



Constitutional Court of Romania

On the matter of the constitutionality of national legislation governing legal capacity and the guardianship system

File no. 695D/2017 (Nabosnyi Alexandru Stefan Francisc)

Written submissions of the Mental Disability Advocacy Centre

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OVERVIEW

1. This written submission is provided in support of the demand of complainant Nabosnyi Alexandru Stefan Francisc, in the case in File no. 695D/2017. We kindly ask the Court to find that the provisions in Article 164 (1) of the Civil Code are unconstitutional. This document will substantiate our claim by looking at the Romanian Constitution, a range of international instruments that Romania has ratified, jurisprudence of regional and international judicial bodies and practices from other countries which have reformed their guardianship system as a result of relevant development in international law and jurisprudence.
2. This document has been written by the Mental Disability Advocacy Centre (hereinafter “MDAC”). MDAC is an international human rights organisation that uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide. MDAC’s vision is a world of equality where emotional, mental and learning differences are valued equally; where the inherent autonomy and dignity of each person is fully respected; and where human rights are realised for all persons without discrimination of any form.
3. MDAC has participatory status at the Council of Europe, special consultative status with the United Nations Economic and Social Council and it has standing to lodge collective complaints under the European Social Charter. It works to advance the human rights of children and adults with actual or perceived intellectual or psycho-social disabilities (mental disabilities). MDAC operates at the global level as well as regional and domestic levels in Europe and Africa. MDAC has won a number of cases at the European Court of Human Rights (ECtHR) related to the rights of people with mental disabilities, most notably, *Shtukaturov*

v. *Russia*,¹ *Stanev v. Bulgaria*,² *Stankov v. Bulgaria*³ and, recently, *Kocherov & Sergeyeva v. Russia*.⁴ It has served as a third party intervener in a number of cases before the European Court of Human Rights, including *Kędzior v. Poland*,⁵ *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*,⁶ *ZH v. Hungary*⁷ and *Blokhin v. Russia*.⁸ For more information, please visit www.mdac.org.

THE PARADIGM SHIFT IN INTERNATIONAL LAW

4. The most comprehensive and authoritative international law instrument on matters relating to guardianship and legal capacity in the context of disability is the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Adopted by the United Nations General Assembly on 13 December 2006, it entered into force on 3 May 2008. As of 31 July 2016, it has been signed by 187 States and ratified by 166 States and by the European Union. Romania signed the CRPD on 26 September 2007 and ratified it on 31 January 2011.⁹
5. The CRPD has been characterised as a major leap forward in international human rights law which represents the first serious effort to discontinue the marginalisation of disability within human rights.¹⁰ It does not create new rights, but it is the first legally binding instrument to comprehensively explain how existing rights are to be implemented in a framework specific to persons with disabilities.¹¹
6. The principles of equality and non-discrimination are among the main features of the CRPD. They can be found in Article 5(2) which expressly obliges States to “prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds”. This general wording is further emphasised and reiterated throughout the other provisions of the CRPD.
7. The CRPD – negotiated, agreed and ratified by a vast majority of States globally–supersedes all previous standards in this area. It is the result of a paradigm shift in law, politics and psychiatry: these fields of expertise have increasingly recognised

¹Application No. 44009/05, judgment of 27 March 2008.

²Application No. 36760/06, judgment of 17 January 2012.

³Application No. 25820/07, judgment of 17 March 2015.

⁴Application No. 16899/13, judgment of 29 March 2016.

⁵Application No. 45026/07, judgment of 16 October 2012.

⁶Application No. 47848/08, judgment of 17 July 2014.

⁷Application No. 28973/11, judgment of 8 November 2012.

⁸Application No. 47152/06, judgment of 14 November 2013.

⁹ See http://www.ohchr.org/Documents/HRBodies/CRPD/OHCHR_Map_CRPD.pdf (last accessed: 30 July 2016). Status of ratifications can be consulted at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=114&Lang=EN (last accessed: 30 July 2016).

¹⁰Andreas Dimopoulos, *The UN Convention on the Rights of Persons with Disabilities* (Ashgate Publishing Limited, 2010) at 79.

¹¹ United Nations Officer of the High Commissioner for Human Rights (OHCHR), *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007), at 5.

that a medical model of disability which views individuals with impairments as powerless, in need of protection and incapable is no longer appropriate. People with disabilities have for too long been assumed to be incapable of managing their affairs, making competent decisions or participating in public affairs. Instead, the standards codified in the CRPD are grounded in a social model of disability which considers individuals with disabilities to be active rights-holders and not objects of protection. It recognises that many of the factors contributing to an individual's disability lie, not in the fact of the individual's impairment, but in the numerous disabling barriers in society – including legal barriers, such as deprivation of legal capacity and the existence of guardianship or other substituted decision-making systems.

