with these criteria. There is, however, a distinction to be made between such regimes and arrangements between a person and someone they trust to delegate some decisions to that trusted person, with the understanding they will make those decisions based on the will and preferences of the person on behalf of who they are acting. However, in order to comply with Article 12, such arrangements should be available to both persons with and those without disabilities. Article 12 also allows for situations where, as a last resort and in limited circumstances, where the will and preferences of an individual cannot be established after significant efforts have been made to do so, that a decision should be made by an outside decision-maker based on their “best interpretation” of the individual’s will and preferences.²⁶

While recognising that the form that such systems can take can vary widely, the Committee establishes that they should all incorporate the following key elements if they are to be deemed consistent with the requirements of Article 12:

- i. Supported decision-making should be available to all, regardless of the level of support required.
- ii. All support should be based on the individual’s will and preferences, not on their perceived “best interests”.

25. Ibid, para. 27.

26. Ibid, para. 21.

- iii. Supported decision-making should accommodate a diversity of modes of communication.
- iv. States are obliged to facilitate the creation of support. This includes recognising the support person(s) who may have been chosen by an individual. States must also include a mechanism for third parties to verify the identity of a support person as well as a mechanism for third parties to challenge the action of a support person if they believe that the support person is not acting in accordance with the will and preferences of the person concerned.
- v. Support should be available at nominal or no cost – lack of financial resources should not be a barrier to accessing support.
- vi. The use of support should not be used as a justification for limiting other fundamental rights.
- vii. The person must have the right to refuse support and terminate or change the support relationship at any time.
- viii. Safeguards which ensure that the will and preferences of the individual are respected.
- ix. The provision of support to exercise legal capacity²⁷ should be based on non-discriminatory indicators of support needs, not on assessments of mental capacity.²⁸

The requirement to ensure that safeguards exist which ensure that the will and preferences of the individual are respected should not be misinterpreted as a continuation of previous paternalistic practices which had the effect of limiting the exercise of persons with disabilities' legal capacity based on criteria such as "best interests". Instead, it requires States to take measures (such those outlined in iv and vii above) to ensure that the person's will and preferences are respected.

The General Comment then examines the relationship Article 12 has with other provisions of the Convention, noting that recognition of legal capacity is inextricably linked to the enjoyment of many other human rights provided for in the CRPD including, but not limited to, the right to access justice (art. 13); the right to be free from involuntary detention in a mental health facility and not

27. The General Comment uses the terms "supported decision-making", "supported decision-making regime" and "supported decision-making arrangement".

28. Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, para. 29.

to be forced to undergo mental health treatment (art. 14); the right to respect for one's physical and mental integrity (art. 17); the right to liberty of movement and nationality (art. 18); the right to choose where and with whom to live (art. 19); the right to freedom of expression (art. 21); the right to marry and found a family (art. 23); the right to consent to medical treatment (art. 25); and the right to vote and stand for election (art. 29).²⁹ Arstein-Kerslake and Flynn conclude that in considering the requirement of non-discrimination in the recognition of legal capacity across all of these rights (and the need for reform of the domestic legal framework as a result), the following steps should be taken by States:

1. Establish whether the particular issue involves an exercise of legal capacity.
2. Check whether legal capacity is denied to persons with disabilities on an equal basis with persons who do not have disabilities, i.e. assess whether denials of legal capacity are discriminatory on the basis of disability in purpose or effect.
3. Check whether the state provides access for persons with disabilities to support in exercising their legal capacity in that specific legal transaction or relationship.³⁰

The General Comment concludes by addressing the requirements on States Parties for implementation at the national level. They recommend the following steps be taken in that regard:

- a. Recognise persons with disabilities as persons before the law, having legal personality and legal capacity in all aspects of life, on an equal basis with others. This requires the abolition of substitute decision-making regimes and mechanisms that deny legal capacity and which discriminate in purpose or effect against persons with disabilities. It is recommended that States Parties create statutory language protecting the right to legal capacity on an equal basis for all.
- b. Establish, recognise and provide persons with disabilities with access to a broad range of support (meeting the aforementioned criteria) in the exercise of their legal capacity. Safeguards for such support must be premised on respect for the rights, will and preferences of persons with disabilities.

29. Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, para. 31.

30. Arstein-Kerslake & Flynn, "The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law" *The International Journal of Human Rights* 20, No. 4 (2016) 471, 480-481.

- c. Closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations, in the development and implementation of legislation, policies and other decision-making processes that give effect to Article 12.
- d. Undertake or devote resources to the research and development of best practices respecting the right to equal recognition of the legal capacity of persons with disabilities and support in the exercise of legal capacity.
- e. Develop effective mechanisms to combat both formal and informal substitute decision-making. To this end, the Committee urges States Parties to ensure that persons with disabilities have the opportunity to make meaningful choices in their lives and develop their personalities, to support the exercise of their legal capacity. This includes, but is not limited to, opportunities to build social networks; opportunities to work and earn a living on an equal basis with others; multiple choices for place of residence in the community; and inclusion in education at all levels.³¹

Subsequent commentary on General Comment No. 1 of the UN CRPD Committee

A number of issues of interpretation and of general disagreement have arisen since the adoption of the General Comment. Some have taken issue with the premise that mental capacity can be completely delinked from decisions regarding the exercise of legal capacity.³² However, even where, after all reasonable efforts at support have been exhausted, the will and preferences of the individual remain unclear, the General Comment clearly provides for an outside decision-maker making a decision for that person based on the decision-maker's "best interpretation" of the individual's will and preferences (as outlined above. The "best interpretation" principle is also an appropriate rebuttal to those who have argued that the concept of universal legal capacity could impinge on other human rights (such as the enjoyment of the highest attainable standard of health, access to justice, the right to liberty, and even the right to life)³³ in the context of emergencies where informed consent

31. Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, paras. 50-52.

32. See, for example, Adrian Ward, "Abolition of guardianship? 'Best interests' versus 'best interpretation'" (2015) 32 Scots Law Times 150-154.

33. Melvyn Colin Freeman et al, "Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities" (2015) 2(9) Lancet Psychiatry 844.

cannot be obtained and in some circumstances could result in harm to themselves or to others.³⁴

Other objections to the General Comment have centred on concerns regarding the possibility of undue influence or other forms of control being exercised by support persons.³⁵ Yet such concerns could also be characterised as being based on out-dated, paternalistic views of persons with disabilities. Other commentators have also pointed out that the possibility of such influence exists for everyone, given that “all adults are subject to influence, pressure, manipulation and subtle coercion by those close to them”³⁶ and that the CRPD Committee itself, aware of the potential for undue influence, has stated that this can be said to be occurring “where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation”. The Committee goes on to note that while safeguards for the exercise of legal capacity must include protection against undue influence, that protection must also respect the rights, will and preferences of the person, including the right to take risks and make mistakes.³⁷

The concept of protection is not one which is alien to the CPRD. Indeed, Article 16 obliges States Parties to take all appropriate steps to protect persons with disabilities “from all forms of exploitation, violence and abuse”. “Protection in the context of the right to legal capacity now has a new role – instead of smothering the voice of the person (as in the past), it should now be viewed as a protecting the integrity of the process for identifying the will and preferences of the individual so that they can freely engage in a process of revealing their full personhood.

Arstein-Kerslake and Flynn have also prospectively addressed two “hard cases” – situations which have previously been flagged by commentators as being incompatible with respect for the will and preferences of an individual. These

34. Melvyn Colin Freeman et al, “Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities” (2015) 2(9) *Lancet Psychiatry* 844, 845.

35. Adrian Ward, “Adults with Incapacity: Freedom and Liberty, Rights and Status: Part 1” (2011) 5 *Scots Law Times* 21.

36. Piers Gooding, “Navigating the ‘Flashing Amber Lights’ of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns” (2015) 15 *Human Rights Law Review* 45, 56.

37. Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, para. 22.

fall into two categories: firstly, where respecting the will and preferences would result in serious harm, and secondly, where an individual's will and preferences are conflicting.³⁸

Regarding the first category of concern (will and preferences resulting in serious harm), the authors note that different legal systems have different standards for how much harm an individual is allowed to engage in before state intervention will occur. As long as these standards are applied in a non-discriminatory way to persons with disabilities, on an equal basis with persons without disabilities, there should be no conflict with Article 12.³⁹

With respect to the second category (conflicting will and preferences), the authors note that while the term "will and preferences" is not defined in the General Comment or in the CRPD itself, in general, an individual's "will" is used to describe the person's long-term vision of what constitutes a "good life" for them, whereas an individual's "preferences" tends to refer to likes and dislikes, or ways in which a person prioritises different options available to them. It is therefore possible to imagine a situation in which a person's will might conflict with their preferences.⁴⁰ In such circumstances, and where the person has not made an advance directive setting out their wishes or appointed a person to support or assist them in exercising their legal capacity, an outside decision-maker may need to be appointed to find the "best interpretation" of the individual's will and preferences. Initially they should discuss with the person how they wish to exercise their legal capacity with respect to the particular situation. This may involve using varied forms of communication and speaking with the person's supporters. If the will and preferences remain unclear at this point, the "best interpretation" model should be employed by the outside decision-maker when they make a decision.⁴¹

38. Arstein-Kerslake & Flynn, "The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law" *The International Journal of Human Rights* 20, No. 4 (2016) 471, 482.

39. Arstein-Kerslake & Flynn, "The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law" *The International Journal of Human Rights* 20, No. 4 (2016) 471, 482.

40. Arstein-Kerslake & Flynn, "The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law" *The International Journal of Human Rights* 20, No. 4 (2016) 471, 483-484

41. Arstein-Kerslake & Flynn, "The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law" *The International Journal of Human Rights* 20, No. 4 (2016) 471, 484

The Council of Europe and Article 12

The Council of Europe has been engaged with the question of the rights of persons with disabilities in the context of legal capacity for the last number of decades, with a clear line of human rights progression in evidence.

While the Council of Europe is not a regional integration organisation (as per Article 44 of the UN CRPD) and therefore lacks legal capacity to accede to the UN Convention, and while therefore the question of the “compatibility” of its legal instruments with the UN treaty is, strictly speaking, not an issue, there is nevertheless a longstanding practice within the Council of Europe’s mechanisms of trying to align the interpretation of its instruments with more global human rights instruments. This depends on the interpretive leeway allowed for in the relevant instrument in question as well as on the application of an evolutive approach to interpretation.

The Committee of Ministers of the Council of Europe

The Committee of Ministers adopted recommendations in 1999⁴², 2004⁴³ and 2009⁴⁴ which, although not emanating directly from a philosophy of the recognition of universal legal capacity, did call on member States to apply principles such as non-discrimination, flexibility in legal response, maximum preservation of legal capacity, proportionality and respect for the wishes and feelings of the person the subject of legal capacity proceedings.

Also of relevance is the 2011 Recommendation of the Committee of Ministers on the participation of persons with disabilities in political and public life⁴⁵ (which referred to both the Council of Europe Disability Action Plan 2006-2015 and Article 12 of the CRPD) in affirming that:

All persons with disabilities, whether they have physical, sensory, or intellectual impairments, mental health problems or chronic illnesses, have the right to vote

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42. Council of Europe, Committee of Ministers (1999), Recommendation R(99)4 on principles concerning the legal protection of incapable adults, 23 February 1999.
 43. Council of Europe, Committee of Ministers (2004), Recommendation Rec(2004)10 concerning the protection and dignity of persons with mental disorders, 22 September 2004.
 44. Council of Europe, Committee of Ministers (2009), Recommendation CM/Rec(2009)3 to member States on monitoring the protection of human rights and dignity of persons with mental disorders, 20 May 2009.
 45. Recommendation CM/Rec(2011)14 of the Committee of Ministers to member States on the participation of persons with disabilities in political and public life. Adopted by the Committee of Ministers on 16 November 2011 at the 1126th meeting of the Ministers’ Deputies.

on the same basis as other citizens, and should not be deprived of this right by any law limiting their legal capacity, by any judicial or other decision or by any other measure based on their disability, cognitive functioning or perceived capacity. All persons with disabilities are also entitled to stand for office on an equal basis with others and should not be deprived of this right by any law restricting their legal capacity, by any judicial or other decision based on their disability, cognitive functioning or perceived capacity, or by any other means.⁴⁶

Previously, the Venice Commission (the European Commission for Democracy through Law) in its proposed Interpretive Guidance on the Code of Good Practice in Electoral matters with respect to persons with disabilities had tentatively recommended that:

No person with a disability can be excluded from the right to vote or to stand for election on the basis of her/his physical and/or mental disability unless the deprivation of the right to vote and to be elected is imposed by an individual decision of a court of law because of proven mental disability.⁴⁷

The wording of the Interpretive Guidance was subsequently revised (after objections by both civil society and the Commissioner for Human Rights)⁴⁸ with the final version (2011) stating:

Universal suffrage is a fundamental principle of the European Electoral Heritage. People with disabilities may not be discriminated against in this regard, in conformity with Article 29 of the Convention of the United Nations on the Rights of Persons with Disabilities and the case law of the European Court of Human Rights.⁴⁹

Parliamentary Assembly of the Council of Europe

Of particular note is the Parliamentary Assembly Resolution of 2009 – entitled “Access to rights for people with disabilities and their full and active participation in society”⁵⁰ – which made specific mention of the adoption of the CRPD. The Resolution called on member States to guarantee that people with dis-

46. Ibid, para. 3.

47. European Commission for Democracy Through Law, *Interpretative Declaration on the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections* (Venice, 2010), para. 2.

48. Council of Europe Commissioner for Human Rights, *Human Rights Comment: Persons with Disabilities Must Not Be Denied the Right to Vote* (Strasbourg, 2011).

49. European Commission for Democracy Through Law, *Revised Interpretative Declaration to the Code of Good Practice in Electoral Practice in Electoral Matters on the Participation of People with Disabilities in Elections* (Venice, 2011), para. II.1.2.

50. Council of Europe, Parliamentary Assembly (2009), Access to rights for people with disabilities and their full and active participation in society, Resolution 1642, 26 January 2009.

abilities retain and exercise legal capacity on an equal basis with other members of society by:

- Ensuring that their right to make decisions is not limited or substituted by others, that measures concerning them are individually tailored to their needs and that they may be supported in their decision-making by a support person;
- Taking the necessary measures to ensure that, in accordance with the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol, people placed under guardianship are not deprived of their fundamental rights (not least the rights to own property, to work, to a family life, to marry, to vote, to form and join associations, to bring legal proceedings and to draw up a will), and, where they need external assistance so as to exercise those rights, that they are afforded appropriate support, without their wishes or intentions being superseded;
- Providing sufficient safeguards against abuse of people under guardianship notably through establishing mechanisms for periodic review of guardians' actions and ensuring that legislation mandates compulsory, regular and meaningful reviews of guardianship, in which the person concerned is fully involved and has adequate legal representation.

