

Legal Capacity and Supported Decision-Making: Lessons from Some Recent Legal Reforms

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Received: 11 October 2018; Accepted: 29 January 2019; Published: 1 February 2019

Abstract: Article 12 of the Convention on the Rights of Persons with Disabilities calls for a thorough review of State laws to recognise the right of persons with disabilities to enjoy legal capacity on an equal basis with others, thereby abolishing substitute decision-making regimes, and to receive the support they need for its exercise. With the aim of providing useful guidelines for legislative changes yet to be made, the present study examines and assesses, in the light of the Convention, some of the most recent and innovative legislative reforms in the area of legal capacity. The analysis shows that, although they appropriately reflect a change of perspective, shifting from the paradigm of the “best interests” of the person to the respect of their will and preferences, some of these reforms are not fully satisfactory, particularly because they still allow partial or total deprivation of legal capacity for persons with disabilities, and maintain institutions which perpetuate substitute decision-making. However, the recent modification of the Peruvian Civil Code and Civil Procedure Code deserves a highly positive evaluation as the first regulation of legal capacity and supported decision-making substantially compliant with the Convention.

Keywords: disability; legal capacity; decision-making; substitute decision-making; supported decision-making

1. Introduction

As many authors have already discussed, Article 12 of the International Convention on the Rights of Persons with Disabilities (hereinafter referred to as the Convention) contains one of the most significant legal innovations of recent decades, which is called upon to exert a potentially high impact on national legal systems and requires a thorough revision of traditional legal institutions that have lasted for centuries¹. Indeed, by obliging States to recognize that “persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”, and affirming that “States Parties shall take appropriate measures to provide access to persons with disabilities to the support they may require in exercising their legal capacity”, the Convention seems to bar all legislative regulations that allow persons with disabilities being fully or partially deprived of their legal capacity, as happens today in most of the countries. Since the recognition of legal capacity is, moreover, the basic condition to exercise one’s rights, Article 12 appears undoubtedly as a central provision of the Convention.

The UN Committee on the Rights of Persons with Disabilities has addressed this issue in virtually all its Concluding Observations to States Parties². Furthermore, based on the initial reports

¹ Cf. vg. Recover (2014, pp. 22–23); Pérez Bueno (2010, pp. 147–55), who discusses the “enormous challenge posed by the *intrepid* step taken by Article 12 of the Convention” (p. 150, emphasis added).

² To mention only some of the most recent, the Concluding Observations to the United Kingdom indicate that “the Committee is concerned about: (a) The legislation in the State party that restricts the legal capacity of persons with disabilities on the basis of actual or perceived impairment; (b) The prevalence of substituted decision-making in legislation and in practice, and the lack of full recognition of the right to individualized

of the States under review, the Committee found “that there is a general misunderstanding of the exact scope of the obligations of States parties under article 12 of the Convention. Indeed, there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making”. This conviction led the Committee to draw up the first of its General Comments, in which it attempts to provide an interpretation of Article 12 and to specify the general obligations arising from this precept for the States Parties (Committee on the Rights of Persons with Disabilities 2014).

The General Comment of the Committee on the Rights of Persons with Disabilities on Article 12 shows that we are facing a change of paradigm that can be described without exaggeration as revolutionary, making a thorough revision of national laws necessary. In fact, since the Convention came into force, several countries have undertaken deep legislative changes in order to adapt their legal systems to Article 12³. In this paper, three of the most recent and innovative legal reforms—those of Argentina (2014), Ireland (2015) and Peru (2018)—have been selected to be analyzed in the light of the Convention, finding out to what extent they can be a model for legislative changes to be exerted in the remaining States. To carry out that analysis, it is first necessary to examine the requirements of Article 12 of the Convention, which will be the parameter by which to assess the new national laws of the aforementioned countries.

Thus, the following section of this article will deal with the interpretation of Article 12. Sections 3 through to 5 will study the new regulations regarding legal capacity in Argentina, Ireland and Peru; in each case, after highlighting the most significant aspects of the new legal regime, an assessment of its compliance with the Convention will be presented. Finally, the conclusions will mainly try to provide some basic guidelines for the future revision of national laws.

2. The Meaning of Article 12 of the Convention

In nearly all countries, persons with disabilities (mainly with intellectual or psychosocial disabilities) have been traditionally denied legal capacity and declared legally incompetent, and a legal representative (usually called a “guardian”) has been appointed for them, who takes legal decisions and exercises their rights on their behalf, either in all matters concerning their person and assets or in specific matters determined by the court (this model is called “substitute decision-making”). Moreover, most national laws require the guardian to make such decisions according to the best interests of the person concerned.

The purpose of Article 12 of the Convention was to change this situation⁴. But the interpretation of Article 12 is not uncontroversial. Different views have been propounded concerning the central question posed by Article 12: does it exclude any kind of substitute decision-making? After the approval of the Convention, various scholars have given an affirmative answer to this question⁵, while others maintain that substitute decision-making can still be authorized in some cases and

supported decision-making that fully respects the autonomy, will and preferences of persons with disabilities” (n. 30), and, in its Concluding Observations to Bolivia, the Committee expresses its concern “at the continued existence in the State party of regimes that limit partly or completely the legal capacity of persons with disabilities, and at the lack of any measures to repeal such regimes” (n. 27). These Concluding Observations are dated, respectively, on 3 October 2017, and 30 August 2016.

³ A review of the various domestic legislative changes in this field after the Convention can be seen in (Kanter and Tolub 2017, pp. 594–608).

⁴ A review of guardianship laws and of the precedents of the Convention in (Kanter and Tolub 2017, pp. 561–71).

⁵ Cf., for example, (Devi et al. 2011; Cuenca 2012, p. 212) (“the model of substitute decision-making has no place within the requirement of equal legal capacity, even as an exception”); (Arstein-Kerslake 2017, pp. 16–30; Scholten and Gather 2018) (who advocate for substitute decision-making in some cases, but consider that it is not compatible with the provisions of Article 12, and suggest therefore that the Convention be amended).

subject to certain conditions⁶. The General Comment of the Committee on the Rights of Persons with Disabilities on Article 12 followed the first of these possible interpretations.

It must be acknowledged that Article 12 does not explicitly prohibit substitute decision-making (it does not even mention it). Moreover, certain ambiguities in its text leave room for different interpretations. But, in my opinion, strong reasons support the point of view of the Committee's General Comment.

For a correct understanding of Article 12, we should follow the parameters established by the Vienna Convention on the Law of Treaties. According to Article 31.1, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 32 includes as a supplementary means of interpretation "the preparatory works of the treaty and the circumstances of its conclusion".

Therefore, in the first place, let us examine the terms of Article 12. In its first paragraph, "States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law". As the use of the word "reaffirm" clearly shows, Article 12.1 does not add any new content to international human rights law, as the right to recognition before the law had already been proclaimed by the Universal Declaration of Human Rights (Article 6) and by the International Covenant on Civil and Political Rights (Article 16), among other international human rights instruments (Arstein-Kerslake 2017, pp. 22–23). What is new is the content of paragraphs 2 and 3 of Article 12. In paragraph 2, the Convention requires State Parties to "recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life", while paragraph 3 states that appropriate measures must be taken "to provide access by persons with disabilities to the support they may require in exercising their legal capacity". The reference of paragraph 3 to the exercise of legal capacity shows that the concept of legal capacity used by the Convention comprises both the capacity to be a holder of rights (legal standing) and the capacity to exercise one's rights (legal agency)⁷. This conclusion can be confirmed by a review of the preparatory work of the Convention, in which this was one of the major issues of debate, and the different draft provisions differentiating between legal capacity and capacity to act were not supported and were not incorporated into the final text (Dhanda 2007, pp. 438–56; Palacios 2008, pp. 417–62). Moreover, paragraph 2 stresses that persons with disabilities must have their legal capacity recognized "on an equal basis with others" and "in all aspects of life". Therefore, according to this provision there can be no difference concerning legal capacity based on the disability of a certain person. As Article 1 defines disabilities as "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder full and effective participation in society", that means that there can be no difference concerning legal capacity based on the impairment, not even intellectual or mental impairment, of a certain person. Thus, two conclusions can be drawn from Article 12.2:

(a) There can be no deprivation or restriction of legal capacity by any reason linked to the impairment of a certain person. Not even a partial restriction is allowed, because Article 12.2 requires recognition of legal capacity "in all aspects of life". Therefore, any legal provision which allows

⁶ Cf. (Richardson 2012; Dawson 2015; Szmukler et al. 2014; Donnelly 2016; Pearl 2013, p. 29), who considers that "there may be limited scope for substituted decision-making", but "this should be considered an absolute last resort, subject to stringent independent review, and should apply for the shortest possible time"; Bariffi (2014, pp. 383–85), who maintains "that there is absolute incompatibility between the support model and any type of legal representation, even that of a specific and exceptional type", but, nevertheless, considers the declaration of incapacity of the person and his/her subjection to a guardian to be compatible with the Convention, provided it is done outside the support model and the reason is not disability.