8. This is explicitly codified in the definition of “persons with disabilities” in Article 1 of the CRPD which states:

“Persons with disabilities include 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.” (emphasis added)

9. This social model of disability does not deny or ignore the fact that people with disabilities (as all people) may require certain supports to fully realise their rights, including their right to equality before the law. Article 5(3) of the CRPD, for example, includes a right to reasonable accommodation for people with disabilities. Article 9 enshrines a right to accessibility and Article 12, which guarantees the right to equal recognition before the law and to legal capacity on a basis of equality, explicitly requires States to take measures to provide access to support in the exercise of legal capacity and to ensure that such measures include appropriate and effective safeguards to prevent abuse. Further, Article 16 of the CRPD also contains an explicit duty on States to take measures to ensure protection of people with disabilities from exploitation, violence and abuse. However, these safeguards, supports and measures must respect the rights of persons with disabilities and be in line with the fundamental principles of the CRPD, including principles of dignity, autonomy, participation and equality. In relation to the right to equal recognition before the law in particular, the Council of Europe Commissioner for Human Rights frames it as “a move from charity to a rights-based approach and from paternalism to empowerment.”¹²

Legal capacity and guardianship

10. The definition of legal capacity contained in the CRPD is mirrored in Romanian law.¹³ The Committee on the Rights of Persons with Disabilities (‘the CRPD

¹² “Who Gets to Decide: Right to legal capacity for persons with intellectual and psychosocial disabilities”, CommDH/IssuePaper(2012)2, published 20 February 2012 at para. 3.

¹³ Romania, Civil Code, Law No. 287 of 2009, Articles 37 to 42.

Committee') has extensively explored the substance of Article 12 in its General Comment No.1 on equal recognition before the law.¹⁴ It recognises that the right to legal capacity is a legal construct which acknowledges individuals as holders of rights, as persons before the law, and which enables them to exercise those rights by making binding decisions and requiring respect for such decisions. Legal capacity affects all areas of life, from daily decisions, such as entering into contracts to buy or sell property and personal commodities, to decisions about our personal relationships (marriage, sexual and reproductive decisions), our careers (education and ability to contract for employment or enter business agreements), our health (consenting to or refusing medical treatment), our participation in political processes (voting, standing for election), and a myriad of other large and small decisions. It is a key component of access to justice allowing us to seek remedies for violations of other rights, including the right to choose where and with whom to live (Article 19, CRPD). The Council of Europe Commissioner for Human Rights describes legal capacity as going beyond decision-making: "it is about what it means to be human".¹⁵

11. The rights to choice and autonomy are central to the concept of legal capacity. A key component of Article 12 of the CRPD, and indeed of the CRPD as a whole, is the recognition that decisions must no longer be made on behalf of people with disabilities in their supposed best interests: rather people with disabilities must be supported to make decisions for themselves which reflect their expressed will and preferences or the best interpretation of their will and preferences.¹⁶
12. The 'best interest' test has often been used in making decisions about people with disabilities. In practice, this has been used to design measures which ostensibly ensure that people with disabilities are protected. Generally, in order to protect individuals from abuse or violence, the law will impose restrictions on and limit the rights of persons who abuse or exercise violence over others or who are in a position to do so, not on the victims of abuse. However, in the context of disability, the law has – without evidence – classed all persons with disabilities as potential victims and created measures that seek to exercise preventive control over and place restrictions on their rights instead of the rights of those who carry out abuses. This is a form of disability-based discrimination and stigma born of stereotypes to justify a parallel form of governance (guardianship) which would otherwise be unacceptable.
13. For example, when the law seeks to protect people from robbery, it adopts punitive legislation targeting those who would commit robbery. It does not place restrictions on the number of goods someone can acquire or display in public; or condition acquiring goods on people installing alarm systems in their houses. When society wants to protect women against sexual assault, it punishes perpetrators, it creates awareness programs and it ensures the presence of law enforcements

¹⁴Committee on the Rights of Persons with Disabilities, *General Comment No. 1, Article 12: Equal recognition before the law*, CRPD/C/GC/1 of 19 May 2014.

¹⁵"Who Gets to Decide", fn 13 at para. 1.1.

¹⁶See CRPD Committee General Comment No. 1, fn 15 at paras. 21, 27 and 29.

officers on the streets. It does not prohibit women from wearing certain items of clothing, nor does it impose curfews or prohibit women from living in certain places.

14. Guardianship systems, however, see people with disabilities not as valuable members of society who may or may not need support in decision-making but rather as objects of charity in need of protection and as non-legal persons who cannot take decisions. Guardianship systems simply appoint a substitute person recognised under the law as the decision maker and erase the legal identity of the person whose life is affected by these decisions. In the words of Thomas Hammarberg, former Commissioner for Human Rights of the Council of Europe:

“systems of guardianship frequently rely on an image of people with disabilities being either incapable of making decisions (an extremely rare situation in reality) or paternalistic notions that they might make ‘bad decisions’. Yet, all of us make decisions in our lives which other people are likely to disagree with – and restricting our right to make these would be unthinkable on the most part.”¹⁷

15. This approach of substituting one individual's judgement for that of another denies a human being their right to individual recognition before the law. Their existence becomes a non-

existence before the law. Another person or institution intrusively steps into their place, without having to step into their shoes.