While, as was stated above, the maintenance of systems of substituted decision-making, such as guardianship alongside systems of supported decision-making, is not permitted under Article 12 of the CRPD as interpreted by the UN Committee, the 2009 Resolution can be seen as an attempt by the Parliamentary Assembly to endorse the underlying principles of Article 12 while remaining faithful to the current legal framework of the Council of Europe and in particular the jurisprudence of the European Court of Human Rights which allows for certain forms of substitute decision-making under certain controlled circumstances. The Parliamentary Assembly 2009 Resolution innovates, however, by its recognition of the need for support and the primacy of the individual's wishes and intentions.

It is also relevant to note that proposals to adopt an "Additional Protocol concerning the protection of human rights and dignity of persons with mental disorders" to the Council of Europe Convention on Human Rights and Biomedicine (the Oviedo Convention) which would affirm the right of States to impose involuntary measures on persons with disabilities have been criticised by the Parliamentary Assembly, the CRPD Committee, the UN Special Rapporteur on the rights of persons with disabilities, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the UN Office of the High Commissioner for Human Rights – Regional Office for Europe

as being misaligned with the CRPD. Similar sentiments have been expressed by numerous non-governmental organisations.⁵¹ There is perhaps a distinction to be made between, on the one hand, the evolutive interpretation of older Council of Europe instruments (like the ECHR), over time, to ensure a substantial overlap with newer global instruments (like the UN CRPD). By definition this does not happen immediately and is dependent on the kinds of cases that come before the European Court of Human Rights (the Court). It is quite another thing to adopt new Council of Europe instruments which appear to run diagonally against the norms of the global instrument. It is fair to imagine that it would or should be easier to bring the newer instruments into alignment with the UN CRPD than the older ones.

Council of Europe Commissioner for Human Rights

In 2012, the Council of Europe Commissioner for Human Rights published an Issue Paper entitled – *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities*.⁵²

In this Issue Paper the High Commissioner noted that although the ECHR does not directly refer to legal capacity, removal of legal capacity constitutes a serious interference with a person's right to respect for private life under Article 8 of the ECHR.⁵³ The jurisprudence of the European Court of Human Rights (which will be examined in more detail below) has also found that restrictions on legal capacity and barriers to legal challenges to this status can result in the Court finding breaches of Articles 5 (Right to liberty and security) and 6 (Right to a fair trial). Among the recommendations that the Commissioner for Human Rights made in order to bring member State laws into line with the requirements of Article 12 of the CRPD were for such States to:

- Review existing legislation on legal capacity in the light of current human rights standards and with particular reference to Article 12 of the CRPD.

51. Parliamentary Assembly of the Council of Europe, "The case against a Council of Europe legal instrument on involuntary measures in psychiatry" <http://website-pace.net/documents/10643/2221023/legal-instrument-on-involuntary-measures-psychiatry-EN.pdf/44541d2f-78bc-4c92-b67f-5eb851adb399> (last accessed 30 November 2016).

52. Council of Europe Commissioner for Human Rights (February 2012), *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities* CommDH/IssuePaper(2012)2.

53. The fact that a removal of legal capacity can constitute a violation of Article 8 of the ECHR was affirmed by the Court in *Sýkora v Czech Republic* (Application No. 23419/07, judgment 22 November 2012).

- Abolish mechanisms providing for full incapacitation and plenary guardianship.
- Review judicial procedures to guarantee that a person who is placed under guardianship has the possibility to take legal proceedings to challenge the guardianship or the way it is administrated as long as guardianship regimes still remain valid.
- Develop supported decision-making alternatives for those who want assistance in making decisions or communicating them to others (with these alternatives being easily accessible for those in need and provided on a voluntary basis).
- Establish robust safeguards to ensure that any support provided respects the person receiving it and his or her preferences, is free of conflict of interests and is subject to regular judicial review.
- Involve persons with intellectual and psychosocial disabilities and the organisations representing them actively in the process of reforming legislation on legal capacity and developing supported decision-making alternatives.⁵⁴

The Issue Paper demonstrated a growing awareness on the part of one important bodies of the Council of Europe that current legislative models in its member States of legal incapacity were incompatible with the requirements of Article 12 of the CRPD. While it clearly stated the need to move away from systems of substituted decision-making to ones based on support, it also sought to provide immediate procedural safeguards for persons who had had their legal capacity removed, until such time as the necessary reforms were carried out by member States.

European Court of Human Rights

The CRPD first appeared in the jurisprudence of the Court in its decision in *Glor v. Switzerland*⁵⁵ where the CRPD was referred to as providing evidence of “a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment”⁵⁶ as well as finding, for the first time, a violation of Article 14 (Prohibition of Discrimination) of the ECHR based on the applicant’s disability.

54. The fact that a removal of legal capacity can constitute a violation of Article 8 of the ECHR was affirmed by the Court in *Sýkora v Czech Republic* (Application No. 23419/07, judgment 22 November 2012), p. 7-8.

55. *Glor v. Switzerland* (Application No. 13444/04, judgment 30 April 2009)

56. *Glor v. Switzerland* (Application No. 13444/04, judgment 30 April 2009), para. 53.

Specifically on the issue of legal capacity, the Court has found that those who have been declared legally incapable and are detained must be entitled to challenge their detention.⁵⁷ The Court went further in *Stanev v. Bulgaria*⁵⁸ where the Grand Chamber found that Article 6(1) of the ECHR “must be interpreted as guaranteeing in principle that anyone who has been declared partially incapable... has direct access to a court to seek restoration of his or her legal capacity.”⁵⁹ In this decision the Court also noted that “there is now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity”⁶⁰ and that “the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible.”⁶¹

Importantly, the Court also clarified in *Salontaji-Drobnjak v. Serbia*⁶² that declarations of full legal incapacity (where all decision-making rights are removed from the individual) breached the principle of proportionality and were therefore contrary to Article 8(2) of the ECHR. The Court has also established that “judges adopting decisions with serious consequences for a person’s private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons.”⁶³ It has also been established that there should be extensive procedural protections in proceedings concerning the legal capacity of individuals. These protections should include legal representation, the right to be heard in person and safeguards against conflict of interest.⁶⁴

The case law of the Court has therefore established strong procedural requirements on member States in circumstances where a person has been deprived of their legal capacity in certain areas. It has also established that declarations of full legal incapacity are not permitted as it is not proportionate to the aim that is sought to be achieved. In effect, the Court has overlaid strong procedural safeguards to the imposition of legal incapacity and has drastically

57. *Shtukaturov v. Russia* (Application No. 44009/05, judgment 27 March 2008).

58. *Stanev v. Bulgaria* (Application No. 36760/06, judgment 17 January 2012).

59. *Stanev v. Bulgaria* (Application No. 36760/06, judgment 17 January 2012), p. 245.

60. *Stanev v. Bulgaria* (Application No. 36760/06, judgment 17 January 2012), p. 243.

61. *Stanev v. Bulgaria* (Application No. 36760/06, judgment 17 January 2012), p. 244.

62. *Salontaji-Drobnjak v. Serbia* (Application No. 36500/05, judgment of 13 October 2009) para 144.

63. *X & Y v. Croatia* (Application No. 5193/09, judgment of 3 November 2011), para. 84.

64. *D.D. v. Lithuania* (Application No. 13469/06, judgment of 14 February 2012).

reduced the circumstances under which such incapacities can be legally imposed.

Lewis⁶⁵ suggests that litigation concerning legal capacity issues before the European Court of Human Rights can be divided into three “clusters.” The first cluster aims to “chip away” at the guardianship edifice by focusing heavily on procedural issues and their compatibility with various provisions of the ECHR. The second aims to decouple declarations of legal incapacity from the automatic loss of ancillary rights (such as the right to vote). And the third aims to enlist the Court to require the Contracting States to move in a completely different direction to guardianship by requiring the establishment of supported decision-making regimes in lieu.⁶⁶

Most of the cases which have come before the European Court of Human Rights to date have fallen into the first two categories. It has yet to hear cases focused more squarely on the right to supported decision-making. That is has the capacity to enter this realm is beyond doubt. Indeed, a succession of US State courts have begun issuing orders in favour of supported decision-making even in the absence of legislation to that effect (and even without ratifying the UN convention).

For example, *In the Matter of the Guardianship of Dameris L.*⁶⁷ the Surrogate’s Court of the County of New York the court recognized a need “to reconcile outmoded, constitutionally suspect [guardianship] statute[s] ... with the requirements of substantive due process and the internationally recognized human rights of persons with intellectual disabilities.”⁶⁸ The court concluded that “guardianship is no longer warranted because there is now a system of supported decision-making in place that constitutes a less restrictive alternate to the Draconian loss of liberty entailed by a plenary ... guardianship. This use of supported decision-making, rather than a guardian’s substituted decision-making, is also consistent with international human rights, most particularly Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).”⁶⁹ Another example of where US courts have moved towards

65. Oliver Lewis, “Advancing Legal Capacity Jurisprudence” (2011) 6 European Human Rights Law Review 700.

66. *Ibid.*, p. 706.

67. *In the Matter of the Guardianship of Dameris L.*, Pursuant to SCPA Article 17-A, Surrogate’s Court: County of New York, No. 2009-0892. Decided: December 28, 2012. Available at <http://caselaw.findlaw.com/ny-surrogates-court/1619828.html>.

68. *Ibid.*, 1.

69. *Ibid.*, 10.

recognition of supported decision-making is the decision of the Supreme Court of Pennsylvania in its decision in *In Re Perry*⁷⁰ where the court concluded that guardianship was not required in a situation where it was clear that the supports available to the individual who was the subject of the guardianship application were sufficient to assist her in making decisions and in meeting her essential needs.

It is likely that the next wave of cases before the European Court of Human Rights will build on the record of the Court to date to focus much more intently on what ought to replace traditional guardianship regimes. The Court certainly has the inherent jurisdiction to mandate positive obligations to some extent and in as much as they form part of the logic of the core right (in this instance Article 8) and also because supported decision-making is (to coin the analysis of the American Courts) a least restrictive alternative compared to even partial guardianship. In short is entirely possible – indeed predictable – for the European Court of Human Rights, faced with the right “cluster” of cases, to take a similar approach to its American counterparts.

The Disability Action Plan 2006-2015 and the Disability Strategy 2017-2023

The Committee of Ministers adopted the *Council of Europe Action Plan 2006-2015* in April 2006.⁷¹ It was intended that the principles and actions contained in the Action Plan would be integrated into the policy, legislation and practice of member State governments as well as raising awareness of same through awareness-raising campaigns and co-operation with the private sector and civil society, particularly non-governmental organisations of people with disabilities.⁷² It aimed to meet country-specific conditions and emphasised

70. *In re Patricia Anne Peery, an alleged incapacitated person. Appeal of Patricia Anne Peery.* 556 Pa. 125 (1999)727 A.2d 539. Decided March 25, 1999. Available at <http://caselaw.findlaw.com/pa-supreme-court/1404361.html>.

71. Council of Europe, Committee of the Ministers (2006), Recommendation Rec(2006)5 to member States on the Council of Europe Action Plan to promote the rights and the full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015, 5 April 2006.

72. Council of Europe, Committee of the Ministers (2006), Recommendation Rec(2006)5 to member States on the Council of Europe Action Plan to promote the rights and the full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015, 5 April 2006, p.2.

the need for a cross-cutting response to the barriers faced by people with disabilities⁷³ given the intersectional nature of discrimination.

The 2006-2015 Action Plan contained fifteen “action lines” which set out key objectives and specific actions to be implemented by member States. Action Line No.12: *Legal Protection* began by emphasising that people with disabilities have the right to recognition everywhere as persons before the law and that when assistance is needed to exercise that legal capacity, member States must ensure that this is “appropriately safeguarded by law”.⁷⁴ Actions to be taken by member States under this action line included providing protection against discrimination through the setting up of specific legislative measures, bodies, reporting procedures and redress mechanisms. Consistent with Article 12 of the CRPD (which was adopted two years after the adoption of the Action Plan), member States were also called on to ensure that people with disabilities had equal access to the judicial system by securing their right to information and communication that is accessible to them, as well as to provide appropriate assistance to those people who experience difficulty in exercising their legal capacity and ensuring that this assistance is commensurate with the required level of support. Member States were also instructed to ensure the equal right of persons with disabilities to own and inherit property.⁷⁵ Another of the action lines contained in the Action Plan can also be seen as supportive of principle of equal recognition before the law, including the need to ensure the participation of people with disabilities in public life (Action Line No.1) and access to information and communication (Action Line No. 3).

Subsequently, in 2015, the Council of Europe published an Evaluation of the implementation of the Action Plan.⁷⁶ Regarding Action Line No. 12, the report

73. Council of Europe, Committee of the Ministers (2006), Recommendation Rec(2006)5 to member States on the Council of Europe Action Plan to promote the rights and the full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015, 5 April 2006, p.5.

74. Council of Europe, Committee of the Ministers (2006), Recommendation Rec(2006)5 to member States on the Council of Europe Action Plan to promote the rights and the full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015, 5 April 2006, para. 3.12.1.

75. Council of Europe, Committee of the Ministers (2006), Recommendation Rec(2006)5 to member States on the Council of Europe Action Plan to promote the rights and the full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015, 5 April 2006, para. 3.12.3.

76. Council of Europe, Implementation of the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: Improving the quality of life of people with disabilities in Europe 2006-2015, Recommendation CM/Rec(2006)5 of the Committee of Ministers to member States, October 2015.

notes that while most member States had made improvements to their general anti-discrimination and legal protection frameworks with particular attention to disability, the question of legal capacity was still an area where significant progress still needed to be made.⁷⁷ While pointing to a number of good practices amongst member States where supported decision-making was being incorporated into national frameworks, the report points out that guardianship and substituted decision-making mechanisms and measures involving the full deprivation of legal capacity was still the dominant model.⁷⁸

The task force of the Council of Europe's intergovernmental Ad Hoc Committee on the Rights of Persons with Disabilities (CAHDPH) drafted a *Council of Europe Strategy on the Rights of Persons with Disabilities 2017-2023*⁷⁹ which was adopted by the Committee of Ministers of the Council of Europe on 30 November 2016. Noting that the aforementioned Evaluation of the implementation of the Action Plan found an implementation gap between standards and practice⁸⁰, the Strategy emphasises that both the CRPD and the Action Plan marked a "paradigm shift" from the traditional medical-based approach to disability to one based on human rights.⁸¹ The Strategy takes a two-pronged approach to implementation – (i) via specific projects, campaigns, trainings, activities etc., organised at the national and local levels by national stakeholders in the member States, and (ii) by mainstreaming disability related issues in all the work and activities of the Council of Europe. The CAHDPH is responsible for supporting and monitoring the implementation of the Strategy in the Council of Europe member States. It will present biennial reports to the Committee of Ministers assessing progress achieved.