⁷ Cf., in this sense, (Dinerstein 2012; Pearl 2013, p. 3; Arstein-Kerslake 2017, p. 23; Scholten and Gather 2018, p. 228).

deprivation or restriction of legal capacity for persons with mental or intellectual impairment will be a violation of Article 12⁸.

(b) As stated, legal capacity includes legal agency, which is the capacity to exercise one's rights and to take decisions by oneself. Therefore, there can be no difference concerning the capacity to take decisions by oneself based on the impairment of a certain person. In other words, no reason linked to the impairment of a certain person can allow the denial of her capacity to take decisions by herself. Substitute decision-making means denying a person the right to take decisions by herself and transferring her decision-making capacity to another person. If that is not allowed for persons without disabilities, it cannot be allowed for a person on the basis of her disability. This conclusion is confirmed by the terms of Article 12.5, which recognizes "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". Mentioning some specific aspects of legal agency and reaffirming that persons with disabilities have the equal right to exercise their legal agency in those fields, it stresses again that persons with disabilities should be allowed to take decisions by themselves as is allowed for any other person.

In full consistency with these conclusions, Article 12.3 calls to provide persons with disabilities the support they require in exercising legal capacity. As some persons with disabilities may face difficulties in exercising their rights or making decisions, support should be provided to help them undertake those tasks. Article 12.3 does not explicitly say that all persons with disabilities should be entitled to exercise their legal capacity, but, if it is read in connection with the preceding paragraph, it shows that the shift from substituted decision-making to supported decision-making must be implemented for all persons with decision-making impairments of any kind and intensity.

Of course, supported decision-making is more problematic to implement than substitute decision-making: it is easier to replace in her decisions a person who has difficulties in decision-making than to help her develop her own decision-making process. Furthermore, although some jurisdictions tend to foster that the person arranges her own support, as will be shown below, this will often not be possible. These practical difficulties lead some authors to defend a softer interpretation of CRPD, which leaves some room for substituted decision-making. Although, as has been suggested, it can be agreed that this approach is "understandable at this point in time" (Then et al. 2018, p. 74)⁹, it should be kept in mind that right to legal capacity is a civil right, not subject to progressive realization. Therefore, as Article 12.3 explicitly declares, States must provide all the necessary means to facilitate its exercise, including the provision of supports if the person is unable to arrange them herself, as well as an appropriate training of supporters.

Finally, we come to paragraph 4, which is the most difficult to interpret. In fact, this paragraph is the main argument used by those authors who argue that substitute-decision making is compatible with Article 12 (Richardson 2012, pp. 346–47; Dawson 2015, pp. 71–72; Szmukler et al. 2014, p. 247). Article 12.4 requires providing "appropriate and effective safeguards to prevent abuse", which 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". Certainly, the language of this paragraph is very similar to that used by current substitute decision-

⁸ That does not mean, however, that impairment can never be the reason for the denial of a certain capacity not linked to the basic rights of the person, as Dawson seems to understand from the Committee's General Comment on Article 12 (Dawson 2015, pp. 72–73). For example, a blind person would be reasonably denied the capacity to drive (this is the example he uses), because of the danger to other persons' rights of doing so. That is not, however, a restriction of legal capacity. On the one hand, because strictly saying there is no right to drive: driving is only allowed for those persons who prove a specific capability. On the other hand, the denial of the capacity to drive to a blind person would not be a discrimination on the basis of disability, because a difference of treatment on the basis of an impairment, as any other difference of treatment, can be justified if it is necessary for the protection of other fundamental rights or public goods. These kinds of balances are an essential part of legal practice.

⁹ This research carried out by (Then et al. 2018) shows that this seems to be the point of view of several Law Reform Agencies.

making laws, and some of its sentences seem to be contradictory with Article 12.3: why should support, for example, be applied for the shortest time possible? Therefore, Minkowitz has suggested “setting aside aspects of the safeguards provision that do not fit well with an inclusive system of legal capacity that replaces all forms of substituted decision-making with support that respects individual autonomy” (Minkowitz 2013, p. 3). Nevertheless, in my opinion Article 12.4 can also be read in a way that confirms the interpretation of the preceding paragraphs, and that should be the right way to read it, because every legal norm must be understood in its context.

Firstly, it should be made clear that safeguards are not an alternative to supports, but an element of them. According to the terms of Article 12.4, safeguards must be provided by measures relating to the exercise of legal capacity, and the content of these measures has been defined by Article 12.3, specifying that they must be support measures. What Article 12.4 orders is that support measures must include safeguards, the primary purpose of which is to ensure that support respects the rights, will and preferences of the person. That means, above all, that support can never be imposed against the explicit will of the person, as this would be a clear violation of Article 12.4. Of course, safeguards also have to prevent abuse, conflict of interest or undue influence, but both purposes are not incompatible. On the contrary, if situations of manipulation or abuse occur in the support relationship, the decisions taken in the context of the support will not correspond to the real preferences of the person supported. If one of these situations exists, it may be exceptionally justified to override the preferences of the person concerning a specific decision, such as, for example, the appointment of the supporter, in order to protect her real will (a justification that could also be found in analogous cases for other situations of vulnerability different from disability¹⁰). Of course, this exceptional divergence from the choice made by the person needing or receiving support would only be legitimate if there is a present situation or an immediate risk of abuse, conflict of interest or undue influence, and if it helps her to exercise her rights and to put her will and preferences into practice. It will never be justified, on the contrary, to override the will of the person based on an assessment of her decision (arguing, for example, that the person has made or is likely to make an unwise decision, or a decision that is harmful for her or that can compromise her personal autonomy in the future).

Article 12.4 does not specify how support should be arranged, but it does outline some basic features of support measures as follows:

(a) Proportional: as supports might entail a certain intrusion into the private sphere of the person, they should not be more intense than is strictly necessary, so that their costs do not outweigh their benefits.

(b) Tailored to the person’s circumstances: support systems should be sufficiently broad and flexible to be able to adapt to the situation, circumstances and needs of each person. This includes situations wherein it is not possible to know the will of the person in any way, nor is the person capable of giving consent, but it is nevertheless necessary to adopt a decision or to conclude a legal act; in such extreme cases, the support shall consist of making the best interpretation of the will and preferences of the person, based for example on her life story, on her previous wishes and preferences, or on her expression of trust in certain people¹¹. In practice this may lead to the granting of consent by representation for certain legal acts. But this is not substituted decision-making, because: (1) such a representation is only possible when the person has not previously expressed her will, by means, for example, of an advance directive and the efforts practicable to ascertain her current will are unsuccessful; (2) the decision is not made according to the “best interests” of the person supported, but according to the best interpretation of her will and preferences¹².

¹⁰ Kong has drawn an interesting analogy between the protection of women against gender violence and the protection of persons with disabilities against abuse (Kong 2015). Cf. also (Szmukler 2017), who examines the meaning of the concepts of “will” and “preferences” used by Article 12.4.

¹¹ Cf., in this sense, (Arstein-Kerslake and Flynn 2016; Cuenca 2012, pp. 212–13).