Mental capacity and legal capacity as distinct concepts

16. It is important to distinguish between the concept of mental capacity and the legal construct that is legal capacity. A medical diagnosis or ascribed disability is often erroneously considered to be synonymous with a need to restrict or deny legal capacity. The CRPD Committee has stated that legislation or other measures should not confuse mental capacity and legal capacity, and that “‘unsoundness of mind’ and other discriminatory labels”¹⁸ cannot justify denial of legal standing or legal agency. Mental capacity is one's capacity to make decisions and can vary from person to person and from one moment to the next depending on internal and external factors. It may also vary depending on social and political contexts and the discipline or profession of the person assessing someone's mental capacity. As set out above, legal capacity is an objective legal construct. Article 12 of the CRPD requires that we refocus our legal capacity regimes away from identifying and categorising mental capacity, then conflating it with legal capacity through the automatic deprivation of decision-making rights based on a person's diagnosis, disability category or other mental capacity assessment. Rather, legal capacity regimes must be based on a presumption of legal capacity for everyone and focus on identifying what supports are required in a given case

¹⁷In Foreword to Mental Disability Advocacy Centre, *Legal Capacity in Europe A Call to Action to Governments and to the EU* (Budapest, 2013).

¹⁸CRPD Committee General Comment No. 1, fn 15 at para. 13.

in order to facilitate an individual in the exercise of her or his legal capacity, where such supports are requested by the person concerned.

Guardianship both violates rights and condones abuses

17. Guardianship systems are inadequate because, as set out above, they violate international human rights law. In the past decade it became clearer and clearer that guardianship systems also deprive people of basic human rights and actually condone and facilitate abuse and exploitation. They must therefore not simply be abolished but be replaced by alternative systems which prevent abuses while also allowing people to retain their existence as persons before the law and to enjoy the rights they have by virtue of their status of human beings.
18. The abuses against people with disabilities which are facilitated or encouraged by guardianship are increasingly well documented. People under guardianship have discovered their savings have been spent or their homes have been sold by their guardians without their knowledge¹⁹ and they are often forced to live in institutions or on the streets and subjected at the will of their guardians to forced medication and physical restraints when in such institutions.²⁰
19. It is also worth mentioning that such abuses are not specific to countries with certain income levels or from certain geographical areas; they happen across the globe, wherever guardianship systems exist. In [a 2010 report](#), the U.S. Government Accountability Office (GAO) found hundreds of allegations of physical abuse, neglect and financial exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010. Guardians also stole \$5.4 million in assets from their wards in that period, the GAO reported.
20. In Bulgaria, it has been reported that people under guardianship can be exposed to physical and mental harm and that guardianship promotes abandonment and dislocation.²¹ In Croatia, it has been reported that when people are placed under guardianship it enables their forced placement in psychiatric hospitals for years at a time where they are subjected to forced and non-consensual treatment.²² The Finnish system of guardianship has forced people to live in segregated institutions, far from friends or families who want to live together with them.²³

¹⁹ See examples of such cases in Emily Gurnon. *Guardianship in the US: protection or exploitation?* Next Avenue, 23 May 2016, available at <http://www.nextavenue.org/guardianship-u-s-protection-exploitation/> (last accessed 30 July 2016); European Union Agency for Fundamental Rights, *Legal capacity of persons with intellectual disabilities and persons with mental health problems* (Luxembourg, 2013), available at <http://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf> (last accessed 30 July 2016) at 44.

²⁰ See, among others, *Stanev v. Bulgaria*, fn 2; *Shtukaturov v. Russia*, fn 1; and *Stankov v. Bulgaria*, fn 3. For examples outside Europe, see Emily Gurnon. *Guardianship in the US: protection or exploitation?*, fn 26.

²¹ Oliver Lewis, *Why should Bulgaria change its guardianship system?* (Mental Disability Advocacy Centre, 2016), available at <http://mdac.org/en/olivertalks/2016/03/14/why-should-bulgaria-change-its-guardianship-system> (last accessed 30 July 2016).

²² Human Rights Watch, *Ana's story: fighting for disability rights in Croatia*, 2015, available at <https://www.hrw.org/news/2015/10/20/anas-story-fighting-disability-rights-croatia> (last accessed 30 July 2016).

²³ Mental Disability Advocacy Centre, *Finnish man with intellectual disabilities asks the Strasbourg Court: Protect my family rights*, (MDAC, 2016), available at <http://mdac.org/en/news/finnish-man-intellectual-disability-asks-strasbourg-court-protect-my-family-rights> (last accessed 30 July 2016).

