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## Are We Closing the Gap? Reforms to Legal Capacity in Latin America in Light of the Convention on the Rights of Persons with Disabilities

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# Are We Closing the Gap? Reforms to Legal Capacity in Latin America in Light of the Convention on the Rights of Persons with Disabilities

Pablo Marshall,\* Paula Vásquez,\*\* Violeta Purán,\*\*\* & Loreto  
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## ABSTRACT

*This Article examines the the reforms developed in Latin America over the last decade that have adapted domestic legislation regarding legal capacity toward the support model of the Convention on the Rights of Persons with Disabilities (CRPD). Our examination of the reforms in Costa Rica, Argentina, Peru, and Colombia focuses on the adoption process of the reforms, the main characteristics of the implemented support model, some transitional and implementation aspects of the reforms, and a critical examination of their relationship to the CRPD. Finally, this Article explores some weaknesses related to the reforms' implementation processes.*

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## I. INTRODUCTION

The Convention on the Rights of Persons with Disabilities (CRPD) is one of the international human rights instruments that has received the most significant number of ratifications immediately after being opened for subscription. The convention was adopted in December 2006, opened for ratification in March 2007, and entered into force in

May 2008. As of 2022, 185 states have ratified it.<sup>1</sup> Article 1 of the CRPD provides, “[t]he purpose of the present Convention is 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.”<sup>2</sup> It understands persons with disabilities as including all “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>3</sup> Article 4 of the CRPD establishes the obligation of the states parties to “adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention” and “all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.”<sup>4</sup> Regarding those articles, numerous legislative reforms have been adopted worldwide to account for the requirements of the CRPD to promote, protect, and ensure the rights of persons with disabilities in various areas of life.<sup>5</sup>

Article 12 of the CRPD establishes the equal recognition of persons with disabilities before the law. This obligation includes recognizing their legal personality and capacity on equal terms with others in all aspects of life. The Committee on the Rights of Persons with Disabilities (the Committee), in its General Comment No. 1 (GC1), specifies that legal capacity includes (1) conceiving persons with disabilities as holders of rights and (2) granting them the capacity to act regarding those rights.<sup>6</sup> For people with disabilities to exercise their legal capacity under equal conditions, the states parties must adopt appropriate measures to provide them with the support necessary to make decisions that have legal effects.<sup>7</sup> This support system must include adequate and effective safeguards to guarantee respect for the rights, wills, and preferences of persons with disabilities and prevent their abuses.<sup>8</sup> To comply with these provisions, the CRPD

1. See *Convention on the Rights of Persons with Disabilities (CRPD)*, UNITED NATIONS DEPT OF ECON. & SOC. AFFS.: DISABILITY, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last visited Oct. 26, 2022) [<https://perma.cc/KLG9-UH2H>] (archived Oct. 26, 2022).

2. *Convention on the Rights of Persons with Disabilities* art. 1, Mar. 30, 2007, 2515 U.N.T.S. 3 [hereinafter CRPD].

3. *Id.*

4. CRPD, *supra* note 2, art. 4, §§ 1(a)–(b).

5. See generally MENTAL HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS (Michael Ashley Stein et al. eds., 2021) (collecting a comprehensive review of recent reforms in the area of legal capacity).

6. CRPD, *supra* note 2, art. 12, § 3; Comm. on the Rts. of Pers. with Disabilities, General Comment No. 1, U.N. Doc. CRPD/C/GC/1, ¶ 12 (May 19, 2014) [hereinafter General Comment No. 1].

7. See General Comment No. 1, *supra* note 6, ¶ 26.

8. See CRPD, *supra* note 2, art. 12, § 4; General Comment No. 1, *supra* note 6, ¶ 20.

urges the states parties to examine their internal legislation and take measures to develop laws and policies that replace regimes based on substituted decision-making by a system of supported decision-making.<sup>9</sup> Over the last decade, the CRPD has promoted a series of legislative reforms to legal capacity of the states with the common objective of advancing the adoption of regimes compatible with the new paradigm entrenched in the CRPD.

In the opinion of the Committee, Article 12 of the CRPD is incompatible with any substituted decision-making regime.<sup>10</sup> Substituted decision-making implies that a third person takes—in a general or particular way, permanently or temporarily—the decisions that correspond to, and impact persons with, disabilities. Instead, according to Article 12 of the CRPD, the states parties must adopt “the pertinent measures to provide access to persons with disabilities to the support they may need in exercising their legal capacity.”<sup>11</sup> It is definitive: jurisdictions are expected to advance from a substituted decision-making model towards one of decision-making support. GC1 has produced great controversy in common law jurisdictions and elsewhere, resulting in abundant academic literature. This may be due to several reasons, including that Article 12 constitutes a crucial element for the treatment of persons with disabilities in the CRPD because (1) it incorporates tremendously innovative and previously unknown ideas into the legal field, such as decision-making support; (2) it has an impact on certain sensitive issues, such as involuntary treatment and hospitalization, which, as much as they can save a person’s life, constitute a historical case of abusive treatment and torture against psychiatric patients where the status in which they have been left has not been cleared by GC1; and (3) the states parties have shown a lack of will and political and legal objections to make their domestic law compatible with the obligations arising from the Committee’s interpretation of Article 12.<sup>12</sup>

Despite a push to adopt CRPD standards, governments in common law jurisdictions maintain a regime where an individual’s decision-making capacity is functionally evaluated and may be substituted if found inadequate. In Latin America, however, the attitude of several governments has been (at least in theory) quite deferential to the Com-

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9. See General Comment No. 1, *supra* note 6, ¶ 26.

10. See *id.* ¶ 28.

11. *Id.* ¶ 3.

12. See generally 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*, 15(1) HUM. RTS. L. REV. 1 (2015); Matthé Scholten & Jakov Gather, *Adverse Consequences of Article 12 of the UN Convention on the Rights of Persons with Disabilities for Persons With Mental Disabilities and An Alternative Way Forward*, 44(4) J. MED. ETHICS 226 (2017); Jillian Craigie, Michael Bach, Sándor Gurbai, Arlene Kanter, Scott Y.H. Kim, Oliver Lewis & Graham Morgan, *Legal Capacity, Mental Capacity and Supported Decision-Making: Report from a Panel Event*, 62 INT’L J.L. & PSYCHIATRY 160 (2019).

mittee, which promotes the replacement of both the guardianship regime and the functional models of capacity used to evaluate decision-making capacity. Thus, over the last ten years in this region, reforms to legal capacity have been carried out to implement the support model for decision-making. In some cases, at least partially, they have ended with the institution of guardianship.

This Article describes the reforms to legal capacity carried out in four Latin American jurisdictions: Costa Rica, Argentina, Peru, and Colombia. These are the first Latin American countries to reform their domestic legislation on legal capacity, particularly concerning the adaptation of it to CRPD standards. Our objective is to make known to the English-speaking academic community, with some degree of detail, the legislative developments conducted in this region, serving as a reference for other countries that are considering the implementation of reforms in this area of law.

The Article aims to provide a detailed account of each of the reforms, understood as a process of transforming the legal capacity regime. This implies an analysis of the new regulations from a substantive and procedural perspective and means understanding the reforms from the implementation perspective as an attempt to put into practice a new model of legal capacity. Although a critical examination is relevant to identify the successes and failures of the reforms and account for the aspects that are susceptible to improvement, the scope of the review makes it sensitive to maintain the focus on the description of the reforms. However, this description also includes identifying problems that arose and were debated during the reforms.

We focus on five principal dimensions of the new legislation and reform process. Part I describes relevant aspects of the reform process (formal aspects, relevant actors, the role of the CRPD in its gestation and development, and the most controversial elements in the discussion). Part II describes the main structural features of the support system implemented by the reforms (recognition of legal capacity, substantive and procedural aspects of the support, and safeguards). Part III describes the transitional aspects of the reforms, and Part IV analyses three of the main measures to implement the reforms. Part V examines the adaptation of the reforms to the standards of the CRPD, and Part VI makes a preliminary analysis of the weaknesses of the reforms.

This research is fundamentally descriptive and aims to serve as input for other research on legal capacity. This Article examines the legislative reforms on legal capacity, including the reform projects, the legislative discussion, and the legal texts approved concerning other national legislation and administrative regulations. Additionally, it examines academic papers and information from civil society addressing the reforms. Finally, to identify aspects that could not be found in the documentary analysis, mainly linked to the reform process and its implementation, we conducted semi-structured interviews in 2021 with

relevant actors concerning the reforms in each of the four countries. The interviewees were provided with information about our research and agreed to be interviewed by the research team.

**Table 1: List of Interviewees**

	Country	Interviewee Number	Background
1	Costa Rica	CR-1	Female – Expert
2		CR-2	Female – Expert/Politician
3		CR-3	Male – Expert/Activist
4		CR-4	Male – Activist/Judiciary
5		CR-5	Female – Expert/Judiciary
6	Colombia	CO-1	Female – Expert
7		CO-2	Male – Expert/Activist
8		CO-3	Female – Expert/Activist
9		CO-4	Female – Academic/Judiciary
10		CO-5	Female – Expert/Activist
11		CO-6	Female – Academic
12	Peru	PE-1	Female – Academic
13		PE-2	Male – Expert/Activist
14		PE-3	Male – Academic
15		PE-4	Female – Activist
16		PE-5	Female – Activist
17		PE-6	Female – Academic/Judiciary
18	Argentina	AR-1	Female – Academic/Judiciary
19		AR-2	Female – Academic/Judiciary
20		AR-3	Male – Academic/Judiciary
21		AR-4	Female – Academic
22		AR-5	Male – Expert/Activist



II. THE REFORM PROCESSES: ORIGIN AND DEVELOPMENT

This Part describes the reforms to the selected jurisdictions from the perspective of their origin and development. The following aspects of the reforms will be reviewed: (1) the formal characteristics; (2) the most relevant actors involved, with particular emphasis on the participation of organizations of persons with disabilities; (3) the role of the CRPD before and during the reform; (4) the role of comparative law during the reform; and (5) the main points of disagreement that arose during its discussion.

A. *Formal Aspects*

**Table 2: Legislation and Administrative Regulation**

	<b>Legislation</b>	<b>Administrative Regulation</b>	<b>Previous Legislation Regulating Legal Capacity</b>
Argentina	Civil and Commercial Code (2014)	Decree 868 (2017)	Civil Code (1869)
Colombia	Law 1,996 (2019)	Decree 1,429 (2020)	Civil Code (1887), Law 1,306 (2009), Law 1,618 (2013)
Costa Rica	Law 9,379 (2016)	Regulation 41,087-MTSS (2018)	Civil Code (1887), Family Code (1973), Civil Procedure Code (1989)
Peru	Peruvian Civil Code [modified by DL 1,384 (2018)]	DS 016-2019-MIMP (2019), AR 046-2019-CE-PJ (2019)	Civil Code (1984), Civil Procedure Code (1993)

The reforms had relevant differences regarding the duration of the legislative debate, involvement of parliament, and regulatory techniques.

Costa Rica enacted legal capacity reform with its Promotion of Personal Autonomy of Persons with Disabilities Law (CR-AL).<sup>13</sup> The legislative debate for the CR-AL took the longest. This project was presented in 2009 and approved seven years later in 2016. The CR-AL established a system of support and safeguards by repealing and mod-

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13. Law No. 9379, Aug. 30, 2016, 166 LA GACETA art. 1 (Costa Rica).

ifying various provisions of the Family Code and the Civil Procedure Code (CR-CPC) regarding interdiction and guardianship.<sup>14</sup>

The Argentine reform was included in the new Civil and Commercial Code of the Nation (ACC), enacted in October 2014.<sup>15</sup> The ACC began to take shape in 2011 and was passed in 2014. This regulatory body came to replace the old Civil Code that governed legal capacity, including interdiction and guardianship.<sup>16</sup> Although the National Mental Health Law introduced some reforms in 2010 in line with the CRPD,<sup>17</sup> the general regime of legal capacity was reformed by the ACC. Implementing the reform is difficult due to Argentina being a federal republic. Each of the twenty-four provinces has jurisdiction over the procedural legislation.

In Peru, the reform did not originate in a statute but in the Legislative Decree that recognizes and regulates the legal capacity of persons with disabilities under equal conditions (PE-LD 1,384).<sup>18</sup> PE-LD 1,384 modified several articles of the Peruvian Civil Code (PCC) and was issued by the executive power after authorization by Congress through Delegating Law 30,823 (2018).<sup>19</sup> The Peruvian reform was conducted through delegated legislation by the executive. Unlike other reforms, it was designed as a modificatory law, whose primary focus was the modification of the PCC. Before this reform, the General Law of Persons with Disabilities advanced the recognition of rights for persons with disabilities;<sup>20</sup> however, it did not address legal capacity issues. Additionally, the Civil Procedure Code (PE-CPC) and Legislative Decree of Notaries (PE-LD 1,049) were modified to give procedural support to the system of support.<sup>21</sup>

Finally, the Colombian reform materialized in a law that established the regime for exercising the legal capacity of persons with disabilities of legal age (CO-LC).<sup>22</sup> The reform was initiated in July 2017, and the CO-LC was passed two years later in August 2019. This law repeals the substituted decision-making system in Colombia, mainly governed by the Law for the Protection of People with Mental Disabilities and the Regime of Legal Representation of Emancipated

14. See generally Law No. 5476, Dec. 21, 1972, 24 LA GACETA (Costa Rica); Law No. 7130, Aug. 16, 1989, CÓDIGO PROCESAL CIVIL (Costa Rica).

15. See generally CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL PROCEDURE CODE] (2014) (Arg.).

16. See *id.*

17. Law No. 26657, Dec. 2, 2010, [32041] B.O. 1 (Arg.).

18. Law No. 1384, Sept. 4, 2018, EL PERUANO 3 (Peru).

19. See generally Legislative Decree No. 295, July 24, 1984, EL PERUANO 1 (Peru). Law No. 30823, July 19, 2018, EL PERUANO 20, art. 1 (Peru).

20. See Law No. 29973, Dec. 24, 2012, 12304 EL PERUANO 418999 (Peru).

21. Legislative Decree No. 295, July 7, 1984 (Peru); Legislative Decree 1049, June 26, 2008 (Peru).

22. L. 1996/2019, agosto 26, 2019, 51.057 DIARIO OFICIAL [D.O.] 1 (Colom.).

Incapable,<sup>23</sup> several articles of the Civil Code,<sup>24</sup> and the Procedural Code (CO-PC),<sup>25</sup> to accommodate a supported decision-making model.

We observed three differences in the reforms. First, the legal capacity reforms originated in two ways. The legislative body produced the reforms in Argentina, Colombia, and Costa Rica. In contrast, the Peruvian reform comes from the executive branch. Second, the Colombian, Costa Rican, and Peruvian legislation arose from a special reform process. The Argentine reform was part of a more comprehensive modernization project, systematization, and civil and commercial legislation unification. Third, the Costa Rican and Colombian reforms gave birth to special legislation on the legal capacity of persons with disabilities. In contrast, the Argentine and Peruvian reforms were inserted into their civil codes, a systematic regulatory body traditionally considered the common law containing the default rules of private law in civil law systems. This difference in technique and contexts has influenced the scope and implementation processes. For example, Peruvian Law No. 30,823 only delegated the executive power to legislate on disability matters. That impacted the possibilities of eliminating other types of guardianship, such as that for habitual drunkards and drug addicts. In Argentina, for its part, the reform did not introduce systematic changes in the provincial and national codes of procedure, keeping the procedural side of guardianship intact.

On the other hand, the legislative reforms refer to the executive power for specific regulation. In Costa Rica, an important regulatory source is Decree 41,087-MTSS [Regulations to the Law for the promotion of the personal autonomy of persons with disabilities] (2018) (CR-AL Regulation),<sup>26</sup> which generally develops the objectives outlined in the CR-AL. Similar is the Peruvian case, in which Supreme Decree that regulates the granting of reasonable adjustments, the appointment of support and implementation of safeguards for the exercise of the legal capacity of persons with disabilities (PCC Regulation) regulates the generality of the specific aspects of the law.<sup>27</sup> Additionally, Peru has created a protocol for judicial attention of persons with disabilities (Administrative Regulation 010-2018-CE-PJ).<sup>28</sup> In Colombia, the CO-LC mandates the administration to regulate the national guidelines and protocol for the assessment of support<sup>29</sup> and the regulation of the provision of such services.<sup>30</sup> The protocol for the assessment of support was issued in December 2020, and the regula-

23. L. 1306/2009, junio 30, 2009, 47.371 DIARIO OFICIAL [D.O.] 58 (Colom.).

24. *See generally* L. 57/1887, abril 20, 1887, 7.019 DIARIO OFICIAL [D.O.] (Colom.).

25. L. 1564/2012, julio 12, 2012, 48.489 DIARIO OFICIAL [D.O.] (Colom.).

26. Executive Decree No. 41087-MTSS, Apr. 30, 2018, LA GACETA (Costa Rica).

27. Supreme Decree No. 016-2019-MIMP, Aug. 25, 2019, EL PERUANO 10 (Peru).

28. Administrative Resolution No. 010-2018-CE-PJ, Jan. 10, 2018, EL PERUANO (Peru).

29. L. 1996/2019 art. 12 (Colom.).

30. *Id.* art. 13.

tion of the assessment services was issued in April 2022 (Decree 487).<sup>31</sup> The Ministry of Justice issued Decree 1,429 in November 2020 to further regulate Articles 16, 17, and 22 of the CO-LC.<sup>32</sup> There are other references in Articles 30 and 62 of the CO-LC that order the regulation of the incorporation of advance directives in the clinical history of persons with disabilities and the issuance of the regulation to guarantee the right to work of persons with disabilities. The ACC did not refer to administrative regulations, and no executive regulations have been issued with reference to support for legal capacity.

In conclusion, it is possible to infer that, although all the reform processes analyzed have the common objective of aligning their internal legislation with international standards of human rights, there are important formal differences between them. Their different origins, processes, and legislative techniques respond to the context in which they developed, which certainly influences their scope and implementation processes.

### B. Actors

A different constellation of actors participated in promoting and discussing each of the reforms. Among them were political actors, administrative bodies, the judiciary, academics, and civil society organizations, including organizations of persons with disabilities.

In Costa Rica, after the ratification of the CRPD in 2008, the judiciary conducted a review process of regulating the legal capacity of persons with disabilities. The conclusion was that guardianship contradicted Article 12 of the CRPD.<sup>33</sup> Based on these conclusions, civil society organizations supported a reform project presented by three MPs in the Legislative Assembly.<sup>34</sup> In the parliamentary process, different state institutions stand out: the National Council for Rehabilitation and Special Education, the ombudsman's office, the

31. L. 487/1998, diciembre 28, 1998, 43.460 DIARIO OFICIAL [D.O.] (Colom.).

32. See Decreto 1429/2020, noviembre 5, 2020, 51.489 DIARIO OFICIAL [D.O.] 8 (Colom.).

33. See Interview: CR-1; OBSERVATORIO DE VIOLENCIA DE GÉNERO CONTRA LAS MUJERES Y ACCESOS A LA JUSTICIA, POLÍTICA DE IGUALDAD PARA LAS PERSONAS CON DISCAPACIDAD EN EL PODER JUDICIAL [POLICY OF EQUALITY FOR PERSONS WITH DISABILITIES IN THE JUDICIAL SYSTEM] (2008), <https://observatoriodegenero.poderjudicial.go.cr/images/Acciones/Documentos/politica-discapacidad.pdf> (last visited Nov. 6, 2022) [<https://perma.cc/8987-H9M8>] (archived Sept. 30, 2022).

34. See generally Interview: CR-1, *supra* note 33; ANA HELENA CHACÓN, OFELIA TAITELBAUM & LESVIA VILLALOBOS, EXPEDIENTE 17305. PROYECTO DE LEY "AUTONOMÍA DE LAS PERSONAS CON DISCAPACIDAD" [BILL "AUTONOMY OF PERSONS WITH DISABILITIES"] (2016), <http://www.asamblea.go.cr/sd/SiteAssets/Lists/Consultas%20Biblioteca/EditForm/Proyecto-17305.pdf> (last visited Nov. 6, 2022) [<https://perma.cc/U3QE-H7BU>] (archived Sept. 30, 2022); *Autonomía de las personas con discapacidad* [Autonomy of Persons with Disabilities], CAPACIDADES (Nov. 26, 2009), <http://discapacidades.blogspot.com/2009/11/autonomia-de-las-personas-con.html> [<https://perma.cc/A3NB-RBVD>] (archived Sept. 30, 2022).