¹² In the United States, guardians are required to make the decision that the person under guardianship would have wanted to make if he or she could have done so: this is called the “substituted judgment” standard (I thank an anonymous reviewer for this remark; see also (Donnelly 2016, pp. 326–27)). This standard is not

(c) They should apply for the shortest time possible: in the context of a supported decision-making model, this provision can only be understood in the sense that support measures should help the person to be able to exercise her legal capacity with less support in the future.

(d) They should be subject to regular review.

The terms of Article 12 lead, thus, to conclude that Article 12 calls for a complete abolition of substitute decision-making regimes. This interpretation, which substantially agrees with the General Comment of the Committee on the Rights of Persons with Disabilities, can be confirmed by considering the remaining parameters mentioned in the Vienna Convention on the Law of Treaties: context and purpose of the treaty.

Regarding the context, it has been argued that there is “internal inconsistency between various rights, particularly between (what are usually called) negative and positive rights, supported by the Convention” (Dawson 2015, p. 71). Certainly, the Convention is not free of inconsistencies and ambiguities, but the interpreter should make the effort to read it as a whole. Concerning the interpretation of Article 12, several aspects are remarkable. Firstly, throughout the Convention there is a constant emphasis on the capacity of persons with disabilities to make choices by themselves. This is clearly shown, for example, by Article 19, which recognizes the right of choice concerning independent living and place of residence; Article 25, that requires ensuring free and informed consent of persons with disabilities in the field of health; or Article 27, which stresses that work must be “freely chosen or accepted”, among other provisions. Secondly, the Convention recognizes the fundamental rights of persons with disabilities “on an equal basis with others”, a clause which is included in most of its articles and prohibits any difference of treatment in the exercise of fundamental rights on the basis of disability. Above all, the Convention should be read through the lens of the general principles proclaimed by Article 3, the first one of which is indeed “respect of inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons”.

On the other hand, the object and purpose of the Convention is explicitly defined by Article 1: “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”. The necessity of the Convention to achieve these goals is explained by the fact that, as the Preamble states, despite the various international instruments of human rights “persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world”. The Convention wants to break with this situation, caused among other reasons by a social perception of persons with disabilities as objects of assistance and protection rather than subjects of rights. One of the most significant benchmarks of this break with the past and this shift from a medical to a social model of disability is precisely Article 12 (Palacios 2008, p. 419; Arstein-Kerslake 2017, pp. 17–21).

As a conclusion of the preceding reasoning, the basic principles which, according to Article 12, should inspire the statutory regulation of legal capacity can be summarized as follows:

(1) Legal systems must recognize the full capacity of people with disabilities to exercise their rights (legal agency). No restriction of legal capacity for any reason linked to disability is allowed by Article 12.

(2) Legal systems must replace substituted decision-making systems by support mechanisms which help persons with disabilities who need it to exercise their legal capacity, always based on respect for their will and preferences and aimed at facilitating the process of taking and expressing their decisions. They should be sufficiently broad and flexible to be able to adapt to the situation, circumstances and needs of each person.

(3) Finally, legal systems must provide for appropriate safeguards to ensure that support mechanisms effectively respect the rights, will and preferences of the person supported and to prevent any abuse; one of these safeguards being its regular review by a competent judicial body.

different to the best interpretation of the will and preferences; such a model would not be substitute decision-making, provided that the first condition mentioned in the text is also met. A definition of substitute decision-making can be found in Committee on the Rights of Persons with Disabilities (2014), n. 27.

These principles, and the interpretation of Article 12 that has been presented in this Section, will be the basis of the evaluation of the Argentinian, Irish and Peruvian laws on legal capacity that will be examined in the following sections.

3. The New Regulation of Legal Capacity in Argentina

The new regulation of legal capacity in Argentina is part of a much more ambitious legislative reform: Argentina has recently implemented a new Civil and Commercial Code, which was approved by Congress on 1 October 2014 and came into force on 1 August 2015¹³. It is noteworthy that the preparatory work for this new regulation counted on the participation of civil society, and, particularly, regarding the subject matter of the present study, involved representative organizations of persons with disabilities.

The legal regime instituted by the new Civil and Commercial Code, regarding the exercise of legal capacity, can be summarized by the following essential aspects:

(a) It expressly recognizes the legal capacity of every individual, which refers both to what the Code calls “legal competence”, which can be defined as the capability to be the holder of legal rights and duties, as well as to the “capacity of exercise”, which is the capacity to exercise the rights recognized by the law on their own (Articles 22 and 23). Consequently, capacity is always presumed (Article 32 a).

(b) The Code stipulates, however, that restrictions on capacity may be established. According to Article 31 b), they are exceptional and can be only imposed procuring the benefit of the person. The first paragraph of Article 32 specifies that “the judge may restrict the capacity for certain acts of a person over thirteen years of age who suffers from an addiction or a permanent or prolonged mental disorder, of sufficient severity, whenever he/she considers that the exercise of the individual’s full capacity may result in damage to his/her person or property”. As can be observed, the situation giving rise to the restriction of capacity is shaped by the simultaneous occurrence of two conditions. Firstly, the individual must have an addiction or a permanent or prolonged serious mental impairment, and secondly, there is a danger of harm to the person or to her property if the full capacity to act is preserved. The restriction of capacity is agreed on only in connection with certain acts, which should be specified by the court, so that, with respect to those acts which the judgment does not mention, the general rule of presumption of capacity to act prevails. Article 38 also orders “that personal autonomy must be affected as little as possible”, so that the scope of restriction must be kept to a minimum.

(c) The main effect of the restriction of capacity is the provision of support measures, which Article 43 sets up in a very flexible way, since it is “any measure of a judicial or extrajudicial nature that facilitates the person who needs it decision-making to manage themselves, manage their assets or enter into legal acts in general”. As pointed out, “by virtue of the recognition of the diversity of disability, decision-making support takes many forms and must be designed taking the specific circumstances and needs of the person into account. It can be singular or plural. It may involve relatives, external operators, social workers, institutions, or one or more of these options” (Fernández 2015, p. 113). This means, therefore, that the nature, scope and effects of the support mechanisms must be specified individually in the court ruling. However, the regulation contained in the Code allows some general characteristics to be defined. First, as shown clearly by the first sentence of Article 43, the support mechanisms are not only projected within the strict framework of legal acts. They are designed rather to facilitate decision-making in all aspects of life as needed by the

¹³ The preliminary draft was prepared by a Commission of experts, the “Commission for the Preparation of the Bill for the Reform, Updating and Unification of Civil and Commercial Codes of the Nation”, created by Decree of the President of the Republic on 23 February 2011. Once the preliminary draft was completed on 27 February 2012, it began its parliamentary procedure on 8 June, which concluded with its approval by Congress on 1 October 2014.

individual, so that they can cover both personal and property matters¹⁴. Second, and this is perhaps the most relevant feature of the support model, the main intervention of the supporter does not take place by replacing or completing the capacity and the consent of the person in the adoption of decisions with legal effectiveness and in the celebration of legal acts, as happens in the traditional institutions of Civil Law, but, prior to that, in the process of forming the will. Indeed, support is aimed to help individuals develop their own decision-making process, informing them, helping them in their understanding and reasoning, and facilitating them to express their preferences (Bariffi 2016, pp. 65–66)¹⁵. This is clearly indicated in the second paragraph of Article 43: “support measures have the function of promoting autonomy and facilitating communication, understanding and expression of the will of the person regarding the exercise of their rights”. Thirdly, failure to comply with the established support mechanisms may affect the validity of the legal acts of the person with restricted capacity, although no general rule is established in this area. Article 38 once more refers to the court ruling, which will “indicate the conditions of validity of the specific acts subject to restriction, regarding the persons involved and the role in which they act”. Once again, there is a wide range of possibilities here. The ruling can establish, for example, that the legal acts concluded by the person with disability are fully valid, provided that they had the help of the supporter before the adoption of the decision; validity may require that they also have the consent of the supporter; or validity may be granted to acts related to the individual or assets of the supported person that only have the express will of the supporter, since Article 101 c) stipulates that the supporter may have representative functions with respect to certain acts referred to in the judgment. Naturally, this representation does not fit in with acts of a very personal nature, for which, in principle, consent by representation is excluded¹⁶. Although the Code does not expressly mention it, it must be understood that the requirement of judicial authorization for the execution of certain acts, imposed by Article 121 on guardianship of minors, is applicable to support with representative functions, since it seems logical that, if authorization is required for a representative figure who has more extensive powers, even more should it be required for representation with more limited powers. Of course, the court ruling can establish different regimes and designate various supporters in relation to the different legal acts. Finally, as indicated in Article 32 in its third paragraph, supporters should always favor decisions that respond to the preferences of the person being supported. Regarding the designation of supporters, the last paragraph of Article 43 provides that “the interested party may propose to the

¹⁴ Arstein-Kerslake has suggested that “the right to support for the exercise of legal capacity is restricted to areas of legal agency and personhood” (Arstein-Kerslake 2017, p. 178), but, as she herself points out, legal agency is exercised whenever an individual intends an action or inaction that has legal consequences, and therefore affects nearly every aspect of an individual’s life (cf. Arstein-Kerslake 2017, pp. 149–51.)