21. In 2015, the Hungarian Ombudsman initiated an ex officio investigation into the human rights violations experienced by people placed under guardianship. The Ombudsman's report reached out to guardianship authorities and civil society organisations, including organisations representing people with mental disabilities, to share their experiences. One guardianship authority explicitly acknowledged that the majority of complaints – the number of which is growing year by year – raise concerns about management of finances by guardians²⁴ and that many civil and criminal proceedings have been initiated against the guardians in this respect.²⁵
22. Deprivation/restriction of legal capacity and the imposition of guardianship violates human rights in and of itself, but the above examples illustrate that it also results in violations of many other rights. The CRPD Committee has recognised that:

“Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education and work. The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.”²⁶

23. The Council of Europe Commissioner for Human Rights recognises that deprivation of legal capacity leads to learned helplessness and dependence, individuals are more likely to be diminished in the eyes of service providers, community members, public officials and others and that, “This diminishment contributes to the risk of stereotyping, objectification, and other forms of exclusion which people with disabilities disproportionately face, which in turn adds to the experience of powerlessness and the vulnerability to abuse and neglect.”²⁷

24. The rights contained in Article 12 of the CRPD have been recognised as closely linked to many other rights, including the right to liberty and security of the person (Articles 14 and 25): “Respecting the right to legal capacity of persons with disabilities on an equal basis with others includes respecting the right of persons with disabilities to liberty and security of the person.”²⁸ The CRPD Committee emphasises that:

²⁴The other area where people under guardianship challenged their guardian's decisions concerned the placement in residential social care institutions.

²⁵Commissioner for Fundamental Rights, Report of the Commissioner for Fundamental Rights in case No. AIB-2709/2016, 2016.

²⁶CRPD Committee General Comment No. 1, fn 15, at para. 8.

²⁷“Who Gets to Decide”, fn 13, at para. 1.2.

²⁸CRPD Committee General Comment No. 1, fn 15, at para. 40.

“The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. States parties must refrain from such practices and establish a mechanism to review cases whereby persons with disabilities have been placed in a residential setting without their specific consent.”²⁹

25. The European Court of Human Rights has also acknowledged the link between denial of legal capacity and the right to liberty.³⁰ The right to legal capacity has further been closely associated with and considered to impact on the rights of people with disability to access to justice (Article 13),³¹ freedom from torture (Article 15), freedom from violence, exploitation and abuse (Article 16,) personal integrity (Article 17),³² nationality (Article 18),³³ privacy (Article 22),³⁴ and political participation (Article 29).³⁵

Further standards on legal capacity and supported decision-making

26. From the CRPD perspective which prioritises a focus on support needs, it becomes more evident that, rather than protecting the rights of people with disabilities and facilitating the exercise of those rights, guardianship regimes themselves represent a legal barrier to the exercise of fundamental human rights and leave individuals vulnerable to abuse. Instead of perpetuating these regimes, States need to consider how and to what extent they can provide support to people with disabilities to make decisions, including how legal regimes can facilitate and provide recognition to existing informal mechanisms of support, such as that provided by family or friends – the burden is not entirely on the State to provide comprehensive support to all people with disabilities who request it if individuals already have access to necessary supports informally to which the State can simply give recognition.

27. Indicators of a noticeable move away from substituted decision-making models (such as that embodied by the Romanian guardianship system) and towards autonomy and supported decision-making practices are reflected in the legal and policy activities of many international standard setting bodies in addition to the CRPD, such as in reports by the Commissioner for Human Rights of the Council

²⁹Ibid.

³⁰ *Shtukaturov v. Russia*, fn 1 and *Stanev v. Bulgaria*, fn 2.

³¹ “The recognition of the right to legal capacity is essential for access to justice in many respects”. CRPD Committee General Comment No. 1, fn 15, at para. 38.

³² CRPD Committee General Comment No. 1, fn 15, at para. 42.

³³ CRPD Committee General Comment No. 1, fn 15, at para. 43.

³⁴ CRPD Committee General Comment No. 1, fn 15, at para. 47. Also, in *Shtukaturov v. Russia*, fn 1, the European Court of Human Rights found the complete denial of legal capacity to violate Article 8 of the Convention.

³⁵ CRPD Committee General Comment No. 1, fn 15, at para. 48 - 49. See also, decision of the European Court of Human Rights in *Alajos Kiss v. Hungary*, Application No. 38832/06, judgment of 20 May 2010.

of Europe,³⁶ judgments of the ECtHR³⁷ and documents of the European Union Fundamental Rights Agency.³⁸

THE EU AND THE COUNCIL OF EUROPE'S DISABILITY STANDARDS

28. There are a wide range of bodies and instruments which are relevant for disability rights at both the level of the European Union and the level of the Council of Europe. While we will shortly present them below, it is important to emphasize that, except Ireland, all other EU Member States have ratified the CRPD, which was also ratified by the EU itself, being the first human rights treaty the EU has ever ratified as a standing political entity. Moreover, its provisions are legally binding for most Council of Europe Member States – 46 Member States signed and 43 Member States have already ratified the CRPD.

European Union

29. The European Union ratified the CRPD in 2010. International agreements to which the EU is a party constitute part of EU law and are binding on the EU institutions (and the Member States). In addition, such agreements prevail over provisions of EU law, such as regulations, directives, decisions, recommendations and opinions, and EU legislation must be interpreted and applied in a manner that is consistent with the international agreement.³⁹ Thus, the EU is obliged to comply with the CRPD in those areas which fall under EU competences. The European Disability Strategy 2010-2020 underlines that "EU action will support and supplement national policies and programmes to promote equality, for instance by promoting the conformity of Member State legislation on legal capacity with the UN Convention."⁴⁰ The Commission called on Member States several times to share good practices especially in the field of implementation of the right to legal capacity.⁴¹

Council of Europe and the European Court for Human Rights

30. In 2009, the Parliamentary Assembly of the Council of Europe invited Member States to "guarantee that people with disabilities retain and exercise legal capacity on an equal basis with other members of society,"⁴² which can only be achieved by ensuring, inter alia, that: the right of persons with disabilities to "make

³⁶ See eg. Commissioner for Human Rights of the Council of Europe. *The right of people with disabilities to live independently and be included in the community. Issue Paper commissioned and published by Thomas Hammarberg*. CommDH/IssuePaper(2012)3; *Who gets to decide?*, fn 13.