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77. Council of Europe, Implementation of the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: Improving the quality of life of people with disabilities in Europe 2006-2015, Recommendation CM/Rec(2006)5 of the Committee of Ministers to member States, October 2015, p. 54.
 78. Council of Europe, Implementation of the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: Improving the quality of life of people with disabilities in Europe 2006-2015, Recommendation CM/Rec(2006)5 of the Committee of Ministers to member States, October 2015, p. 56.
 79. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016. Available at <http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c400c>.
 80. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 14.
 81. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 11.

As is to be expected in an instrument of its kind, the Strategy does not impose any legal obligations on the member States. It is instead intended to “guide and support” their work and activities aimed at implementing the CRPD and supplemented by the Council of Europe.⁸² The Strategy does, however, assert that the rights contained in it are to be interpreted in line with the UN CRPD. It can be argued that the CRPD is therefore the primary normative rights framework which member States of the Council of Europe are required to adhere to when implementing the Council of Europe Strategy.

While it is a longstanding desideratum of the Council of Europe that its instruments would be interpreted alongside global instruments, there is no legal hierarchy of global and regional treaties as such. Normative alignment is a steady evolutive process for which entities such the European Court of Human Rights are well equipped.

A more extreme approach to normative alignment has been taken by one organ of the Organization of American States (OAS). The Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities (the relevant treaty monitoring body under the OAS Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities) issued a General Observation on Article 12 of the CRPD in 2011.⁸³ Article 1.2(b) of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities provides is to the effect that a declaration of legal incapacity is not to be considered discrimination. However, the OAS Committee re-cast Article 1.2(b) that in light of its understanding of the requirements of Articles 2 (non-discrimination definition) and 12 of the CRPD. It stated:

This Committee declares that the criterion established in Article 1.2(b) *in fine* of the OAS Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, inasmuch as it establishes that “*If, under a state’s internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination*”, **seriously contradicts the provisions of Articles 2 and 12 of the United**

82. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 17.

83. OAS Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities, “General Observation of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities on the need to interpret Article 1.2(b) in fine of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities”, OEA/ Ser.L/XXIV.3.1, CEDDIS/doc.12(I-E/11) rev.1 (28 April 2011). http://www.sedi.oas.org/ddse/documentos/discapacidad/English/CEDDIS_General%20Observation.DOC (last accessed 30 November 2016).

Nations Convention, and the Committee therefore construes that the aforementioned criterion must be reinterpreted in light of the latter document currently in force. (pp.4-5).

This is quite striking. The Committee used the more general concept of non-discrimination to effectively adjudge one provision in the treaty (allowing for partial guardianship) to violate the general prohibition against discrimination. In effect, the Committee read out Article 1.2(b) of the Inter-American convention.⁸⁴ It also recommended that the Secretary General of the OAS commence a process of redrafting Article 1.2(b).

The new Council of Europe Strategy identifies five cross-cutting issues that need to be considered in all the Council of Europe work and in all its activities supporting member States.⁸⁵ These issues are also essential for member States to take into consideration in their legislation, policies and activities and in all areas of life to improve the lives of persons with disabilities.⁸⁶ The cross-cutting issues are:

Participation, co-operation and co-ordination

The Strategy points out that Article 32 of the CRPD emphasises the importance of international co-operation in support of the national implementation of the CRPD. It highlights the importance of the Council of Europe and its independent monitoring mechanisms aligning their work and activities and “benefiting from the meaningful participation of representative organisations of persons with disabilities and other relevant stakeholders.”⁸⁷ The Strategy also encourages co-operation with national focal points, coordination mechanisms and independent monitoring frameworks as formulated in and assigned nationally under Article 33 of the CRPD. This also requires co-operation with other regional and international organisations, National Human Rights Institutions (NHRIs), Equality Bodies, Ombudsman Institutions and civil society, service providers, specialised agencies, media, private sector, academia, independent experts and in particular organisations of persons with disabilities.⁸⁸

This emphasis on co-operation at multiple political and social levels within member States has the potential to encourage dynamic and innovative thinking

84. See also a follow-through report on relevant reforms in the OAS member States, Regional Diagnosis on the Exercise of Legal capacity by Persons with Disabilities,(OAS, 2015).

85. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 19.

86. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 18.

87. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 32.

88. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 33.

in terms of approaches to a supported decision-making model of legal capacity where States and national institutions benefit from the experiences and evaluations of others, particularly people with disabilities and their representative organisations.

Universal Design and reasonable accommodation

The Strategy notes that persons with multiple, complex and intersecting impairments face additional barriers and are at higher risk of institutionalisation, exclusion and poverty. Highlighting that denial of reasonable accommodation as well as denial of access can constitute discrimination, the need to promote and develop affordable assistive technologies, devices and services is noted.⁸⁹ This is particularly relevant to the issue of legal capacity as regimes of supported decision-making will require adaptively and innovation in order to ensure that individuals with alternative methods of communication have their will and preferences heard and respected.

The remaining three cross-cutting issues are “*Gender equality perspective*”, “*Multiple discrimination*” and “*Education and training*”.

The Strategy then lists five rights-based priority areas. While they are based on Council of Europe human rights standards and are intended to build on and further develop the existing body of work done to date, the Strategy expressly States that the interpretation and implementation of these priority areas will be done in line with the CRPD, the evolving body of decisions, guidelines and General Comments of the CRPD Committee, as well as the developing case law of the European Court of Human Rights and the decisions of the European Committee of Social Rights. The priority areas are:

1. Equality and non-discrimination
2. Awareness raising
3. Accessibility
4. Equal Recognition before the law
5. Freedom from exploitation, violence and abuse.⁹⁰

With respect to priority area 4, Equal Recognition before the law, the Strategy specifically refers to the CRPD Committee’s General Comment No. 1 (2014) on Article 12, encompassing an interpretation which refers to the two parts of legal capacity, the capacity to hold rights and duties and the capacity to act

89. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 36-37.

90. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 20-23.

on them. The Strategy notes that substituted decision-making, including full guardianship regimes, still prevail in many member States. While some aspects of these practices have been confirmed as a violation of basic human rights and fundamental freedoms by decisions of the European Court of Human Rights (which has called on the relevant authorities to remedy such violations), the Strategy refers once again to the requirements of the CRPD.⁹¹ It interprets the provisions of the CRPD as requiring States, as far as possible; to replace substituted decision-making with systems of supported decision-making. It States that possible limitations on decision-making “should be considered on an individual basis, be proportional and be restricted to the extent to which it is absolutely necessary”. Limitations should not take place when less interfering means are sufficient in light of the situation, and accessible and effective legal safeguards must be provided to ensure that such measures are not abused.⁹²

This interpretation of Article 12 within the Strategy, where there is some margin allowed for States to retain regimes of substituted decision-making (even if that occurs alongside the development of systems of supported decision-making), differs from the UN CRPD Committee’s elaboration of its interpretation of the requirements of Article 12 in its aforementioned General Comment No.1 (as detailed in the previous section of this Study). Yet as aforementioned, the Council of Europe and its legal framework is *sui generis*. Although the majority of its members States have ratified the CRPD, the Council of Europe has not and cannot accede to the UN CRPD. There is therefore, *sensu stricto*, no “legal hierarchy” which obliges the Council of Europe to raise its standards to meet those of the CRPD. A process of steady normative alignment is, however, to be reasonably expected.

Crucially, the Strategy allows member States, who are the actual signatories to the CRPD, to innovate in accordance with their domestic needs and circumstances. Nothing in the wording of the Strategy prohibits a member State from reforming its laws in accordance with the CRPD Committee’s interpretation of Article 12. It is therefore possible for Council of Europe member States to meet their obligations under both the ECHR and the CRPD by granting full recognition of legal capacity at a national level. This would be entirely consistent with the Strategy’s endorsement of the CRPD as the normative human rights framework in the area of disability.

91. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 61-62.

92. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016, para. 63.

Approaches taken in member States of the Council of Europe

Reservations and Declarations to Article 12

Reservations and interpretative declarations are governed by the Vienna Convention on the Law of Treaties (1969)⁹³ which defines a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”⁹⁴ With respect to interpretative declarations, the Treaty Handbook of the United Nations States that “[a] State may make a declaration about its understanding of a matter contained in or the interpretation of a particular provision in a treaty. Interpretative declarations of this kind, unlike reservations, do not purport to exclude or modify the legal effects of a treaty. The purpose of an interpretative declaration is to clarify the meaning of certain provisions or of the entire treaty.”⁹⁵ The Handbook makes clear, however, that although a distinction is made between the two mechanisms, “[h]owever phrased or named, any such statement purporting to exclude or modify the legal effect of a treaty provision with regard to the declarant is, in fact, a reservation.”⁹⁶

Article 19 of the Vienna Convention 1969 States that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, make a reservation unless:

- a. The reservation is prohibited by the treaty;

93. Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf.39/27 (1969).

94. Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf.39/27 (1969), Article 2(1)(d).

95. United Nations Treaty Section of the Office of Legal Affairs, Treaty Handbook (2012), para. 3.6.1. Available at <https://treaties.un.org/doc/source/publications/THB/English.pdf> (last accessed 14 December 2016).

96. United Nations Treaty Section of the Office of Legal Affairs, Treaty Handbook (2012), para. 3.5.1.

- b. The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- c. In cases not falling under the above two categories, the reservation is incompatible with the object and purpose of the treaty

Article 46(1) of the CRPD reiterates Article 19 of the 1969 Vienna Convention where it provides that reservations incompatible with the object and purpose of the CRPD shall not be permitted. There is a continuing debate about whether UN treaty monitoring bodies have the inherent jurisdiction to pronounce on reservations. The trend seems to be in favour of this direction.

A number of reservations and interpretative declarations regarding Article 12 have been made by member States of the Council of Europe upon their ratification of the CRPD:

- Estonia made a declaration that: “The Republic of Estonia interprets Article 12 of the Convention as it does not forbid to restrict a person’s active legal capacity, when such need arises from the person’s ability to understand and direct his or her actions. In restricting the rights of the persons with restricted active legal capacity the Republic of Estonia acts according to its domestic laws.”
- France made a declaration that “With regard to Article 29 of the Convention [Participation in political and public life], the exercise of the right to vote is a component of legal capacity that may not be restricted except in the conditions and in accordance with the modalities provided for in Article 12 of the Convention.”
- Georgia made a declaration stating: “Georgia interprets Article 12 of the Convention in conjunction with respective provisions of other international human rights instruments and its domestic law and will therefore interpret its provisions in a way conferring the highest legal protection for safeguarding dignity, physical, psychological and emotional integrity of persons and ensuring integrity of their property.”
- The Netherlands made the following declaration: “The Kingdom of the Netherlands recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Furthermore, the Kingdom of the Netherlands declares its understanding that the Convention allows for supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law. The Kingdom of the Netherlands interprets Article 12 as restricting substitute decision-making arrangements to cases where such measures are necessary, as a last resort and subject to safeguards.”
- Norway has declared that: “Norway recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Norway

also recognizes its obligations to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. Furthermore, Norway declares its understanding that the Convention allows for the withdrawal of legal capacity or support in exercising legal capacity, and/or compulsory guardianship, in cases where such measures are necessary, as a last resort and subject to safeguards.”

- Poland made a interpretative declaration regarding Article 12 as follows: “The Republic of Poland declares that it will interpret Article 12 of the Convention in a way allowing the application of the incapacitation, in the circumstances and in the manner set forth in the domestic law, as a measure indicated in Article 12.4, when a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct.”

In a way many of these reservations and declarations look back to pre-existing domestic legislation as the benchmark or to the established jurisprudence of the European Court of Human Rights – which is changing. This is perhaps a natural instinct against (perceived) disruptive change. But many of them will likely be withdrawn in the future as the Court is nudged into the space of supported decision-making (as it almost inevitably will) and as the many innovations occurring around the world and in Europe become more deeply entrenched.

Overview of approaches taken in Council of Europe member States

As has been outlined above, the UN CRPD Committee has confirmed that systems of substitute decision-making are incompatible with the requirements of Article 12 of the CRPD. Given that the UN CRPD Committee’s General Comment on Article 12 confirms that the rights and obligations of Article 12 are civil and political and are therefore required to be immediately realised, there is an onus on all States Parties to the CRPD to take immediate and concrete steps at legislative, judicial and administrative levels to ensure that all persons have their right to equal recognition before the law respected and upheld. There must also be meaningful participation by persons with disabilities in this process.⁹⁷

When discussing approaches to reform of legal capacity laws, it is important to note that where States have introduced reforms such partial guardianship and/or supported decision-making, while maintaining systems of plenary

97. Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session, para. 30.

guardianship, the numbers of people placed under plenary guardianship have not decreased.

For example, in France, statistics released by the Ministry of Justice for the period 1990-2004 demonstrate that the availability of the “curatelle” regime (the system of partial guardianship) did not result in a reduction in the numbers of applications under the “tutelle” regime (plenary guardianship) until the final year and even then, the number of applications for the less restrictive regime were only marginally lower (50.5% application for curatelle versus 59.5% applications for tutelle).⁹⁸

In other words, there is a tendency among States to rely on out-dated models of substitute decision-making, even when these exist alongside less restrictive. This highlights once again that Article 12 of the CPRD does not permit the maintenance of systems of substitute decision-making alongside new supported decision-making regimes.

All Council of Europe member States have signed the UN Convention on the Rights of Persons with Disabilities and the majority of member States have also ratified. However, all Council of Europe member States also have, in various forms, even in very limited circumstances, systems of substitute decision-making in place at a domestic level. There have been a variety of approaches/strands to legal reform in recent years by member States.

Abolition of plenary guardianship

Some Council of Europe member States have abolished plenary (full guardianship) but have retained the concept of partial guardianship (i.e. it is still possible for individual's to be deprived of their ability to make decisions in certain areas).

Czech Republic

Proposals for reform of the system of legal capacity in the Czech Republic were adopted/published in 2012 and the new Civil Code came into effect in 2014.⁹⁹ Under the new law, plenary guardianship (full legal incapacity) is no longer an option and any restriction of legal capacity is to be viewed only as an option of last resort. In order for such a restriction to be imposed, the following two conditions must be met:

98. “Projet de loi portant réforme de la protection juridique des majeurs». Available at <http://www.senat.fr/rap/106-212/106-2126.html> (last accessed 23 November 2016).

99. Act No. 89/2012 Coll., Civil Code. A version of the law is available in English here: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf> (last accessed 13 November 2016).