¹⁵ It is, however, the incorrect understanding of the mechanisms of support that leads some authors to understand as such the traditional institutions of guardianship and trusteeship regulated for example by the Spanish Civil Code: cf. in this sense (Martínez de Aguirre 2013, pp. 32–35).

¹⁶ In this regard, the specific regime established by the Code for certain legal acts of a very personal nature must be considered. Thus, for example, in relation to marriage, Articles 403 and 405 provide that, when the person suffers permanent or transitory mental impairment that prevents discernment for the act of marriage, whether the capacity is restricted or not, they can only contract marriage with judicial authorisation. This will previously require the opinion of an interdisciplinary team “on the understanding of the legal consequences of the act of marriage and the aptitude for relationship life on the part of the affected person”, and a personal interview by the judge of the future spouses. On the other hand, regarding decisions related to health, consent by representation is allowed “if the person is absolutely unable to express her will at the time of medical care and has not expressed it in advance,” and it is an “emergency situation with a certain and imminent risk of serious harm to her life and health” (Article 59, last paragraph). With respect to another very personal right such as the right to vote, Article 3 a) of the Electoral Code excludes “persons declared demented in court”, but it must be understood that this rule has been repealed by the new regime established by the Civil and Commercial Code, which has abolished the legal status of demented, and it has been so pointed out by the Prosecutor before the Supreme Court in an opinion dated 6 April 2016. If this thesis were accepted, in Argentina today there would be no possibility of depriving people with disabilities of the right to vote, which, as is logical, they could only exercise personally, even when they have the necessary support to do so.

judge the appointment of one or more persons he trusts to support him”, although the decision corresponds to the judge, who has to “seek the protection of the person with respect of possible conflicts of interest or undue influence”.

(d) Argentine Law maintains, however, an exceptional case of traditional *incapacitation*: specifically, the last paragraph of Article 32 of the Code provides that “when the person is absolutely unable to interact with the environment and express his or her will in any appropriate way or format and the support system is ineffective, the judge may declare incapacity”. The effect of this declaration of incapacity is the provision of a figure, which the Argentine Civil Code calls “curador” (trustee), who has the same functions as the guardian of minors (Article 138, first paragraph). He therefore holds full legal representation of the individual in property affairs (Article 117) and substitutes him or her in decision-making, with the limitations established by Articles 120 to 127, that, comprise, for example, the requirement of judicial authorization for certain legal acts. The main function of the trustee is “to take care of the person and the assets of the incapacitated person and to try to restore his or her health” (Article 138, second paragraph). A person with full capacity can designate the trustee by means of an advance directive, but the decision depends on the judge, who can approve or disapprove this appointment (Article 139).

(e) Finally, the Argentine Civil Code, in Articles 31 to 40, surrounds the process of capacity restriction with a rigorous set of *guarantees*, aimed at making the most appropriate court ruling for the person with disability and which can promote her personal autonomy to a greater extent. In this sense, three fundamental aspects can be highlighted. In the first place, the right of the person concerned to participate in the process is recognized (Article 31 e), even granting them the character of a party (Article 36, paragraph 1), which means that they can produce all the evidence they deem appropriate, either in defense of their capacity or to request certain restrictions or support measures. Furthermore, the person concerned must have legal assistance, “which must be provided by the State if he or she lacks financial means”, so that, in the event of appearing without a lawyer, the judge must appoint one immediately (Article 36, second paragraph). The Code also requires (Article 36) that immediacy be guaranteed to the person concerned during the process. This means that the judge cannot make his decision based only on certain external opinions but must have direct knowledge of the individual’s situation, that allows him to understand his abilities, aptitudes and needs. The judge is also obliged to hold a personal interview with the interested party before adopting any resolution, in which the lawyer who provides assistance and the Public Prosecutor’s Office must be present. To ensure that the participation of the party concerned in the process is fully effective, accessibility must be assured (not only physical, but also communicational or cognitive), making the appropriate reasonable adjustments, and protecting the right of the party concerned to receive information “through means and technologies which are adequate for his or her understanding” (Article 31 d). A second guarantee of extraordinary relevance is interdisciplinarity, which basically means that, before delivering the judgment that ends the process of capacity restriction, the judge must have the opinion of an interdisciplinary team (Article 37, last paragraph). In other words, the assessment of the person should be not just medical, but also requires the intervention of other professionals such as psychologists or social workers. This interdisciplinary evaluation is consistent with an approach to disability based on the social model as opposed to the medical-rehabilitator model. Finally, Article 40 orders a periodic review of capacity restrictions, which can be requested at any time by the party concerned and must be carried out at least within three years. This review will include new interdisciplinary reports and a new personal interview with the party; to reinforce the duty of the judge to proceed to the review under his own initiative, the Code also establishes the duty of the Public Ministry to urge such a review if the judge has not carried it out already. Because of that review, the cessation of incapacity or restrictions of capacity may be decreed (Article 47), the legal acts for which the capacity is restricted may be reduced, or other modifications regarding the support measures, their scope or effects may be made.

We will now compare this new legislative regulation with the provisions of the Convention. In this sense, the first obvious aspect is that the Civil and Commercial Code continues to speak of restrictions on capacity. Moreover, when defining the situation that gives rise to a restriction of

capacity, reference is made to disability, to a permanent or prolonged mental disorder, even though this is not the only condition, since it is also required that there is a danger of harm to the person or to her property if legal agency is exercised. But, ultimately, we find that people with disability, and only they, can be deprived of their legal capacity, albeit only partially, for specific and exceptional acts, implying that their “legal capacity on an equal basis with others in all aspects of life” is not recognized, as called for by Article 12.2 of the Convention. Undoubtedly, the provision of support for decision-making can have an effect, as has been shown, on the validity of legal acts, which in certain cases will require the consent of the supporter or may be even adopted only with the consent of the latter. This clearly reveals that certain legal effects of support provision may be similar to those of a capacity restriction. However, we are not facing a merely terminological question. Firstly, because it is necessary to eliminate the suspicion, so deeply rooted in common mentality, and which, in a certain fashion, Article 32 of the Argentine Civil and Commercial Code perpetuates, that the protection of persons with intellectual or psychosocial disabilities requires restricting their legal capacity. But, above all, because a correct understanding of the support model implies knowing that the support is aimed precisely at facilitating that the persons can make their own decisions and exercise their legal capacity. Therefore, it does not seem necessary or reasonable that it is based on a previous restriction of capacity. Of course, despite the insistence, it is convenient to underline once more that the absence of a formal restriction on capacity is fully compatible with establishing, where appropriate, that compliance with established support mechanisms is a condition for the validity of legal acts. In short, the paradigm pointed to by the Convention leads us to avoid the rigid schematism of traditional legal regimes, which associate a protection figure with a previous declaration of incapacity, and to design a model that offers an individualized solution to each person’s situation, in order to facilitate the full exercise of her rights, which undoubtedly is a much more complex and onerous task.