Supreme Court of Justice, and the Supreme Electoral Tribunal, among others.<sup>35</sup> In addition, various civil society organizations participated, such as the Information Committee of Organizations of Persons with Disabilities, the Independent Living Movement, and the RED-PRO Federation of Persons with Disabilities.<sup>36</sup> Even though some social organizations (mainly the Independent Living Movement) criticized the limited participation granted to persons with disabilities during the legislative discussion,<sup>37</sup> the pressure of the movement of persons with disabilities was decisive in the passing of the project. Noteworthy was a demonstration walk of persons with disabilities who traveled along the main national highway of Costa Rica towards the Legislative Assembly building.<sup>38</sup>

In Argentina, two main vectors fostered the reform of legal capacity. First, the judiciary has applied international law standards in guardianship cases since 2009.<sup>39</sup> Second, there was a general reform of private law legislation.<sup>40</sup> In 2011, a drafting commission composed of three ministers of the Supreme Court generated the first bill of reform presented to Congress. Regarding legal capacity, disability organizations and academics considered the bill insufficient and

35. See Asamblea Legislativa, *Expediente N° 17305 Redacción Final* (2016) (Costa Rica).

36. See *id.*

37. See *id.* at 1325.

38. See Interview: CR-1, *supra* note 33; Carlos Arrieta Pérez, *Personas Con Discapacidad Piden a la Asamblea Legislativa Validar su Autonomía* [Persons with Disabilities Ask Legislative Assembly to Validate Their Autonomy], ELPAÍS.CR (May 5, 2016), <https://www.elpais.cr/2016/05/05/personas-con-discapacidad-piden-a-la-asamblea-legislativa-validar-su-autonomia/> [https://perma.cc/L9S4-DM32] (archived Sept. 30, 2022); Manuel Avendaño Arce, *Jóvenes en Silla de Ruedas Llegan a Asamblea para Impulsar Proyecto que Crea Figura de Asistentes Personales* [Youth in Wheelchairs Come to the Assembly to Promote a Project that Creates the Institution of Personal Assistants], LA NACIÓN (May 5, 2016), <https://www.nacion.com/el-pais/jovenes-en-silla-de-ruedas-llegan-a-asamblea-para-impulsar-proyecto-que-crea-figura-de-asistentes-personales/7Z2OLSGES5FNBGXQNDWPKKT3NU/story/> [https://perma.cc/MSV4-A7W2] (archived Sept. 30, 2022); Karla Barquero, *Personas con Discapacidad Recorrerán 282 Kilómetros* [Persons with Disabilities Will Travel 282 Kilometers], CRHOY.COM (Apr. 20, 2016), <https://archivo.crhoy.com/personas-con-discapacidad-recorreran-282-kilometros/nacionales/> [https://perma.cc/GZ7R-3QJU] (archived Sept. 30, 2022); Carmen Picado, *Personas con Discapacidad Recorrerán 282 Km para Pedir Aprobación de Autonomía* [Persons with Disabilities Will Travel 282 Kilometers to Request Approval of Autonomy], TV SUR (Mar. 18, 2016), <https://www.tvsur.co.cr/noticias/personas-con-discapacidad-recorreran-282-km-para-pedir-aprobacion-de-autonomia/> [https://perma.cc/RDB3-7YWQ] (archived Sept. 30, 2022).

39. See, e.g., Jorge Lafferriere & Carlos Muñoz, *Los Procesos Civiles Relativos a la Capacidad: de la Ley de Salud Mental al Nuevo Código Civil y Comercial* [Civil Procedures Related to Capacity: From Mental Health Law to the New Civil and Commercial Code], PENSAR EN DERECHO 141 (2017). See generally Interview: AR-1; Interview: AR-2.

40. See Interview: AR-3; Interview: AR-4; Decreto 191/2011, Feb. 28, 2011 (Arg.).

contrary to the CRPD because it kept guardianship.<sup>41</sup> By order of the executive, Congress continued to discuss the bill, convening public hearings in different cities of the country for civil society to present proposals.<sup>42</sup> Several disability organizations participated in these hearings.<sup>43</sup> However, the hearings were criticized as merely formal and not sufficiently participatory. Thanks to pressure from organizations of persons with disabilities, it was possible to negotiate and approve a reform that furthered the recognition of legal capacity in the original bill. Relating to the support system, Article 43 of the new ACC reflects the work of these groups of activists and academics.<sup>44</sup>

In Peru, the reform involved Congress, which delegated the regulation of a matter of primary legislation to the executive. In compliance with this delegation, PE-LD 1,384 was issued with no previous consultation process. However, the text of the PE-LD 1,384 was based on two rejected bills presented to the Peruvian Congress in 2015 (No. 4201/2014-CR) and 2017 (No. 872/2016-CR).<sup>45</sup> In the discussion of those bills, it became possible to identify the participation of multiple actors from academia (both civil lawyers and disability specialists), government (Ministries of Justice and Human Rights, Foreign Affairs, Women and Vulnerable Populations, and the ombudsman, among

41. See Interview: AR-3, *supra* note 40; Interview: AR-4, *supra* note 40; REDI, CELS, ADC, FAICA & FENDIM, INFORME ALTERNATIVO ARGENTINA SITUACIÓN DE LAS PERSONAS CON DISCAPACIDAD EN ARGENTINA 2008/2012 [ALTERNATIVE REPORT ARGENTINA: SITUATION OF PERSONS WITH DISABILITIES IN ARGENTINA 2008/2012] 1, 20 (2012), <http://www.redi.org.ar/Documentos/Informes/Informe-alternativo-al-comite-sobre-los-derechos-de-las-personas.pdf> [<https://perma.cc/7RG2-G2Z3>] (archived Sept. 30, 2022) [hereinafter INFORME ALTERNATIVO ARGENTINA SITUACIÓN].

42. See Presidenta de la Nación, Jefe de Gabinete de Ministros, & Ministro de Justicia y Derechos Humanos, *Mensaje del Poder Ejecutivo Nacional N° 884/2012*.

43. See generally Interview: AR-3, *supra* note 40; Letter from La Mesa Federal de Salud Mental, to Marcelo Fuentes, President, La Comisión Bicameral para la Unificación de los Códigos Civil y Comercial de la Nación Justicia y Derechos Humanos (Aug. 13, 2012); FUNDACIÓN SUR ARGENTINA, PONENCIA AUDIENCIA PÚBLICA COMISIÓN BICAMERAL PARA LA UNIFICACIÓN DE LOS CÓDIGOS CIVIL Y COMERCIAL DE LA NACIÓN [PUBLIC HEARING PRESENTATION OF BICAMERAL COMMISSION FOR THE UNIFICATION OF THE NATIONAL CIVIL AND COMMERCIAL CODES] (2012); MINISTERIO PÚBLICO TUTELAR DE BUENOS AIRES, PONENCIA AUDIENCIA PÚBLICA COMISIÓN BICAMERAL PARA LA UNIFICACIÓN DE LOS CÓDIGOS CIVIL Y COMERCIAL DE LA NACIÓN [PUBLIC HEARING PRESENTATION OF BICAMERAL COMMISSION FOR THE UNIFICATION OF THE NATIONAL CIVIL AND COMMERCIAL CODE] (2012); Letter from REDI, to María Soledad Cisternas Reyes, Presidenta, Comité sobre los Derechos de las Personas con Discapacidad (July 4, 2012); Letter from Red Iberoamericana de Expertos en la Convención Internacional sobre los Derechos de las Personas con Discapacidad, to Exmos Sres. (Aug. 21, 2012) [hereinafter Red Iberoamericana]; ASOCIACIÓN AZUL, PONENCIA AUDIENCIA PÚBLICA COMISIÓN BICAMERAL PARA LA UNIFICACIÓN DE LOS CÓDIGOS CIVIL Y COMERCIAL DE LA NACIÓN [PUBLIC HEARING PRESENTATION OF BICAMERAL COMMISSION FOR THE UNIFICATION OF THE NATIONAL CIVIL AND COMMERCIAL CODE] (2012).

44. See generally Interview: AR-2, *supra* note 39; Interview: AR-3, *supra* note 40; Interview: AR-4, *supra* note 41; Interview: AR-5; Red Iberoamericana, *supra* note 43.

45. See Law No. 4601/2014-CR, June 16, 2015, CONGRESO DE LA REPÚBLICA (Peru); Law No. 872/2016-CR, Jan. 12, 2017, CONGRESO DE LA REPÚBLICA (Peru).

others), and organizations of persons with disabilities.<sup>46</sup> However, reforming legal capacity in Peru has been in the making since 2010, promoted mainly by the NGO *Sociedad y Discapacidad*.<sup>47</sup> Furthermore, noteworthy relevant actors in the reform process are the Disability Board of the National Human Rights Coordinator,<sup>48</sup> the Peruvian Down Syndrome Society, and the *Fundación Álamo*.<sup>49</sup>

In Colombia, a group of deputies, senators, and the ombudsman introduced the reform in 2017.<sup>50</sup> The bill has a direct antecedent in a working group formed for the government in 2015,<sup>51</sup> supported by the National Disability Council and with the participation of public bodies, academic institutions, and civil society organizations.<sup>52</sup> Various disability organizations stand out, such as the Colombian Association of Down Syndrome, *Nodo Comunitario*, and the Action Program for Equality and Social Inclusion.<sup>53</sup> These organizations had great influence not only in their participation in the working group but in multiple instances during which they lobbied to achieve a legal capacity reform to adapt Colombian legislation to the standards of the CRPD.<sup>54</sup>

In all the reforms, there was cooperation from multiple actors including political and administrative institutions, and academic and

46. See generally Law No. 4601/2014-CR (Peru); Law No. 872/2016-CR (Peru); see also Renata Bregaglio & Renato Constantino, *Un Modelo para Armar: la Regulación de la Capacidad Jurídica de las Personas con Discapacidad en el Perú a Partir del Decreto Legislativo 1384* [A Model to Assemble: Regulation of the Legal Capacity of Persons with Disabilities in Peru from Legislative Decree 1384], 4(1) REVISTA LATINOAMERICANA EN DISCAPACIDAD SOCIEDAD DERECHOS HUMANOS 32, 46 (2020).

47. See generally SODIS, <https://sodisperu.org> (last visited Oct. 30, 2022) [<https://perma.cc/YE69-YN3C>] (archived Sept. 30, 2022); NACIONES UNIDAS DERECHOS HUMANOS, CONVENCION SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD [CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES] (2014).

48. See MESA DE DISCAPACIDAD Y DERECHOS DE LA COORDINADORA NACIONAL DE DERECHOS HUMANOS [DISABILITY AND RIGHTS BOARD OF THE NATIONAL COORDINATOR OF HUMAN RIGHTS], MEMORIA ANUAL 1, 4–7 (2021).

49. See Interview: PE-1; Bregaglio & Constantino, *supra* note 46, at 46.

50. L. 027/2017, julio 31, 2017, [613] GACETA DEL CONGRESO 1 (Colom.).

51. See Sharon Bustamante, *Aplicando la reforma del Código Civil: Capacidad jurídica y salvaguardias* [Applying the Civil Code Reform: Legal Capacity and Safeguards], PONTIFICA UNIVERSIDAD CATÓLICA DEL PERÚ 1 (2019).

52. See L. 027/2017 at 11 (Colom.).

53. See *id.*

54. See Interview: CO-1; Interview: CO-2; Interview: CO-3; Interview: CO-4; Interview: CO-5; Luis Fernando Astorga, *Proyecto: Cultivando Capacidades para Cosechar Derechos de Handicap International* [Project: Cultivating Capacity to Provide Rights by Handicap International], DISCAPACIDAD Y SALUD (June 29, 2010), <https://discapacidadrosario.blogspot.com/2010/06/proyecto-cultivando-capacidades-para.html> [<https://perma.cc/PQ5F-XR39>] (archived Oct. 10, 2022); *Proyectos liderados* [Leading Projects], ASDOWN COLOMBIA, <https://asdown.org/proyectos-liderados/> (last visited July 18, 2022) [<https://perma.cc/C76C-EXBL>] (archived Oct. 10, 2022); *Capacidad Jurídica* [Legal Capacity], UNIVERSIDAD DE LOS ANDES COLOMBIA PAIIS, <https://paiis.uniandes.edu.co/capacidad-juridica/> (last visited Jul 18, 2022) [<https://perma.cc/7RTG-3GNE>] (archived Nov. 1, 2022) [hereinafter *Capacidad Jurídica*, PAIIS].

civil society organizations. Moreover, civil society and organizations of persons with disabilities played a leading role. However, in Colombia, participation was more prominent and decisive than in other countries. In contrast, in Costa Rica, persons with disabilities had limited involvement in the reform discussion.

### C. *The Role of the CRPD*

All legal capacity reforms occurred after the ratification of the CRPD. The tangible impacts of the CRPD in the conception, discussion, and approval of the reforms are transcendental.

Even before the respective reforms were carried out, there were voices and efforts from different sectors reporting the need to adjust domestic legislation on legal capacity. In Costa Rica, the CRPD was ratified in 2008 and the reform project was presented in 2009. However, activist movements and organizations of persons with disabilities had long denounced guardianship as unsustainable.<sup>55</sup> This was a significant factor leading to the promoted legislative initiative.<sup>56</sup> In Argentina, the CRPD was also ratified in 2008. Civil society organizations and academics began to raise the need for reform in this area, which materialized in 2011.<sup>57</sup> In Peru, the CRPD was ratified in 2007, but the first reform bill only dates from 2015.<sup>58</sup> However, since around 2010, civil society organizations have promoted changes in recognizing rights for persons with disabilities, especially incorporating CRPD standards.<sup>59</sup> Colombia ratified the CRPD in 2011, and the reform bill

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55. See Interview: CR-2; CONSEJO NACIONAL DE REHABILITACIÓN Y EDUCACIÓN ESPECIAL, AGENCIA DE COOPERACIÓN INTERNACIONAL DEL JAPÓN, & OBSERVATORIO DEL DESARROLLO DE LA UNIVERSIDAD DE COSTA RICA, ESTUDIO BÁSICO SOBRE LAS NECESIDADES Y LAS OPORTUNIDADES DE LAS PERSONAS CON DISCAPACIDAD EN COSTA RICA [REPORT ON THE NEEDS OF AND OPPORTUNITIES FOR PEOPLE WITH DISABILITIES IN COSTA RICA] (Mar. 2006); CONSEJO NACIONAL DE REHABILITACIÓN Y EDUCACIÓN ESPECIAL COSTA RICA, LISTA DE CUESTIONES EN RELACIÓN CON EL INFORME INICIAL DE COSTA RICA ADOPTADA POR EL COMITÉ SOBRE LOS DERECHO DE LAS PERSONAS CON DISCAPACIDAD EN SU DÉCIMO PERIODO SESIONES [LIST OF ISSUES RELATED TO THE INITIAL REPORT OF COSTA RICA ADOPTED BY THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES AT ITS TENTH SESSION] 50 (Apr. 11, 2014) [hereinafter COSTA RICA ISSUES TO COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES].

56. See Interview: CR-1, *supra* note 33; Interview: CR-2, *supra* note 55; CHACÓN, TAITELBAUM & VILLALOBOS, *supra* note 34, at 1.

57. *E.g.*, Interview: AR-1, *supra* note 39; Interview: AR-3, *supra* note 40; RI & REDI, CAPACIDAD JURÍDICA Y ACCESO A LA JUSTICIA: UNA PROPUESTA DE REFORMA LEGAL DESDA LAS ORGANIZACIONES DE PERSONAS CON DISCAPACIDAD [LEGAL CAPACITY AND ACCESS TO JUSTICE: A PROPOSAL FOR LEGAL REFORM FROM ORGANIZATIONS OF PEOPLE WITH DISABILITIES] (2010); INFORME ALTERNATIVO ARGENTINA SITUACIÓN, *supra* note 41, at 193.

58. See Law No. 4601/2014-CR (Peru).

59. See, *e.g.*, Interview: PE-1, *supra* note 49; Interview: PE-2; Interview: PE-3; Interview: PE-4; *Piden nueva ley para personas con discapacidad* [They Ask for a New Law for Persons with Disabilities], OFICINA DE COMUNICACIONES DEL CONGRESO,



was presented in 2017.<sup>60</sup> As mentioned above, the public sector has a leading role.<sup>61</sup> Still, a vibrant civil society promoted the reform since the ratification of the CRPD, highlighting the importance of the content of Article 12 of the CRPD and adjusting domestic legislation with the obligations set forth therein.<sup>62</sup>

**Table 3: Period of the Reforms**

	Argentina	Colombia	Costa Rica	Peru
Ratification of CRPD	2008	2011	2008	2007
Particular Observation CRPD	2012	2016	2014	2012
1st Legal Capacity Bill	2012	2017	2009	2015
Legal Capacity Reform	2014	2019	2016	2018
Complete Coming into Force	2015	2021	2016	2018
Administrative Regulation	2017	2020	2018	2019
Total Years	9	9	10	12

All the reforms have the clear objective of adapting the respective national legislation to the standards of the CRPD to comply with the international obligations subscribed by the states parties.<sup>63</sup> In each

<https://www2.congreso.gob.pe/Sicr/Prensa/heraldo.nsf/CNnoticiasanteriores/d051970a31c24fb8052577bb006c8015?OpenDocument> (last visited Oct. 15, 2022) [<https://perma.cc/2S75-XQYY>] (archived Sept. 23, 2022).

60. See generally L. 027/2017 (Colom.).

61. See Interview: CO-3, *supra* note 54; L. 027/2017 at 11 (Colom.).

62. See Interview: CO-1, *supra* note 54; Interview: CO-3, *supra* note 54; Interview: CO-4, *supra* note 54; ASDOWN COLOMBIA, EL EJERCICIO DE LA CAPACIDAD JURÍDICA: GUÍA PARA SU APLICACIÓN [THE EXERCISE OF LEGAL CAPACITY: GUIDE FOR ITS APPLICATION] [https://asdown.org/wp-content/uploads/2019/09/Guia-para-Implementacion-Cap\\_Juridica.pdf](https://asdown.org/wp-content/uploads/2019/09/Guia-para-Implementacion-Cap_Juridica.pdf) (last visited July 18, 2022) [<https://perma.cc/W2WT-MEVJ>] (archived Oct. 15, 2022); COALICIÓN COLOMBIANA POR LA IMPLEMENTACIÓN DE LA CONVENCIÓN SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD [COLOMBIAN COALITION FOR THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES] 15–20 (2016).

63. See Interview: CR-1, *supra* note 33; Interview: AR-3, *supra* note 40; Interview: PE-2, *supra* note 59; Interview: PE-3, *supra* note 59; Interview: PE-5; Interview: PE-6; Interview: CO-1, *supra* note 54; Interview: CO-2, *supra* note 54; Interview: CO-3, *supra* note 54; L. 027/2017 at 11–14 (Colom.); CHACÓN, TAITELBAUM & VILLALOBOS, *supra* note 34, at 1; Law No. 2791/2017-PE, Apr. 6, 2017, EL PERUANO, art. 42 (Peru); *Mensaje del Poder Ejecutivo Nacional N° 884/2012*, *supra* note 42, at 1, 4–5.

legal system under study, the constitutional system makes human rights treaties part of the body of norms at the constitutional level: the *constitutional block*. In other words, CRPD standards are considered norms of constitutional status in the domestic legal systems, even though they are not directly contained in the respective national constitutions. Consequently, there was an international law obligation and an internal conflict of norms that pushed the states to adapt their domestic regulations to the standards of the convention.<sup>64</sup>

The CRPD also played a fundamental role in the debate on the reforms. In each case, the CRPD was used as a foundation to promote the recognition of legal capacity and adopt a support system following the provisions of Article 12. In general, the obligations emanating from the convention, following GC1, constituted the support to eliminate the substitution regimes of the will of persons with disabilities that were still in force in the jurisdictions analyzed.