- i. That individual would otherwise be under a threat of serious harm.
- ii. Milder and less restrictive measures would not suffice to protect his/her interests.¹⁰⁰

The principles of subsidiarity and necessity are the basis of any restriction of legal capacity. The assessments of capacity which are carried out when an application is made for partial guardianship are based on the functional approach to legal capacity, i.e. the capacity of the person is assessed on an issue-specific basis, based on whether they understand the decision and the consequences that flow from it. The new legislation also States that “the decision to limit the legal capacity does not deprive an individual of the right to individually make juridical acts in ordinary matters of everyday life.”¹⁰¹ The limits on the legal capacity of the individual are therefore confined to the particular area in which it has been decided that he or she “lacks” legal capacity. When choosing a guardian, the court shall take into account the wishes of the individual as well as the suggestions of persons to whom that person is close.¹⁰² Where a court appoints a guardian, they generally work act in conjunction with the individual concerned based on his will. If the persons will cannot be established, the decision can be made by the court on the application of the guardian. Any decision to partially limit legal capacity must be reviewed every three years.¹⁰³

In its Concluding Observations on the initial report of the Czech Republic, the CRPD Committee noted with concern 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.”¹⁰⁴ The Committee called upon the Czech Republic to amend its Civil Code and “fully harmonize its provisions

100. Act No. 89/2012 Coll., Civil Code. A version of the law is available in English here: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf> (last accessed 13 November 2016), s. 55.

101. Act No. 89/2012 Coll., Civil Code. A version of the law is available in English here: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf> (last accessed 13 November 2016), s. 64.

102. Act No. 89/2012 Coll., Civil Code. A version of the law is available in English here: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf> (last accessed 13 November 2016), s. 62.

103. Act No. 89/2012 Coll., Civil Code. A version of the law is available in English here: <http://obcanskyzakonik.justice.cz/images/pdf/Civil-Code.pdf> (last accessed 13 November 2016), s. 59.

104. Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of the Czech Republic, 15 May 2015, U.N. Doc. CRPD/C/CZE/CO/1, para. 22.

with Article 12 of the Convention, as indicated in the Committee's general comment No. 1 (2014) on equal recognition before the law".¹⁰⁵

Germany

Legal guardianship is governed by of the German Civil Code¹⁰⁶ (with procedural issues being dealt with by the Federal Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction) under a system known as "Rechtliche Betreuung". Article 1896 of the Civil Code States:

1. If a person of full age, by reason of a mental illness or a physical, mental or psychological handicap, cannot in whole or in part take care of his affairs, the custodianship court, on his application or of its own motion, appoints a custodian for him. The application may also be made by a person incapable of contracting. To the extent that the person of full age cannot take care of his affairs by reason of a physical handicap, the custodian may be appointed only on the application of the person of full age, unless the person is unable to make his will known.
 - 1a. A custodian may not be appointed against the free will of the person of full age.
 2. A custodian may be appointed only for groups of tasks in which the custodianship is necessary. ...

Plenary guardianship does not, therefore, exist under German law. Limited guardianship exists where it is considered that it is necessary for a particular domain of decision-making (e.g. health and personal welfare, property and financial affairs). Such orders are made by the Guardianship/Probate Court (Betreuungsgericht) and should only remain in place for as long as is necessary and up to a maximum of seven years.¹⁰⁷ The decision to appoint a guardian can be reviewed by the court of second instance (Landgericht). Priority will be given to guardians who are selected by the individual themselves, although professional and public guardians may also be appointed by the court.

105. Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of the Czech Republic, 15 May 2015, U.N. Doc. CRPD/C/CZE/CO/1, para. 23.

106. German Civil Code (BGB) in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719).

107. Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction of 17 December 2008 (Federal Law Gazette I, p. 2586, 2587), last amended by Article 11 of the Act of 20 April 2013 (Federal Law Gazette I p. 831), section 294(3).

The guardian must comply with wishes of the person under guardianship to the extent that this is not inconsistent with their “best interests”. The guardian must also take into account wishes which were expressed by the person under guardianship before the guardian was appointed, unless it is clear that he/she no longer wants those wishes to be upheld. Before the guardian makes decisions in the relevant area, he must discuss them with the person under guardianship, to the extent that this is not inconsistent with their best interests.¹⁰⁸

In its Concluding Observations on the initial report of Germany, the CRPD Committee noted its concern “that the legal instrument of guardianship (“Rechtliche Betreuung”), as outlined in and governed by the German Civil Code is incompatible with the Convention.¹⁰⁹ The Committee recommended that Germany eliminate all forms of substituted decision-making and replace it with a system of supported decision-making consistent with the Committee’s General Comment No. 1 (2014). Germany was also advised to develop professional quality standards for supported decision-making mechanisms and, in close cooperation with persons with disabilities, provide training on Article 12 of the CRPD at the federal, regional and local levels to all relevant actors.¹¹⁰

Legal recognition for supported decision-making

A number of Council of Europe member States have introduced recognition for supported decision-making, although they still maintain elements of substitute decision-making, contrary to the requirements of Article 12 of the CRPD.

Ireland

The Assisted Decision-Making (Capacity) Act¹¹¹ was signed into law on 30 December 2015, but the majority of the substantive sections have not, at the time of writing, been “commenced” (i.e brought into force). The Act is intended to replace the Regulation of Lunacy (Ireland) Act 1871 which has governed the area of legal capacity in Ireland for over a century. The “guiding

108. German Civil Code (BGB) in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719), section 1901(3).

109. Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Germany, 13 May 2015, U.N. Doc. CRPD/C/DEU/CO/1, para. 25.

110. Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Germany, 13 May 2015, U.N. Doc. CRPD/C/DEU/CO/1, para. 26.

111. Assisted Decision-Making (Capacity) Act, 2015. Available at <http://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/html> (last accessed 16 November 2016).

principles” of the Act make no reference to “best interests” and instead place emphasis on the need to ascertain and the will and preferences of the individual.¹¹²

The 2015 Act allows for a person to make an “Assisted Decision Making Agreement”¹¹³ whereby they may appoint a “decision-making assistant” to help them to make decisions regarding their “personal welfare or property and affairs”¹¹⁴. The Act makes clear that an assistant is not entitled to make a decision on behalf of the appointer.¹¹⁵ The individual may have appoint more than one assistant who may act jointly and/or severally.¹¹⁶ Unlike in other jurisdictions, however, it appears that the individual must be deemed to be “capable” (based on a functional assessment of capacity) at the time when they wish to appoint a “decision-making assistant” in order for the agreement to be valid and exercisable.¹¹⁷ The role of the assistant is to:

- “(a) assist the appointer to obtain the appointer’s relevant information,
- (b) advise the appointer by explaining relevant information and considerations relating to a relevant decision,
- (c) ascertain the will and preferences of the appointer on a matter the subject or to be the subject of a relevant decision and assist the appointer to communicate them,
- (d) assist the appointer to make and express a relevant decision, and
- (e) endeavour to ensure that the appointer’s relevant decisions are implemented.”¹¹⁸

A number of safeguards have been put in place regarding Assisted Decision-Making Agreements:

- The effect of the agreement must be explained to the appointer by someone other than the proposed assistant.¹¹⁹
- The agreement may be revoked by either the appointer or the assistant at any time and may be varied at any time when there is agreement to that variation by both parties.¹²⁰

112. Assisted Decision-Making (Capacity) Act, 2015, s. 8(7).

113. Assisted Decision-Making (Capacity) Act, 2015, Part 3.

114. Assisted Decision-Making (Capacity) Act, 2015, s. 10(1).

115. Assisted Decision-Making (Capacity) Act, 2015, s. 14(2).

116. Assisted Decision-Making (Capacity) Act, 2015, s. 10(5).

117. Assisted Decision-Making (Capacity) Act, 2015, s. 10(1).

118. Assisted Decision-Making (Capacity) Act, 2015, s. 14(1).

119. Assisted Decision-Making (Capacity) Act, 2015, s. 10(4)(d)(i).

120. Assisted Decision-Making (Capacity) Act, 2015, s. 10(3).

While clearly not fully consonant with the requirements of Article 12 of the CRPD due to its reliance on an assessment of mental capacity, Assisted Decision-Making Agreements represent a positive step forward given their retention of the individual's legal capacity and their emphasis on support in giving effect to their will and preferences.

Czech Republic

Under the aforementioned reform of the Civil Code of the Czech Republic, a number of legal options are available to individuals wishing to avail of support – agreements on support in decision-making, representation by a family member and guardianship without restricting legal capacity. However, only the “agreements on support in decision-making” can be said to amount to full supported decision-making as the other two options do not contain sufficient safeguards to ensure that all decisions are made in accordance with the will and preferences of the individual.

With respect to “agreements on support in decision-making”, the provision of assistance is agreed between an individual who requires assistance due to “complications resulting from his mental disorder”¹²¹ and their chosen supporter. The individual may make agreements with multiple supporters.¹²² Such agreements require the approval of the court.¹²³ The support person, with the consent of the individual, may be present at legal proceedings, provide the person with necessary information, assist with communication and provide advice¹²⁴ (concerns have been raised by civil society organisations regarding the potential for such “advice” to be given in such a way as to exert undue influence). The support person must act in accordance with the wishes of the person receiving the support¹²⁵. Either Party may apply to the court to terminate the agreement and the support person may be removed by the court if they are deemed to have breached their duties.¹²⁶

These agreements, while certainly a positive step forward as options for support, are problematic in a number of respects.

- i. Lack of safeguards to ensure that the will and preferences of the individual are respected, particularly regarding the ability of a third party to challenge

121. Act No. 89/2012 Coll., Civil Code, s. 45.

122. Act No. 89/2012 Coll., Civil Code, s. 45.

123. Act No. 89/2012 Coll., Civil Code, s. 46(2).

124. Act No. 89/2012 Coll., Civil Code, s. 46(1).

125. Act No. 89/2012 Coll., Civil Code, s. 47(2).

126. Act No. 89/2012 Coll., Civil Code, s. 48.

actions of the support person if there is a suspicion that that person is not acting in accordance with those will and preferences.

- ii. There is a concern that these Agreements may not be capable of being tailored to situations where an individual has high level support needs in terms of decision-making.

In its Concluding Observations on the initial report of the Czech Republic, the CRPD Committee called upon the State 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.”¹²⁷

Georgia

The law on legal capacity in Georgia has undergone substantial reform in recent years due to the decision of the Constitutional Court in October 2014.¹²⁸ In this decision, the court held that a person’s right to legal capacity was protected by Article 14 of the Georgian Constitution – the equality clause – as well as Article 16 of the Constitution which States that “[e]veryone has the right to free development of his/her personality”. Based on this, the court found that a “deprivation of legal capacity” does not mean that a person does not have the right to make a decision, but instead means that they are unable to make a decision independently. It therefore held that it is not permissible for a guardian to make a decision for an individual. Instead, it found only supported or joint decisions by the individual and their guardian could be valid and that these types of decisions could only be taken in specific areas of life (i.e. there could not be full removal of legal capacity). The decision that an individual requires support or an arrangement for joint decision-making with a guardian should only be based on an individual assessment. The Court, in issuing its judgment, provided the government with four months within which to bring in the necessary legislative reforms, at which point the legal provisions which had been found to be unconstitutional would no longer be valid.

The Civil Code of Georgia was subsequently amended to give effect to the Constitutional Court’s ruling. Article 1275(3) now provides that “[s]upport shall be established for a beneficiary of support”. There is therefore an assumption

127. Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of the Czech Republic, 15 May 2015, U.N. Doc. CRPD/C/CZE/CO/1, para. 23.

128. *Citizens of Georgia – Irakli Kemoklidze and David Kharadze v. Parliament of Georgia*, Case No. 2/4/532,533 (Judgment of 8 October 2014).

that legal capacity is not to be removed and systems of support must instead be established in order to ensure that that legal capacity can be exercised.

The Civil Code has also been amended to state that “support shall be established for a beneficiary of support”. The Civil Code provides that a court may make a declaration which declares a person as a “beneficiary of support”, may assign a supporter(s), define the limits of support and the rights and duties of the supporter(s).¹²⁹ A supporter may be a family member, a relative, or a friend of a person, or an “expert” as defined under the Civil Code.¹³⁰ In selecting a supporter, the court must take into account, amongst other considerations of suitability, “the interests and the will of a beneficiary of support”.¹³¹

The role of supporters is to “assist beneficiaries of support in making a choice and a decision”¹³² and to “assist a beneficiary of support when he/she concludes a transaction to fully comprehend conditions and legal consequences of the transaction”¹³³ in a specified realm of decision-making. A supporter is required to monitor the medical care provided to a beneficiary of support, identify his/her wishes/choices, and assist him/her in taking an appropriate decision by communicating to the support beneficiary the information necessary for making a decision in an understandable form.¹³⁴

Up to this point, the support framework envisioned by the Civil Code would appear to be consistent with the requirements of Article 12 of the CRPD.

The Civil Code does provide for “exceptional cases” where it is “objectively impossible for a supporter to declare the intent of a beneficiary of support for more than one month, and that the prohibition of making a decision instead of the beneficiary of support can significantly prejudice him/her” where the court may authorise the supporter to conclude “necessary

129. Civil Code of Georgia, Section Three: “Guardianship, Custodianship, and Support”, Law of Georgia No 3339 of 20 March 2015, Article 1280(1).

130. Civil Code of Georgia, Section Three: “Guardianship, Custodianship, and Support”, Law of Georgia No 3339 of 20 March 2015, Article 1280(2).

131. Civil Code of Georgia, Section Three: “Guardianship, Custodianship, and Support”, Law of Georgia No 3339 of 20 March 2015, Article 1280(3).

132. Civil Code of Georgia, Section Three: “Guardianship, Custodianship, and Support”, Law of Georgia No 3339 of 20 March 2015, Article 1278(3).

133. Civil Code of Georgia, Section Three: “Guardianship, Custodianship, and Support”, Law of Georgia No 3339 of 20 March 2015, Article 1293(3).

134. Civil Code of Georgia, Section Three: “Guardianship, Custodianship, and Support”, Law of Georgia No 3339 of 20 March 2015, Article 1289(2).

transactions on behalf of the beneficiary of support and based on his/her interests".¹³⁵ Parliamentarians have commented that this provision would only be applicable in cases where a person is in a coma for more than a month and their property is under some threat, leading to the need for a legal representative to make decisions in relation to these interests.

The reforms also permit an individual who has been deprived of his/her legal capacity to apply for its restoration him/herself. However, the practical operation of this provision has proved problematic, with the Georgian Coalition for Independent Living having to take proceedings which resulted in the Court of Appeals ruling that the court of first instance must hear such applications, even when taken by the individual under guardianship themselves. There have also been more general issues with the practical implementation of the legal reforms and there is anecdotal evidence that the shift in thinking regarding legal capacity and the need for systems of supported decision-making has not fully taken place at a professional or community level, despite efforts on the part of the healthcare ministry.