In the same manner, the most serious objection that, from my point of view, should be posed to the new Argentine legislative regulation is that an institution that assumes the complete deprivation of legal capacity and substitute decision-making has been maintained. It is true that it is an exceptional provision, and that the circumstance giving rise to the declaration of incapacity is not the person’s disability, but a factual situation, which is the absolute factual impossibility of interacting with the environment. Nevertheless, for the reasons stated above, it is a provision that is radically incompatible with Article 12 of the Convention, and that, since it will most likely be applied mainly to persons with disabilities, constitutes a discrimination on the basis of disability prohibited by Article 5. It should be recalled that, as the Committee on the Rights of Persons with Disabilities has pointed out, “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” (Committee on the Rights of Persons with Disabilities 2014, p. 6). The incapacitation to which the last paragraph of Article 32 of the Argentine Civil Code refers is clearly a substitute decision-making regime, because it meets the three essential characteristics that according to the Committee define such regimes: “(i) legal 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; or (iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective “best interests” of the person concerned, as opposed to being based on the person’s own will and preferences” (Committee on the Rights of Persons with Disabilities 2014, p. 6). Moreover, the requirement of the third paragraph of Article 32, according to which the supporter should favor the decisions that respond to the preferences of the person, is not extended to the trustee to whom the fourth paragraph of Article 32 refers.

It should be added, that support with representative functions entails also substitute decision-making, if it is not strictly limited to the situations in which the person cannot communicate her will by any means and it is not possible to verify her preferences. Therefore, to be fully compliant with the Convention in this regard, the Code should have explicitly limited support with representative functions to such cases, and the declaration of incapacity regulated by the last paragraph of Article 32 would not have been necessary. For those cases, the Code should have also explicitly included the

criterion formulated by the Committee on the Rights of Persons with Disabilities in General Comment No. 1 (No. 21), which requires the supporter to act in accordance with the best possible interpretation of the will and preferences of the supported person, which is substantial to distinguish this intense support from substitute decision-making.

The support model is undoubtedly the most innovative aspect of the new Code, and it deserves a positive evaluation. Particularly laudable is the high flexibility with which the support measures have been configured, allowing a great variety of modalities and a wide diversity of legal effects, which will make its individualized design and implementation in response to the circumstances of each person possible¹⁷. The Code also insists, repeatedly, that support measures should favor the will and preferences of the person, thus clearly showing the purpose that any supporter has to pursue. As the Committee on the Rights of Persons with Disabilities has explicitly pointed out, it is not the protection of the “best interests” of the person with disabilities, but the respect of their will and preferences, which include “the right to take risks and make mistakes” (Committee on the Rights of Persons with Disabilities 2014, p. 5). It is inconsistent, however, that this will is not respected in regards to the designation of the supporter itself, since the Code allows the judge to diverge from the proposal made by the person concerned. It would be more correct to establish as a general rule that the judge be subject to the appointment made by the person, only being able to diverge from this choice, if it were necessary, in very serious cases and for justifiable reasons, such as immediate danger of abuse, conflict of interest or undue influence.

Finally, concerning the safeguards implemented to ensure that the support respects the will of the person and to avoid abuse, the regulation of the guarantees of the judicial procedure should be included in this category. It is indeed appropriate and complete, in particular regarding the right of the interested party to participate with legal assistance and the requirement that the assessment of the person has to be carried out by an interdisciplinary team. Furthermore, the most important and valuable safeguard is undoubtedly the periodic review of the support mechanisms by the judicial authority, whenever the party concerned requests it or, in any event, every three years. However, perhaps the legitimacy to request the review before the aforementioned period of three years should have been extended, at least to the Public Prosecutor’s Office, to the supporters themselves and to the relatives who according to Article 33 can request the restriction of the capacity. We are facing, indeed, the most effective way to end possible abuse, conflict of interest or undue influence by any of the supporters. In those cases of more intense support motivated by the impossibility of the person to make her will known, the requirement of judicial authorization for certain legal acts, among them all acts of disposition, established in Article 121, serves also as an effective safeguard.

In summary, the new statutory regulation of legal capacity in Argentina has both positive and negative aspects. Undoubtedly, the design of the support system represents a substantial advance over the traditional models of Private Law, because the center of attention shifts from the protection of the alleged “best interests” of the person with disability by replacing her in decision-making to the protection of her freedom facilitating her decision-making. This regulation can serve, thus, as a guideline for future legal reforms, including the regulation of the judicial procedure for determining support. However, the link between the provision of support and the restriction of capacity must be avoided, and support should never be imposed against the will of the person. Moreover, it is not wise that any figure that responds to the traditional paradigm of substitute decision-making remains in legal systems, not even for extreme or exceptional cases. It is worth remembering in this context a general principle of legislative policy, very useful for Disability Law, which is the desirability of avoiding the elaboration of legal standards for borderline cases, which later will inevitably be subject to extensive interpretation¹⁸.

¹⁷ Cf. in this sense (Pagano 2016), which examines various judicial decisions following the enactment of the new Code that have made use of this variety of support mechanisms.

¹⁸ As has been pointed out, “the border-line cases can be solved more effectively by judicial instances, able to appreciate in miniature possible aggravating, attenuating or even exculpatory circumstances. Law, on the contrary, is obliged to present general situations, as if painting with a large brush; applied to statistically

4. The Irish Assisted Decision-Making Act

Ireland, although it promptly signed (on 30 March 2007) the Convention on the Rights of Persons with Disabilities, has been the last Member State of the European Union to ratify it, which did not occur until 20 March 2018. This delay in ratification was motivated by the desire repeatedly expressed by the Government to carry out the necessary legislative reforms to comply with the Convention prior to ratification. Of the various reforms planned by the Government, the most important was undoubtedly the one related to legal capacity and legal guardianship mechanisms, a matter governed so far in Ireland by obsolete regulations contained in the Lunacy Regulation Act of 1871. The new statute, called Assisted Decision-Making (Capacity) Act, was enacted on 30 December 2015, although at the time of writing no more than a few minor provisions of an administrative nature have come into force, specifically related to the creation of the new Decision Support Service, reference to which will be made below.

Ireland's ratification of the Convention has been accompanied, though, by a reservation to Article 12, which states that "to the extent article 12 may be interpreted as requiring the elimination of all substitute decision making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards". This seems to be a reservation incompatible with the object and purpose of the Convention, which is to enable persons with disabilities to exercise their rights on an equal basis with others, and therefore prohibited by Article 46, as well as by Article 19 of the Vienna Convention on the Law of Treaties (Devandas Aguilar 2018, p. 10; however, it confirms that the Irish legislator has wished to maintain substitute decision-making regimes in certain cases, as will be shown below in the analysis of the new Act.

Probably the most relevant aspect of the new Irish Act is the intent to allow the person herself to adopt the necessary provisions on the exercise of her capacity. For this purpose, it considers three fundamental institutions—assisted decision-making, co-decision-making and enduring powers of attorney:

(a) Firstly, a person over the age of 18 who considers that her decision-making capacity is in question or may shortly be in question can appoint, through a decision-making assistance agreement, one or more assistants who will support her in decision-making regarding those personal and/or property matters that are contemplated in the agreement (Section 10). The assistant will not make the decisions instead of the assisted person, nor even complement them, but the decisions will be considered as adopted only by the person. The functions of the decision-making assistant are limited, as expressed in Section 14, to help the supported person obtain the information relevant to the decisions, to advise her, to ascertain her will and preferences and assist her to communicate them, to assist her in making and expressing her decision and to endeavour to ensure that her decisions are implemented. In the event that there are several decision-making assistants, the agreement must specify whether they will act jointly or severally.

(b) Secondly, in the same circumstances the person may also choose to appoint, through a co-decision-making agreement, a co-decision-maker, that is, a person who jointly makes decisions with her with regard to the personal and/or property matters referred to in the agreement, although in this case it must necessarily be a relative or friend who has a link with her based on a relationship of trust (Section 17). For the co-decision-making agreement to be valid, a statement by a medical practitioner is required, declaring that the appointer has capacity to make a decision to enter into the agreement, and has capacity to make decisions with the assistance of the co-decision-maker (Section 21.4, f). The functions of the co-decision-maker include those of the assistant mentioned in the previous institution, but in addition, the co-decision-maker must make the decision jointly with the person

atypical cases, it will tend to turn the exception into a rule with unpredictable and risky effects" (Ollero 2011, p. 1282). In relation to the issue examined in this paper, the borderline-cases can be addressed perfectly with the broad powers conferred on the judicial authority for the design of support mechanisms.

who appointed him, that is, he must give his consent. In the event of the decision giving rise to a legal act, this will be null and void unless it has the consent of both (with both signatures if the decision is formalized in a document). There may also be several co-decision-makers, but, unlike what happened with the first of the institutions examined, they will have to be named in different co-decision-making agreements and with respect to different matters or decisions. Finally, there is an objective limit on the scope of co-decision-making, since it may not include acts of disposal of the property by way of gift (Section 17.4).