The Committee supported the reforms through its observations to the extent that it urged the states to make the necessary adjustments in their respective domestic legislation. In particular, the CRPD recommended that Costa Rica eliminate guardianship and implement

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64. See generally, e.g., Interview: AR-3, *supra* note 40; Interview: PE-4, *supra* note 59; Interview: CO-1, *supra* note 54; Pablo Marshall, *El ejercicio de derechos fundamentales de las personas con discapacidad en Chile: Derecho internacional, enfoques teóricos y casos de estudio* [The Exercise of the fundamental Rights of Persons with Disabilities in Chile: International Law, Theoretical Approaches and Case Studies], 247 REVISTA DE DERECHO UNIVERSIDAD DE CONCEPCIÓN 45 (2020); Geovana Vallejo, Mónica Hernández & Adriana Posso, *La capacidad jurídica de las personas con discapacidad en Colombia y los nuevos retos normativos* [The Legal Capacity of Persons with Disabilities in Colombia and the New Regulatory Challenges], 8(1) CES DERECHO 3 (2017); Carla Villarreal, *El reconocimiento de la capacidad jurídica de las personas con discapacidad mental e intelectual y su incompatibilidad con los efectos jurídicos de la interdicción y la curatela: Lineamientos para la reforma del Código Civil para la implementación de un sistema de apoyos en el Perú* [The Recognition of the Legal Capacity of Persons with Mental and Intellectual Disabilities and Its Incompatibility with the Legal Effects of Interdiction and Curatorship: Guidelines for the Reform of the Civil Code for the Implementation of a Support System in Peru], PONTIFICIA UNIVERSIDAD CATÓLICA DEL PERÚ 1 (2014); Francisco J. Bariffi, *El Régimen de la Incapacidad del Código Civil argentino a la luz de la Convención Internacional sobre los Derechos de las Personas con Discapacidad* [The Disability Regime of the Argentine Civil Code in Light of the International Convention on the Rights of Persons with Disabilities], in DISCAPACIDAD, JUSTICIA Y ESTADO: ACCESO A LA JUSTICIA DE PERSONAS CON DISCAPACIDAD 107 (2013); Ericka Álvarez & Mariana Villarroel, *Análisis de la curatela y la capacidad de actuar de las personas con discapacidad en Costa Rica, a la luz de la Convención sobre los Derechos de las Personas con Discapacidad* [Analysis of the Guardianship and the Capacity to Act for Persons with Disabilities in Costa Rica in Light of the Convention on the Rights of Persons with Disabilities], UNIVERSIDAD DE COSTA RICA 1 (2010); Elard Bolaños, *La regulación de la capacidad jurídica de las personas con discapacidad mental en el Perú, Propuesta para su adecuación con el modelo social* [The Regulation of the Legal Capacity of Persons with Mental Disabilities in Peru, Proposal for its Adaptation to the Social Model], 1ER CONGRESO INTERNACIONAL VIRTUAL EN DISCAPACIDAD Y DERECHOS (2015).

a support system to advance the equal recognition of legal capacity;<sup>65</sup> Argentina acknowledge the equal recognition of persons with disabilities before the law and reconsider the different bills that presented inconsistencies with Article 12 when contemplating a hybrid model that admitted substituted decision-making by keeping some instances of guardianship;<sup>66</sup> Peru repeal interdiction and guardianship;<sup>67</sup> and Colombia harmonize its legislation and jurisprudence with international standards on legal capacity.<sup>68</sup>

#### D. *The Role of Comparative Law*

The reforms were developed consecutively over time: Argentina in 2014, Costa Rica in 2016, Peru in 2018, and Colombia in 2019. Therefore, it is worth asking whether and to what extent previous reforms supported the current reforms and whether reforms of legal capacity in other jurisdictions were influential. This influence can refer to incorporating similar norms or models (positive influence) or avoiding certain aspects considered problematic in the compared experience (negative influence).

Regarding Costa Rica, Argentina, and Peru, the comparative references are poor. The Costa Rican bill was based on the Spanish model of independent living regarding support, but it was innovative regarding legal capacity.<sup>69</sup> There was no further mention of this model in the legislative discussion. In Argentina, these foreign legal capacity models were only mentioned during the public hearings with civil societies, including: British Columbia, Hungary, Sweden, and Ireland.<sup>70</sup> In Peru, the first bill cited Italy and the United Kingdom as models of the support systems.<sup>71</sup> On the other hand, some actors pointed to Chile, Argentina, and Spain as examples of countries that keep guardianship

65. See Convention on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Costa Rica*, ¶¶ 21–24, U.N. Doc. CRPD/C/CRI/CO/1 (May 12, 2014) [hereinafter *Concluding Observations Costa Rica*].

66. See Convention on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Argentina as Approved by the Committee at its Eighth Session (17–28 Sept. 2012)*, ¶ 19–20, U.N. Doc. CRPD/C/ARG/CO/1 (Oct. 8, 2012).

67. See Convention on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Peru*, ¶ 25, U.N. Doc. CRPD/C/PER/CO/1 (May 16, 2012).

68. See Convention on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Colombia*, ¶¶ 70–71, U.N. Doc. CRPD/C/COL/CO/1 (Sept. 30, 2016).

69. See Comm. on the Rights of Persons with Disabilities, *Respuestas de Costa Rica a la lista de cuestiones* [Reponses from Costa Rica to the list of issues], U.N. Doc. CRPD/C/CRI/Q/1/Add.1, at 74–75 (2014).

70. See *Red Iberoamericana*, *supra* note 43.

71. Law No. 30823 art. 34 (Peru).

regimes to illustrate that this institution would not be contrary to CRPD standards.<sup>72</sup>

In contrast, several comparative influences are identified in the debate on Colombian reform. First, the Argentine and Peruvian reforms were thoroughly reviewed,<sup>73</sup> as were Canadian and Costa Rican legislation to a lesser extent.<sup>74</sup> The joint work with regional disability law networks that provided evidence of the experience of Argentina and Peru was critical.<sup>75</sup> Brazil, Mexico, Sweden, Hungary, and Ireland have been mentioned as countries that had already undertaken reforms to legal capacity to comply with the obligations of Article 12 of the CRPD but failed.<sup>76</sup> In contrast to those jurisdictions cited, the legislative debate shows awareness that Colombia will be the first country that seeks to fully eradicate from the legal system the substituted decision-making of persons with disabilities.<sup>77</sup>

In summary, comparative legislation on legal capacity was considered in all the reforms. In some cases, the reforms served as inspiration for legislative techniques or to avoid replicating negative experiences. Foreign legal capacity models are referred to, but legal transplants were not performed. Colombia stands out as the country with the most foreign influences, both from Latin America and outside the region, as it is the only country that uses the other Latin American reforms as a reference. The other reforms do not allude to or influence each other.

### E. *Main Themes of Discussion*

Examining the legislative debate makes it possible to identify specific themes around which discussions and tensions arose. The discussion's points of disagreement and consensus constitute relevant elements to consider. The arguments put forward in this stage have

72. See *Dictamen de la Comisión de Justicia y Derechos Humanos recaído en los proyectos de Ley, 48/2011-CR, 53/2011-CR, 400/2011-CR, 623/2011-CR, 1983/2012-CR, 3968/2014-CR, 4159/2014-CR y 4175/2014-CR con un texto sustitutorio mediante el cual se propone la Ley que modifica diversos artículos del Código Civil*, Comisión de Justicia y Derechos Humanos, 10 (Peru) [hereinafter *Peru Comisión de Justicia y Derechos Humanos*].

73. See Caridad Valdés, *Capacidad, discapacidad e incapacidad en clave carpenteriana [Capacity, Disability, and Incapacity in a Carpentarian Key]*, 4 IUS REVISTA DEL INSTITUTO CIENCIAS JURÍDICAS DE PUEBLA A.C. 39, 62 (2010); Rafael Barreto Souza, *Capacidad jurídica: un Nuevo Paradigma Desde la Convención de las Naciones Unidas Sobre los Derechos de las Personas con Discapacidad [Legal Capacity: A New Paradigm from the United Nations Convention on the Rights of Persons with Disabilities]*, 30(2) AM. UNIV. INT'L L. REV. 177, 187 (2015).

74. See Interview: CO-2, *supra* note 54; Interview: CO-3, *supra* note 54; COSTA RICA ISSUES TO COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, *supra* note 55, at 15.

75. See Interview: CO-2, *supra* note 54; Interview: CO-3, *supra* note 54.

76. See L. 5ª/1991, junio 27, 2017, 536 GACETA DEL CONGRESO 1, art. 36 (Colom.).

77. See *id.*

been reproduced during the implementation of the reforms and are likely to be replicated beyond that stage.

In Costa Rica, although the majority position favored reform in line with the CRPD standards, there were reservations related to three points: (1) the funding of the reform and the public provision of support, (2) the lack of protection of persons with disability if the guardianship was abolished, and (3) the possibility of eliminating the judicial appointment of the support person.<sup>78</sup> These reservations did not cause significant resistance to the reform at this stage. Instead, there was little political interest in passing the reform bill, which may explain why, as was mentioned, only three MPs supported the bill and it took seven years to pass the new legislation.<sup>79</sup>

In Argentina, the debate over the ACC arose against the change to a system of universal legal capacity and the consequent elimination of guardianship.<sup>80</sup> It was postulated that granting autonomy to persons with disabilities could be risky because it would leave them unprotected and make them more vulnerable to abuse. Several conservative actors pushed to maintain substituted decision-making institutions for complex cases.<sup>81</sup> The case of Gustavo Cerati, a famous Argentine singer who, after a stroke, remained in a coma for four years until his death in 2014, was used as an example of a problematic, paradigmatic case and had particular importance in the legislative debate.<sup>82</sup> The Network for the Rights of Persons with Disabilities criticized that the legislative discussion focused on exceptional cases, perpetuated a paternalistic and rehabilitative model of disability and diverted the focus from the general interests of persons with disabilities.<sup>83</sup>

In Peru, there were no significant discussions before the reform because no consultative process was conducted before passing the delegated legislation. Therefore, the debate arose after its publication.<sup>84</sup> However, there were questions about the two draft reforms, particu-

78. See generally Interview: CR-1, *supra* note 33; Álvarez & Villarroel, *supra* note 64; Asamblea Legislativa, *Expediente N° 17305 Redacción Final* (2016) (Costa Rica).

79. See Interview: CR-1, *supra* note 33; Interview: CR-3; Asamblea Legislativa, *Expediente N° 17305 Redacción Final*, arts. 1–7 (2016) (Costa Rica).

80. See Interview: AR-4, *supra* note 40; Honorable Cámara de Senadores de la Nación, *Período 131° - 19° Reunión - 9° Sesión especial*, 136 (2013); Honorable Cámara de Diputados de la Nación, *Inserciones Expediente No102-S-2103*, 56 (2014); Honorable Cámara de Diputados de la Nación, *17° Reunión - 12° Sesión ordinaria (especial)*, 49–50 (2014).

81. See Interview: AR-1, *supra* note 39; Interview: AR-4, *supra* note 40; Interview: AR-5, *supra* note 40; Honorable Cámara de Senadores de la Nación, *supra* note 80, at 136; Honorable Cámara de Diputados de la Nación, *Inserciones*, *supra* note 80, at 56; Honorable Cámara de Diputados de la Nación, *17° Reunión*, *supra* note 80, at 49–50.

82. See Interview: AR-3, *supra* note 40.

83. See LA RED POR LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD (REDI), SEGUIMOS RECLAMANDO: ¡NO A LA MUERTE CIVIL DE NADIE! [WE CONTINUE TO CLAIM: NO TO THE CIVIL DEATH OF ANYONE!], (2014).

84. See Interview: PE-2, *supra* note 59.

larly from academia and some legislators.<sup>85</sup> Those against the support model argued that the reform could put the autonomy and property rights of persons with disability at risk.<sup>86</sup>

Finally, in Colombia, the most controversial aspect was also the possibility of eliminating substituted decision-making.<sup>87</sup> The administration and some MPs, private law scholars, and some disability organizations opposed the bill on those grounds. They defended a rehabilitative conception of disability and conceived guardianship as protective of persons with disabilities.<sup>88</sup> Another intense debate dealt with the compulsory use of support when the support person had already been appointed. There is a possibility of voiding the legal act in cases where the support is not used.<sup>89</sup>

In summary, it is possible to identify that the focus of the discussion was in adopting a support system and eliminating substituted decision-making for complex or borderline cases. Resistance to the reform was based mainly on opposition to a new social paradigm of disability. In Costa Rica, some reservations related to the importance of funding, an issue not addressed in other jurisdictions.

#### F. Scope

Finally, in addition to having modified, to varying degrees, the general legislation on legal capacity (mainly civil and procedural codes), the reforms have had an uneven impact on some specific sectoral regulations in matters such as (1) sexual and reproductive rights, (2) the right to vote, (3) criminal law responsibility, (4) mental health, and (5) medical law more generally.<sup>90</sup> Mental health is perhaps the

85. See *Peru Comisión de Justicia y Derechos Humanos*, *supra* note 72, at 10.

86. See *id.*

87. See Letter from Cámara de Representantes de la República de Colombia & Angélica Lozano, to Carlos Arturo Correa, President, Comisión Primera (2017); Letter from Subdirector General, Sol Quiceno, to Amparao Yaneth Calderon Perdomo, Secretaría Comisión Primera Constitucional Permanente, Cámara de Representantes (2018); Alcibiades Serrato, *Carta de comentarios de la Asociación Colombiana de Personas con Discapacidad Física (ACOPEDIFI)*, GACETA DEL CONGRESO 106 at 37 (Mar. 2018); *Actas de Comisión Primera Constitucional Permanente [Minutes of the First Permanent Constitutional Commission]*, CÁMARA DE REPRESENTANTES DE LA REPÚBLICA DE COLOMBIA (2017); Interview: CO-2, *supra* note 54.

88. See generally *Actas de Comisión Primera Constitucional Permanente*, *supra* note 87; Serrato, *supra* note 87; Interview: CO-1, *supra* note 54; Interview: CO-2, *supra* note 54; Interview: CO-3, *supra* note 54; Interview: CO-5, *supra* note 54; Interview: CO-6.

89. See generally Interview: CO-2, *supra* note 54; Interview: CO-5, *supra* note 54; L. 1306/2009 art. 58 (Colom.).

90. See *Indicadores estructurales Argentina - Medidor en línea del cumplimiento de la Convención de Naciones Unidas de los Derechos de las Personas con Discapacidad en Latinoamérica [Structural Indicators Argentina - Online Compliance Measure with the United Nations Convention on the Rights of Persons with Disabilities in Latin America]*, LATAMDIS (2022), <https://juristasporladiscapacidad.org/latamdis/banco-de->

legal field more closely attuned to the reforms on legal capacity, even if the general recognition of legal capacity has not been clearly recognized in every case. The Peruvian Mental Health Law establishes the unconditional right of mental health patients to grant medical consent.<sup>91</sup> In addition, Supreme Decree 007-2020-SA indicates that forced hospitalization is only appropriate in cases of a psychiatric emergency when the person is unable to express their consent, even after real, considerable, and pertinent efforts have been made to obtain an expression of will, including the provision of support for decision-making.<sup>92</sup>

In sexual and reproductive health, progress has been strong in Argentina and Costa Rica. The Law on Access to Voluntary Interruption of Pregnancy provides that people with restricted capacity may give their informed consent, if they wish, with the assistance of a support person.<sup>93</sup> Similar regulation operates on issues of contraception and sterilization.<sup>94</sup> The ACC, likewise, provides that no person with disabilities can be subjected to health research without their free and informed consent, for which they must be guaranteed access to the support they need.<sup>95</sup> In Costa Rica, on the other hand, it was possible to eliminate the practice of forced sterilization, but a sectoral reform was not necessary for this, since it follows from Article 11(h) of the CR-AL.<sup>96</sup> Regarding the right to vote, although all jurisdictions, except for Colombia, provided the suspension of the right to vote with the appointment of a guardian for persons with disabilities, this situation changed with the reforms to legal capacity. However, an express modification to the sectoral legislation was not necessarily due to the

datos/?article%5B%5D=articulo-12&country%5B%5D=argentina&indicator%5B%5D=estructurales [https://perma.cc/W32R-SLYK] (archived Oct. 18, 2022); *Indicadores estructurales Perú - Medidor en línea del cumplimiento de la Convención de Naciones Unidas de los Derechos de las Personas con Discapacidad en Latinoamérica* [Structural Indicators Peru - Online Compliance Measure with the United Nations Convention on the Rights of Persons with Disabilities in Latin America], LATAMDIS (2022), https://juristasporladiscapacidad.org/latamdis/banco-de-datos/?article%5B%5D=articulo-12&country%5B%5D=peru&indicator%5B%5D=estructurales [https://perma.cc/C7ZK-2XVZ] (archived Oct. 18, 2022); *Indicadores estructurales Colombia - Medidor en línea del cumplimiento de la Convención de Naciones Unidas de los Derechos de las Personas con Discapacidad en Latinoamérica* [Structural Indicators Colombia - Online Compliance Measure with the United Nations Convention on the Rights of Persons with Disabilities in Latin America], LATAMDIS (2022), https://juristasporladiscapacidad.org/latamdis/banco-de-datos/?article%5B%5D=articulo-12&country%5B%5D=colombia&indicator%5B%5D=estructurales [https://perma.cc/2GR5-4RSA] (archived Oct. 18, 2022).

91. See Law No. 30947, May 23, 2019, EL PERUANO 4, art. 4(7) (Peru).

92. See Supreme Decree No. 007-2020-SA, Mar. 6, 2020, MINISTERIO DE SALUD (Peru).

93. See generally Law No. 27610, Jan. 15, 2021, [34.562] B.O. 2 (Arg.).

94. See Law No. 27655, Dec. 24, 2021, [34.821] B.O. 12 (Arg.).

95. See CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 59 (2014) (Arg.).

96. See Interview: CR-1, *supra* note 33; Interview: CR-4; Law No. 9379, Aug. 30, 2016, 166 LA GACETA 1, art. 11(h) (Costa Rica).

prevalence of the assistance for voting. In conclusion, progress has been made in sectoral reforms, mainly in areas related to health and sexual and reproductive rights, but modifications are lacking in depth and systematicity. No reference to reform on criminal responsibility rules was found.

### III. SYSTEMS OF SUPPORT

This Part analyzes the support systems introduced by the reforms to legal capacity in each jurisdiction under study. The main features of the new legislation are highlighted, and commonalities and differences among jurisdictions are identified. Following the structure of Article 12 of the CRPD, systems of support are organized in terms of (1) the recognition of the legal capacity of persons with disabilities, (2) the substantive and procedural regulation of support for decision-making, and (3) the safeguards for the exercise of legal capacity.

#### A. *Legal Capacity before the Reforms*

As mentioned, the reforms to legal capacity in Latin America originate from the desire to comply with Article 12 of the CRPD. Before the reforms, all the legal capacity regimes were built around a guardianship regime, affecting the exercise of rights of certain groups of persons with disabilities. Then, to comply with the CRPD provisions, it was necessary to shift legislation towards a model of support for decision-making and abolish the main instances of substituted decision-making, including guardianship. The changes promoted by the reforms implied a transformation of some of the most traditional private law institutions that included incapacity, interdiction, and guardianship. The previous regime embraces a substantial distinction between the *capacidad de goce* (the capacity to hold legal rights and obligations) and the *capacidad de ejercicio* (the capacity to act by oneself in law). The former was considered universal, but the latter was restricted, limited, or absent in cases of certain people who supposedly lacked autonomy.

Legal capacity in the civil law tradition is required for the validity of legal acts (a general category including every private law and public law manifestation of will with valid legal effects<sup>97</sup>). This requirement is complemented by the presumption that all adult persons have the capacity to act. However, it provides a series of grounds for incapacity (age and “insanity” currently being the most relevant) that function as

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97. This general category of German origins influenced civil law tradition and is widely used in continental Europe and Latin America. See ALEJANDRO GUZMÁN BRITO, ACTO, NEGOCIO, CONTRATO Y CAUSA EN LA TRADICIÓN DEL DERECHO EUROPEO E IBEROAMERICANO [ACT, BUSINESS, CONTRACT AND CAUSE IN THE TRADITION OF EUROPEAN AND IBERO-AMERICAN LAW] (1st ed. 2005).



exceptions to the general rule.<sup>98</sup> These grounds commonly distinguish between *incapacidad absoluta* and *relativa* (absolute and relative incapacity). The first implies *nulidad absoluta*—that is, avoidance of the legal act conducted by someone who is “absolutely incapable,” without the possibility of ratification. Therefore, to validly celebrate a legal act, the person must necessarily be represented by a guardian. However, those who are “relatively incapable” can conduct legal acts under authorization admitting the possibility of ratification. Therefore, the person who is relatively incapable is recognized as holding limited autonomy to act, unlike one who is absolutely incapable, who can only act through a legal representative.