³⁷ See eg. *Lashin v Russia*, Application No. 33117/02, judgement of 22 January 2013; *MS v Croatia*, Application No. 36337/10, judgement of 25 April 2013; *Sýkora v The Czech Republic*, Application No. 23419/07, judgement of 22 November 2012; *DD v Lithuania*, Application No. 13469/06, judgement of 14 February 2012; *Stanev v Bulgaria*, fn 2; *X and Y v. Croatia*, Application No. 5193/09, Judgment 3 November 2011.

³⁸ *Legal capacity of persons with intellectual disabilities and persons with mental health problems*, fn 26.

³⁹ See, for example, in the context of the discussion on the CRPD, Joined Cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Jette Ring, v. Dansk almennyttigt Boligselskab, and HK Danmark, acting on behalf of Lone Skouboe Werge, v. Dansk Arbejdsgiverforening, 11 April 2013, paragraph 29-32.

⁴⁰ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic Social Committee and the Committee of the Regions, European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe. Brussels, 15.11.2010. COM(2010) 636 final. Para 2.1.3

⁴¹ See Disability High Level Group reports from 2008 and 2009.

⁴² Council of Europe, Parliamentary Assembly. *Access to rights for people with disabilities and their full and active participation in society*, Resolution 1642 (2009), adopted on 26 January 2009.

decisions is not limited or substituted by others, that measures concerning them are individually tailored to their needs and that they may be supported in their decision making by a support person.”⁴³It further requires that, “people placed under guardianship are not deprived of their fundamental rights (not least the rights to [...] bring legal proceedings [...]), and, where they need external assistance so as to exercise those rights, that they are afforded appropriate support, without their wishes or intentions being superseded.”⁴⁴

31. In February 2012 the Council of Europe’s Commissioner for Human Rights published a issue paper entitled “Who Gets to Decide?” on the right to legal capacity.⁴⁵ Among the recommendations was that States should “abolish mechanisms providing for full incapacitation and plenary guardianship”, ensure that people with disabilities enjoy all fundamental rights and review judicial procedures that allow for restriction of legal capacity. He also recommended that States develop supported decision-making systems and “establish robust safeguards” that ensure the supports provided are at the selection of the individual. He emphasised that “reforming current mechanisms for legal capacity is one of the most significant human rights issues in Europe today”.
32. Moreover, the Council of Europe Disability Strategy 2017-2023 sets out, inter alia, the following:
 - a. *“3.4. Equal recognition before the law. Equal recognition before the law, as defined among others by the UNCRPD (Article 12) refers to the two parts of legal capacity, the capacity to hold rights and duties and the capacity to act on them. Legal capacity and access to justice are essential to real participation in all areas of life and full inclusion of persons with disabilities in society. Legal capacity is in fact connected to all human rights and their enjoyment.*
 - b. *States are required under the UNCRPD, as far as possible to replace substituted decision-making with systems of supported decision-making. Possible limitations on decision-making should be considered on an individual basis, be proportional and be restricted to the extent to which it is absolutely necessary. Limitations should not take place when less interfering means are sufficient in light of the situation, and accessible and effective legal safeguards must be provided to ensure that such measures are not abused.*
 - c. *Council of Europe bodies, member States and other relevant stakeholders should seek to:*
 - a) *Support member States in their efforts to improve their legislation, policies and practices with regard to ensuring legal capacity of persons with disabilities.*
 - b) *Identify, collect and disseminate existing good practices on supported decision-making systems and practices that persons with*

⁴³ Ibid, para. 7.1.

⁴⁴ Ibid, para. 7.2.

⁴⁵ Thomas Hammarberg, “Who Gets to Decide?”, Council of Europe, February 2012, CommDH/IssuePaper(2012)2

disabilities have available for being able to exercise their legal capacity and have access to choices and rights.”

33. The European Convention on Human Rights does not expressly mention the right to legal capacity, nor does it prohibit guardianship. However, the European Court for Human Rights

(ECtHR) has repeatedly highlighted that the question of legal capacity falls under article 8 (the right to respect for one’s private and family life)⁴⁶ and found restrictions or denial of legal capacity and placement under guardianship to be in violation of article 6 (right to fair trial) of the Convention.⁴⁷

34. Going in a bit more detail in this, we notice that it has been the consistent case-law of the ECtHR that the concept of "private life" under Article 8(1) of the Convention does not have an exhaustive definition but includes matters relating to an individual’s physical, moral and psychological integrity. The concept of private life “stands for the sphere of immediate personal autonomy.”⁴⁸ Private life embraces aspects of an individual’s physical and social identity,⁴⁹ sexual life,⁵⁰ a right to personal development and the right to establish and develop relationships with other human beings and with the outside world.⁵¹ Article 8 has also been recognised as of central importance for the individual’s “self-determination”,⁵² for “a settled and secure place in the community”⁵³ and for “secur[ing] to the individual a sphere within which he can freely pursue the development and fulfilment of his personality”.⁵⁴