(c) Thirdly, any person over the age of 18, in anticipation of a future lack of decision-making capacity, may appoint an attorney on whom he or she confers general authority to act on his or her behalf in relation to her property or authority to do specified things in personal or property matters. This power will not enter into force until the donor lacks capacity to make those decisions (Section 59). There are some limitations regarding the content of these powers. On the one hand, in relation to the personal sphere, the power can not include any decision relating to refusal of life-sustaining treatment, nor those that have been subject to pre-existing advance healthcare directives. In addition, the attorney can never use force on the donor (imposing, for example, an involuntary confinement or any other coercive measure), except in circumstances of exceptional emergency, and provided the measure is necessary and proportionate (Section 62). On the other hand, the Act stipulates that the attorney may not dispose of the property of the donor by way of gift unless specific provision to that effect is made in the power. Even in this case, the only gifts allowed are gifts to persons related to the donor on customary occasions, or gifts to charities of a reasonable amount regarding the value of the assets and the financial obligations of the donor (Section 63). A donor may appoint several attorneys, and he is allowed to establish whether they will act jointly or severally; if it is not specified in the power, it shall be understood that they act jointly.

It may happen, however, that a person who has not made any provision in fact becomes incapable of making decisions. In such a case, she can be declared legally incompetent in relation to one or more decisions in personal and/or property matters. There are two modalities of this declaration: the court can declare that the person lacks capacity unless she has the assistance of a co-decision-maker, or that she lacks capacity even when the assistance of a co-decision-maker were available (Section 37). In the first case, the court will grant a deadline to the party concerned to adopt a co-decision-making agreement; in the second case, as well as in the first case, if the deadline lapses without the co-decision-making agreement having been concluded, the court will appoint a decision-making representative. In order to determine the capacity of the person, Section 3 of the Act orders a functional assessment, specifically stating that a person will be considered incapable of making a decision if he or she cannot understand the information relevant to the decision, retain that information long enough to make a voluntary choice, use it as part of the process of making the decision or communicate their decision by any means. The representative will make the decisions to which the representation refers on behalf of the person declared incompetent, although he must, as far as possible, ascertain the will and preferences of the person and help her to communicate them (Section 41). Moreover, the same limits regarding the content of the powers that have been mentioned in the preceding paragraph for the attorney apply to the decision-making representative, although he may dispose of the property of the represented person by way of gift if the court allows him to do so in the decision-making representation order. The possibility of appointing several representatives is also explicitly mentioned, having the court order to determine whether they will act jointly or severally. The declaration of lack of capacity and, therefore, the appointment of the representative must be judicially reviewed at any time when requested by the relevant person, and ex officio every 12 months, or every 3 years “if the court is satisfied that the relevant person is unlikely to recover his or her capacity” (Section 49).

All the interventions in the field of legal capacity of persons referred to above, from assisted decision-making to representation, are subject to the general principles defined in Section 8 of the Act, which of course are more relevant when the intervention is more intense. Firstly, a person cannot be considered unable to make a decision unless all practicable steps have been taken to help her do so and cannot be considered unable only because she has made or is likely to make an unwise

decision. Secondly, the intervention will only be carried out if it is necessary, and it has to be made in the least restrictive manner to the person's freedom, as well as with respect to her bodily integrity, privacy and autonomy. Finally, when making any decision, the intervener must give effect, in so far as it is practicable, to the past and present will and preferences of the relevant person that are ascertainable and must take into account her beliefs and values. If it is likely that the person may recover her capacity, intervention will only be carried out if there is an urgent reason to do so.

Finally, the Act contains a wide range of safeguards to avoid abuse or conflict of interest. In addition to the principles and limits already indicated concerning the content of the intervention, it should be mentioned, for example, that a set of reasons for unsuitability is established regarding the appointment of any of the support figures regulated by the Act. Those under 18 years of age cannot be appointed for such functions; nor those who have been convicted of a crime against the person to be supported or against their property; or the owners, managers or employees of a facility for persons with disabilities in which the interested party resides, unless they are their immediate family members. Likewise, if the supporter is a spouse or civil partner of the assisted person or lives with him or her, the former becomes disqualified for support if the marriage or civil partnership dissolves, if the parties become legally separated or sign a separation agreement, or if they cease their cohabitation for more than 12 months. Another of the most important aspects of the Law is, also, the creation of an administrative body, called the Decision Support Service, to which any person can report that a supporter is not fulfilling his or her functions appropriately; if the Director considers that the complaint is well founded, he may request the court to withdraw these functions. The supporter must submit periodic reports on the fulfillment of their functions to the Service, and the Service has overall competence in assessment and supervision.

Once the most remarkable features of the new Irish Act have been outlined, we can examine its compliance with the Convention. Firstly, it should be noted that the main thrust of the Act is respect for the will of the person who may have difficulties in decision-making, even offering a varied range of possibilities so that she can adopt appropriate measures regarding the exercise of her legal capacity; specifically, the institutions of the assisted decision-making agreement and the co-decision-making agreement seem to offer a satisfactory answer to most situations in which persons with intellectual or psychosocial disabilities find themselves. In this regard, it is undoubtedly true that the Irish model, which, as recommended by the UN Committee on the Rights of Persons with Disabilities, completely abandons the criterion of "best interests" to replace it with the criterion of "will and preferences", constitutes a far-reaching advance in the right direction.

Likewise, safeguards aimed at guaranteeing respect for the rights, will and preferences of the supported person and avoiding abuse seem sufficient. This category includes, for example, the mechanisms of administrative and judicial supervision of the various support figures instituted by the law, the limitations with respect to the acts that may be subject to the co-decision-making agreement or the powers of the representative or attorney or, in the case of a judicially declared incapacity, the court's obligation to review the declaration every three years. More rigorous safeguards are lacking, though, in order to guarantee as far as possible, the most appropriate decision in court proceedings related to legal capacity, such as those established by the Argentine Civil and Commercial Code. Specifically, the full participation of the interested party in the process should be ensured, with the necessary support measures and reasonable adjustments, and their direct hearing by the court. It should be ascertained as well that the judicial body has all the necessary information available, including an interdisciplinary evaluation of the person whose capacity is being questioned. Nevertheless, the Act does not even require the court to base its decision on a medical opinion when declaring incapacity, which Section 50 states as optional, and makes no mention of any reports of other professionals such as psychologists or social workers.

The main downside of the new Irish Act, however, is, once again, the possibility that a person's incapacity can be legally declared, a declaration that necessarily involves the appointment of a representative as a substitute decision-maker, meaning therefore that, in this aspect, the traditional model remains unchanged. As has been said, we find that "the basic premise of the new legislation is that a certain standard of mental capacity is a prerequisite for the recognition of the individual's

legal capacity” (Flynn and Arstein-Kerslake 2014, p. 134¹⁹). This obviously violates Article 12 of the Convention, which requires to recognize persons with disabilities legal capacity on an equal basis with others. What also seems surprising, in contrast with the flexibility of the Argentine model that we have previously examined, is the rigidity of Irish Law, which, as has just been pointed out, inexorably associates the appointment of a representative with the declaration of incapacity, not allowing the option for less intense models of intervention, such as assisted decision-making or co-decision-making. In fact, co-decision-making only applies if the court has established that the person lacks capacity unless assisted by a co-decision-maker, and the person freely adopts the co-decision-making agreement²⁰. This creates the paradox that the judge can appoint a person to substitute the individual declared incompetent in decision-making but cannot designate a person who performs a less intense intervention. Moreover, in the appointment of the representative the court is obliged to take into account the will and preferences of the person who has been declared incompetent but is not bound to them. For the representative, however, this tie is somewhat stronger, since the general principle established in the seventh subsection of Section 8 for all types of intervention compels him to implement, whenever feasible, the past and present wishes and preferences of the relevant person that are ascertainable. In this sense, it has to be acknowledged that decision-making representation stipulated in the Irish Act does not follow the “best interests” principle (Arstein-Kerslake 2017, p. 173). However, it is still substitute decision-making, as it meets the other two features mentioned by the Committee on the Rights of Persons with Disabilities in the definition quoted in the previous section of this article. Therefore, a more flexible model would have been desirable, in which, without the need for a prior declaration of incapacity, the necessary support mechanisms for decision-making could be established by the court for a person who has difficulties making decisions or communicating them (and who has not herself adopted the necessary provisions through the various means legally available), taking into account the person’s will and preferences and, of course, not imposing the support against her explicit will. Only in cases where the person is absolutely unable to communicate her will, and it is necessary to make a decision, would it be allowed to make the decision for her, always acting in accordance with the best possible interpretation of her will and preferences, a criterion that is not specifically mentioned in the Act.