Before the reforms, in Peru, Colombia, and Costa Rica, people with disabilities could be declared relatively or absolutely incapable depending on their circumstances. The category of incapacity used with this purpose was *demencia* (insanity),<sup>99</sup> or similar categories such as “those deprived of judgement”;<sup>100</sup> even the *sordomudos* (“deaf and dumb”), who could not express themselves in writing, were considered absolutely incapable. In the case of *demencia*, legal acts could be declared void, even when the person was not under guardianship, if it were proven that “insanity” was already present at the time of the act.<sup>101</sup>

Although each of the jurisdictions analyzed presents its peculiarities regarding the legal capacity regime regulated in its civil regulations, the impact of the reforms is substantive for the Latin American legal culture. Legal capacity is considered a requirement of the legal act—a central category for understanding individuals’ participation in both public and private legal life. By recognizing a person’s capacity to exercise legal capacity, the reforms grant a general authorization to autonomously act validly in the law by conducting all kinds of legal acts. The civil code is generally considered common and general law; therefore, the reform entails a chain effect that implies a much more systemic paradigm shift than other peripheral legal reforms. This explains why, despite efforts made previously in the analyzed jurisdictions to recognize the rights of persons with disabilities, there had not yet been any transformative change. The latter necessarily came hand in hand with a reform of civil legislation.

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98. See, e.g., Bariffi, *supra* note 64, at 107–17.

99. See L. 1564/2012 (Colom.); L. 1564/2012, julio 12, 2012, 48.489 DIARIO OFICIAL [D.O.] (Colom.); CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 54 (2014) (Arg.).

100. Legislative Decree No. 295 art. 43 (Peru); Law No. 63, Sept. 28, 1887, CÓDIGO PROCESAL CIVIL art. 41 (Costa Rica).

101. See Legislative Decree No. 295 art. 582 (Peru); Law No. 63 art. 473.

## B. *Recognition of Legal Capacity*

As mentioned, the reforms had the common objective of adopting a legal capacity regime compatible with the rights and obligations of Article 12 of the CRPD. This achievement depended on persons with disabilities being recognized to enjoy and exercise legal capacity in the same conditions as others, and in all aspects of their lives. This recognition was translated by the reforms into a general presumption of the legal capacity of people with disabilities. Although before the reforms, there was a presumption of legal capacity for persons of legal age. The legislation considered cases of incapacity, interdiction, and guardianship; hence, a presumption of capacity targeted explicitly at persons with disabilities was relevant.

In Costa Rica, the CR-AL establishes a general presumption of the legal capacity of persons with disabilities in Article 5.<sup>102</sup> The legal equality of persons with disabilities was recognized concerning legal personality, legal capacity, and capacity to act.

In Argentina, Article 31(a) of the ACC establishes “the general capacity of the exercise of the human person is presumed, even when hospitalized in a care establishment.”<sup>103</sup> However, the ACC also contemplates cases of capacity limitations, which are exceptional and must always be imposed for the benefit of the person.<sup>104</sup> The first case is the *restricted capacity*.<sup>105</sup> Under this hypothesis, the person retains their capacity in general terms, but the judge is empowered to limit it to specific acts.<sup>106</sup> Restricted capacity requires that (1) the person is over thirteen years of age, (2) the person suffers from a permanent or prolonged mental disorder or addiction of sufficient severity, and (3) it is estimated that the exercise of their full capacity may result in damage to their person or property. In this case, the person must act under the support mechanisms established by the judge so that their actions have legal validity.<sup>107</sup> The second case of limitation of legal capacity refers to the declaration of *incapacity*. Incapacity can be declared only exceptionally by the judge, who must also appoint a guardian, only when “the person is completely unable to interact with the environment and express his [or her] will by any appropriate means or format and the support system is ineffective.”<sup>108</sup>

In Peru, the PCC also contemplates a rule of presumption of legal capacity of persons with disabilities in Article 3: “The persons with

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102. See Law No. 9379 art. 5 (Costa Rica).

103. Cód. PROC. CIV. Y COM. art. 31(b) (Arg.).

104. See *id.* art. 31(b).

105. *Id.* art. 32(1).

106. See 14 RICARDO LORENZETTI, CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN COMENTADO [COMMENTARY OF THE NATIONAL CIVIL AND COMMERCIAL CODE] 129–30 (2014).

107. See Cód. PROC. CIV. Y COM. art. 32(3) (Arg.).

108. *Id.* art. 32(3).

disability have *capacidad de ejercicio* [capacity to act] in equal conditions in all aspects of life.”<sup>109</sup> This is complemented by the provisions of Article 42, which explicitly point out that this presumption is valid regardless of whether they use support or require reasonable adjustments to express their will.

In Colombia, Article 6 of the CO-LC provides the presumption of the legal capacity of persons with disabilities.<sup>110</sup> As in Peru, it is expressly established that this is independent of the use of support. However, in the Colombian case, there is an explicit provision for the presumption of the legal capacity to conduct legal acts independently from the support, even if the support has been specifically appointed for that act.<sup>111</sup>

### C. *Support for the Exercise of Legal Capacity*

The concept of support for the exercise of legal capacity is not defined in the CRPD. According to the interpretation of the Committee, support “is a broad term, which encompasses official and informal arrangements, of different types and intensities.”<sup>112</sup> In any case, and even in critical situations, its purpose must be to foster the confidence and skills of persons with disabilities to enhance their autonomy, making every effort to ensure that their will and preferences are respected.<sup>113</sup> This broad concept is expected to be specified in implementing support systems by those jurisdictions that reform their legal capacity regimes. Recognizing that there are many relevant aspects to be considered, the focus is on four elements of the reforms: How are support measures defined? Who serves as support? Who can benefit from the support? How intense can the support be and does it admit forms of representation?

#### 1. How Are Support Measures Defined?

All the reforms under analysis, except for Costa Rica, have chosen to expressly define what is meant by support. The concepts used are consistent in pointing out they are measures that facilitate decision-making with legal relevance.<sup>114</sup> Therefore, the concept of support is not restricted to a specific mechanism or instrument. Instead, in line with the Committee, it may consist of persons of support, measures related to design and universal accessibility, or alternative communication

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109. Legislative Decree 1049, June 26, 2008, EL PERUANO art. 3 (Peru).

110. L. 1306/2009 art. 6 (Colom.).

111. *Id.* art. 8.

112. General Comment No. 1, *supra* note 6, ¶ 25.

113. *See id.* ¶ 18.

114. *See* CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 43 (Arg.); Law No. 30823 art. 659-B (Peru); L. 1306/2009 art. 3(5) (Colom.).

methods, among others, which will vary according to what the person needs.<sup>115</sup>

This broader definition would extend the use of support for the entire decision-making process, and not only for the moment of formalization or expression of final consent. This amplitude may allow support for (1) the process of understanding the acts (e.g., what do I want to do?; what consequences does my act bring?; what requirements do I need to fulfill to carry it out?); (2) communication (e.g., do I need help to be given information?; do I need support to communicate my will?); (3) seeking advice (e.g., I cannot make this decision without the recommendation of a trusted person; after this advice, I could decide); (4) integrative processes (e.g., I need to make this decision together with a person I trust); and (5) representation (e.g., I cannot make this decision, so I need someone else to make it for me).<sup>116</sup>

The CR-AL constitutes a strange case. When regulating different support mechanisms, it uses terminology different from that used in other jurisdictions and Article 12 of the CRPD. Thus, it uses *support* to refer to support for independent living and *safeguard* to refer to support for the exercise of legal capacity.<sup>117</sup> Regarding this last figure, the CR-AL establishes the figure of the guarantor for legal equality, who must provide support in making decisions of legal relevance to persons with disabilities.<sup>118</sup>

All the reforms considered that support measures can be general (for a set of acts) or singular (established for a particular act). The standard requirement is that in the arrangement that designates the support, it is made explicit for which act or group of acts it will be available.<sup>119</sup>

Finally, all the jurisdictions analyzed indicate that the function or role of the support person(s) should be aimed at promoting the personal autonomy of the persons with disabilities so they can progressively make decisions independently.<sup>120</sup>

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115. See CRPD, *supra* note 2, art. 24, § 4–5.

116. See, e.g., LORENZETTI, *supra* note 106, at 255; Bregaglio & Constantino, *supra* note 46, at 49–50; Alejandro García & David Gutiérrez, *Principales novedades de la Ley 1996 de 2019 que regula el régimen de capacidad legal en personas con discapacidad mayores de edad [Main Novelties of the 2019 Law 1996 that Regulates the Legal Capacity Regime in Persons with Disabilities of Legal Age]*, MEDELLÍN UNIVERSIDAD EAFIT 1, 48 (2020).

117. Law No. 9379 arts. 2(e), (g) (Costa Rica).

118. See *id.* art. 11.

119. See Executive Decree No. 41087-MTSS arts. 1–17 (Costa Rica); CÓD. PROC. CIV. Y COM. art. 38 (Arg.); Administrative Resolution No. 010-2018-CE-PJ arts. 13(1), 17 (Peru); L. 1564/2012 art. 586 (Colom.).

120. See Law No. 5476 art. 2(m) (Costa Rica); CÓD. PROC. CIV. Y COM. art. 43 (Arg.); Law No. 30823 art. 659-B (Peru); L. 1306/2009 arts. 4–5 (Colom.).

## 2. Who Serves as Support?

One of the noticeable common characteristics of the reforms is their reliance on family and informal support networks to conduct the support workload. This is expressed on two grounds. First, they indicate that the people who provide support must be a person of trust and suitable to conduct the task.<sup>121</sup> Second, there is little guidance about what to do without such a suitable, trusted person.

The problem of the absence of a suitable, trusted person is resolved differently in each analyzed legislation, and no comprehensive solutions are provided. The CR-AL authorizes the designation of a legal person.<sup>122</sup> The Peruvian reform does not specify which institutions should conduct this task, so it has been assumed that it would be the ombudsman's office due to its work to protect vulnerable groups.<sup>123</sup> In the Argentine case, the issue is not resolved in the ACC. There is a bill seeking to create a state-funded public system to facilitate support in these cases.<sup>124</sup> However, no solution is currently in place. Finally, in Colombia, Article 14 of the CO-LC provides that the judge appoints a personal defender from the ombudsman's office to provide the necessary support without trusted persons.<sup>125</sup>

Even if a person of trust is available, specific inabilities to serve as a support person in Peru and Colombia are made explicit. In the first case, someone convicted of domestic violence or sexual crimes cannot be designated as a support person.<sup>126</sup> At the same time, Article 45 of the CO-LC establishes inabilities to serve as support: (1) the existence of pending litigation between the supported and the support persons and (2) conflicts of interest among them.<sup>127</sup> Regarding their number, all the reforms contemplate the possibility of appointing more than one support person if the person so requires.<sup>128</sup>

121. See Law No. 5476 art. 10 (Costa Rica); Cód. PROC. CIV. Y COM. art. 43 (Arg.); Legislative Decree No. 295 art. 659-B (Peru); L. 1306/2009 arts. 4(3), 34(2), 41, 54, 56 (Colom.).

122. See Law No. 5476 art. 18 (Costa Rica).

123. See Interview: PE-6, *supra* note 63; *Mecanismo Independiente para promover, proteger u supervisar la aplicación de la Convención sobre los Derechos de las Personas con Discapacidad – MICDPD* [Independent Mechanism to Promote, Protect or Supervise the Application of the Convention on the Rights of Persons with Disabilities – MICDPD], DEFENSORÍA DEL PUEBLO, <https://www.defensoria.gob.pe/mecanismo-independiente-para-promover-y-supervisar-la-convencion-sobre-derechos-de-personas-con-discapacidad-micdpd/> (last visited July 18, 2022) [<https://perma.cc/5L2F-RPMC>] (archived Oct. 16, 2022); Legislative Decree No. 295 art. 86 (Peru).

124. See Interview: AR-1, *supra* note 39; Trámite Paramentario, *Expediente 4845-D-2017 Sistema de apoyos para personas con discapacidad. Creación* [Bill 4845-D-2017 Support System for people with disabilities: Creation] (2017).

125. See L. 1306/2009 art. 14 (Colom.).

126. See Legislative Decree No. 295 art. 659-E (Peru).

127. L. 1306/2009 art. 45 (Colom.).

128. See Executive Decree No. 41087-MTSS art. 9 (Costa Rica); CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [Cód. PROC. CIV. Y COM.] arts. 32, 38, 43 (Arg.); Legislative Decree No. 295 art. 659-C (Peru); L. 1306/2009 arts. 15, 16, 34(3) (Colom.).

### 3. Who Can Receive Support?

No beneficiary of support is identified in the analyzed jurisdictions. Given the scope of regulation on this matter, it is uncertain whether the support measures can be used by all the people who need them or if, necessarily, the recipients must be persons with disabilities.

In Costa Rica, it can be deduced from the rules that regulate the procedure for the appointment of the guarantor for equality that the beneficiaries can only be persons with disabilities.<sup>129</sup> During the process, the initial request must include a medical opinion issued by the Costa Rican Social Security Fund or by a treating specialist doctor that proves the disability condition of the person.<sup>130</sup> Once the request is received, the judge will order the Legal Medicine Department of the Judicial Investigation Organization to issue a comprehensive opinion, including a diagnosis and prognosis regarding the person's physical, mental, intellectual, psychosocial, and sensory condition.<sup>131</sup>

In Argentina, no explicit provision is in place. According to some opinions, the definition of support admits that a person voluntarily requests a support measure.<sup>132</sup> In this case, there is no need to evaluate the need for support or the disability, as is indicated in the cases of restricted capacity and incapacity,<sup>133</sup> because it is the person himself who brings the knowledge to the court.<sup>134</sup> However, some private law scholars have offered a more restricted interpretation arguing that the support measures are linked to the cases of capacity limitations provided in Article 32 (restricted capacity and incapacity).<sup>135</sup> From this last point of view, the beneficiary of support could only be a person who meets the requirements of Article 32 and is therefore a person with disability.<sup>136</sup>

In Peru, Articles 45 and 45-B of the CPP establish that all persons with disabilities who require support to exercise their legal capacity can request it.<sup>137</sup> Then, the specific regulation on support stated that any person of legal age can access the support they consider perti-

129. See Law No. 9379 arts. 2, 8 (Costa Rica); see also LEY DE AUTONOMÍA PERSONAL: POR EL DERECHO A DECIDIR MI PROYECTO DE VIDA [PERSONAL AUTONOMY LAW: FOR THE RIGHT TO DECIDE MY LIFE PLAN], UNFPA CR & CONAPDIS (2018).

130. See Law No. 7130 art. 847(4) (Costa Rica).

131. See *id.* art. 848(2).

132. See REDI & CELS, PRINCIPIOS DE INTERPRETACIÓN DEL MODELO DE CAPACIDAD JURÍDICA Y DEL SISTEMA DE APOYOS DEL NUEVO CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN [PRINCIPLES OF INTERPRETATION OF THE MODEL OF LEGAL CAPACITY AND OF THE SYSTEM OF SUPPORTS OF THE NATION'S NEW CIVIL AND COMMERCIAL CODE] 1, 8–9 (2018), <https://www.cels.org.ar/web/wp-content/uploads/2018/01/Principios-de-interpretación-jur%C3%ADdica-CCCN.pdf> [<https://perma.cc/2SAV-6A3B>] (archived Sept. 28, 2022) [hereinafter REDI & CELS].

133. See CÓD. PROC. CIV. Y COM. art. 32 (Arg.).

134. See REDI & CELS, *supra* note 132, at 9.

135. See CÓD. PROC. CIV. Y COM. art. 32 (Arg.).

136. See LORENZETTI, *supra* note 106, at 256.

137. Legislative Decree No. 295 arts. 45, 45-B (Peru).

ment.<sup>138</sup> The PCC Regulation adopts the restrictive alternative in this unclear scenario. Judicial support arrangements require an official disability certificate.<sup>139</sup> The only way that allows persons without disabilities to designate support is that of advanced directives.<sup>140</sup>

Finally, in Colombia, Articles 8 and 9 of the CO-LC establish that all persons with disabilities of legal age have the right to conduct legal acts independently and have reasonable accommodation and necessary support.<sup>141</sup> However, later, when the arrangement of support measures is regulated, the CO-LC includes any “person, of legal age, whose will and preferences are manifested in a determined legal act.”<sup>142</sup> Therefore, it may be concluded that not only persons with disabilities can be supported.

#### 4. Support Intensity and Representation

Most of the analyzed legislation has recognized the need to arrange more intense support cases. This need is linked to the idea that support measures must be tied to the need for support and not limit the person’s autonomy in question.<sup>143</sup> That may include cases of representation under certain circumstances. In all cases, the law seeks to safeguard the will of persons with disabilities in cases of substituted decision-making, establishing that the support or representative must be based on, respect, or consider the will, preferences, and life history of the person represented.

The CR-AL regulation establishes that the support in exercising the capacity to act will be of different intensity, which varies according to the specific situation of the persons with disabilities.<sup>144</sup> That includes intense forms of support that show similarities with guardianship. It indicates the more intense forms of support proceed in the case of compromise of consciousness that impede consenting to a particular act.<sup>145</sup> It points out, in any case, that the guarantor is neither a type of legal representative nor like other figures,<sup>146</sup> and the determination of intense support, and how it is provided, must be based on and guarantee the will, tastes, desires, and preferences of the persons with disabilities. For this, it is possible to resort to the life trajectory or fam-

138. *Id.* art. 659.

139. See Administrative Resolution No. 010-2018-CE-PJ arts. 40(d), 43(c) (Peru); Law No. 30823 art. 844 (Peru); Legislative Decree No. 295 art. 844 (Peru).

140. See Legislative Decree No. 295 art. 659-F (Peru).

141. L. 1306/2009 arts. 8–9 (Colom.).

142. *Id.* art. 3(3).

143. See Eilionoir Flynn & Anna Arstein-Kerslake, *Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity*, 10(1) INT’L J.L. CONTEXT 81, 94–102 (2014).

144. See Executive Decree No. 41087-MTSS art. 8 (Costa Rica).

145. See *id.*

146. See *id.* art. 7(8).

ily history, the social context, and even previous manifestations of will and preferences.<sup>147</sup>

The ACC includes the possibility of representation because the judge could declare the person's incapacity and appoint a guardian.<sup>148</sup> In the case of people with restricted capacity, the support person designated by the judge could have representation powers for certain acts.<sup>149</sup> The support, in any case, must promote autonomy and favor decisions that respond to the preferences of the person concerned.<sup>150</sup> Finally, the Argentine legislation contemplates the option of conventional representation when the persons with disabilities have voluntarily given their consent for third-party representation for particular circumstances.<sup>151</sup>

In Peru, Article 659-B of the PCC points out that "support does not have powers of representation except in cases where this is expressly established by decision of the person in need of support or the judge."<sup>152</sup> The latter constitutes an exceptional case. The judge can determine the support for persons with disabilities who cannot express their will and those in a coma (who have not previously designated support). In any case, the law demands (1) the exhaustion of all efforts to obtain a manifestation of the person's will, (2) the previous provision of accessibility measures and reasonable adjustments, and (3) that it be necessary for the exercise and protection of rights.<sup>153</sup> It is also established that in all cases, the judge must conduct the appropriate steps to obtain the best possible interpretation of the person's will and preferences and pay attention to their life trajectory.<sup>154</sup>

The Colombian reform, for its part, is the most exhaustive in the regulation of representation cases. The CO-LC provides that the support person may have representation powers when there is an express mandate from the supported person to conduct one or more legal acts on their behalf.<sup>155</sup> In case there is no express mandate and support has been constituted by judicial means, the support person may request authorization from the judge for the representation provided that they meet the following requirements: (1) that the supported person is absolutely unable to express their will and preferences for any possible means and format of communication and (2) that the support person

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147. See *id.* art. 8.

148. See CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 32 (Arg.).

149. See *id.* art. 101(c).

150. See *id.* art. 32.

151. See, e.g., LORENZETTI, *supra* note 106, at 255–56; REDI & CELS, *supra* note 132, at 2–3.

152. Legislative Decree No. 295 art. 659-B (Peru).

153. See *id.* art. 659-E.

154. See *id.* (stating that in all cases, judges must carry out pertinent steps to obtain the best possible interpretation of the will and preferences of persons with disabilities while considering their life trajectory).