In addition, a number of other provisions of the Civil Code mean that the support framework is subject to a number of restrictions which cannot be reconciled with the requirements of Article 12 of the CRPD. For example, if a support beneficiary engages in a transaction which a court has declared requires support and he/she does not obtain the approval of the supporter, that transaction will be deemed to be invalid, unless it is deemed that the support beneficiary "benefits" from the transaction¹³⁶ (i.e. the support beneficiary requires the approval of the supporter if a transaction will result in harm or damage to the support beneficiary). Further, when a beneficiary of support concludes a written transaction with another party, it must also be signed by the supporter.¹³⁷ The support arrangement may only be terminated if the beneficiary of support dies or "the reason for which the support was established ceases to exist".¹³⁸ A request to terminate the support arrangement may be submitted by the support beneficiary to the court.¹³⁹

135. Civil Code of Georgia, Section Three: "Guardianship, Custodianship, and Support", Law of Georgia No 3339 of 20 March 2015, Article 1293(4).

136. Civil Code of Georgia, Section Three: "Title Two: Transactions, Chapter One: General Provisions", Law of Georgia No 3339 of 20 March 2015, Article 58(1).

137. Civil Code of Georgia, Section Three: "Title Two: Transactions, Chapter One: General Provisions", Law of Georgia No 3339 of 20 March 2015, Article 69(3).

138. Civil Code of Georgia, Section Three: "Guardianship, Custodianship, and Support", Law of Georgia No 3339 of 20 March 2015, Article 1304(1).

139. Civil Code of Georgia, Section Three: "Guardianship, Custodianship, and Support", Law of Georgia No 3339 of 20 March 2015, Article 1301(2).

Pilot projects on supported decision-making

Pilot projects on supported decision-making have been carried out in a number of member States, as well as in Israel (which has observer status with the Parliamentary Assembly of the Council of Europe). They have occurred in two contexts:

- As part of a process of law reform.
- In order to “build the case” for law reform.

Czech Republic

As already stated above, supported decision-making has formed part of the Czech Republic’s Civil Code since 2014. The Czech NGO QUIP (“Quality in Practice”), in co-operation with another civil society organisation, inclusion Czech Republic, have been conducting a pilot project on supported decision-making entitled “Black and White” which began in January 2012 and concludes in February 2017. It combines legal expertise and fieldwork conducted with people with intellectual and psychosocial disabilities and their families in order to create circles of support for legal capacity.¹⁴⁰ It intends to develop a national model of circles of support so that the project outcomes will be sustainable into the future, raise awareness of the requirements of Article 12 of the CRPD as well as the potential alternative models of exercising legal capacity and to support capacity-building of activists to promote supported decision-making. It has also engaged in strategic litigation.

At the beginning of the project, a synthesis report entitled “Black Book” was compiled. This was an analysis of individual case studies which detailed the position which persons with intellectual and psychosocial disabilities found themselves in relation to their legal capacity (this was prior to the 2014 reforms of the Civil Code). This report was intended to raise awareness about the problems and the support needs of people with intellectual and psychosocial disabilities, as well the myths concerning current guardianship law among people with intellectual and psychosocial disabilities, their families and professionals (public guardians, doctors, judges, school and social services staff).¹⁴¹

The project also worked with 27 individuals and their social workers in order to create circles of support based on the principles of person-centred

140. “Black and White”, QUIP. <http://www.kvalitavpraxi.cz/en/projects/current-projects/black-and-white/> (last accessed 16 November 2016).

141. “Black and White” – Choices: A platform on supported decision-making. <http://www.right-to-decide.eu/2014/10/black-and-white/> (last accessed 19 November 2016).

planning. This part of project led to the development of a Guidebook which can be used by social workers to assist in creating circles of support.

The project also involved in the drafting of the first “agreement on support in decision-making” under the reformed Civil Code which was subsequently approved by the court. The project was also invited to provide training to judges on the reforms.

For the final part of the project, a “White Book” has been developed which comprises good practice examples and recommendations for the implementation of Article 12 of the CRPD based on the experiences gained during the project.

Latvia

Between September 2014 and April 2016, the Resource Centre for People with Mental Disability “ZELDA” (RC ZELDA) implemented its “Pilot Project for Introducing Supported Decision-Making in Latvia”.

The pilot project was carried out in the context of legal reforms which were underway in Latvia as a result of the Constitutional Court’s decision in *J.F.*¹⁴² in 2010 which concerned the provisions of Latvia Civil Law which provided that the legal capacity of persons with a mental disability who were unable to represent themselves or manage their property could be revoked. Their legal capacity could only be recovered if the person was deemed to have “recovered”. Referring to both Article 12 of the CRPD and the decision of the European Court of Human Rights in *Shtukurov*, the court found that the State had a duty to take an individual approach to questions of restriction of legal capacity, ensuring that “the most appropriate restriction for each particular case” was applied. Given that the existing legal framework did not recognise “borderline situations” and only allowed for full legal incapacitation of an individual was not consistent with Latvia’s human rights obligations.¹⁴³ Given that it was possible to impose less restrictive measures to achieve the aim of protecting the rights and interests of persons with mental disabilities, the court found that the current legal framework was unconstitutional.¹⁴⁴ It declared that the relevant provisions would be invalid from 1 January 2012, giving the government a year to carry out the necessary reforms.

142. Judgment of the Constitutional Court, Case No. 2010-38-01. Announced on 27 December 2010.

143. Judgment of the Constitutional Court – para. 12.

144. Judgment of the Constitutional Court – para. 13.

Ultimately, transitional regulations of the Civil Code came into force on 13 February 2012 and these were effective until the substantive amendments to the law entered into force on 1 January 2013. The new laws provided for powers of attorney, temporary guardianship (for emergency situations while the needs of the individual are being assessed and restriction of legal capacity (as a last resort where less restrictive measures would not be appropriate or have previously proven to be unsuitable). Such restrictions must be absolutely necessary and should only apply to particular areas of decision-making. Article 358¹ Part 2 of the Civil Law stipulates that “in assessing a person’s capabilities, it must firstly be determined whether and to what extent the guardian and the ward act jointly, and only then whether and to what extent the guardian acts independently. Three forms of legal capacity restrictions can therefore exist:

- In a specified area the person acts independently.
- In a specified area the person acts jointly with the guardian (co-decision making).
- In a specified area the guardian acts independently (substituted decision-making).¹⁴⁵

The aim of the project was to introduce supported decision-making in order to avoid the restriction of legal capacity. The project involved creating a conceptual model of supported decision-making, drafting proposals for legislative amendments and exchanging information with Czech and Bulgarian partners who were introducing similar support services. Training was also given to experts in person-centred thinking and planning. The first support providers were trained. Direct support in decision-making was provided to 28 persons with mental disabilities and consultations were given to 55 family members/support providers. Ultimately, a handbook on supported decision-making was published in both Latvian and English and a conference entitled “Introduction of the Supported Decision-Making in Latvia and Experience of Other Countries” was held.¹⁴⁶

The pilot project provided support in the legal area (applications to court, support for victims in communication with police, communication with employers regarding labour law issues, renewal of official documents), the

145. Resource Centre for People with Mental Disability “ZELDA” (RC ZELDA), Handbook – First Steps in Implementation of Supported Decision-Making in Latvia, Riga (April 2016), p.23.

146. Resource Centre for People with Mental Disability “ZELDA” (RC ZELDA), Handbook – First Steps in Implementation of Supported Decision-Making in Latvia, Riga (April 2016), p.2.

financial sphere (communication with official authorities regarding tax, budget planning and money management), daily living skills (communication/literacy, cooking, accommodation, psychological support, education opportunities, job hunting), health care issues (finding an appropriate health care professional, communication with the National Health Service regarding reimbursement of medicines, psychological support for individuals who were voluntarily admitted to psychiatric hospitals).¹⁴⁷

As a result of the project, RC ZELDA has prepared recommendations for changes to the legal capacity legislation in Latvia in order to provide for alternative mechanisms of support that would be adapted to an individual's needs. RC ZELDA has also requested that the Ministry of Justice create a working group which would develop the necessary amendments.¹⁴⁸

Bulgaria

Two pilot projects were carried out in Bulgaria between October 2012 and September 2013 as part of a larger "Next Step Program" (October 2012 – May 2014), the aim of which was to assist in the practical implementation of models of supported decision-making in the Bulgaria.

The first project was entitled "Paradigm shift in the context of Article 12 from UNCRPD. Searching solutions for people with mental health problems", as was carried out by the Global Initiative on Psychiatry – Sofia (GIP – Sofia) in partnership with the National Organization of the Users of Mental Health Services (NOUMHS). The project sought to test approaches for supported decision-making for persons with mental health problems. The activities are implemented in Sofia and Blagoevgrad and include at least 20 persons.

The second project, "Empowerment of people with disabilities", was carried out by the Bulgarian Association of Persons with Intellectual Disabilities (BAPID). The project sought to test approaches for supported decision-making for at least 20 persons with intellectual disabilities. It is implemented in the cities of Sofia and Vidin.

147. RC ZELDA has completed the Pilot Project on Implementation of the Supported Decision-Making in Latvia", <http://zelda.org.lv/en/news/rc-zelda-has-completed-the-pilot-project-on-implementation-of-the-supported-decision-making-in-latvia-2467> (last accessed 20 November 2016).

148. RC ZELDA has completed the Pilot Project on Implementation of the Supported Decision-Making in Latvia", <http://zelda.org.lv/en/news/rc-zelda-has-completed-the-pilot-project-on-implementation-of-the-supported-decision-making-in-latvia-2467> (last accessed 20 November 2016).

The Bulgarian Center for Not-for-Profit Law (BCNL) co-ordinated the “Next Step Program” and was responsible for coordinating the project partners as well as for the advocacy and analysis element of the project which would be the basis for recommendations for legal frameworks and regulations which would ensure respect for the right to legal capacity of person with intellectual disabilities and mental health problems.

The actors in the two projects comprised:

- The supported person – these were individuals who already had someone who had taken over decision-making for them or who were at risk of someone doing so, without any assessment having been done regarding their ability to act and make decisions themselves.
- Supporters – these were individuals who would empathize with the supported person, were respected by them and were trusted by them. The supporters were not professionals and were not financially compensated for their work. The network of supporters was dynamic and subject to change. Supporters needed to be able to understand the way in which the supported person communicated, be able to interpret the person’s will and preferences and ensure that those were implemented.
- Facilitators – facilitators were charged with supporting the person in the process of establishing the network as well as facilitating the relationship between the supported person and their supporters.¹⁴⁹ They were generally trained professionals.

An evaluation process would then be carried out to assess the support needs of the individual, their environment and how supported decision-making could be incorporated into that environment. An “algorithm” was then applied which involved the following stages which ensured that the support arrangement complied with Bulgarian law:

- a. Identification of the person who requires support.
- b. Identification of a facilitator.
- c. Creation of a support network – identification of both who the supporters are and how they will support the individual.
- d. Drawing up of a personal plan by the supported person with the assistance of his supporters and the facilitator which identified short and long term

149. Bulgarian Center for Not-for-Profit Law (BCNL), “Supported Decision-Making or how people with intellectual disabilities or mental health problems can live independent lives” (2014). Available at <http://inclusion-international.org/wp-content/uploads/2014/01/PodkrepEN.pdf> (last accessed 20 November 2016).

goals, the relevant supporters and which elements of the wider community might need to be involved in order to achieve those goals. Regular meetings of all three parties would also be agreed.

- e. Implementation of the personal plan through supported decision-making.

There was also the possibility for the person who required support to create an “anti-crisis” plan with the assistance of a facilitator. In these plans the person could express his/her will and preferences, identify “triggering events” in which a trustee was authorised to make decisions on the person’s behalf as well as identifying when such “trusteeships” should be terminated (i.e. when the crisis was over) and the trustee would no longer be authorised to make decisions on that person’s behalf. These anti-crisis plans proved particularly useful for people with mental health difficulties who were less likely to have strong support networks.

In the first pilot project, “Paradigm shift in the context of Article 12 from UNCRPD. Searching solutions for people with mental health problems”, the focus was on extending the circle of support for the individual. Those supporters would provide assistance in all domains of life. The supporters also got to know the individual well enough to be able to help them identify situations in which they may be at risk of a mental health crisis and assist them in that regard. There was also the opportunity for individuals to participate in mutual support groups which included others with mental health difficulties. There was then the potential for members of that mutual support group to become part of each other’s support networks.

In the second pilot project, “Empowerment of people with disabilities”, the creation of schemes of supported decision-making were based on four key questions:

- *Who am I?* – This would lead to the development of a “personal profile” which addressed the key areas of that person’s life, e.g. residence, education, health, leisure time, relationships and emotional needs. The goal of the personal profile was to be a “driver for change” in the individual’s life by gradually increasing the resources of the supporting network .
- *Who do I trust?* – The response to this question aided the creation of support networks.
- *What is my vision for myself in the future?* – A “personal life plan” was created by the individual regarding his/her wishes for their future.

- *How can I achieve it?* – This question identified the appropriate supports necessary to achieve the goals set out in the “personal life plan”.¹⁵⁰

Out of these two pilot projects, a tangential project, entitled “Article 12 – Next Step” was carried out by the BCNL. It comprised advocacy, in the form of proposals for law reform which would facilitate supported decision-making, as well as research outputs regarding changes in attitudes based on the two pilot projects and the gathering of information on the results of the two projects.¹⁵¹

Another outcome of the larger program was the production of a Cost Benefit Analysis of Supported Decision-Making¹⁵² which provided evidence that supported decision-making (as alternative to guardianship) is beneficial not just due to the fact that it increases the quality of life of persons with disabilities and moves Bulgaria closer towards compliance with its obligations under the CPRD, but that it is also beneficial and preferable to the removal of legal capacity from an economic perspective.¹⁵³ The analysis emphasised that the economic benefit should always be secondary to the primary purpose of supported decision-making (i.e. improved quality of life, respect for human rights, independent living and inclusion in the community of people with disabilities). It found that supported decision-making contributes to the inclusion in society of persons with disabilities and an improvement in their employment opportunities. The benefits for both the individual and the society in terms of financial value per year (when compared with guardianship) were:

- An increase of annual person’s income of 3 230 BGN (59%).¹⁵⁴

150. Bulgarian Center for Not-for-Profit Law (BCNL), “Supported Decision-Making or how people with intellectual disabilities or mental health problems can live independent lives” (2014). Available at <http://inclusion-international.org/wp-content/uploads/2014/01/PodkrepEN.pdf> (last accessed 20 November 2016), p. 9.