5. Peru: The First Regulation of Legal Capacity Compliant with the Convention

The last legal reform in the field of legal capacity that has been approved before finishing this article is the reform of the Peruvian Civil Code and Civil Procedure Code, which was enacted on 3 September 2018. The General Act on Persons with Disabilities, enacted on 13 December 2012, already stated in Article 9 that “persons with disabilities have legal capacity in all aspects of life on an equal basis with others. The Civil Code regulates the support systems and reasonable accommodations that they require for decision-making”. But the implementation of this general principle required a reform of the Civil Law, and in fact the second final provision of this Act created a Special Committee for the revision of the Civil Code. This Committee, in which representatives of the organizations of persons with disabilities took part, started its work on 12 February 2014 and presented to Parliament its draft proposal on 31 March 2015. The lack of a sufficient parliamentary consensus delayed the approval of the reform, but it has finally been approved by the Government based on a delegation of legislative competence by the Parliament.

¹⁹ The authors make this assessment regarding the Bill, which was presented in 2013, but of course, it can be applied to the final legal text, which has not been modified in this regard. A specific consequence of this basic premise and a remnant of the medical model of disability is the requirement for a medical opinion to be able to formalize a co-decision-making agreement, which might considerably hinder the application of such a potentially fertile institution.

²⁰ The limitation that the co-decision-maker must be a relative or friend of the person who appoints him has also been criticized, since this provision excludes those persons who may not have a family support network, and it would violate Article 12.3 of the Convention, which orders States to take all appropriate measures “to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. Cf. (Healy 2015).

The main features of the new Peruvian regime of legal capacity can be summarized as follows:

(a) The first and most important aspect of Peruvian regulation is that there is no restriction of capacity on the basis of disability. On the contrary, the new Article 42 of the Code expressly states that all persons with disabilities have full capacity to exercise their rights on an equal basis with others and in all aspects of life. The general principle already proclaimed by Article 9 of the General Act on Persons with Disabilities has been thus specified, explicitly declaring that persons with disabilities have not only formal legal capacity, the capacity to be a holder of rights and duties, but also full “capacity of exercise” or legal agency. Only persons in a coma who had not previously designated a support may have their capacity restricted (Article 44.9).

(b) The Peruvian Civil Code specifies a very wide and flexible model of support for the exercise of legal capacity, being the general rule that the support is chosen and arranged by the person who needs it. Indeed, any person who has reached the age of majority, with or without disability, can establish freely the supports she deems appropriate to help her in the exercise of legal capacity. The supports are defined as “forms of assistance freely chosen by a person of age to facilitate the exercise of their rights, including support in communication or in understanding legal acts and their effects, and the manifestation and interpretation of the will of the supported person”; whenever the supporter has to interpret the will of the supported person, the Code specifies that this shall be done considering “the life story of the individual, his preferences, the previous declarations of will in similar contexts, the information that the persons in which he trusts may have, and any other considerations which are appropriate for the particular case”(Article 659-B). The person that establishes the supports decides their form, identity, amount, effects and extension, but they will not have representative functions, unless it has been explicitly so decided by the person who needs support. One or more persons, specialized public institutions or specialized and registered non-profit private organizations can be appointed as supporters. This appointment is done before the judge or the public notary, who issues a final resolution, which, according to Article 847 of the Civil Procedure Code, “specifies who are going to be the support persons or institutions, to which legal acts is the support restricted, its duration, and the safeguard provisions if they are necessary”. Although the text of this precept is not very clear, the general perspective of the new regulation, which relies always on the will of the supported person, leads, in my opinion, to interpret that this resolution has only a formal character, and cannot diverge from what the individual who needs support has decided. The supporters can also be appointed in anticipation of the possibility that the person need assistance for the exercise of her legal capacity in the future. In this case, the appointer will establish the circumstances in which this appointment will have effect.

(c) There is also the possibility of a judicial provision of support, by request of any person, but only in very exceptional cases, for persons with disabilities that cannot manifest their will and for persons in a coma who had not previously designated a support (Article 659-E of the Civil Code). This can only take place after a real and appropriate effort to know the will of the person has been made, with the accessibility measures and reasonable accommodations that are required, and when the designation of supporters is necessary for the exercise and protection of the rights. The judge will appoint the supporter by taking into account the relationships of friendship, trust or kinship of the person who needs support, and will determine the extension and effects of the support, always trying to obtain the best possible interpretation of the will and preferences of the person according to her life story. As mentioned in the previous paragraph, support can only have representative functions if it is explicitly declared.

(d) The safeguards for guaranteeing respect of rights, will and preferences of the person receiving support and to prevent abuse or undue influence have to be established by the individual himself who is to receive support, or by the judge if the support has been decided by him, and they must include a periodic review of the support. Besides this, the judge can adopt all the measures he deems appropriate to determine if the supporter acts according to his appointer’s mandate and respecting their will and preferences (Article 659-G).

(e) Regarding judicial procedures on legal capacity, the Civil Procedure Code, in its new Article 845, obliges the judge to undertake all the adaptations, adjustments and accommodations that are

necessary to ensure the expression of the will of the persons with disabilities. In addition, one of the most innovative aspects of the new regulation is the requirement that final resolutions also be drafted in an easy-to-read format, thus facilitating its comprehension by the interested person.

This description shows that the Peruvian regime of legal capacity is the first one in the world to comply substantially with the Convention. On the one hand, unlike the countries that have been previously examined, Peru does not allow any restriction of legal capacity on the basis of disability, thus recognizing legal capacity to persons with disabilities on an equal basis with others, as Article 12 of the Convention requires. On the other hand, the Peruvian Civil Code stipulates the appropriate instruments to provide support in the exercise of legal capacity, always in accordance with the will and preferences of the person. The UN Special Rapporteur on the rights of persons with disabilities has recently summarized the main features of a supported decision-making regime compliant with the Convention: “Contrary to substitute decision-making regimes, under a supported decision-making arrangement, legal capacity is never removed or restricted; a supporter cannot be appointed by a third party against the will of the person concerned; and support must be provided based on the will and preferences of the individual” (Devandas Aguilar 2018, p. 7). The new legislative regulation in Peru is fully consistent with these guidelines. Of course, when the person is not able to communicate his will, and it is not possible to discover his preferences, “a support person could be provided in the absence of communication from the individual indicating opposition to the involvement of a support person” (Arstein-Kerslake 2017, p. 193). That means that support can be provided *without* the will of the person who needs it, and therefore the Peruvian Civil Code allows the judge to appoint and arrange the supports in these exceptional cases, but it can never be imposed *against* his will. In these cases, support may also have representative functions, in other words, the support person can take decisions on behalf of the person receiving support (Arstein-Kerslake 2017, pp. 165–68), but again, in contrast with the Argentine and Irish laws, the Peruvian Civil Code rightly determines the only valid standard to take such decisions; the best interpretation of the will and preferences of the individual. This interpretation has to be determined considering, as has already been quoted, “the life story of the individual, his preferences, the previous declarations of will in similar contexts, the information that the persons in which he trusts may have and any other considerations which are appropriate for the particular case”.