155. See L. 1996/2019 art. 48 (Colom.).



demonstrates that the legal act to be conducted reflects the best interpretation of the will and preferences of the supported person.<sup>156</sup>

#### D. *Procedural Aspects: The Judicial Constitution of Support*

The reforms include various mechanisms for the arrangement of support measures. They all admit the support constitution through a judicial procedure. Likewise, in some cases, the arrangement of support is accepted through extrajudicial mechanisms, either by a private agreement or by the advance statement or directive for cases of future inability to make decisions.<sup>157</sup>

##### 1. Principles

It is possible to identify certain common principles that govern the judicial procedures for the constitution of support and safeguards. First, any evaluation and state intervention that determines the need for support must be *interdisciplinary*.<sup>158</sup> For its part, in Peru, although there is no explicit rule, the interdisciplinary team of the Family Council intervenes in the processes within the Family Court.<sup>159</sup> Second, the *principle of immediacy* forces the judge to have direct contact with the persons with disabilities.<sup>160</sup> Finally, the *primacy of respect for the will and preferences* of the persons with disabilities forces the judge to make reasonable adjustments and contemplate the necessary accessibility measures to guarantee their participation.<sup>161</sup>

##### 2. Competent Court

As for the competent court, the processes in the jurisdictions under study occur before family courts.<sup>162</sup> In Argentina, Article 36 of the ACC indicates that the court of the first instance corresponding to the domicile or place of hospitalization of the interested party will be competent,<sup>163</sup> which, due to the federal structure of its state, in some cases will reach the civil courts and, in others, the family courts.

156. *Id.* (providing a direct translation of the relevant portions of the article).

157. *See infra* Part III.E.

158. *See, e.g.*, Law No. 7130 arts. 848(2)–(3) (Costa Rica); CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 31 (Arg.); L. 1306/2009 art. 33 (Colom.).

159. *See* Supreme Decree No. 017-93-JUS, June 3, 1993, EL PERUANO art. 53 (Peru).

160. *See, e.g.*, Law No. 7130 art. 851(4) (Costa Rica); Cód. PROC. CIV. Y COM. art. 35 (Arg.); Legislative Decree 1049 art. 845 (Peru); L. 1306/2009 art. 34(1) (Colom.).

161. *See, e.g.*, Law No. 7130 art. 848(2) (Costa Rica); Cód. PROC. CIV. Y COM. arts. 31, 36, 38 (Arg.); CÓDIGO CIVIL art. 119-A (1993) (Peru); L. 1306/2009 art. 34(1) (Colom.).

162. *See, e.g.*, Law No. 9379 art. 6 (Costa Rica); Legislative Decree No. 295 art. 53 (Peru); L. 1564/2012 art. 22 (Colom.).

163. *See* Cód. PROC. CIV. Y COM. art. 36 (Arg.).

### 3. Procedure and Standing

Concerning the applicable judicial procedure for arranging support measures, the legislation of every analyzed jurisdiction prescribes it be done in a nonadversarial process. Even though the law requires judicial intervention, they are not conformed to an adversarial trial where a dispute is resolved between two or more parties. In Peru, the nonadversarial nature of the procedure is made explicit,<sup>164</sup> while no specific reference is made in Costa Rica and Argentina. For its part, in Colombia, a simple nonadversarial procedure is available when the person with disabilities promotes the arrangement of support.<sup>165</sup> An adversarial, verbal, and summary procedure is used when it is promoted by a different person.<sup>166</sup>

Regarding the standing to arrange or ask for support measures, all four reforms consider the person concerned as the primary stakeholder and relatives and caregivers as the other people that can request support arrangements. The Costa Rican procedure is initiated at the verbal request, written request, or any means of communication by the persons with disabilities.<sup>167</sup> Family members can act if the person has a functional limitation that makes it impossible or limits them to make the request independently. Nongovernmental organizations that provide services, support, or social benefits to persons with disabilities may request support measures.<sup>168</sup>

In Argentina, a limited number of persons are entitled to request the declaration of restricted capacity and incapacity: the person themselves, the spouse and/or the cohabitant, relatives within the fourth degree, and the *Ministerio Público* (attorney general).<sup>169</sup> In the case of those not considered in Article 32 of the ACC (thus, not under a regime of restricted capacity), they have exclusive standing to ask the judge to appoint one or more people of their trust to provide support.<sup>170</sup>

In Peru, the use of two types of judicial procedures depends on who initiates the process. The first type of procedure for the arrangement of support takes place when requested by a person who can express the supported person's will.<sup>171</sup> The second type occurs when the appointment of exceptional support is made through a special procedure at the

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164. See Supreme Decree No. 016-2019-MIMP art. 36 (Peru) (describing the support and safeguard process as non-contentious).

165. See Law No. 7130 art. 577 (Costa Rica).

166. See *id.* art. 396; L. 1996/2019 art. 32 (Colom.).

167. See Law No. 9379 art. 7 (Costa Rica) (stating a safeguard request may be managed and reviewed through verbal or written means of communication).

168. See *id.* art. 8.

169. See Cód. PROC. CIV. Y COM. art. 33 (Arg.).

170. See *id.* art. 43.

171. See Supreme Decree No. 016-2019-MIMP arts. 40–42 (Peru); Legislative Decree No. 295 arts. 659-A, 844 (Peru).

request of any person.<sup>172</sup> Although the same stages are followed, there are differences regarding the requirements to file the request and the conditions that must be considered proven to grant the support in each of them.

Finally, in Colombia, the judicial arrangement of support can be promoted by persons with disabilities or by someone else.<sup>173</sup> In the latter case, it must be proven that (1) the persons with disabilities are unable to express their will and preferences by any means or format of communication and (2) this leads to the violation or threat of their rights by a third party.<sup>174</sup>

#### 4. Interdisciplinarity

For the judicial arrangement of support, the participation of actors from various disciplines has been adopted as a common ground that contributes to evaluating and determining the need for support. In Costa Rica, the CR-CPC mandates interdisciplinary intervention from medical and social perspectives. Regarding the medical perspective, Article 847(4) indicates that the initial application must include a medical opinion that proves the disability condition.<sup>175</sup> Then, during the process, the judge will require an official comprehensive statement about the person's intellectual, mental, and psychosocial state.<sup>176</sup> Regarding the social perspective, a Department of Social Work and Psychology of the Judiciary report is required on both the person concerned and the support person.<sup>177</sup>

The ACC establishes that restrictions on legal capacity must always have an interdisciplinary nature.<sup>178</sup> Article 37 prescribes that considering the opinion of an interdisciplinary team is essential to the restriction of capacity.<sup>179</sup> However, there is little legal guidance on what satisfies this requirement. It has been suggested by some civil society organizations that these interventions must be understood within the framework of a process where communicational accessibility and reasonable adjustments are guaranteed.<sup>180</sup> So, the expert reports that fall within the traditional paradigm of a mere medical diagnosis would be insufficient and contrary to the standards of the CRPD.<sup>181</sup>

172. See Supreme Decree No. 016-2019-MIMP arts. 43–51 (Peru); Legislative Decree No. 295 arts. 659-E, 842 (Peru).

173. See L. 1996/2019 art. 32 (Colom.); L. 1564/2012 art. 396, 568 (Colom.).

174. See *id.* art. 396(1).

175. See Law No. 7130 art. 847(4) (Costa Rica) (requiring a medical opinion diagnosing the lack of an individual's cognitive or volitional capacity).

176. See *id.* art. 848(2).

177. See *id.* art. 848(3).

178. See CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 31(c). (Arg.).

179. See *id.* art. 37.

180. See REDI & CELS, *supra* note 132, at 9–10.

181. See *id.* at 9.

In Peru, the participation of an interdisciplinary team is contemplated if it is necessary to make adjustments to ensure the full participation of persons with disabilities in the judicial procedure.<sup>182</sup> After the initial request, the judge can order the action of a multidisciplinary team to assess, together with the person with a disability, the support needs for autonomy and communication. For this purpose, the team can collect information from people who are part of the personal network, support the procedure by conducting procedural adjustments, and assist persons with disabilities in better interpreting their will and preferences in exceptional cases.<sup>183</sup>

Finally, the CO-LC mandates an assessment of support in any process of a judicial adjudication of *support needs*.<sup>184</sup> This assessment must follow technical standards to determine the requirements to support a person to exercise their legal capacity.<sup>185</sup> By mandate of Article 12 of the CO-LC, the Presidential Council for the Participation of Persons with Disabilities conducted a participatory process to prepare a document of guidelines and national protocol for assessing support needs.<sup>186</sup> According to this document, the assessment of support needs must follow nine guidelines: (1) readiness (corresponding to the first moment of contact with the person with disabilities or those who come to request the assessment of support); (2) motivations and life project (investigating the motivations of the person with a disability or who requests it, to carry out the assessment of support and to know the possible use that will be given to it); (3) support network; (4) people who should not provide support; (5) wealth and money management; (6) family, personal care, and housing; (7) general, mental, sexual, and reproductive health; (8) work and income generation; and (9) access to justice, citizen participation, and voting.<sup>187</sup>

## 5. Participation of Persons with Disabilities

Another necessary aspect to evaluate is whether the judicial procedures contemplate the participation of persons with disabilities. Besides the recognition of the primacy of respect for the person's will and preferences, this principle translates into instances of effective

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182. See Supreme Decree No. 016-2019-MIMP art. 41(2) (Peru).

183. See *id.* art. 44.

184. See L. 1996/2019 art. 33 (Colom.).

185. See *id.* arts. 3, 7, 11.

186. See LUCAS CORREA & ADRIANA BAUTISTA, BANCO INTERAMERICANO DE DESARROLLO, VALORAR APOYOS PARA TOMAR DECISIONES: LINEAMIENTOS Y PROTOCOLO NACIONAL PARA LA VALORACIÓN DE APOYOS EN EL MARCO DE LA LEY 1996 DE 2019 [ASSESSING SUPPORT TO MAKE DECISIONS: GUIDELINES AND THE NATIONAL PROTOCOL FOR THE ASSESSMENT OF SUPPORT WITHIN THE FRAMEWORK OF LAW 1996 OF 2019] 8, 9 (2020), <http://snd.gov.co/documentos/lineamientos-valoraciones-apoyo.pdf> [<https://perma.cc/JDB2-5FHV>] (archived Oct. 16, 2022).

187. See *id.* at 25.

participation within the process and in the elimination of barriers that could prevent their intervention.

Costa Rica guarantees the effective participation of persons with disabilities in all stages of the judicial procedure.<sup>188</sup> The *principle of gratuity* is recognized to ensure that economic costs do not constitute a barrier to justice.<sup>189</sup> Additionally, the CR-CPC provides that during the judicial process, the following safeguards must be adopted: (1) the appointment of a procedural guardian for persons with disabilities to provide support, guidance, and legal advice, and (2) the judge must personally interview the persons with disabilities.<sup>190</sup>

In Argentina, the ACC prescribes that the person has the right to receive information through means and technologies suitable for their understanding.<sup>191</sup> They have the right to participate in the process with the assistance of a lawyer provided by the state if they cannot afford one.<sup>192</sup> The judge should personally interview the concerned person,<sup>193</sup> which is considered a part of the process and can provide all the necessary evidence.<sup>194</sup>

In Peru, the judge must make all the adaptations and adjustments so that the person with a disability can express their will during the process.<sup>195</sup> In the hearing, support from the multidisciplinary team may be requested to ensure full participation.<sup>196</sup> In the case of the appointment of exceptional support, the judge must make real, considerable, and pertinent efforts to obtain the expression of the person's will.<sup>197</sup> If that is not accomplished, the judge must take the appropriate steps to get the best possible interpretation of their will.<sup>198</sup>

Finally, the CO-LC institutes a general standard for judicial action in the judicial arrangement of support processes, which must consider and favor the fulfillment of the person's will and preferences.<sup>199</sup> The person's participation is essential, as the decision may be

188. See Executive Decree No. 41087-MTSS art. 10 (Costa Rica).

189. See *id.*; Law No. 9379 art. 6 (Costa Rica).

190. See Law No. 7130 art. 848 (Costa Rica).

191. See CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 31(d) (Arg.).

192. See *id.* art. 31(e).

193. See *id.* art. 35.

194. See *id.* art. 36.

195. See Legislative Decree No. 295 art. 845 (Peru).

196. See Supreme Decree No. 016-2019-MIMP art. 41(2) (Peru) (permitting a judge to request a multidisciplinary team when necessary to make procedural adjustments or ensure the full participation of persons with disabilities).

197. See *id.* art. 46.

198. See *id.* art. 47.

199. See L. 1996/2019 art. 31 (Colom.) (requiring judges to take into account the wills and preferences of persons with disabilities while undertaking the judicial adjudication of support processes).

annulled otherwise.<sup>200</sup> In addition, the judge must interview the person in private to consult their will and understand their preferences.<sup>201</sup>

### E. *Forms of the Constitution of Extrajudicial Support*

In addition to the judicial arrangement of support, the reforms have considered other mechanisms that do not require judicial intervention, increasing flexibility and reducing unnecessary intervention. Except for Costa Rica, all legislation contemplates the possibility that a person can arrange support measures through advance directives. Furthermore, it is possible to conduct support agreements in the Colombian and Peruvian cases.

#### 1. Support Agreements

A support agreement can be defined as an agreement between the person requesting support and the person who is to provide the support. According to the CO-LC, support agreements constitute a formal mechanism by which the person of legal age designates one or more people to assist them in making decisions regarding legal acts.<sup>202</sup> These agreements can be processed before a notary or an extrajudicial conciliator. Both procedures are similar: the competent official must meet separately with the person concerned and verify that the content of the support agreement meets their will and preferences, granting accessibility measures and reasonable adjustments. Then, before signing the agreement, the official must communicate to the support person the legal obligations they acquire.<sup>203</sup> The person who has current support agreements must use them when holding acts contained therein as a requirement for their validity; otherwise, grounds for relative nullity of the act will be incurred.<sup>204</sup> Finally, the support agreements can be terminated unilaterally by the person concerned or modified by mutual consent of the parties, respecting the same formality and procedure used for its perfection.<sup>205</sup> They cannot be extended for a period longer than five years.<sup>206</sup>

According to Article 659-D of the PCC, the person of legal age who requires support can designate it before a notary in the Peruvian

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200. *See id.* (threatening to nullify support processes where the relevant person with disabilities does not participate in the relevant judicial arrangements, unless exempt under art. 38 of Law 1996).

201. *See* L. 1564/2012 art. 586 (Colom.).

202. *See* L. 1996/2019 art. 15 (Colom.) (defining support agreements as formal support mechanisms by which a person of legal age designates one or more persons to assist them in decisions relating to one or more specific legal acts).

203. *See id.* arts. 16–17.

204. *See id.* art. 19.

205. *See id.* art. 20.

206. *See id.* art. 19.

case.<sup>207</sup> The PCC regulation contains the appointment procedure following standard notarial agreement requirements.<sup>208</sup> It is also mandated that appointments and revocations, resignations, modifications, or substitutions be registered in the Public Registry of Natural Persons.<sup>209</sup>

## 2. Advance Directives

In general, advance directives can be conceptualized as a legal act through which a person previously expresses their will regarding decisions related to one or more legal acts. As a procedure for the designation of supports, it constitutes an advance declaration of a person who designates her support if a future disability occurs.

The ACC considers that a competent person may have *advance medical directives* in anticipation of their incapacity.<sup>210</sup> It is therefore restricted to the field of health. One or more people must express medical consent; however, they cannot consent to be subject to euthanasic practices, and the directives that imply such practice should be considered as not written.<sup>211</sup> This mandate can be revoked permanently under the same formalities of the original directive. If that is not possible, it can be canceled verbally, given that a record is left.<sup>212</sup>

The Peruvian reform introduced the figure of *future support*.<sup>213</sup> This figure is not entirely new, as the law that strengthens the guardianship of the incapable or older adult through the modification of various articles of the civil code previously contemplated the possibility of a person appointing a guardian in advance.<sup>214</sup> However, with the reform, it is possible to designate support measures and specify safeguards before a notary. Likewise, the person may exclude some persons or institutions from such appointment; determine the form, scope, duration, and guidelines of the support received; and indicate the moment or circumstances in which the appointment must be effective.<sup>215</sup>

The CO-LC provides that advance directives can be based on decisions related to one or several legal acts, whether health, financial, or

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207. See Legislative Decree No. 295 art. 659-D (Peru).

208. See Supreme Decree No. 016-2019-MIMP art. 24 (Peru).

209. See *id.*

210. See CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 31(d) (Arg.).

211. See *id.*

212. See MARISA HERRERA, GUSTAVO CAMELO & SEBASTIÁN PICASSO, 1 CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN COMENTADO [COMMENTARY ON THE CIVIL AND COMMERCIAL CODE OF THE NATION] 145 (1st ed. 2015).

213. See Legislative Decree No. 295 art. 659-F (Peru); Supreme Decree No. 016-2019-MIMP arts. 29–34 (Peru).

214. See Law No. 29633, Dec. 17, 2010, EL PERUANO 431068 (Peru).

215. See Legislative Decree No. 295 art. 659-F (Peru); Supreme Decree No. 016-2019-MIMP arts. 29–34 (Peru).

personal, aimed at having legal effects.<sup>216</sup> These directives must be signed before a notary or an extrajudicial conciliator.<sup>217</sup> Regarding the publicity of the advance directive, any person may submit a copy of the directive to be considered by third parties.<sup>218</sup> Likewise, the person may request that the directives associated with decisions about their health be incorporated into their medical records.<sup>219</sup> Finally, another aspect regulated in the CO-LC is the mandatory nature of advance directives. It is established that, as a general rule, compliance with an advance directive will be required;<sup>220</sup> however, the signing of the directive does not invalidate the will and preferences of the person expressed after it unless a perennial will clause is stipulated. This kind of clause allows invalidating in advance the expressions of will and preference that contradict the content of the decisions in the directive and are expressed after it, considering that the will may be void in the future.<sup>221</sup> Perennial clauses, however, are not allowed in medical advance directives.<sup>222</sup>

### F. Safeguards

Article 12 of the CRPD also establishes an obligation of the states parties to 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.”<sup>223</sup> Therefore, an adequate safeguards regime must be designed so that persons with disabilities are respected as decision-making agents, avoiding relations of domination based on dependency and guaranteeing that the decisions adopted are an expression of the will and preferences of the persons with disabilities.<sup>224</sup>

As a common criterion, none of the analyzed jurisdictions regulates safeguards by establishing a limited list (*numerus clausus*) of measures. Instead, the legislation has set general parameters on the functioning of support and safeguards, allowing these measures to be evaluated and selected according to the needs and specific circumstances of the person in need of support.

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216. See L. 1996/2019 art. 15 (Colom.) (defining support agreements as formal support mechanisms by which a person of legal age designates one or more persons to assist them in decisions relating to one or more specific legal acts).

217. See *id.* art. 22.

218. See *id.* art. 29.

219. See *id.* art. 30.

220. See *id.* art. 26.

221. See *Capacidad Jurídica*, PAIS, *supra* note 54.

222. See L. 1996/2019 arts. 27–28 (Colom.).

223. CRPD, *supra* note 2, art. 12, § 4.

224. See ANNA ARSTEIN-KERSLAKE, RESTORING VOICE TO PEOPLE WITH COGNITIVE DISABILITIES: REALIZING THE RIGHT TO EQUAL RECOGNITION BEFORE THE LAW 190 (2017).



According to how they operate, we have classified safeguards between normative safeguards that provide substantive rules that imply protection of the autonomy and rights of the person; procedural safeguards that contemplate safeguards in the process of arranging support measures; and supervision safeguards that are available for the control of a third party over the actions of the support person.

Only two safeguards were identified as common to all the reforms: a term during which the courts must review the arrangement of support or after which the agreement made before a notary is rendered void,<sup>225</sup> and the obligation of participation of persons with disabilities and the respect of their will and preferences during the procedure of the arrangement of support.<sup>226</sup> Each country regulates several additional safeguards.