151. Bulgarian Center for Not-for-Profit Law (BCNL), “Supported Decision-Making or how people with intellectual disabilities or mental health problems can live independent lives” (2014). Available at <http://inclusion-international.org/wp-content/uploads/2014/01/PodkrepEN.pdf> (last accessed 20 November 2016), p. 11.

152. Bulgarian Center for Not-for-Profit Law (BCNL), “Cost Benefit Analysis of Supported Decision-Making” (Sofia, 2014). Available at http://bapid.com/bapid/wp-content/uploads/2014/08/SDM_report_engED.pdf (last accessed 20 November 2016).

153. Bulgarian Center for Not-for-Profit Law (BCNL), “Cost Benefit Analysis of Supported Decision-Making” (Sofia, 2014), p. 4.

154. Bulgarian Center for Not-for-Profit Law (BCNL), “Cost Benefit Analysis of Supported Decision-Making” (Sofia, 2014), p. 64.

- A 66% annual saving for society of 5 012 BGN per person when that person is receiving the minimum wage.¹⁵⁵

Israel

The Parliament of Israel, the Knesset, was granted observer status with the Parliamentary Assembly of the Council of Europe on 2 December 1957.¹⁵⁶

Bizchut (the Israeli Human Rights Center for People with Disabilities), carried out a pilot project on supported decision-making entitled “Article 12 – Supported Decision Making”.¹⁵⁷ It was intended to “bring about a change in Israeli society and its attitude towards persons with disabilities”. The pilot project included participants with a wide variety of disabilities (psychosocial, intellectual, autism spectrum), some of whom also had physical disabilities. A majority of the participants were under guardianship at the beginning of the pilot project.

Support meetings were held with the participants, with an average of 30 meetings with each. The project also included an “assessment study” which analysed to what extent the support process resulted in an increase in the participants’ ability to make decisions independently. A research model was designed to identify key indicators regarding independent decision-making which were taken at the beginning and end of the pilot project. The assessment study also comprised interviews with the participants, their supporters and their guardians (where applicable).¹⁵⁸

The assessment process concluded that the support model utilised in the project significantly advanced the participants’ ability to understand the decision-making processes, make decisions and to implement those decisions¹⁵⁹,

155. Bulgarian Center for Not-for-Profit Law (BCNL), “Cost Benefit Analysis of Supported Decision-Making” (Sofia, 2014), p. 63.

156. Council of Europe, “Israel // Observer to the Parliamentary Assembly” <http://www.coe.int/en/web/portal/israel> (last accessed 28 November 2016).

157. Bizchut, The Israeli Human Rights Center for People with Disabilities, “Article 12 Supported Decision Making Pilot: Summary of Assessment Study Findings (December 2015). http://bizchut.org.il/en/wp-content/uploads/2016/03/pilot_report_ENG.docx (last accessed 29 November 2016).

158. Bizchut, The Israeli Human Rights Center for People with Disabilities, “Article 12 Supported Decision-Making Pilot: Summary of Assessment Study Findings (December 2015). http://bizchut.org.il/en/wp-content/uploads/2016/03/pilot_report_ENG.docx (last accessed 29 November 2016), p.4.

159. Bizchut, The Israeli Human Rights Center for People with Disabilities, “Article 12 Supported Decision-Making Pilot: Summary of Assessment Study Findings (December 2015). http://bizchut.org.il/en/wp-content/uploads/2016/03/pilot_report_ENG.docx (last accessed 29 November 2016), p.4.

irrespective of the nature of their disability. The study also noted that guardians who were family members felt that they obtained a better understanding of:

- What their role was in assisting the family member with a disability.
- Knowledge and tools as to how to steer the individual the subject of guardianship toward more independent decision-making
- Information regarding a variety of possible solutions that can meet the needs and wants of the family member who has a disability.¹⁶⁰

The conclusions which emerged out of the pilot project included – the need for similar pilot projects of longer duration, the need to vary the cohort of participants in terms of the nature and severity of their disability, the need to continue development of the supported decision-making model (supporter’s role, guidance for supporters) and the need to investigate further the needs of family members who are assisting/supporting persons with disabilities (recognising their potential to play an important role in achieving independent decision-making and even the removal of guardianship orders).¹⁶¹

Jurisdiction outside of the Council of Europe – Australia

Pilot projects on supported decision-making are also being carried out in a number of Australian States. The operation of the National Disability Insurance Scheme (NDIS) is one of the drivers for such projects as it tries ensuring that people with disabilities have more control in choosing their services and supports.

Further, the Australian Law Reform Commission carried out a review of equal recognition before the law and legal capacity for people with disabilities in 2014¹⁶² which included consultations with stakeholders. That review concluded that the legal frameworks at national, state and territorial level should be reformed in order to ensure that supported decision-making is encouraged,

160. Bizchut, The Israeli Human Rights Center for People with Disabilities, “Article 12 Supported Decision-Making Pilot: Summary of Assessment Study Findings (December 2015). http://bizchut.org.il/en/wp-content/uploads/2016/03/pilot_report_ENG.docx (last accessed 29 November 2016), p. 5.

161. Bizchut, The Israeli Human Rights Center for People with Disabilities, “Article 12 Supported Decision-Making Pilot: Summary of Assessment Study Findings (December 2015). http://bizchut.org.il/en/wp-content/uploads/2016/03/pilot_report_ENG.docx (last accessed 29 November 2016), p. 6-7.

162. Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124), 24 November 2014. Available at <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124> (last accessed 14 December 2016).

representative decision-makers are appointed only as a last resort and the will, preferences and rights of persons direct decisions that affect their lives.¹⁶³

In New South Wales the Public Guardian is working with the Trustee and Guardian on a project which aims to build the skills of people who need help to make financial decisions and provide training to service providers to help promote and deliver supported decision-making.¹⁶⁴

In Victoria, the OVAL project was run by the Office of the Public Advocate for 12 months from September 2015. It was a collaborative supported decision-making project with Victorian Advocacy League for Individuals with Disability Inc. (VALID). The aim of the project was to recruit, train and match volunteer supporters in a particular region with 60 socially isolated people with decision-making disabilities who wish to receive support with decision-making about their NDIS support plan.¹⁶⁵ The project was intended to develop a “model of practice” for supported decision-making.

An evaluation of the supported decision-making project which was carried out in South Australia between 2010 and 2012 concluded that there were specific benefits to most of the participants. These were seen in their increased confidence in themselves and in their decision-making. There was evidence of improvement in decision-making skills. Participants described the growth in their support networks. Many participants reported that they felt more in control of their lives. Supporters also reported positive changes – increases in supported decision-making in the lives of the participants, changes to the way they considered decision-making with the participants, and positive improvements in the nature and quality of their interpersonal relationships.¹⁶⁶

Strategic Litigation within member States

The crucial role of strategic litigation in driving the reform movement for legal capacity can be seen in a number of Council of Europe member States. It is

163. Ibid, Recommendation 3-1.

164. New South Wales Public Guardian, “Supported Decision-Making Project 2016: Factsheet”, <http://www.publicguardian.justice.nsw.gov.au/Documents/SDM%20Project%20Factsheet%202016.pdf> (last accessed 18 November 2016).

165. Office of the Public Guardian – Victoria, “Supported Decision-Making – Areas of Action”, <http://www.publicadvocate.vic.gov.au/advocacy-research/supported-decision-making> (last accessed 18 November 2016).

166. Office of the Public Advocate – South Australia, Evaluation of the Supported Decision-Making Project (November 2012), http://www.opa.sa.gov.au/files/batch1376447055_final_supported_decision_making_evaluation.pdf (last accessed 30 November 2016).

clear that member States courts are becoming increasingly alive to the requirements of Article 12 of the CRPD and are re-examining their national legal frameworks in that context.

Georgia

In Georgia, the Coalition for Independent Living, a disability NGO, has established two legal clinics – one in the state capital, Tbilisi and one in West Georgia. These clinics have actively sought to identify cases of discrimination against persons with disabilities by conducting interviews with persons with disabilities and raising awareness of the existence of the Clinics by way of public service announcements and social media profiles. These clinics have “legal support teams” which include lawyers, law students and disability advocates who have been trained on the normative content of the CRPD and litigation practices and are tasked with identifying instances in which the CRPD can be relied on to enforce rights. The training also included site visits to psychiatric institutions, “special” schools and workshops where persons with disabilities are employed so as to encourage real engagement and understanding of the lives of persons with disabilities in Georgia.

The clinics have engaged in a number of strategic litigation cases, some of which have involved issues of legal capacity. In one case which is ongoing, a large bank, which was contracted by the state to provide banking services to people with disabilities, had been treating persons with disabilities as if they were legally incapacitated – not accepting their signatures for authorisation and instead requesting evidence of powers of attorney from the individual’s support person/representative.

Specifically on the issue of legal capacity, the clinic has been involved in a case where an individual who is currently under guardianship wishes to have his legal capacity restored. His guardian opposes this. The court in Georgia has refused to review the individuals’ complaint as he is currently under guardianship. However, the aforementioned reforms of Georgia’s legal capacity law’s mean that persons who have been deprived of their legal capacity many now apply to court directly for its restoration.

The legal support groups in the clinics also conduct public education training, including for law students, local decision-makers, persons with disabilities and police officers. A number of training session have also been carried out with lawyers and the Georgia Bar Association (the official body for lawyers in Georgia) has accredited a disability rights training module designed by the

legal support group and this now forms part of the educational programme for lawyers in Georgia.

The Coalition is currently attempting to organise similar training sessions for members of the judiciary.

Lithuania

The Human Rights Monitoring Institution, based in Vilnius, along with the UK NGO “Interights”, represented D.D. in her application to the European Court of Human Rights.¹⁶⁷ The applicant’s legal capacity had been removed upon the request of her adoptive father in 2000. She was eventually placed under guardianship. Her guardian was initially her psychiatrist, then her father and finally, the director of the care home into which she was eventually placed on the application of her father. The applicant did not participate in any of the decisions regarding her legal capacity or her placement in the home.

The Court found that the applicant’s placement in the social care home amounted to a deprivation of liberty due to the fact that the home had a complete control over her treatment, care, accommodation and freedom of movement. The Court found that his detention was lawful as her guardian had consent to it. It did hold, however, that Article 5(4) of the ECHR had been breached as D.D. had no means by which to have her detention reviewed. The Court also found a breach of Article 6(1) of the ECHR due to the manner in which the guardianship proceedings had been conducted. D.D.’s legal capacity was subsequently restored by the district court in Lithuania.

As a result of the decision of the European Court of Human Rights, reforms to the system of legal capacity in Lithuania were passed in 2015 and came into effect on 1 January 2016. The law now provides that a person with a mental or intellectual disability can only be found legally incapable in certain areas and that they may act independently outside of that specific field. Previously, such a “partial guardianship” option was only available to individuals with addictions.

It should be noted, however, that while the new law requires the court to determine precisely which areas the person is to be declared incapable, there is no prohibition on the court declaring him/her as incapable in all areas of life. In the case of such a declaration, this would result in *de facto* full legal incapacity.

167. *D.D. v. Lithuania* (Application No. 13469/06, judgment of 14 February 2012).

In the areas where they are found legally incapable, the person is required to take decisions jointly with a “caretaker” who is charged with “assisting” them to make decision (and whose consent is required in order to enter into agreements). There is now also an obligation on the “Incapacitated Persons’ Status Review Commissions’ to carry out an annual review of a person’s incapacity.

The individual has a right to attend any court proceedings in relation to his/her legal capacity and the right to free legal aid has been expanded to include these types of hearings. The person subject to partial guardianship also has the right to request the removal of their guardian/caretaker.

In the period between 1 January 2016 and 30 June 2016, out of 545 cases, 304 court decisions were adopted granting requests to declare person legally incapable. That amounts to more than 55% of the total requests.

The legal reforms also provide for the possibility for individuals to make supported decision-making agreements and advance directives, although there is concern in Lithuanian civil society that there is a lack of training to ensure effective implementation of these provisions. This is concern is supported by the fact that from 1 January 2016 to the date of writing of this Study (late December 2016), only 7 advanced directives and 3 supported decision-making agreements have been registered.

In its Concluding Observations on Lithuania in May 2016, the CRPD Committee stated its deep concern at the legal provisions permitting the denial or restriction of the legal capacity of persons with disabilities contrary to Article 12 which limit the 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. It referred to its General Comment No. 1 (2014) on equal recognition before the law and recommended that the Lithuania repeal all “laws, policies and practices permitting guardianship and trusteeship for adults with disabilities and replace regimes of substituted decision-making with regimes of supported decision-making.”¹⁶⁸

168. Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Lithuania, 11 May 2016, U.N. Doc. CRPD/C/LTU/CO/1, para. 25-26. Available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhssZC9ptKX1BBEFvI4q2fNHbisloJQJExObNo%2b164VPCFXgGIA71mMejw37A6S9N9XPufu0q0d%2bKAUo0n7OoJHqx9ZI19RGvzh%2fHa4npWrhh3Z> (last accessed 29 November 2016).

Bulgaria

In 2014, the Bulgarian Constitutional Court heard an appeal from the Bulgarian Ombudsman in accordance with his powers to challenge a law which violates the rights and freedoms of citizens.¹⁶⁹ The Ombudsman challenged the constitutionality of certain provisions of the Bulgarian Persons and Family Act (1949) which set out the legal consequences of an individual being placed under guardianship (either full or partial). In his appeal, the Ombudsman specifically cited provisions of the CRPD as evidence of the invalidity of the regime of guardianship which exists in Bulgaria as well as the decision of the European Court of Human Rights in *Stanev v. Bulgaria*¹⁷⁰. The Court held that a regime of substitute decision-making was necessary in light of specific provisions of the Bulgarian Constitution which States that persons with mental disabilities “shall receive special protection from the State and society”.¹⁷¹ The Constitutional Court interpreted the system of guardianship as giving effect to this provision as it is intended to protect people with mental disabilities from performing legal actions that could either their own interests or those of third parties. It is however, worthy of note, that the Persons and Family Act predates the Bulgarian Constitution, which was only adopted in 1991.

In its decision, the Constitutional Court also concluded that the system of guardianship was both the only possible form of protection for persons with mental disabilities as well as being the most effective approach to achieve this aim. It also stated its concern that a declaration of unconstitutionality would give rise to a significant gap in the legal status of persons with disabilities and create legal uncertainty. This was due to the fact that it was not open to the Bulgarian court to declare the provision invalid/unconstitutional while also granting a period of “grace” to the parliament in order for it to enact replacement legislation,¹⁷² which (as seen in previous examples) has been a possibility for other state constitutional courts.

The decision of the Constitutional Court is to be contrasted with the approach of the European Court of Human Rights in *Stanev v. Bulgaria*¹⁷³ in 2012 and

169. Constitutional Court of the Republic of Bulgaria, Decision of the Constitutional Court No. 12 / 2014 cc No. 10 / 2014.