Nevertheless, there are two aspects in which the new Peruvian regulation seems in my opinion not fully satisfactory. Firstly, the Peruvian Civil Code calls the person to arrange her own supports in the exercise of legal capacity. It seems to ignore, however, that there might be persons with disabilities that cannot arrange their own supports, for example because they do not have a family network or relatives or private entities in which they trust, or simply because they do not know how to do it. These situations might entail an intervention of public authorities, because Article 12.3 of the Convention requires States to take all appropriate measures “to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. Therefore, the Code should have provided at least the possibility that the person herself or her relatives demand to the court the arrangement of her support, of course with respect of her will and preferences.

The second objection concerns the safeguards required by Article 12.4 to ensure respect for the rights, will and preferences of the person and to avoid conflict of interest or undue influence. The Committee on the Rights of Persons with Disabilities has in fact acknowledged that “all people risk being subject to undue influence, yet this may be exacerbated for those who rely on the support of others to make decisions. Undue influence is characterized as 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” (Committee on the Rights of Persons with Disabilities 2014, p. 5). Of course, “the primary purpose of the safeguards outlined in article 12 of the Convention is to ensure the respect of the rights, will and preferences of the person concerned” (Devandas Aguilar 2018, p. 8), but they also have to provide an effective protection against manipulation, domination or undue influence, among other factors because, if these situations occur in the support relationship, the decisions taken in the context of the support will not correspond to the real preferences of the person supported. Moreover, we have to take into account that the support relationship, as for

example the employment relationship, is an unequal relationship, in which one of the parties, in our case, the person receiving support, is in a weaker position and is, therefore, more vulnerable to manipulation, abuse or undue influence. In my view, the Peruvian Civil Code fails to prevent sufficiently these situations and risks. It is not enough to allow the person receiving support to establish the safeguards he deems appropriate himself; the law must protect the weakest party in the relationship and has to provide these safeguards if the individual himself fails to do it. Different kinds of safeguards have been examined in the study of the Argentine and Irish laws, and other possible forms could be designed, such as independent monitoring of the support relationship by a support supervisor²¹.

6. Conclusions

The analysis that has been undertaken of the new legal regimes governing legal capacity in Argentina, Ireland and Peru reveals, in the first place, that an advance towards a model which fully respects the rights of persons with disabilities is possible. Certainly, Article 12 of the Convention sets a very exacting standard and demands a revolutionary change, and, therefore, most of the legislative initiatives carried out with the explicit aim of complying with the Convention do not fully accomplish this accommodation. However, as the recent reform of the Peruvian Civil Code has shown, implementation of Article 12 is not an unreachable target. On the contrary, various models fit in the general framework defined by the Convention, and different configurations of the supports in the exercise of legal capacity are possible. In any case, the precedent analysis provides some fundamental guidelines for the revision of national laws, which I will try to summarize in this final section of the article:

1. National law cannot allow any deprivation or restriction of legal capacity on the grounds of disability, or which will be mainly applied to persons with disabilities. The possibility of these restrictions is indeed the major shortcoming of the Argentine and Irish regulations. On the other hand, the fact that such restrictions have been fully abolished is in turn the main reason to consider the Peruvian regulation as the first one consistent with the Convention.

2. Legal reform in the field of legal capacity must be based on a change of perspective. The guiding principle and the aim to pursue in legal capacity regulation can no longer be the protection of the “best interests” of the person being supported, as has been repeatedly stated, not even a supposed benefit of the person in a heteronomous determination. It must be rather the protection of her freedom, which includes, of course, the right to make wrong decisions. Therefore, supports are required, not to protect the supposed best interests of the person with disability, but to help her exercise her freedom and put her will and preferences into practice. This shift of the paradigm, which not only the Peruvian, but also the Argentine and Irish regulations reflect, already constitutes a decisive step forward in the right direction.

3. In coherence with this change in perspective, the axis around which the new legislative regulations on legal capacity should turn is supported decision-making. What the law should provide, as stated in Article 12.3 of the Convention, is the support that persons with disabilities may need in the exercise of their legal capacity. Nevertheless, support in the exercise of legal capacity does not primarily consist of providing a substitute or complementary consent in legal acts, which was until now, and still continues to be, the essential purpose of the institutions of legal assistance to persons with disabilities in many civil laws. It mainly involves, instead, providing assistance during the decision-making process, to enable a person with disability to make a free and fully informed decision. In this sense, the description of assisted decision-making that appears in Article 14.1 of the Irish Act is very apt, which indicates that the assistant should carry out the following tasks: (a) help the person supported to obtain the information relevant to the decisions; (b) advise him or her, explaining the relevant information and the circumstances that affect the decision; (c) ascertain the will and preferences of the person supported on the subject matter of the decision and help him or

²¹ Devandas Aguilar (2018, p. 11), mentions as appropriate safeguards “time limits, periodic review, requirements for being a supporter, liability, complaint and redress mechanisms, and monitoring”.

her to communicate them; (d) help him or her to make and express the decision; and (e) endeavour to ensure that the decision is implemented.

Of course, if supported decision-making has to do with helping a person put his will and preferences into practice, a very logical conclusion is that the first will which has to be respected is the will to have or not have support. Therefore, support should never be imposed against the will of a person, and the most reasonable way to arrange support is through the free decision of the person who might need it. The legal relevance of such a decision recommends of course that it becomes somehow formalized in a public document. However its approval by a court should not be required, on the one hand because it does not seem appropriate to impose on the person who needs support the additional burden of undergoing a judicial procedure, and on the other hand to avoid an unnecessary work overload for judicial bodies, which, in any event, will have to assume new tasks related to the supervision and review of the support systems and implementation of the safeguards that might be determined. A good alternative is the provision contained in the Peruvian Civil Procedure Code allowing the appointment and arrangement of the support to be made before the public notary. The law should also provide, however, the appropriate means so that a person can have access to the support she needs and wishes to receive when she is unable to arrange it herself and appoint her supporters, for example because of the lack of an adequate family network, a provision which fails in Peruvian Civil Code.

Only in very exceptional circumstances, when it is not possible to know the will of the person in any way, and she is unable to manifest or communicate it by any means, support can be provided without the will of the person. In such cases, support may have representative functions, which means that the supporter can make decisions, when they have to be made, on behalf of the person being supported, but always relying on the best possible interpretation of the will and preferences of the individual, based on their life story, on their previous wishes and preferences, or on their expression of trust to certain people.

4. Finally, the Argentine and Irish legislative regulations also show what kind of safeguards may be suitable for guaranteeing the requirements of Article 12.4 of the Convention, specifically to avoid abuse and conflicts of interest and to preserve the rights, will and preferences of the person for which support measures are established. Particularly remarkable are the following types of safeguards: (a) the declaration of the unsuitability of certain persons to assume the function of support provision; (b) the requirement of judicial authorization for the execution of certain legal acts; (c) administrative and judicial supervision of the functioning of support mechanisms; and (d) periodic review by the judicial authority of the established support measures, which is undoubtedly, in my opinion, the most relevant safeguard. As has been said, the primary purpose of the safeguards is to ensure the respect of the rights, will and preferences of the person concerned, but they have to prevent manipulation, domination or undue influence as successfully as possible, and to provide an effective protection against these risks, because all these circumstances hinder the decisions made in the context of the support relationship corresponding to the real will of the person supported. Therefore, it does not seem sufficient entirely to entrust the determination of the safeguards to the person receiving support, as the Peruvian Civil Code does.

As stated at the opening of this text, there are many legal systems that require a substantial modification to the legal provisions regarding the exercise of legal capacity, in order to adapt them to the requirements of the Convention on the Rights of Persons with Disabilities. The new Argentine, Irish and Peruvian regulations show us the way forward, but also the shortcomings that we should strive to overcome.

Nevertheless, the assessment of the Argentine, Irish and Peruvian regulations that has been made is based on a certain understanding of Article 12 of the Convention, which has been presented in Section 2, and which in the opinion of the author is the most reasonable and sound interpretation. However, this is still a question open to discussion, and it should be examined more deeply in future research.

Funding: This research received no external funding.

Conflicts of Interest: The author declares no conflict of interest.

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