In Costa Rica, it is possible to distinguish between normative safeguards that regulate the criteria to designate and the competencies of the guarantor of equality;<sup>227</sup> the procedural safeguard of the procedural guardian, who must provide support, guidance, and legal advice to the person during the procedure that leads to the support arrangement;<sup>228</sup> and a supervision safeguard, which determines that the support measure can be reviewed at any time at the request of the same persons able to request the support measure and, in any case, requires a mandatory review by the judge every five years.<sup>229</sup>

In Argentina, the measures are not explicitly regulated as safeguards. However, Article 43 of the ACC mandates the judge to establish “measures for the protection of the person concerning possible conflicts of interest or undue influence,” which corresponds to a definition of safeguards according to the CRPD.<sup>230</sup> Specifically, under the ACC, it is possible to identify normative safeguards, such as the general principles that regulate the restriction of legal capacity (the presumption of capacity, exceptionality on the limitations on capacity, interdisciplinarity, right to receive information through the media and technologies suitable for understanding, and the right to participate in the judicial process);<sup>231</sup> procedural safeguards, such as the necessary participation of a lawyer during the judicial process;<sup>232</sup> and a safeguard of supervision, the duty to review the sentence declaring incapacity and

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225. See Law No. 5476 art. 9 (Costa Rica); CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 40 (Arg.); Legislative Decree No. 295 art. 659-G (Peru); L. 1306/2009 arts. 18, 41 (Colom.).

226. See Executive Decree No. 41087-MTSS art. 10 (Costa Rica); Cód. PROC. CIV. Y COM. arts. 31, 36 (Arg.); Legislative Decree 1049 arts. 119-A, 845 (Peru); L. 1996/2019 art. 34(1) (Colom.).

227. See Law No. 9379 arts. 2(g), 11 (Costa Rica).

228. See Law No. 7130 art. 848 (Costa Rica).

229. See Law No. 9379 art. 9 (Costa Rica).

230. REDI & CELS, *supra* note 132, at 14–15; see also HERRERA, CAMELO & PICASSO, *supra* note 212, at 114–15; LORENZETTI, *supra* note 106, at 259–60.

231. See Cód. PROC. CIV. Y COM. art. 31(d) (Arg.).

232. See *id.* arts. 35–36.

restricted capacity. This judgment may be revised at any time at the interested party's request. In the case provided in Article 32 (declaration of incapacity and restricted capacity), the judge must carry out a mandatory review within three years based on new interdisciplinary opinions and hold a personal hearing.<sup>233</sup>

In Peru, the PCC adopted the safeguards definition of the CRPD.<sup>234</sup> Accordingly, the PCC includes the following normative safeguards: the designation of supports must adhere to the will and preference of the person with disabilities, which must be interpreted in accordance with their life trajectory and previous manifestations in similar contexts;<sup>235</sup> a rule that prescribes that the determination of the support falls essentially to the person and not to the judge or notary;<sup>236</sup> and the prohibition of designating support people convicted of family or sexual violence.<sup>237</sup> In terms of procedural safeguards, the PCC establishes the obligation of the judge and the notary to carry out all the appropriate steps to obtain the best interpretation of the will, preferences, and life history of the person, granting accessibility measures and reasonable adjustments in the process.<sup>238</sup> Finally, the PCC regulation includes an exemplary (and not exhaustive) list of supervision safeguards: (1) accountability attaching documents that support the administration of assets, (2) audits, (3) unannounced periodic supervision, (4) carrying out unannounced home visits, (5) conducting interviews with the support person and people close to the person concerned, and (6) requesting information from public or private institutions if warranted.<sup>239</sup>

Finally, in Colombia, the CO-LC defines the safeguards and provides criteria for their constitution: principles of necessity, correspondence with the specific circumstances of each person, defined duration, and impartiality of the support persons.<sup>240</sup> These criteria correspond to normative safeguards, consisting of principles and rules that regulate the award of support; procedural safeguards, including the obligation of the judge, notary, or conciliator to meet personally and separately with the person concerned and the existence of a separate support needs assessment from the judicial procedure of the arrangement of the support;<sup>241</sup> and a safeguard of supervision by the Public Prosecutor's Office to ensure the rights of persons with disabilities in

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233. *See id.* art. 40.

234. *See* Legislative Decree No. 295 art. 659-G (Peru).

235. *See id.* arts. 659-B, 659-E.

236. *See id.* art. 659-C.

237. *See id.* art. 659-E.

238. *See id.*; Legislative Decree 1049 arts. 16, 54 (Peru).

239. *See* Supreme Decree No. 016-2019-MIMP art. 21(3) (Peru).

240. *See* L. 1996/2019 art. 5 (Colom.).

241. *See id.* arts. 16, 17, 34, 37, 38.

the processes of a judicial arrangement of support and the effective fulfilment of support is established.<sup>242</sup>

#### IV. TRANSITION REGIME

In Costa Rica, the reform entered into force immediately after publication in August 2016.<sup>243</sup> Similarly, no *vacatio legis* (the period from the publication of a law until it comes into force) was provided in Peru, so it was effective immediately after publication in September 2018. In contrast, the Argentine reform entered into force in August 2015, one year after its promulgation in August 2014.<sup>244</sup>

The CO-LC, however, created a complex transition regime. First, a *vacatio legis* of twenty-four months was set for Chapter V of the CO-LC on the judicial arrangement of support.<sup>245</sup> The rest of its provisions entered into force immediately after publication in August 2019.<sup>246</sup> Moreover, the CO-LC included a process of a judicial arrangement of transitory support measures in which the family judge could determine the necessary support for a person of legal age who is absolutely unable to express their will and preferences by any means, whenever necessary to guarantee the exercise and protection of their rights.<sup>247</sup> A person could promote this process with a legitimate interest, which proves a relationship of trust with the person. It is also established that the term of the exceptional support could not exceed the end date of the transition period and that, in any case, the person concerned may oppose it at any time during the process.<sup>248</sup>

Besides *vacatio legis* of some of them, the reforms adopted specific transitional measures. We focus on three of them: (1) cases in which a guardian is already appointed, (2) pending cases of guardianship, and (3) notification of guardians and persons under the guardianship that the reform affects.

##### A. Disability Cases Already Declared

The reforms provided transitional measures to regularize the situation of persons with disabilities subjected to guardianship before they entered into force. The reforms opted for measures that operated automatically, transforming guardianship into support measures or a judicial review case by case of a person under guardianship as an evaluation of the actual need for support.

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242. See *id.* art. 40.

243. See Law No. 9379 art. 8(2) (Costa Rica).

244. See Law No. 27077, Dec. 18, 2014, B.O. art. 1 (Arg.).

245. See L. 1996/2019 art. 52 (Colom.).

246. See *id.* arts. 52, 63.

247. See *id.* art. 54.

248. See *id.*; *supra* tbl.3.

In Costa Rica, transitory Article 1 of the CR-AL provides that the guardians would automatically become *guarantors of equality* as a transition measure for those currently under guardianship.<sup>249</sup> Two years were granted to review these measures, which the judge should conduct *ex officio*.<sup>250</sup> In addition, it was ordered to register assets in the name of the person under guardianship within six months.<sup>251</sup>

In Argentina, the entry into force of the ACC did not affect guardianship appointments under the previous regime. However, Article 152 of the old civil code already established the obligation to review guardianships every three years.<sup>252</sup>

In Peru, the reform restored the legal capacity of persons declared under guardianship.<sup>253</sup> In addition, it was provided that any person could request the review of the guardianship of persons with disabilities and the arrangement of support measures.<sup>254</sup> Likewise, it was ordered that when the interdiction has been declared by a final judgment and a guardian has been appointed, the same judge must transform the measure into one of support.<sup>255</sup> The Executive Council of the Judiciary established the rules and procedures necessary to transition to the support system in Administrative Resolution 046-2019 (AR 046-2019).<sup>256</sup>

Finally, in Colombia, Article 56 CO-LC mandates a future review process for persons with disabilities under guardianship.<sup>257</sup> The same judge who appointed the guardian must initiate this process within a maximum of thirty-six months from the entry into force of Chapter V of the law.<sup>258</sup> Whether the persons concerned require support to exercise their legal capacity will be reviewed in that process.<sup>259</sup>

## B. Pending Cases

At the entry into force of the reforms, there were still processes for processing the appointment of guardians. Some reforms expressly provided transitional measures for these cases, while others remained silent. The CR-AL and ACC do not refer directly to the requested guardianship cases. However, regarding the prospective application of laws, the ongoing judicial processes should consider the new legal ca-

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249. See Law No. 9379 art. 8(1) (Costa Rica).

250. See *id.*

251. See *id.*

252. See CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 152 (Arg.)

253. See Legislative Decree No. 295 (Peru).

254. See *id.*

255. See *id.* art 1(a).

256. See generally Ministerial Resolution No. 046-2019-MIMP, Feb. 14, 2019 (Peru).

257. See L. 1996/2019 art. 56 (Colom.).

258. See *id.*

259. See *id.*

capacity provisions.<sup>260</sup> In Peru, PE-LD 1,384 provided that the judge who hears the guardianship application must suspend it and transform it into one of support.<sup>261</sup> In Colombia, the CO-LC prohibited any new process of guardianship appointment.<sup>262</sup> At the same time, it ordered the suspension with immediate effect of the procedures initiated before enacting the law. Exceptionally, the judge could order the lifting of this suspension, only to apply preventive measures when it is considered pertinent to guarantee the person's rights.<sup>263</sup>

### C. Notifications

Some jurisdictions contemplated the notification of guardians, the people under guardianship, or those involved in pending processes of guardianship to inform them of the effects of the reform, granting them a term to express their support request. Others, however, did not expressly refer to a duty of notification.

In Costa Rica and Argentina, no measures are contemplated regarding the notification of the persons under guardianship or with a request of guardianship in progress. In Peru, RA 046-2019 prescribes that if a guardian has been already appointed, the judge who heard the process must issue an informative resolution on the restitution of legal capacity *ex officio*.<sup>264</sup> The court will notify the guardians, the persons with disabilities, and other parties in the process, who within fifteen days must state if a support arrangement is necessary.<sup>265</sup> The same mechanism applies if a guardian's appointment is in progress. The CO-LC provides that in reviewing guardianship, the person concerned and the appointed guardian must be summoned *ex officio*.<sup>266</sup> Those summoned must appear before the court to determine if they require the judicial arrangement of support.<sup>267</sup>

## V. IMPLEMENTATION OF THE REFORM

Implementation is a key stage of legal reforms. For example, the success of a legal capacity reform and its impact on society may depend on elements independent of the merely normative legislation design. Overestimating the relevance of policymaking and social determinants is likely in jurisdictions with a poor record of impact analysis concerning legislation. Latin American legislative processes generally lack such analysis in issues of social policy, and, as the debate of the ana-

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260. See HERRERA, CAMELO & PICASSO, *supra* note 212, at 31.

261. See Legislative Decree No. 295 art. 1(b) (Peru).

262. See L. 1306/2009 art. 55 (Colom.).

263. See *id.* art. 55.

264. See Ministerial Resolution No. 046-2019-MIMP art. 3(2) (Peru).

265. See *id.*

266. See L. 1306/2009 art. 56 (Colom.).

267. See *id.*

lyzed reforms shows, data about the object of regulation and likely factual consequences of the legal change are totally absent. Implementation is complex, and legal capacity reforms are an ongoing process. This Part focuses on only three discrete aspects of implementations: supervisory administrative bodies, training, and public records of support measures.

A. *Bodies in Charge of Implementing and Supervising the Reforms*

The reforms did not contemplate a specific administrative body for their implementation and further supervision. Compliance with the new regulations was entrusted to different executive bodies responsible for administering justice or promoting the rights of persons with disabilities.

In Costa Rica, the National Council for Persons with Disabilities (CONAPDIS) is the administrative body in charge of disability matters, attached to the Ministry of Labor and Social Security. CONAPDIS is responsible for promoting and supervising compliance with the rights of persons with disabilities.<sup>268</sup> In addition, the ombudsman's office, with the judiciary's Access to Justice Commission and its Persons with Disabilities Subcommission, has played a relevant role in implementing the new regime.<sup>269</sup>

In Argentina, a body supervising the reform was not explicitly created, and there was no general implementation policy. However, as it is a reform based on a judicial procedure in all cases, the courts (national and provincial) have been the main actors implementing it.<sup>270</sup> The *Ministerio Público Tutelar* and the *Defensoría General* have also

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268. See *¿Qué es CONAPDIS?* [What is CONAPDIS?], Consejo Nacional de Personas con Discapacidad de Costa Rica (CONAPDIS), <https://conapdis.go.cr/que-es-conapdis/> (last visited July 18, 2022) [<https://perma.cc/V5DR-ZJDB>] (archived Nov. 6, 2022).

269. See Interview: CR-1, *supra* note 33; Interview: CR-4, *supra* note 96; Comisión de Acceso a la Justicia, *Protocolo de atención para el efectivo acceso a la justicia de personas con discapacidad psicosocial* [Protocol for Effective Access to Justice for Persons with Psychosocial Disabilities], 6 COLECCIÓN DOCUMENTS DE POLÍTICA ÁREA JUSTICIA 13, 72 (2013).

270. See Interview: AR-1, *supra* note 39; Interview: AR-2, *supra* note 39. See generally Juan Manuel Iglesias, *Discursos jurídicos en torno a los apoyos para ejercicio de la capacidad jurídica y la vida independiente en 2017 ¿Qué dicen las/os juezes de la Ciudad Autónoma de Buenos Aires en sus fallos?* [Legal Discourse Around Support for the Exercise of Legal Capacity and Independent Living in 2017. What do the Judges of the Autonomous City of Buenos Aires Say in Their Rulings?] (Universidad de Buenos Aires Proyectos DeCyT, 2018).

intervened.<sup>271</sup> The Review Body of the Mental Health Law is also highlighted in changing the paradigm in medical settings.<sup>272</sup>

In Peru, the National Council for the Integration of Persons with Disabilities,<sup>273</sup> a body dependent on the Ministry of Women and Vulnerable Populations, may have importance in implementing the reform. However, it has not played the expected role as a driving force for the reform because more extensive supervision and sanctions are required.<sup>274</sup> On the other hand, the Ministry of Justice and the Permanent Commission for Access to Justice for People in Vulnerable Conditions have coordinated training for judicial operators.<sup>275</sup>

In Colombia, the Presidential Council for the Participation of Persons with Disabilities was entitled as the reform's governing body.<sup>276</sup> This body monitors compliance with regulations and ongoing policies, dictating the protocols and guidelines for applying the reform.<sup>277</sup> In turn, bodies such as the ombudsman's office, governors' offices, district mayors' offices, and municipal ombudspersons supervise the support arrangements.<sup>278</sup>

## B. Training

There is a lack of regulation of training for legal operators who would put into practice the reforms. Only the Colombian reform incorporated the need for education and training in this aspect. The CO-LC provided that the Ministry of Justice and the judicial schools train administrative and judicial levels through the Superior Council of the

271. See *Nuestra Misión [Our Mission]*, MINISTERIO PÚBLICO TUTELAR, <https://mptutelar.gob.ar/nuestra-mision> (last visited July 18, 2022) [<https://perma.cc/N7AS-ST52>] (archived Nov. 6, 2022); Interview: AR-1, *supra* note 39; Interview: AR-2, *supra* note 39; *Defensoría General de la Nación Argentina [General Defender of the Argentine Nation]*, MINISTERIO PÚBLICO DE LA DEFENSA REPÚBLICA ARGENTINA, <https://www.mpd.gov.ar/index.php/defensoria-general-de-la-nacion/defensora-general-de-la-nacion/83-defensoria-general-de-la-nacion> (last visited July 18, 2022) [<https://perma.cc/Z79S-EEVG>] (archived Nov. 6, 2022).

272. See Interview: AR-4, *supra* note 40; Interview: AR-5, *supra* note 40; Law No. 26657 arts. 38–40 (Arg.); Secretaría Ejecutiva del Órgano de Revisión Ley 26.657, *Plan de Acción del Órgano de Revisión de la Ley Nacional de Salud Mental (ORN) 2018* (2018).

273. *Consejo Nacional para el Desarrollo y la Inclusión de las Personas con Discapacidad [National Council for the Development and Inclusion of Persons with Disabilities]*, GOBIERNO DE PERÚ, <https://www.conadisperu.gob.pe> (last visited July 18, 2022) [<https://perma.cc/FP83-KPJU>] (archived Sep. 30, 2022).

274. See Interview: PE-1, *supra* note 49; Interview: PE-3, *supra* note 59.

275. See Interview: PE-6, *supra* note 63; see also *Actividades Comisión y Capacitación [Commission Activities and Training]*, PODER JUDICIAL DEL PERÚ, [https://www.pj.gob.pe/wps/wcm/connect/AJPVvJC/s\\_ajpvcyjc/as\\_actividades/](https://www.pj.gob.pe/wps/wcm/connect/AJPVvJC/s_ajpvcyjc/as_actividades/) (last visited July 18, 2022) [<https://perma.cc/Y5NN-K852>] (archived Sept. 30, 2022).

276. See L. 179/2019, febrero 8, 2019, DIARIO OFICIAL [D.O.] art. 10 (Colom.); *Quiénes Somos [Who We Are]*, SISTEMA NACIONAL DE DISCAPACIDAD DE COLOMBIA, <http://snd.gov.co/quienes-somos.html> (last visited July 18, 2022) [<https://perma.cc/RUR3-FL3X>] (archived Sept. 30, 2022); Presidential Decree No. 179/2019, 10 (2019) (Colom.).

277. See L. 1306/2009 art. 12 (Colom.).

278. See Interview: CO-4, *supra* note 54; L. 1996/2019 art. 11 (Colom.).

Judiciary.<sup>279</sup> According to information from the Ministry of Justice, from 2019 to 2021, 5,082 people have been trained, including family commissioners, police inspectors, the ombudsman's office, the attorney general's office, the Superintendency of Notaries and Registry, the Penitentiary and Prison Services Unit, mayors' offices, the judicial branch, notaries, legal conciliators, municipalities, persons with disabilities, their families and support persons, and extrajudicial conciliators.<sup>280</sup>

In Costa Rica, Article 4(3) of the CR-AL Regulation requires training persons with disabilities who receive support and support persons.<sup>281</sup> The policy's objective is to inform persons with disabilities about their rights.<sup>282</sup> In addition, training is provided to children and adolescents with disabilities, their families, legal representatives, and organizations that represent them.<sup>283</sup> The Ministry of Education gives this training to the Council for Young Persons and the National Children's Trust in coordination with CONAPDIS.<sup>284</sup> Training for legal operators, judges, and public defenders focused on the paradigm shift established by the reform and the elimination of guardianship.<sup>285</sup>

In Peru, training has been promoted by civil society organizations in coordination with entities such as the Commission for Access to Justice of the Judiciary. This training was aimed at family court judges

279. See L. 1306/2009 arts. 13, 16–17 (Colom.).

280. See *Indicadores de proceso Colombia - Medidor en línea del cumplimiento de la convención de naciones unidas de los derechos de las personas con discapacidad en Latinoamérica* [Process Indicators Colombia - Online Compliance Measure with the United Nations Convention on the Rights of Persons with Disabilities in Latin America], LATAMDIS, <https://juristasporladiscapacidad.org/latamdis/banco-de-datos/?article%5B%5D=articulo-12&country%5B%5D=colombia&indicator%5B%5D=de-proceso> (last visited Apr. 5, 2022) [<https://perma.cc/LYR8-WKLG>] (archived Sept. 30, 2022).