170. *Stanev v. Bulgaria* (Application No. 36760/06 [2012] ECHR 46).

171. Constitution of the Republic of Bulgaria, Article 51(3).

172. Bulgarian Center For Not-For-Profit Law Foundation (BCNL), Think Tank on a new formula for the right to legal capacity – Collection of materials (18 – 21 September 2016, Borovetz, Bulgaria) *Guardianship in the practice of European Constitutional Courts* by Radoslava Yankulova, p. 104.

173. *Stanev v. Bulgaria* (Application No. 36760/06 [2012] ECHR 46).

*Stankov v. Bulgaria*¹⁷⁴ in 2015. In *Stanev*, the applicant had, amongst other rights violations, been placed under partial guardianship and was not permitted access to the courts in order to seek to have his legal capacity restored. The Court concluded that Article 6(1) of the ECHR must be interpreted as guaranteeing in principle that anyone who has been declared partially incapable has direct access to a court to seek restoration of his or her legal capacity".¹⁷⁵ It also noted "the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible", with specific reference to the CRPD following.¹⁷⁶ This principle of the right of persons who have been declared legally incapable to access to the courts in order to review that declaration was affirmed by the Court in *Stankov*.

As will be seen in the next section, the momentum for reform of Bulgaria's guardianship laws has come from Parliament rather than the judiciary.

174. *Stankov v. Bulgaria* (Application No. 25820/07, judgment of 17 March 2015).

175. *Stanev v. Bulgaria* (Application No. 36760/06 [2012] ECHR 46, para. 245).

176. *Stanev v. Bulgaria* (Application No. 36760/06 [2012] ECHR 46, para. 244).

Good practice examples from member and observer States

Ireland

As mentioned above, Ireland has recently undergone a process of reform of its legal capacity laws. The Assisted Decision-Making (Capacity) Act¹⁷⁷ was signed into law on 30 December 2015, but the majority of the substantive sections have not yet been brought into force.

The new law can be seen as progressive in a number of areas, including the absence of any reference to “best interests” with the guiding principles instead stating that in making an intervention, the intervener shall:

- a. permit, encourage and facilitate, in so far as is practicable, the relevant person to participate, or to improve his or her ability to participate, as fully as possible, in the intervention,
- b. give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable,
- c. take into account
 - i. the beliefs and values of the relevant person (in particular those expressed in writing), in so far as those beliefs and values are reasonably ascertainable, and
 - ii. any other factors which the relevant person would be likely to consider if he or she were able to do so, in so far as those other factors are reasonably ascertainable, ...¹⁷⁸

177. Assisted Decision-Making (Capacity) Act, 2015. Available at <http://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/html> (last accessed 16 November 2016).

178. Assisted Decision-Making (Capacity) Act, 2015, section s. 8(7).

As well as “assisted decision-making agreements”, which were analysed in an earlier section of this study, four other categories of “support” are provided for under the new legislation: co-decision-making, representative decision-making, advance healthcare directives and powers of attorney. It is important to note, however, that the ability to avail of these mechanisms is, in various ways, dependent on an assessment of the “mental capacity” of the individual, based on a functional concept of decision-making capacity.¹⁷⁹

Co-decision-making

As with assisted decision-making agreements, in a co-decision-making the individual (“appointer”) who requires support may choose to make a “co-decision-making agreement” with a “co-decision maker” who will jointly make one or many decisions regarding the person’s personal welfare, their property and affairs.¹⁸⁰ A co-decision-making agreement must be registered with the Director of the Decision Support Service.¹⁸¹

Importantly, a co-decision-maker cannot be the owner or registered provider of a designated centre or mental health facility in which the person who intends to appoint him/her resides.¹⁸² A co-decision-maker must instead be a relative or friend of the appointer who has had such personal contact with the appointer over such period of time that a relationship of trust exists between them and is able to perform his or her functions under the co-decision-making agreement.¹⁸³ The functions of a co-decision-maker are to:

- a. advise the appointer by explaining relevant information and considerations relating to a relevant decision,
- b. ascertain the will and preferences of the appointer on a matter the subject of, or to be the subject of, a relevant decision and assist the appointer with communicating the appointer’s will and preferences,
- c. assist the appointer to obtain the appointer’s relevant information,
- d. discuss with the appointer the known alternatives and likely outcomes of a relevant decision,
- e. make a relevant decision jointly with the appointer, and

179. Assisted Decision-Making (Capacity) Act, 2015, section 3.

180. Assisted Decision-Making (Capacity) Act, 2015, section 16.

181. Assisted Decision-Making (Capacity) Act, 2015, section 22.

182. Assisted Decision-Making (Capacity) Act, 2015, section 18(1)(f).

183. Assisted Decision-Making (Capacity) Act, 2015, section 17(2).

- f. make reasonable efforts to ensure that a relevant decision is implemented as far as practicable.¹⁸⁴

A co-decision-maker makes a decision jointly with the appointer and any documents giving effect to that decision must be signed by both the appointer and the co-decision-maker.¹⁸⁵ Co-decision-makers must therefore acquiesce to the wishes of the appointer regarding a decision and cannot refuse to sign a document giving effect to that decision “unless it is reasonably foreseeable that such acquiescence or signature ... will result in serious harm to the appointer or to another person.”¹⁸⁶ The co-decision-maker does, therefore, have the power to subvert the will and preferences of the appointer in certain limited circumstances, undermining its potential to be fully compliant with Article 12 of the CRPD.

Representative decision-making

Decision-making representatives, although couched in the language of “will and preferences”, are effectively guardians charged with making decisions for person deemed to lack capacity. The legislation States that they should only be appointed where less restrictive options of “assistance” would not be suitable or as beneficial.¹⁸⁷

The Act provides that an application may be made to the court for the appointment of a decision-making representative. The person who is the subject of the application may have a “court friend” appointed who will assist them with the process.¹⁸⁸ When making a decision-making representation order, the court must ensure that the powers conferred on the representative are “as limited in scope and duration as is necessary in the circumstances having regard to the interests of the relevant person the subject of the order.”¹⁸⁹

When considering the suitability of a person to be a decision-making representative, the court must have regard to the following:

- a. the known will and preferences of the relevant person;
- b. the desirability of preserving existing relationships within the family of the relevant person;

184. Assisted Decision-Making (Capacity) Act, 2015, section 19(1).

185. Assisted Decision-Making (Capacity) Act, 2015, section 23(3).

186. Assisted Decision-Making (Capacity) Act, 2015, section 19(5).

187. Assisted Decision-Making (Capacity) Act, 2015, section 38(1).

188. Assisted Decision-Making (Capacity) Act, 2015, section 100.

189. Assisted Decision-Making (Capacity) Act, 2015, section 38(9).

- c. the relationship (if any) between the relevant person and the proposed representative;
- d. the compatibility of the proposed representative and the relevant person;
- e. whether the proposed representative will be able to perform the functions to be vested in him or her;
- f. any conflict of interest.¹⁹⁰

The person themselves, however, has no right to make suggestions regarding a suitable representative. The court is not obliged to appoint a family member or friend of the individual. All that is required is that the relevant person has “a *bona fide* interest in the welfare of a relevant person”.¹⁹¹ The representative may therefore be selected from a panel administered by the Decision Support Service.¹⁹² No limits exist on how many people such panel members may act as representatives for or how often they must meet with the individual the subject of the court order.

As with co-decision-making, more than one person may be appointed.¹⁹³ A decision-making representative may be appointed to make decisions in respect of the individual’s person welfare or property and affairs, or both. The decision-making representative must submit a report to the Director of the Decision Support Service regarding the performance of their functions every twelve months.¹⁹⁴

Advance healthcare directives

Advance healthcare directives (“living wills”) are also provided for under the new legislation (although the individual must be deemed to have sufficient capacity in order for the directive to be valid). Such directives allow a person to set out their will and preferences concerning treatment decisions that may arise in respect of him or her in the future.¹⁹⁵ While advance healthcare directives can be applicable to decisions in relation to both physical and mental health, a notable exception is where the individual is subject to involuntary treatment under the Mental Health Act (2001) and/or under the Criminal Law (Insanity)

190. Assisted Decision-Making (Capacity) Act, 2015, section 38(5).

191. Assisted Decision-Making (Capacity) Act, 2015, section 36(1).

192. Assisted Decision-Making (Capacity) Act, 2015, section 38(7).

193. Assisted Decision-Making (Capacity) Act, 2015, section 38(10).

194. Assisted Decision-Making (Capacity) Act, 2015, section 46(1).

195. Assisted Decision-Making (Capacity) Act, 2015, section 82.

Act (2006).¹⁹⁶ Where the treatment in question is being carried out under these statutory powers, medical professionals are not required to comply with the wishes of the person as set out in their advance healthcare directive.

A number of issues arise regarding the 2015 Act's compliance with the requirements of Article 12 of the CRPD:

- The requirement for a person to pass a function test of mental capacity in order to avail of the supports/assistance provided for under the Act. This is contrary to the requirements of Article 12 (and as expanded upon in the CRPD Committee's General Comment No. 1 of 2014) which requires States to provide support the decision-making capacity of all individuals in order to give effect to their will and preferences.
- The potential for the appointment of a decision-making representative against the wishes of the individual (although such representatives will still be required to act with reference to the will and preferences of the individual).
- The inability of persons subject to involuntary treatment or who are subject to powers under the criminal law insanity provisions to enforce advance healthcare directives.

Bulgaria

A working group on the implementation of Article 12 of the CRPD which had previously been set up by the Ministry of Justice. This was mainly comprised of representatives of nongovernmental organisations. It prepared a concept paper¹⁹⁷ in August 2012. It was published at the end of September 2012,¹⁹⁸ and adopted by the Bulgarian Council of Ministers on 14 November 2012. The concept paper proposed two alternatives to guardianship: supported decision-making and advance directives.¹⁹⁹ These proposals did not progress further however.

196. Assisted Decision-Making (Capacity) Act, 2015, section 85(7)(a).

197. Bulgarian Centre for Non-profit Law, Concept paper for amendments in domestic legislation, related to the implementation of the standards of Art. 12 of the UN Convention for the Rights of Persons with Disabilities, available in Bulgarian at: http://www.bcnl.org/uploadfiles/documents/news_docs/2012/proekt_koncepcia.pdf last accessed 27 November 2016.

198. Bulgaria, Ministry of Justice, News, 27.09.2012, <https://mjs.bg/117/6/> last accessed 27 November 2016.

199. "Access to Justice for Persons with Intellectual Disabilities" (AJuPID), Comparison of legal systems in access to justice for persons with intellectual disabilities (March 2015), p. 32: <http://www.ajupid.eu/en/>.

As mentioned above, a number of cases on the topic of legal capacity were decided by the European Court of Human Rights in respect of Bulgaria. An unsuccessful appeal by the Bulgarian Ombudsman regarding Bulgaria's capacity laws was also heard by the Bulgarian Constitutional Court.

It was in that context that the Ministry of Justice published a revised draft law for public discussion in 2015. Representatives of the Ombudsman as well as a number of civil society organisations participated in the working groups on the development of the texts of the bill. After public consultation in the Spring of 2016, the bill was approved by the Bulgarian Council of Ministers and submitted to the Parliament.²⁰⁰ In September 2016, in accordance with legislative procedure, the relevant parliamentary commissions began to review the text of the bill and it was adopted at first hearing. The next stage of the process is plenary hearing but this has been delayed due to the current political situation in Bulgaria.

The proposed text contains many positive elements which have been based on the experience of BCNL and GIP in the pilot projects on supported decision-making which have been examined earlier in this study. Many elements of the Bill would bring Bulgaria closer to meeting the requirements of Article 12 of the CRPD, including the inclusion of provisions on supported decision-making in the form of both assisted and co-decision-making arrangements, the express prohibition of the undue influence or the substitution of the will of the supported person, respect for the wishes and preferences of the supported person and the express exclusion of directors or staff of residential institutions where the individual resides. The supported person may also terminate the agreement unilaterally at any time.

Unfortunately, some aspects of the Bill are also problematic in the context of Article 12 obligations. For example, the availability of support arrangements such as those outlined above are based on a functional assessment of capacity. The proposed legislation also provides for the ability of the court to order "protection measures" which would amount to a "temporary prohibition" on the supported individual taking a particular action where:

1. All the possibilities for determining support measures have been exhausted, and
2. An urgent decision needs to be made, but the supported person and the supporting person are in serious disagreement.

200. Report to the Office of the High Commissioner for Human Rights by the Office of the Bulgarian Ombudsman (last accessed 27 November 2016).

Such protection measures can be applied to decisions regarding choice of residence, disposition of assets and medical treatment. The retention of such forms of substituted decision-making, even in such limited circumstances, is clearly incompatible with the requirements of Article 12.

Sweden

Plenary guardianship still exists in Sweden (the trustee or "*förvaltare*" system) and the system of support decision-making (the mentor or "*god man*" system), while generally voluntary, can be imposed by a court when, as a result of health problems, an individual is deemed to be unable to make a decision for themselves. Commentators have also voiced concern that the mentor system does not contain sufficient safeguards to ensure that the mentor involves the person concerned in the decision-making process. There is therefore a risk that the "support" in exercising legal capacity becomes a "de facto" mechanism of substitute decision-making.

In parallel with this legal framework, however, Sweden established a nationwide system of Personal Ombudsmen in 2000. This system provides support in decision-making for persons with severe mental or psychosocial disabilities. Personal Ombudsmen (POs) are highly skilled persons who do outreach work and establish trusting relationships with individuals in need of support via a relational model. The lack of "formality" within the service is particularly important when working with individuals with psychosocial disabilities who may be isolated from the rest the community and/or have been institutionalised for a number of years.

POs assist individuals in taking control of their own situation, identify care needs, draw up action plans and ensure that these individuals receive the necessary help. POs have no medical responsibility, nor do they make any decisions in the capacity of an authority; they work only to represent the individuals they assist.²⁰¹ The national scheme had grown out of ten pilot projects which the Swedish government had funded between 1995 and 1998. Of particular note was the PO-Skåne project which was created by an organisation of individuals who had previously used institutional and psychiatric care.

A 2005 study on the national system of POs found that the scheme is profitable in socioeconomic terms due to the fact that individuals with PO support require less care. It found that the PO system reduces costs by approximately

201. Zero Project, "Innovative Policy 2015 on Independent Living: Sweden's Personal Ombudsmen. Available at <http://zeroproject.org/policy/sweden-2/> (last accessed 27 November 2016).