35. In several cases, the ECtHR has recognised that decisions taken by guardians – overriding or ignoring the wishes of the person placed under guardianship – profoundly impact on the person’s day-to-day living and interaction with the world, clearly fall within the scope of Article 8(1) and constitute a very serious interference with rights protected by this article.⁵⁵ For example, the overreaching and adverse effects of having one’s legal capacity deprived were very clearly depicted by the Court in the case of *X and Y v Croatia* where the appointed

⁴⁶*Shtukaturv v. Russia*, fn 1 and *Ivinović v. Croatia*, Application no. 13006/13, judgement of 18 September 2014.

⁴⁷*Shtukaturv v. Russia*, fn 1 and *Stanev v. Bulgaria*, fn 2.

⁴⁸Karen Reid, *A practitioner’s guide to the European Convention on Human Rights*, (Thomson Reuters, 2015), page 866.

⁴⁹*Mikulic v. Croatia*, Application No. 53176/99, judgment of 7 February 2002, at para 53.

⁵⁰*Dudgeon v. the United Kingdom*, Application No. 7525/76, judgment of 22 October 1981, Series A. No. 45, pp. 18 -19 at para 41 and *X and Y v. the Netherlands*, Application No. 8978/80, judgement of 26 March 1985.

⁵¹*Pretty v. UK*, Application No. 2346/02, judgement of 29 April 2002, at para 63; *Burghartz v. Switzerland*, Application No. 16213/90, opinion of the Commission, 37, at para 47; *Friedl v. Austria*, Application No. 15225/89, judgment of 31 January 1995, Series A No. 305-B, opinion of the Commission, p. 20, para 45; and *Niemietz v. Germany*, Application No. 13710/88, judgment of 16 December 1992.

⁵²*Connors v UK*, Application No. 66746/01, judgment of 27 May 2004, at para. 82.

⁵³*Gladysheva v. Russia*, Application No. 7097/10, judgment of 6 December 2011, at para 93; *Yordanova and Others v. Bulgaria*, Application No. 25446/06, judgment of 24 April 2012, at para 118; *Connors v. the United Kingdom*, Application No. 66746/01, judgment of 27 May 2004 at paras. 81-84, and *Orlić v. Croatia*, Application No. 48833/07, judgment of 21 June 2011. at paras. 63-70.

⁵⁴*Shtukaturv v. Russia*, fn 1, at para 83; *Brüggemann and Scheuten v. Germany*, Application No. 6959/75, Commission’s report of 12 July 1977, Decisions and Reports 10, p. 115 at para 55.

⁵⁵See for example *Shtukaturv v. Russia*, fn 1, at para 83; *Salontaji-Drobnjak v. Serbia*, Application No. 36500/095, judgment of 13 October 2009, at para 144; *X and Y v Croatia*, fn 47, at para 102; *Sýkora v Czech Republic*, Application No. 23419/07, judgment of 22 November 2012, at para 101; and *Lashin v. Russia*, Application No. 33117/02, judgment of 22 November 2012.

guardian was given the power to represent the applicant in all her “personal matters and matters concerning her property, managing her assets and taking proper care of her person, rights, obligations and well-being.”⁵⁶ The Court elaborated that:

“Divesting someone of legal capacity entails serious consequences. The person concerned is not able to take any legal action and is thus deprived of his or her independence in all legal spheres. Such persons are put in a situation where they depend on others to take decisions concerning various aspects of their private life, such as, for example, where to live or how to dispose of their assets and all income. Numerous rights of such persons are extinguished or restricted. For example, such person is not able to make a will, cannot be employed, and cannot marry or form any other relationship creating consequences for their legal status, etc.”

36. As a consequence, the Court noted that the measure of divesting someone of their legal capacity amounts to a serious interference with that person’s private life⁵⁷ and ultimately found that in the applicant’s case her incapacitation did not pursue a legitimate aim and was not necessary in a democratic society.⁵⁸ Similarly, in *Shtukaturv v Russia* the Court took note of the total dependency and vulnerability of people under guardianship, stating that “as a result of his incapacitation the applicant became fully dependent on his official guardian in almost all areas of life”,⁵⁹ and found full incapacitation to be disproportionate and in breach of Article 8.⁶⁰ Mr Shtukaturv was placed under guardianship of his mother in proceedings about which he was not aware and was not asked to participate. His mother subsequently placed him in a psychiatric hospital without his consent. He spent seven months there and was denied the opportunity of meeting his lawyer. The European Court of Human Rights said that deprivation of legal capacity constitutes a “very serious” interference with a person’s private life and found that the fact that it was applied for an indefinite period, and could not be challenged by the person under guardianship, constituted a violation of the European Convention on Human Rights.