281. See Executive Decree No. 41087-MTSS art. 4(3) (Costa Rica).

282. See *id.*

283. See *id.*

284. See *id.*

285. See Interview: CR-3, *supra* note 79; see Interview: CR-5; OBSERVATORIO DE VIOLENCIA DE GÉNERO CONTRA LAS MUJERES Y ACCESOS A LA JUSTICIA, *supra* note 34; COMISIÓN UNIDAD DE ACCESO A LA JUSTICIA, INFORME DE LABORES 2018 [2018 WORK REPORT] (2018), <https://accesoaljusticia.poder-judicial.go.cr/index.php/quienes-somos/informe-de-labores?download=191:informe-de-labores-2018> [<https://perma.cc/55RF-6N-QX>] (archived Sept. 30, 2022); SUBCOMISIÓN DE ACCESO A LA JUSTICIA, INFORME DE LABORES 2019 [2019 WORK REPORT] (2019), <https://accesoaljusticia.poder-judicial.go.cr/index.php/quienes-somos/informe-de-labores?download=990:informe-de-labores-2019> [<https://perma.cc/NC6G-FTKY>] (archived Sept. 30, 2022); COMISIÓN UNIDAD DE ACCESO A LA JUSTICIA, INFORME DE LABORES 2020 [2020 WORK REPORT] (2020), <https://accesoaljusticia.poder-judicial.go.cr/index.php/quienes-somos/informe-de-labores?download=991:informe-de-labores-2020> [<https://perma.cc/PJ32-V3UW>] (archived Sept. 30, 2022); see also SUBCOMISIÓN DE ACCESO A LA JUSTICIA, INFORME DE LABORES 2021 [2021 WORK REPORT] (2021), <https://accesoaljusticia.poder-judicial.go.cr/index.php/quienes-somos/informe-de-labores?download=2267:1-informe-presidencia-2021-final> [<https://perma.cc/SG3M-VFG7>] (archived Sept. 30, 2022).



who will apply the reform,<sup>286</sup> and focused on the reform's paradigm shift and practical application.<sup>287</sup> According to the Ministry of Justice, only two courses were held between 2018 and 2021, training 120 lawyers of the public defender office.<sup>288</sup> While there was no public training policy in Argentina, the organizations of persons with disabilities themselves promoted training with academics who worked on the

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286. See Interview: PE-1, *supra* note 49; *Capacitamos a jueces para facilitar acceso a justicia de personas con discapacidad* [We Train Judges to Facilitate Access to Justice for Persons with Disabilities], DEFENSORÍA DEL PUEBLO DE PERÚ (July 4, 2019), <https://www.defensoria.gob.pe/actividades/iniciamos-capacitacion-a-jueces-para-facilitar-acceso-a-justicia-de-personas-con-discapacidad/> [https://perma.cc/NVJ7-ZBVH] (archived Sept. 30, 2022) [hereinafter DEFENSORÍA DEL PUEBLO DE PERÚ]; *Culminó curso sobre capacidad jurídica de las personas con discapacidad* [Course on the Legal Capacity of Persons with Disabilities Completed], COMISIÓN PERMANENTE DE ACCESO A LA JUSTICIA DE PERSONAS EN CONDICIÓN DE VULNERABILIDAD Y JUSTICIA EN TU COMUNIDAD (Oct. 30, 2018), [https://www.eje.pe/wps/wcm/connect/ajpvjyc/s\\_ajpvjyc/as\\_noticia/cs\\_n\\_culmino-curso-sobre-capacidad-juridica-de-las-personas-con-discapacidad](https://www.eje.pe/wps/wcm/connect/ajpvjyc/s_ajpvjyc/as_noticia/cs_n_culmino-curso-sobre-capacidad-juridica-de-las-personas-con-discapacidad) [https://perma.cc/L5TX-6J6U] (archived Sept. 30, 2022) [hereinafter *Comisión Permanente*]; *Jueces de Lima recibirán capacitación sobre derechos de las personas con discapacidad* [Lima Judges Will Receive Training on the Rights of Persons with Disabilities], IDEHPUCP (Aug. 4, 2015), <https://idehpucp.pucp.edu.pe/notas-informativas/investigadores-del-idehpucp-capacitaran-a-jueces-de-lima-sobre-derechos-de-las-personas-con-discapacidad/> [https://perma.cc/PA8S-E5YJ] (archived Sept. 30, 2022) [hereinafter IDEHPUCP].

287. *E.g.*, *Capacitación sobre discapacidad dirigida a funcionarios de instituciones públicas* [Training on Disability Aimed at Officials of Public Institutions], GOBIERNO DEL PERÚ (Mar. 28, 2019), <https://www.gob.pe/institucion/conadis/noticias/26999-capacitacion-sobre-discapacidad-dirigida-a-funcionarios-de-instituciones-publicas> [https://perma.cc/7K9N-QMLH] (archived Sept. 30, 2022); Interview: PE-1, *supra* note 49; Interview: PE-4, *supra* note 59; see also DEFENSORÍA DEL PUEBLO DE PERÚ, *supra* note 286; *Comisión Permanente*, *supra* note 286; IDEHPUCP, *supra* note 286.

288. See *Indicadores de proceso Perú - Medidor en línea del cumplimiento de la convención de naciones unidas de los derechos de las personas con discapacidad en Latinoamérica* [Process Indicators Perú - Online Compliance Measure with the United Nations Convention on the Rights of Persons with Disabilities in Latin America], LATAMDIS, <https://juristasporladiscapacidad.org/latamdis/banco-de-datos/?article%5B%5D=articulo-12&country%5B%5D=peru&indicator%5B%5D=de-proceso> (last visited Apr. 5, 2022) [https://perma.cc/8YH5-8YZJ] (archived Sept. 30, 2022).

reform.<sup>289</sup> It is an issue pending improvement due to a lack of public policies and funding.<sup>290</sup>

### C. *Public Record of Support*

All the jurisdictions analyzed, except Colombia, contemplated, as a publicity measure, the registration or annotation of the establishment or designation of supports and safeguards in some publicly accessible registry. Regarding a public record or registry of support, the CR-AL provides that the appointment of a guarantor for equality will be communicated to the Public Property Registry for its respective annotation in the inscriptions of property of the persons with disabilities.<sup>291</sup> The ACC establishes that sentences of restricted capacity and incapacity must be registered in the Registry of Civil Status and Capacity of Persons and leave a record in the margin of the birth certificate.<sup>292</sup> If the person concerned asks for the appointment of a support person, the registration will take place only at the person's request.<sup>293</sup> In Peru, Article 2030 of the PCC referred to support registration providing that the judgments and support arrangements must be registered in the Personal Registry.<sup>294</sup> The same is applied to changes in the support or safeguards and those that leave them without effect.<sup>295</sup> Finally, the CO-LC failed to create a public record of support. The law's only mention of a registry appears in Article 51, which provides a measure of publicity to third parties: that legal acts involving goods subject to registration must have an annotation regarding the act conducted using support.<sup>296</sup>

289. See, e.g., *El derecho a la capacidad jurídica de las personas con discapacidad, desde una perspectiva de género* [The Right to Legal Capacity of Persons with Disabilities, from a Gender Perspective], FCPYS, <https://fcp.uncuyo.edu.ar/cursos/item/seminario-el-derecho-a-la-capacidad-juridica-de-las-personas-con-discapacidad-desde-una-perspectiva-de-genero> (last visited July 18, 2022) [<https://perma.cc/EJ3W-THPF>] (archived Sept. 30, 2022); see also Interview: AR-3, *supra* note 40; Interview: AR-4, *supra* note 40; *La discapacidad en el nuevo Código Civil* [Disability in the New Civil Code], RÍO NEGRO (Sept. 22, 2015), [https://www.rionegro.com.ar/la-discapacidad-en-el-nuevo-codigo-civil-XCRN\\_7944415/](https://www.rionegro.com.ar/la-discapacidad-en-el-nuevo-codigo-civil-XCRN_7944415/) [<https://perma.cc/4CZW-422R>] (archived Sept. 30, 2022); Secretaría de Comunicación Gobierno de Salta, *Capacitación sobre el impacto del Nuevo Código Civil en las personas con discapacidad* [Training on the Impact of the New Civil Code on Persons with Disabilities], GOBIERNO DE SALTA (Oct. 10, 2016), <https://www.salta.gob.ar/prensa/noticias/capacitacion-sobre-el-impacto-del-nuevo-codigo-civil-en-las-personas-con-discapacidad-48653> [<https://perma.cc/ANZ4-SY95>] (archived Sept. 30, 2022).

290. See Interview: AR-2, *supra* note 39; Interview: AR-3, *supra* note 40; Interview: AR-4, *supra* note 40.

291. See Law No. 5476 art. 37 (Costa Rica).

292. See CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 39 (Arg.).

293. See *id.* art. 43.

294. See Legislative Decree No. 295 art. 2030(9) (Peru).

295. See *id.*

296. See L. 1306/2009 art. 51 (Colom.).

## VI. COMPLIANCE WITH THE CRPD STANDARDS

Article 12 is one of the most significant and controversial articles of the CRPD. It contains the primary obligations that the states parties should fulfill concerning adopting their legal capacity legislation. However, the normative content of this article has been the subject of heated debate, and the Committee's interpretation contained in the GC1 has been highly questioned.<sup>297</sup> Despite those criticisms, the GC1 offers an interpretive framework to assess compliance with the obligations of the CRPD of the reforms under study.

This Part assesses the compliance of the analyzed reforms with Article 12 according to the Committee's observations. It should be noted that there are obligations for which compliance is straightforward to verify, while others involve a more significant margin of appreciation on the part of the states parties.

### A. *Legal Personality under Equal Conditions*

The first obligation contained in Article 12 consists of equal recognition of the legal personality of persons with disabilities.<sup>298</sup> This obligation supposes: (1) that persons with disabilities must be respected as holders of legal personality,<sup>299</sup> recognizing their capacity to enjoy rights, and (2) the nondiscrimination of persons with disabilities due to their disability.

Legal personality is a right that, prior to the reforms under analysis, was already recognized in other international human rights treaties.<sup>300</sup> Likewise, it was already recognized, at least formally, in the legislation of the analyzed jurisdictions. There is no significant debate around recognizing legal personality, and, therefore, it is possible to conclude that this obligation is fulfilled by all the countries analyzed.

### B. *Legal Capacity under Equal Conditions*

The second obligation established in Article 12 consists of recognizing equal legal capacity.<sup>301</sup> According to the Committee, it implies

297. See generally George Szmukler, "Capacity," "best interests," "will and preferences" and the UN Convention on the Rights of Persons with Disabilities, 18 *WORLD PSYCHIATRY* 34 (2019); Charlene Sunkel, *The UN Convention: a service user perspective*, 18 *WORLD PSYCHIATRY* 51 (2019); José Miguel Caldas de Almeida, *The CRPD Article 12, the Limits of Reductionist Approaches to Complex Issues and the Necessary Search for Compromise*, 18 *WORLD PSYCHIATRY* 46 (2019); Silvana Galderisi, *The UN Convention on the Rights of Persons with Disabilities: Great Opportunities and Dangerous Interpretations*, 18 *WORLD PSYCHIATRY* 47 (2019).

298. See CRPD, *supra* note 2, art. 12, § 1.

299. See General Comment No. 1, *supra* note 6, ¶ 11.

300. See, e.g., Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

301. See CRPD, *supra* note 2, art. 12, § 2.

three parts. First, there is respecting persons with disabilities as capable of exercising rights and acting in law themselves. This means recognizing the person as an actor empowered to conduct transactions and create, modify, or extinguish legal relationships.<sup>302</sup> Second, there is ensuring that persons with disabilities can effectively exercise their legal capacity regarding financial and economic issues.<sup>303</sup> Third, there is the nondiscrimination of persons with disabilities by recognizing that they have legal capacity on equal terms with other people in all aspects of life. Therefore, capacity cannot be restricted on the grounds of disability. In this line, the GC1 indicates that the deficits of mental capacity in no case can justify a restriction to the legal capacity.<sup>304</sup>

Before implementing reform in Costa Rica, full legal capacity was not recognized for all persons with disabilities. As the final observations of the CRPD indicate, there was concern about the persistence of procedures such as *interdicción* and declarations of *insanía mental* (insanity).<sup>305</sup> In these cases, the result could be restricting rights, such as voting and the right to form a home and a family.<sup>306</sup> As mentioned, with the promulgation of the CR-AL, this situation changed radically. Article 5 established the presumption of the capacity of persons with disabilities and the recognition of their legal capacity and capacity to act.<sup>307</sup>

In Argentina, before the reform, legal capacity was also restricted. After the reform, the ACC established the general rule that all people have the legal capacity to act, even when hospitalized in a care facility.<sup>308</sup> However, Article 32 contains the possibility that the judge can declare the restricted capacity of a person and even, in the most serious cases, declare their incapacity and appoint a permanent guardian.<sup>309</sup> Therefore, the reform implemented in Argentina does not fully comply with the obligation to recognize legal capacity, despite advances in the direction of the CRPD recommendations. This is one of the most problematic and discussed matters of the reform.

In Peru, legal capacity was restricted to some persons with disabilities following specific provisions of the old civil code. After the reform, the final paragraph of Article 3 of the PCC reproduces the CRPD, providing that persons with disabilities have the capacity to act (*capacidad de ejercicio*) in equal conditions in all aspects of life.<sup>310</sup> It is complemented by Articles 42 and 44 of the PCC,<sup>311</sup> seemingly comply-

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302. See General Comment No. 1, *supra* note 6, at ¶ 12.

303. See *id.* at ¶ 23.

304. See *id.* at ¶¶ 13, 23.

305. See *Concluding Observations Costa Rica*, *supra* note 65, at ¶¶ 21–22.

306. See *id.* at ¶ 21.

307. See Law No. 5476 art. 5 (Costa Rica).

308. CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 31 (Arg.).

309. See *id.* art. 32.

310. See Legislative Decree No. 295 art. 3 (Peru).

311. *Id.* arts. 42, 44.

ing with the provisions of Article 12 of the CRPD regarding the recognition of legal capacity. However, it has been questioned that there are still cases of restricted exercise of legal capacity for some instances of perceived disability according to Article 44 of the PCC: prodigals, those who engage in corruption and mismanagement, habitual drunkards, and drug addicts.<sup>312</sup> They all are subject to guardianship.<sup>313</sup>

Finally, Article 6 of the CO-LC provides the presumption of full legal capacity of all people, expressly stating that disability could not be a reason for the restriction of legal capacity.<sup>314</sup> In this way, the Colombian legislation most widely recognizes the legal capacity of persons with disabilities because it also includes people with perceived disabilities.

Most of the legislation accepted a universal legal capacity system promoted by the Committee. Exceptionally, in Argentina, cases of restrictions on the legal capacity of persons with disabilities continue to be prescribed, while in Peru, guardianship is authorized in situations of perceived disability.

### C. Support System

The third obligation of Article 12 of the CRPD consists of providing support for the exercise of legal capacity.<sup>315</sup> To fulfill this obligation, according to the Committee, it is necessary to (1) ensure access to a support system available to all,<sup>316</sup> (2) guarantee respect for the rights, wishes, and preferences of persons with disabilities and prevent other people from consenting for them;<sup>317</sup> (3) provide the necessary support (technological or physical) of different intensities and quantities;<sup>318</sup> (4) designate suitable people of trust as support persons;<sup>319</sup> (5) prevent the use of support for decision-making as a justification to limit other fundamental rights of persons with disabilities;<sup>320</sup> (6) ensure persons with disabilities have the option of not exercising their right to receive

312. See *id.* art. 44; Bregaglio & Constantino, *supra* note 46, at 47; Ana Rugel, *El tratamiento de las adicciones en el Perú* [Treatment of Addictions in Peru], 25 (2019) (student paper) (on file with Pontificia Universidad Católica del Perú Facultad de Derecho); Rosa Paredes, *Reconocimiento de la capacidad jurídica de las personas con discapacidad en el Perú: avances y retos en su implementación* [Recognition of the Legal Capacity of Persons with Disabilities in Peru: Progress and Challenges in Its Implementation], 3(2) REVISTA LATINOAMERICANA EN DISCAPACIDAD, SOCIEDAD & DERECHOS HUMANOS 36, 56 (2019).

313. See Legislative Decree No. 295 art. 564 (Peru).

314. L. 1996/2019 art. 6 (Colom.).

315. See CRPD, *supra* note 2, art. 12, § 3.

316. General Comment No. 1, *supra* note 6, ¶ 29(a).

317. *Id.* ¶ 17.

318. *Id.* ¶ 29.

319. *Id.*

320. *Id.* ¶ 29(f).

support;<sup>321</sup> and (7) ensure the provision of support does not depend on an evaluation of mental capacity.<sup>322</sup>

In Costa Rica, before the reform, a guardian was appointed who assumed the representation of the persons substituting their decision-making. With the CR-AL, guardianship was eliminated, and, instead, the right of access support was granted. Beyond some conceptual issues, the regulations of support are imperfect due to the following problems: (1) both the provision of the guarantor of equality is subject to a disability evaluation, (2) a clear scope of the support is not established in the law, (3) the appointment of the support person can only be made through the courts, (4) advance directives for the appointment of a guarantor are not included in the law, and (5) because in particular legal acts the presence of the support person is mandatory.

In Argentina, for its part, the reform provides access to support for legal capacity. Measures of support promote autonomy and facilitate communication, understanding, and manifestation of the person's will and preferences to exercise their rights.<sup>323</sup> However, the obligation is partially fulfilled because (1) the judge must designate support that is mandatory for persons with disabilities in cases of restricted capacity and (2), in the case of incapacity, the judge must appoint a guardian, depriving the persons of exercising their legal capacity with support.<sup>324</sup> In the latter case, the substituted decision-making goes against the purpose of the support, according to the Committee.

In Peru, the reform eliminated guardianship for persons with disabilities and created a support system. However, according to Article 659-E of the PCC, the exceptional designation of support by the judge for persons with disabilities who cannot express their will and preferences is mandatory, so the person could not refuse to use it.<sup>325</sup> Therefore, even if there is no clarity on how they could express the refusal, the compulsory use seems to go against the GC1.

Finally, Colombia established a support system to assist persons with disabilities in decision-making. However, in this case, the main problem of compliance is that Article 19 of the CO-LC requires that if there is support arranged, there is an obligation to use it when executing a specific legal act as a requirement for its validity.<sup>326</sup> So, if the person conducts the legal acts specified in the support agreement without using the support stipulated therein, it will be grounds for voiding the act. Persons with disabilities would be forced to use their support, constituting a breach of the Committee's interpretation of Article 12.

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321. *Id.* ¶¶ 19, 29(g).

322. *Id.* ¶ 29(i).

323. *See* CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] art. 43 (Arg.).

324. *Id.* art. 32.

325. *See* Legislative Decree No. 295 art. 659-E (Peru).

326. *See* L. 1306/2009 art. 19 (Colom.).

It is possible to conclude that, in general, all the reforms implement a support system for decision-making. However, in each country, exceptions allow for questioning the complete fulfilment of this obligation. Thus, in Costa Rica, disability certification is also required to access support. In Argentina and Peru, there are exceptional cases of mandatory designation and use of support. Finally, Colombia makes support use mandatory, which would also be contrary to the provisions of the CRPD.

#### D. *Safeguards*

The fourth obligation provided in Article 12 of the CRPD is establishing safeguards to (1) guarantee that safeguards are taken to ensure the legal capacity of persons with disabilities, particularly their wishes and preferences;<sup>327</sup> (2) avoid the abuse to which persons with disabilities may be susceptible, conflicts of interest, and undue influence; and (3) ensure that the measures of support are adapted to the reality of persons, that they are granted in the short term, and that they are subject to periodic review by a competent, independent, and impartial judicial body. It should be noted that the CRPD is particularly sensitive to the risk of undue influence, which can be exacerbated if persons with disabilities rely on the support of others to make decisions. However, the Committee points out that although this protection is necessary, people's rights, will, and preferences must be respected, including the right to take risks and make mistakes.<sup>328</sup>

In Costa Rica, Peru, and Colombia, safeguards are expressly defined in their respective legislation with reference to the three aspects contained in Article 12(4) of the CRPD. In this sense, they provide that the safeguard must be based on and guarantee respect for the rights, will, preferences, and interests of the person receiving the support and intended to prevent abuse and undue influence. Likewise, they all refer to the need for safeguards to be established according to each person's circumstances. Lastly, these laws provide that safeguard measures (and support) must be granted within a certain period and be subject to review.<sup>329</sup>

In Argentina, the ACC does not provide a concept of safeguards aligned with the CRPD terminology. However, it is possible to reconstruct from its regulation a system of safeguards consistent with the obligations established in Article 12 of the CRPD. Thus, it guarantees the participation of the person and the provision of reasonable accom-

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327. CRPD, *supra* note 2, art. 12, § 4; General Comment No. 1, *supra* note 6, at ¶ 20.

328. *See id.* at ¶ 22.