€80,000 per assisted person over a five-year period. The study also found that their psychosocial situation improves. As a result, the National Board of Health and Welfare (*Socialstyrelsen*) began to promote the PO as a new social profession. In 2013 a new regulation entered into force that established permanent funding for the PO system.²⁰² A 2014 report affirmed that Swedish local governments see the PO system as a natural part of the services that are expected to be offered in a municipality.²⁰³

Israel

In March 2016, the Knesset passed a number of amendment to the Israeli Legal Capacity and Guardianship Act (1962).²⁰⁴ It will be recalled that Bizchut (the Israeli Human Rights Center for People with Disabilities) had already carried out a pilot project on supported decision-making.

Previously, the 1962 had provided for both plenary and partial guardianship (with partial guardianship only available for healthcare decisions and property affairs). The criteria for the appointment of a guardian by the court had been whether the individual, either permanently or temporarily, was “unable to look after all or any of his affairs.”²⁰⁵ A guardian was required to act in the individual’s “best interests.” The majority of guardianship orders were of unlimited duration. In most applications for guardianship, the individual the subject of the application was not legally represented.²⁰⁶

The amendments to the legal capacity legislation brought about a number of reforms.²⁰⁷ These included:

- Recognition for supported decision-making. These provisions will come into effect in 2018. The amendment States that the functions of a “decision-making

202. Zero Project, “Innovative Policy 2015 on Independent Living: Sweden’s Personal Ombudsmen. Available at <http://zeroproject.org/policy/sweden-2/> (last accessed 27 November 2016).

203. Zero Project, “Innovative Policy 2015 on Independent Living: Sweden’s Personal Ombudsmen. Available at <http://zeroproject.org/policy/sweden-2/> (last accessed 27 November 2016).

204. Capacity and Guardianship (Amendment No. 18) Law, 5776-2016.

205. Legal Capacity and Guardianship Act (1962), s. 33(a)(4). The Act also provided for a declaration of incompetence where “a person who, by reason of mental illness or a defect of mind is incapable of looking after his affairs” (s. 8).

206. Guardianship by Country: Resource for Second World Congress on Adult Guardianship – Israel. http://www.international-guardianship.com/pdf/GBC/GBC_Israel.pdf (last accessed 28 November 2016).

207. Bizchut, “Introduction to the new Legal Capacity and Guardianship Law”, <http://bizchut.org.il/en/wp-content/uploads/2016/04/Introduction-to-new-guardianship-law.docx> (last accessed 29 November 2016).

supporter” will be to assist a person in obtaining information from any entity, to assist them in understanding the information in order to make decisions in simple and clear language that is understandable to him/her and to assist the person in implementing his decisions and in exhausting his rights.²⁰⁸ A decision-making supporter is prohibited from making decisions on behalf of the person they are supporting.²⁰⁹

- Provision for enduring powers of attorney which cover property and personal affairs (including medical matters).
- Reduction of the instances in which guardians will be appointed to cases in which it is necessary to prevent harm to the person in question and when no less restrictive measure is available.²¹⁰
- Abolition of plenary guardianship. Only partial guardianship remains an option.²¹¹
- The person’s wishes are to be the guiding principle for the guardian. Their “best interests” may only be used as a criterion for decision-making when it has proved impossible to determine the wishes of the individual under guardianship.²¹²
- Where there is disagreement between the guardian and the individual under guardianship regarding personal or medical decisions, the guardian is not permitted to make a unilateral decision.²¹³ This means that a guardian cannot consent to involuntary psychiatric hospitalisation on behalf of the individual.²¹⁴

While many of these provisions bring Israel closer to compliance with the requirements of Article 12 of the CRPD, a number of criticisms have been levelled at the new legislation including that the law does provide for a right for the individual to be heard in all proceedings relating to his/her legal capacity, it does not revoke the concept of legal incapacity, and it retains the principle of “best interests.”²¹⁵

208. Capacity and Guardianship (Amendment No. 18) Law, 5776-2016, s. 30 (addition of section 67(B)).

209. Capacity and Guardianship (Amendment No. 18) Law, 5776-2016, s. 30 (addition of section 67(B)).

210. Capacity and Guardianship (Amendment No. 18) Law, 5776-2016, s. 33A(a).

211. Capacity and Guardianship (Amendment No. 18) Law, 5776-2016, s. 33A(d).

212. Capacity and Guardianship (Amendment No. 18) Law, 5776-2016, s. 67F(b).

213. Capacity and Guardianship (Amendment No. 18) Law, 5776-2016, s. 67F(b)(4).

214. Capacity and Guardianship (Amendment No. 18) Law, 5776-2016, s. 67G.

215. Bizchut, “Introduction to the new Legal Capacity and Guardianship Law”, <http://bizchut.org.il/en/wp-content/uploads/2016/04/Introduction-to-new-guardianship-law.docx> (last accessed 29 November 2016).

Conclusion

The requirements of Article 12 of the CRPD have been clearly interpreted by the UN CRPD Committee. Various bodies of the Council of Europe have acknowledged this shift in consensus regarding the right to universal legal capacity and have gradually moved towards affirming its applicability, most notably in the *Council of Europe Strategy on the Rights of Persons with Disabilities 2017-2023*²¹⁶. To reiterate, the Strategy asserts that the rights covered in it are to be interpreted in light of the UN CRPD.

It is also clear that many member States and civil society actors have recognised the need to make a paradigm shift toward the recognition of full legal capacity and the implementation and integration of systems of supported decision-making in a multilevel approach. Future emphasis is now on opening up new methods of discovery to reveal the person and his/her will and preferences—something that was disincentivised in the past by restrictive guardianship laws. This ensures a completely new role for the philosophy of protection into the future – protecting the integrity of the process to support persons to express their will and preference and to have them respected as the basis for interaction with others.

While all member States still provide for some form of substitute decision-making, there have also been both formal and informal moves towards developing systems of supported decision-making, with one influencing the other. Many important bodies of the Council of Europe have already weighed in on the debate and are keenly interested. This is to be expected since human personhood remains at the core of the mission of the Council of Europe and indeed underpins many of the rights we take for granted like the right to marry and the right to vote.

It remains to be seen if the European Court of Human Rights will, in appropriate cases, be asked to endorse this general move toward supported decision-making as a less restrictive alternative to guardianship. It also remains to be

216. Council of Europe, Human rights: a reality for all – Council of Europe Disability Strategy 2017-2023, CAHDPH CM(2016)155 (2016), 27 October 2016.

seen if it, as well as other bodies, will respond affirmatively. Though the potential implications of Article 15 of the Revised European Social Charter have not been entirely exploited yet, it is equally likely that the European Committee on Social Rights will interpret this provision to reach issues of legal capacity with respect to the right to independent living and indeed to other rights in the Charter.²¹⁷

The following checklist can serve as a guide to achieve the reforms necessary to sustain positive change.

217. A step in this direction has already been taken with regard to assisted decisions of elderly people, under Article 23 of the Charter.

Checklist for member States

- ▶ Has the State recognised the right of all persons to equal recognition before the law on an equal basis with others?
- ▶ Has the State paid due attention to the strictures of the UN CRPD Committee which emphasise that the development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with Article 12 of the Convention?
- ▶ Has the State provided for legal recognition of systems of support to exercise legal capacity which provides new and innovative spaces to enable an individual to express – and enforce – her/his own will and preferences?
- ▶ Has the active participation of persons with disabilities and their representative organisations in each State been sought in creating these systems of support?
- ▶ Do these systems of support optimise new insights and techniques on how to “discover” the person and respect her/his life choices?
- ▶ Are the safeguards in such systems of support based on the rights, will and preferences of the person?

Examples of valid safeguards include:

- Placing legal duties on supporters with consequences for violation of duties, effective and accessible complaints,
- Investigation and monitoring mechanisms where supporters are suspected of exploitation/abuse or violation of duties,
- Liability protection for third parties who, in good faith, respect the will and preferences of the person,
- Legal certainty for third parties transacting with those using support to exercise legal capacity (e.g. mechanisms for verify that an individual is an “authorised” supporter, while respecting the right to privacy/data protection of the supported person).

- ▶ Has the concept of “best interests” been removed from the legal capacity framework and the systems of support?
- ▶ Has the State ring-fenced resources for research and development in the field of legal capacity?

A particular focus should be placed on supporting innovative grassroots projects developed by persons with disabilities and their representative organisations with the aim of specifying the type and range of supports required. The link between the new paradigm and social capital occurring naturally in the community should also be a focus of research.

- ▶ Recognising that legal capacity is connected to all other human rights and inextricably linked with their enjoyment, has the State developed community supports in order to ensure that persons with disabilities have real opportunities to live independently and be included in the community, with choices equal to others?
- ▶ Has the new institutional architecture developed to grow this field and to monitor compliance with the relevant safeguards been detached entirely from traditional offices responsible for guardianship or substitute decision-making?
- ▶ Does the new architecture reflect the positive philosophy of giving business efficacy to rights by ensuring that effective, adequate and appropriate supports are provided?

List of Key Resources for Designing Measures to Implement Article 12 of the CRPD

The following resources are relevant to member States' efforts to reform their domestic legal capacity laws in accordance with the requirements of Article 12 of the CRPD.

Council of Europe

- ▶ Council of Europe Commissioner for Human Rights (February 2012), *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities* CommDH/IssuePaper(2012)2.²¹⁸

United Nations

- ▶ Committee on the Rights of Persons with Disabilities²¹⁹
- ▶ Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (11 April 2014) UN Doc. No. CRPD/C/GC/1²²⁰
- ▶ Concluding Observations of the Committee on the Rights of Persons with Disabilities²²¹

218. https://www.coe.int/t/commissioner/source/prems/IP_LegalCapacity_GBR.pdf.

219. <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

220. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en.

221. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5.

European Union

- ▶ European Union Agency for Fundamental Rights (FRA) (2013) *Legal capacity of persons with intellectual disabilities and persons with mental health problems*, Brussels, Belgium.²²²
- ▶ European Union Agency for Fundamental Rights (FRA) (2011) *The right to political participation of persons with mental health problems and persons with intellectual disabilities*, Vienna, Austria.²²³
- ▶ PERSON (Partnership to Ensure Reforms of Supports in other Nations)²²⁴

Funded by the EU DG Enlargement as an Instrument for Pre-Accession (IPA). It is one of number (20 approximately) funded under the Partnership Programmes for Civil Society Organisations (CSOs). The Centre for Disability Law and Policy at NUI Galway co-ordinate the project and have six leading CSOs as partners based in Albania (ADRF), Bosnia and Herzegovina (SUMERO), Croatia (SHINE), Kosovo* (ISDY), Serbia (MDRIS) and Turkey (RUSIHAK).

The specific objective of PERSON is to increase competencies of CSOs in Balkan States on both regional and national levels to strategically advocate and monitor reforms affecting persons with psycho-social and intellectual disabilities.

Academic Commentary on Article 12 of the CRPD

- ▶ Arstein-Kerslake & Flynn, "The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law" *The International Journal of Human Rights* 20, No. 4 (2016) 471
- ▶ Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?* 34 *Syracuse J. Int'l L. & Com.* 429 (2006-2007)
- ▶ Flynn & Arstein-Kerslake, *The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?*, 32 *Berkeley J. Int'l Law.* 124 (2014).

222. <http://fra.europa.eu/en/publication/2013/legal-capacity-persons-intellectual-disabilities-and-persons-mental-health-problems>

223. <http://bookshop.europa.eu/en/the-right-to-political-participation-of-persons-with-mental-health-problems-and-persons-with-intellectual-disabilities-pbTK3210521/>

224. <http://www.eu-person.com>

* All references to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

- ▶ Gooding (2015) “Navigating the ‘Flashing Amber Lights’ of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns”. *Human Rights Law Review*, 15 (1):45-71
- ▶ Quinn & Arstein-Kerslake, *Restoring the “Human” in “Human Rights”: Personhood and Doctrinal Innovation in the UN Disability Convention*, in *The Cambridge Companion To Human Rights* (Conor Gearty & Costas Douzinas eds., 2012).
- ▶ Quinn, *Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD*, Harv. Project On Disability, (20 February 2010).

Civil Society

- ▶ The National Resource Center for Supported Decision-Making (**USA**)²²⁵
A resource containing videos and stories of people who use supported decision-making as well as education and training material.
- ▶ American Civil Liberties Union (ACLU) – Supported Decision-Making Resource Library (**USA**)²²⁶
Contains general information about supported decision-making and pilot projects. Also contains tools for implementation such as sample Supported Decision-Making Agreements.
- ▶ Black and White Pilot Project on supported decision-making (**Czech Republic**)²²⁷
- ▶ Resource Centre for People with Mental Disability “ZELDA” (RC ZELDA), Handbook – First Steps in Implementation of Supported Decision-Making in Latvia, Riga (April, 2016) (**Latvia**)²²⁸
- ▶ Bulgarian Center for Not-for-Profit Law (BCNL), “Cost Benefit Analysis of Supported Decision-Making” (Sofia, 2014). (**Bulgaria**)²²⁹

225. <http://supporteddecisionmaking.org>

226. <https://www.aclu.org/other/supported-decision-making-resource-library?redirect=supported-decision-making-resource-library>

227. <http://www.kvalitavpraxi.cz/en/projects/current-projects/black-and-white/>

228. http://zelda.org.lv/wp-content/uploads/ZELDAS_brosura_EN_WEB.pdf

229. http://bapid.com/bapid/wp-content/uploads/2014/08/SDM_report_engED.pdf

- ▶ Bizchut, The Israeli Human Rights Center for People with Disabilities, “Article 12 Supported Decision-Making Pilot: Summary of Assessment Study Findings (December, 2015). **(Israel)**²³⁰
- ▶ Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124), 24 November 2014. **(Australia)**²³¹
- ▶ Age Action Ireland, The Alzheimer Society of Ireland, Amnesty International, Centre for Disability Law & Policy NUI Galway, Disability Federation of Ireland, Inclusion Ireland, Irish Mental Health Lawyers Association, Mental Health Ireland, Mental Health Reform, National Advocacy Service for People with Disabilities, Shine and St Patrick’s University Hospital (2012) *Essential Principles: Irish Legal Capacity law*, Dublin. **(Ireland)**²³²
- ▶ Inclusion Europe, *Choices – A platform on supported decision-making*.²³³

230. http://bizchut.org.il/en/wp-content/uploads/2016/03/pilot_report_ENG.docx.

231. <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124>.

232. http://www.nuigalway.ie/cdlp/documents/principles_web.pdf.

233. <http://www.right-to-decide.eu>.

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Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction of 17 December 2008 (Federal Law Gazette I, p. 2586, 2587), last amended by Article 11 of the Act of 20 April 2013 (Federal Law Gazette I p. 831), section 294(3). (Germany).

Arstein-Kerslake & Flynn, “The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law” *The International Journal of Human Rights* 20, No. 4 (2016) 471.

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