37. In *Lashin v. Russia*,⁶¹ the European Court of Human Rights addressed the automatic loss of the right to marry of a person deprived of their legal capacity. The Court took the view that a blanket ban on the right to marry is a violation of the European Convention on Human Rights:

⁵⁶ *X and Y v Croatia*, fn 47, at para. 103.

⁵⁷ *Ibid*, at para 102.

⁵⁸ *Ibid*, at para 116.

⁵⁹ *Shtukaturv v Russia*, fn 1, at para 90.

⁶⁰ *Ibid*, para 96. See also *Sýkora v Czech Republic*, fn 93.

⁶¹ European Court of Human Rights, Application No. 33117/02, Judgment 22 January 2013.

“The Court observes that the applicant’s inability to marry was one of many legal consequences of his incapacity status. The Court has already found that the maintenance of that status (the only measure of protection applicable under the Russian Civil Code to mentally ill persons) was in the circumstances disproportionate and violated Article 8 of the Convention (...). In other words, the applicant was unable to marry primarily because of (...) two major factors (...), namely the deficiencies in the domestic decisionmaking process and the rigidity of the Russian law on incapacity” (paragraph 124).

38. The Court also increasingly relies on provisions of the CRPD in its decisions,⁶² including taking note of the emerging international recognition of and consensus around the importance of autonomy and the provision of support in decision-making for individuals with mental disabilities when assessing the proportionality of incapacitation measures.
39. The Court has consistently stressed that “strict scrutiny is called for where measures that have such adverse effect on one’s personal autonomy are at stake”,⁶³ and that consideration of alternative measures to restriction or deprivation of legal capacity is a factor when considering the proportionality of such measures. In *Ivinović v. Croatia* the Court emphasised that the domestic authorities must properly consider less restrictive alternative measures to any restriction of legal capacity and the latter must only be applied as a last resort.⁶⁴
40. In the recent case of *A-MV v. Finland*, the Court looks at the situation of a man with intellectual disabilities who does not agree with his so-called “mentor”. Even if at the end the Court supported the decision of the mentor not to allow the man to change his place to residence, we see how the Court find the system acceptable only because the person receives support in decision-making and interference is allowed, in very practical terms, only in exceptional circumstances- i.e. changing place of residence from a place where there is an established support network, where the person has work and hobbies and benefits of a wide range of services. Moreover, the argumentation of the mentor itself was not sufficient when the conflict of decisions rose up- many other specialists were involved in the process.
41. In this case as well the Strasbourg Court firmly stated that there was no doubt that AM-V’s right to private life under Article 8 was interfered with by the fact that the domestic courts had refused to change his mentor. The question, therefore, was whether the interference was justified. The Court decided to “*examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.*”⁶⁵

⁶² See for example *Glor v Switzerland*, Application No. 13444/04, judgement of 30 April 2009, at para. 53 and *Çam v Turkey*, Application No. 51500/08, judgment of 23 February 2016 at para 53.

⁶³ *Shtukurov v. Russia*, fn 1, at para 88, *X and Y v Croatia*, fn 47, at para 109, *M.S. v. Croatia*, fn 47, at para. 97.

⁶⁴ *Ivinović v Croatia*, fn 52, at para. 44.

⁶⁵ *AM-V v. Finland*, Application no. 53251/13, judgment of 23 March 2017, para. 84

42. The Court was only satisfied because the “mentor arrangement [...] had been based on, and tailored to, the specific individual circumstances of the applicant, and [...] the impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation.”⁶⁶ It might be important to emphasize here that A-MV had agreed initially to the appointment of his mentor, and continued to acknowledge the need for his support.
43. It is also important to emphasize that the ECtHR acknowledges the relevance of the CRPD in the matter and tried to apply its standards.⁶⁷
44. This link between denial of legal capacity and the right to liberty has been acknowledged by the ECHR in several cases.⁶⁸ In the case of *Kędzior v. Poland* the ECtHR took note of the deficiencies of domestic legislation allowing guardians to make legal decisions with regard to placement in a social care institution against a person’s will. Mr. Kędzior was placed in a social care institution by his brother who had been appointed as his guardian. Under domestic law, his placement was deemed to be voluntary as his guardian had requested it on his behalf, therefore, Mr. Kędzior had no opportunity to challenge the placement. The ECtHR held that Mr. Kędzior was de facto detained and his right to liberty had been violated, as well as his right to a review of the lawfulness of his detention. The ECtHR awarded Mr. Kędzior compensation but, because he remained under guardianship, Mr. Kędzior never had access to the damages, which were allegedly misspent. Following the ECtHR’s decision in this case, the Polish Constitutional Court has recently ruled that laws allowing guardians to detain people in social care institutions blatantly violate fundamental human rights to personal liberty and human dignity.⁶⁹ Importantly, the Constitutional Court made it clear that the underlying premise of guardianship laws which assumes that the decision of the guardian is always compatible with the will of the person concerned, is not convincing because requests for placement in social care institutions are not always motivated by a desire to protect the welfare of the individual under guardianship. The Constitutional Court stated that ignoring the will and the decision-making authority of a person under guardianship objectifies that person and, as it is based on the traditional medical model of disability, assumes that a person with a disability is an “object” of help who needs a guardian to replace him or her in all legal actions. As the court noted, this view is inconsistent with the recently emerging social model of disability and with international human rights law, including the CRPD.⁷⁰
45. Similarly, in 2015, the Slovenian Constitutional Court ruled that people deprived of legal capacity and placed in institutions against their will must be provided with

⁶⁶ AM-V v. Finland, para. 89.