329. *See* Law No. 5476 arts. 2(g), 9 (Costa Rica); Legislative Decree No. 295 art. 659-G (Peru); L. 1306/2009 arts. 5, 18, 41 (Colom.).

modation in the hearing,<sup>330</sup> the review of the sentence,<sup>331</sup> and the duty of the judge to seek the protection of the person regarding possible conflicts of interest or undue influence.<sup>332</sup>

From what has been described, all the countries analyzed have safeguards in the legislation, complying with the obligations outlined in Article 12 of the CRPD. However, compliance with this obligation depends on rules relating to safeguards, and a large part of the compliance with those obligations should be observed in practice, especially concerning safeguards related to procedure and supervision operated by judges and administrative bodies.

## VII. EXPLORING THE WEAKNESS OF THE REFORMS

After examining the obligations contained in Article 12 of the CRPD and the reforms conducted in each of the jurisdictions, we concluded that the reforms generally comply with the CRPD. They may be considered a prominent example of implementing the support system that the CRPD promotes and seek to replace guardianship. The previous section has highlighted the limitation of compliance with the CRPD. However, it is possible to identify fragile aspects in all the reforms, both in their normative regulation and implementation.

As previously commented, we visualize a conceptual problem between support and safeguards in the Costa Rican reform. However, issues have arisen beyond the noted confusion of terms in its implementation. The lack of training of judicial operators has generated difficulties in the clarity of application of the new legislation and criticism.<sup>333</sup> Little knowledge of the new paradigm about disability introduced by the reform has meant that, for example, the difference between the guarantor for equality and the former guardian is not clearly understood.<sup>334</sup> Along these lines, there is a lack of information and dissemination of the reform, especially among citizens and persons with disabilities.<sup>335</sup>

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330. See CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] arts. 31, 36 (Arg.).

331. See *id.* art. 40.

332. See *id.* art. 43.

333. See Yerling Matarrita, *Ley no. 9379 ley para la promoción de la autonomía personal de las personas con discapacidad, análisis jurídico* [Law 9379 for the promotion of the autonomy of people with disabilities, legal analysis], (Feb. 2018) (Legal thesis, Universidad Hispanoamericana); Priscilla Marín, *Análisis jurídico de la normativa que regula la figura del garante frente a la garantía de la autonomía de las personas con discapacidad en los procesos de actividad judicial no contenciosa y en la función notarial en Costa Rica, en el año 2017* [Legal analysis of the regulations that govern the law of the guarantor against the guarantee of the autonomy of people with disabilities in the processes of non-contentious judicial activity and the notarial function in Costa Rica in 2017], (Oct. 2017) (Legal thesis, Universidad Hispanoamericana); Interview: CR-1, *supra* note 33; Interview: CR-5, *supra* note 291.

334. See Interview: CR-3, *supra* note 79; Marín, *supra* note 333, at 123–27.

335. See Matarrita, *supra* note 333, at 165.



One of the essential criticisms in Argentina is the persistence of instances of guardianship; the support system coexists with substituted decision-making. It is problematic that guardianship has not been restrictively applied, and there are difficulties in differentiating the hypothesis of restricted capacity and incapacity.<sup>336</sup> Although the spirit of the law was that incapacitation would be exceptional, the provision has been considered a “slippery slope,” which opens the possibility of misuse.<sup>337</sup>

Additionally, confusion has been generated due to the absence of regulation on elements and more transparent legal rules regarding the infractions of the support model and its effects on the legal acts supported.<sup>338</sup> The legal reform did not intervene systemically in the legal act regulation, so uncertainty about how to support it must be understood.<sup>339</sup> To remedy this gap, the courts have equated the support system to guardianship, and therefore a rule regarding void acts, responsibility, and interpretation of guardianship has been applied.<sup>340</sup> Finally, it is also possible to identify problems in implementing the reform in Argentina because (1) the substantive changes have not come with procedural changes because there has been no reform of the procedural codes that govern each province<sup>341</sup> and (2) the lack of dis-

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336. See Sofia Minieri, *El derecho de las personas con discapacidad al reconocimiento de su capacidad jurídica en el proyecto con discapacidad al reconocimiento de su capacidad jurídica en el proyecto de reforma del Código Civil: cuentas pendientes de una reforma legal necesaria* [The Right of Persons with Disabilities to the Recognition of their Legal Capacity in the Project with Disabilities to the Recognition of their Legal Capacity in the Effort to Reform the Civil Code: Pending Accounts of a Necessary Legal Reform], 1(4) EN LETRA 197, 204 (2014); Antonio Martínez-Pujalte, *Capacidad jurídica y apoyo en la toma de decisiones: enseñanzas de las recientes reformas legislativas en Argentina e Irlanda* [Legal Capacity and Decision Support: Lessons from Recent Legislative Reforms in Argentina and Ireland], 3(2) DERECHOS Y LIBERTADES 167 (2017); Agustina Taverna, *La persona con discapacidad en la República Argentina* [Persons with Disabilities in the Argentine Republic], 19 (2016) (student paper) (on file with Universidad de San Andrés Departamento de Derecho); Iglesias, *Discursos jurídicos*, supra note 270; Silvia Fernández, *El régimen de capacidad en el nuevo Código Civil y Comercial de la Nación* [The Capacity Regime in the New Civil and Commercial Code of the Nation], 25 SUP. ESPECIAL NUEVO CÓDIGO CIVIL Y COMERCIAL 1, 6 (2014); Interview: AR-3, supra note 40.

337. See Interview: AR-3, supra note 40; Minieri, supra note 336, at 208–10; Martínez-Pujalte, supra note 336, at 167, 178–81; Iglesias, *Discursos jurídicos*, supra note 270, at 47–50.

338. See Interview: AR-1, supra note 39; Interview: AR-3, supra note 40; Iglesias, *Discursos jurídicos*, supra note 270, at 4.

339. See Bregaglio & Constantino, supra note 46.

340. See Interview: AR-3, supra note 40.

341. See Marcelo Budich & Anabella Ferraiuolo, *Los procesos sobre determinación de capacidad jurídica: necesidad de armonizar la normativa de forma y de fondo* [The processes on the legal capacity determination: the need to harmonize regulations in form and in substance], in REVISTA DEL MINISTERIO PÚBLICO DE LA DEFENSA DE LA NACIÓN 111, 113–14 (2017); Rubén Garate, *La determinación de la capacidad jurídica, principios y procesos* [Determination of legal capacity, principles, and processes], 47 REVISTA ANALES FACULTAD CIENCIAS JURÍDICAS Y SOCIALES (2017).

semination and training on the reform.<sup>342</sup> In certain provinces, the judiciary has resisted implementing the reform because some maintain a paternalistic view of persons with disabilities.<sup>343</sup> There is still no conviction at the judicial level that the best and legally correct thing is for persons with disabilities to be recognized for exercising their legal capacity.<sup>344</sup>

From the normative point of view, two problematic aspects appear in Peru. The first has to do with maintaining incapacity for addiction, gambling, and prodigality cases because they are viewed as a risk that may affect certain persons with disabilities.<sup>345</sup> The second is the regulation of safeguards. The PCC regulation refers to safeguards because ex-post reviews have been identified as a weak point, but there is no notion of how they act ex-ante to prevent abuse effectively.<sup>346</sup> Regarding implementing the reform, certain key actors do not fully understand its legal consequences, assuming that support is only a change of name for guardianship.<sup>347</sup> In practice, problems have arisen regarding the actions of some judges who are appointing exceptional support in cases that do not correspond to needing such support.<sup>348</sup> The *Ministerio Público* is persistent in recommending applying for guardianship or appointing exceptional support.<sup>349</sup>

342. See generally Carolina Nassif & Ricardo Nassif, *La discapacidad desde un enfoque de derechos: a propósito de la legislación nacional en Argentina* [Disability from a Rights Approach: About the National Legislation in Argentina], 3(2) REVISTA LATINOAMERICANA EN DISCAPACIDAD, SOCIEDAD Y DERECHOS HUMANOS 58 (2019); Marina Sorgi, *Capacidad jurídica de las personas con discapacidad en el código civil y comercial* [Legal Capacity of Persons with Disabilities in the Civil and Commercial Code], 4 DERECHOS EN ACCIÓN (2017); Juan Manuel Iglesias, *Capacidad jurídica y acceso a la justicia de las personas con discapacidad en Argentina* [Legal Capacity and Access to Justice for Persons with Disabilities in Argentina], 7(2) REVISTA ESPAÑOLA DE DISCAPACIDAD 79 (2019).

343. See Interview: AR-1, *supra* note 39. See generally COMITÉ SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD, INFORME ALTERNATIVO ARGENTINA SITUACIÓN DE LAS PERSONAS CON DISCAPACIDAD EN ARGENTINA 2013/2017 [ALTERNATIVE REPORT ARGENTINA: SITUATION OF PERSONS WITH DISABILITIES IN ARGENTINA 2013/2017] (2017); Iglesias, *Discursos jurídicos*, *supra* note 270, at 49–50; Iglesias, *Capacidad jurídica*, *supra* note 342, at 94–97.

344. See Interview: AR-5, *supra* note 40; José María Martocci & Ignacio Zelasqui, *Capacidad jurídica de las personas con discapacidad* [Legal Capacity of Persons with Disabilities], 6 REVISTA DE INTERÉS PÚBLICO 83 (2021); Iglesias, *Capacidad jurídica*, *supra* note 342, at 94.

345. See Interview: PE-1, *supra* note 49; Legislative Decree No. 295 art. 44; (Peru); Bregaglio & Constantino, *supra* note 46, at 47; Rugel, *supra* note 312, at 11–12; Paredes, *supra* note 312, at 54–55.

346. See Interview: PE-3, *supra* note 60; Supreme Decree No. 016-2019-MIMP art. 21 (Peru).

347. See Interview: PE-1, *supra* note 49; Interview: PE-2, *supra* note 60; Paredes, *supra* note 312, at 53–54.

348. See Bustamante, *supra* note 51, at 10.

349. See Interview: PE-1, *supra* note 49; Reynaldo Tantaleán, *Interdicción vs. apoyos y salvaguardias en el ordenamiento jurídico Peruano* [Interdiction vs. Supports and Safeguards in the Peruvian Legal System], 61 DERECHO Y CAMBIO SOCIAL 176, 186–88 (2020).

Regarding the Colombian reform, the main criticism is the inclusion, as a validity requirement, of the use of previously designated support under penalty of nullity. This requirement leads to an experience comparable to that before the reform in certain regards.<sup>350</sup> As in the other analyzed jurisdictions, the most significant difficulties are those related to implementation.<sup>351</sup> Although the Colombian reform is the most recent, and it is difficult to assess in detail, problems have arisen in the transition stage. In this regard, the law left several normative uncertainties, so there are relevant doubts about the applicators,<sup>352</sup> evidencing that the training has not been enough.<sup>353</sup> In addition, the guidelines and protocol for assessing support needs have also been criticized because a more exhaustive and participatory regulation would have been desirable.<sup>354</sup>

In conclusion, it is observed that, beyond the normative inconsistencies offered by the reforms, their greatest weakness is manifested in their implementation. In most jurisdictions, the lack of resources available or insufficient training and dissemination of the reforms may be extremely detrimental for their success. Consequently, although there has been a paradigm shift in a legal capacity in the region, there is still a lack of progress in raising awareness of what this change implies.

### VIII. CONCLUSION

This Article has described in detail the reforms to legal capacity carried out in four Latin American jurisdictions. It has focused on five dimensions concerning the new legislation.

Firstly, regarding the relevant aspects of the reform process, it is possible to infer that although all the reform processes analyzed had the common objective of aligning their internal legislation with international human rights standards, there were important formal differences between them. Their different origins, processes, and legislative techniques responded to the context in which they were developed, which undoubtedly influenced their scope and implementation. There

350. See Sergio Hernández, *Capacidad en situación de discapacidad: análisis de la ley 1996 de 2019* [Capacity in a Situation of Disability: Analysis of the Law 1996 from 2019], 4(1) REVISTA LATINOAMERICANA EN DISCAPACIDAD, SOCIEDAD Y DERECHOS HUMANOS 60, 82 (2020).

351. See Interview: CO-1, *supra* note 54; Julia Betancur, *El cambio de paradigma de la Ley 1996 de 2019 y sus letos jurídicos* [The Paradigm Shift of Law 1996 from 2019 and Its Legal Laws] 47 (2020) (student monograph) (on file with Universidad Eafit Escuela Derecho Medellín); García & Gutiérrez, *supra* note 116. See generally Ana María Arango, *El impacto del proceso judicial de adjudicación de apoyos y su nuevo panorama para las personas con discapacidad* [The Impact of the Judicial Process of Awarding Support and Its New Panorama for Persons with Disabilities], UNIVERSIDAD CES 1 (2020).

352. See generally Interview: CO-1, *supra* note 54; Hernández, *supra* note 350.

353. See Betancur, *supra* note 351, at 52.

354. See Interview: CO-2, *supra* note 54; Interview: CO-3, *supra* note 54; Interview: CO-5, *supra* note 54; Arango, *supra* note 351.

was cooperation from multiple actors, political and administrative institutions, and academia and civil society organizations in all the reforms. Organizations of persons with disabilities played a leading role in some of the reform processes. In Colombia, participation was more prominent and decisive than in other countries. Conversely, in Costa Rica, the involvement of people with disabilities in discussions of the reform was limited. All the reforms had the clear objective of adapting the respective domestic legislation to CRPD standards as a way of complying with the international obligations subscribed to by the states parties. Additionally, the CRPD also played a fundamental role in the debate on the reforms, and the Committee supported the reforms through its observations, to the extent that it urged the states to make the necessary adjustments in their respective internal legislations. Comparative legislation on legal capacity was considered in all the reforms, in some cases as inspiration for legislative techniques or to avoid replicating negative experiences. However, legal transplants were not performed. Colombia stands out as the country with more foreign influences, both from Latin America and from outside the region, being the only country that used the other Latin American reforms as a reference. The other reforms did not allude to or influence each other. During the reforms, the focus of the discussion and principal dissent and resistance to adopting a support system and eliminating substituted decision-making figures for complex or borderline cases was based mainly on opposition to a new social paradigm of disability. In Costa Rica, some reservations related to the importance of funding were issues not addressed in other jurisdictions.

Secondly, regarding the main features of the support system implemented by the reforms, the analysis was divided into four aspects. First, the *presumption of legal capacity* of people with disabilities common to all the reforms was relevant because it materialized the first step, leaving the disproportionate impact of guardianship on this group. Second, common features were found in analyzing the *substantive aspects of the support measures*. All the reforms under analysis, except for Costa Rica, expressly defined support. The concepts used were consistent in highlighting that they were measures that facilitated decision-making with legal relevance. One of the noticeable common characteristics of the reforms is their reliance on family and informal support networks to conduct the support workload. No beneficiary of support was identified in the analyzed jurisdictions. Given the scope of regulation on this matter, it is uncertain whether the support measures can be used by all the people who need them or if, necessarily, the recipients must be persons with disabilities. Most of the analyzed legislation recognized the need to arrange more intense support cases. This is linked to the idea that support measures must be tied to the need for support and not limit the person in question's autonomy. This may include cases of representation under certain circumstances in which the person concerned cannot communicate with

third parties. In all cases, the law seeks to safeguard the will of persons with disabilities in cases of substituted decision-making, establishing that the support or representative must be based on, respecting, or considering the will, preferences, and life history of the person represented. Third, common features were also found in the *regulation of safeguards*. As a common criterion, none of the analyzed jurisdictions regulated safeguards by establishing a *numerus clausus*. Instead, the legislation set general parameters concerning the functioning of support and safeguards, allowing these measures to be evaluated and selected according to the needs and specific circumstances of the person in need of support.

There were only two safeguards identified as common to all the reforms: a term during which the courts must review the arrangement of support or after which the agreement made before a notary is rendered void and the obligation of participation of persons with disabilities and the respect of their will and preferences during the procedure of the arrangement of support. In addition to those, each country regulated several additional safeguards. Fourth, relatively similar *procedures for the arrangement of support* were identified. It was possible to identify certain common principles: interdisciplinarity, immediacy, and the primacy of respect for the will and preferences of the person concerned. The judicial procedure for arranging support measures was conducted in a nonadversarial process, and the judicial arrangement of support could be promoted by persons with disabilities or someone else. The competent court was generally a family or civil court. In addition to the judicial arrangement of support, the reforms considered other mechanisms that did not require judicial intervention, thereby increasing flexibility and reducing unnecessary intervention. Except for Costa Rica, all legislation contemplated the possibility that a person could arrange support measures through advance directives. Additionally, in the Colombian and Peruvian cases, it was possible to conduct support agreements.

Thirdly, regarding the transitional aspects of the reforms, three factors were examined. In Costa Rica, the reform entered into force immediately after its publication in August 2016. Similarly, no *vacatio legis* was provided in Peru; thus, it was effective immediately after its publication in September 2018. Conversely, the Argentine reform entered into force in August 2015, one year after its promulgation in August 2014. The CO-LC, however, created a complex transition regime. The reforms provided transitional measures to regularize the situation of persons with disabilities subjected to guardianship before it entered into force. The reforms opted for measures that operated automatically, transforming guardianship into support measures or a judicial review case by case of a person under guardianship as an evaluation of the actual need for support. At the entry into force of the reforms, there were still processes for processing the appointment of guardians. Some reforms expressly provided transitional measures for

these cases, while others remained silent. Among the established standards were the suspension of the procedures already initiated, the application *in actum* of the new regulations on support, and the immediate repeal of the guardianship procedures. Some jurisdictions contemplated the notification of guardians, the people under guardianship, or those involved in pending processes of guardianship to inform them of the effects of the reform, granting them a term to express their support request. Others, however, did not expressly refer to a duty of notification.

Fourthly, regarding the measures of implementation considered, three aspects were examined. The reforms did not contemplate a specific administrative body for their implementation and further supervision. Compliance with the new regulations was entrusted to different executive bodies responsible for the administration of justice or promoting the rights of persons with disabilities. Regarding training for legal operators who would put the reforms into practice, a lack of regulation was identified. Only the Colombian reform incorporated the need for education and training in this aspect. All the jurisdictions analyzed, except Colombia, contemplated, as a publicity measure, the registration or annotation of the establishment or designation of supports and safeguards in a publicly accessible registry.

Finally, regarding the compliance of the reforms with the standards of the CRPD, the analysis shows a relatively positive balance. Concerning the recognition of legal personality under equal conditions to others, this obligation was fulfilled by all the countries analyzed. Most of the legislation accepted a universal legal capacity system promoted by the Committee. Exceptionally, in Argentina, cases of restrictions on the legal capacity of persons with disabilities continued to be prescribed, while in Peru, guardianship was authorized in situations of perceived disability. Those cases were problematically reconcilable with the Committee's interpretation of Article 12 of the CRPD. Regarding the provision of support, in general, all the reforms involved the implementation of a support system for decision-making. However, in each country, exceptions allowed for the questioning of the complete fulfilment of this obligation. Thus, in Costa Rica, disability certification was also required to access support. There were exceptional cases of mandatory designation and use of support in Argentina and Peru, and Colombia made support use mandatory, which was contrary to the provisions of the CRPD. Finally, all the countries analyzed provided safeguards in the legislation, complying with the obligations outlined in Article 12 of the CRPD. However, compliance with this obligation depended on rules relating to safeguards, and a large part of this compliance must be observed in practice, particularly concerning safeguards about procedure and supervision operated by judges and administrative bodies.

In an exploratory analysis of the weaknesses of the reforms, it was observed that, beyond the normative inconsistencies that the reforms

presented, the significant challenge for a successful paradigm shift in the practice of legal capacity was at the implementation stage. In most of the jurisdictions analyzed, the lack of resources available or insufficient training and dissemination of the reforms were very important for their success. Consequently, there remained a lack of progress in raising awareness of this change.

The preliminary analysis conducted in this Article indicates a need for future research in the following lines and topics: (1) an empirical study of the elements that account for the development and implementation of the reforms is desirable in the different areas of legal life; (2) it is necessary to attend to the practical operation of the support measures and the jurisprudential criteria for their configuration; and (3) further study is necessary on the extension of the reforms to legal capacity in the region to different spheres (e.g., electoral, psychiatric, civil, matrimonial, procreative, and criminal, among others) that can contribute their particularities to the regulation of legal capacity.

This Article is the first to systematically show how legal capacity has been reformed in Latin America in line with the CRPD—identifying the cases of Peru and Colombia as the most relevant to study the implementation of support to legal capacity—laying the foundations for a research agenda on this revolutionary mechanism for guaranteeing the right to legal capacity of persons with disability.

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