⁶⁷ AM-V v. Finland, Application no. 53251/13, judgment of 23 March 2017, paras. 39-45.

⁶⁸ *Kędzior v Poland*, fn 5 and *Stankov v Bulgaria*, fn 3.

⁶⁹ Constitutional Tribunal of the Republic of Poland, Case No. K 31/15, judgment of 28 June 2016, the decision is available in Polish at <http://trybunal.gov.pl/sprawy-w-trybunale/katalog/s/k-3115/> (last accessed 30 July 2016).

⁷⁰ *ibid.*

an opportunity to challenge their placement before a court. The Court also ordered the ex post judicial review of all placements in secured wards of social care institutions.⁷¹

46. In the same time it is vital to note that the European Convention – negotiated and entering into force more than half a century before the CRPD – contains no specific reference to legal capacity nor to equality before the law. As such, the Court has been constrained to consider these questions where they arise within the framework of a Convention ill-suited to providing comprehensive solutions in this area. The case law of the Court is therefore necessarily ad hoc, fragmented and predominantly focused on the procedural rather than substantive aspects of these issues.
47. Movement towards closing the gap between domestic law and standards of international set out in the CRPD is not only visible in the ECtHR's jurisprudence but also in decisions taken by domestic courts all over Europe. For example, the Czech Constitutional Court – although it has not yet had the opportunity to rule on the unconstitutionality of the Czech guardianship system per se – took note of the evolving trends in disability rights and the required a human rights approach to disability in its recent decisions.⁷² In its decision from 2009, the Constitutional Court emphasised that the starting point should be the “priority of a fundamentally free, autonomous individual, whom the state may not prevent from pursuing his idea of happiness by forcing upon him state protection where the individual, perhaps with the help of his family, can take care of himself.”⁷³ The Court stated that “limiting legal capacity is always a serious interference in the personal integrity of the person being limited.”⁷⁴ It noted that “the institution of removal of legal capacity, which is an obvious relic of the old regime, is constitutionally considerably problematic”⁷⁵ and that “the limitation of legal capacity must always be considered the most extreme means”,⁷⁶ so courts must always weigh less restrictive alternatives.

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⁷¹Constitutional Court of the Republic of Slovenia, Case No. U-I-294/12, 10 June 2015, available at <http://odlocitve.us-rs.si/documents/f1/58/u-i-294-123.pdf>.

⁷²Judgments of the Czech Constitutional Court, Case No. 2009/08/18 - I. ÚS 557/09 and Case No. 2011/03/13 - Pl. ÚS 43/10. In the former case the Constitutional Court annulled the consecutive decisions of the Kladno District Court, the Regional Court in Prague and Supreme Court denying to reinstate the full legal capacity of the complainant. In the latter case the Constitutional Court held that the domestic provisions preventing people whose legal capacity have been restricted from exercising their procedural capacity within administrative court proceedings are unconstitutional.

⁷³Judgment of the Czech Constitutional Court, Case No. 2009/08/18 - I. ÚS 557/09 ,para 24, available in English at <http://www.usoud.cz/en/decisions/20090818-i-us-55709-limitation-of-legal-capacity-1/> (last accessed 30 July 2016).

⁷⁴Ibid, at para 21.

⁷⁵Ibid, at para 23.

⁷⁶Ibid.

48. The UN Convention on the Rights of Persons with Disabilities (CRPD) is the most prominent instrument when it comes to disability rights at the level of the United Nations. Its provisions are interpreted, discussed and explained through state reviews and a range of other activities undergone by the UN Committee on the Rights of Persons with Disabilities ('the CRPD Committee), created to supervise the implementation of the Convention.
49. The CRPD Committee has been very clear that, "there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited."⁷⁷ It has called repeatedly on State Parties to "replace guardianship and mental health law with supported decision-making mechanisms and abolish all deprivation of legal capacity both fully and partially in relation to all persons with disabilities."⁷⁸ Guardianship systems are in direct violation, not just of Article 12, but also of the prohibition of discrimination on the basis of disability in Article 5 where such discrimination is defined as:

*"...any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation"*⁷⁹

50. In the same time, rather than calling for an end to protection of the interests and well-being of people with mental disabilities, the CRPD **challenges the way in which States have historically sought to intervene and urges a move towards a more effective mechanism: supported decision-making.**

Alternatives to deprivation/restriction of legal capacity and guardianship

51. The CRPD Committee has clarified that a system of supported decision-making must include, among other things, at least the following:⁸⁰
- a. Arrangements for the promotion and establishment of supported decision-making. Ensure the availability of a wide variety of support measures; the

⁷⁷ CRPD Committee General Comment No. 1, fn15 at para. 5.

⁷⁸ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Ukraine*, CRPD/C/UKR/CO/1, 2 October 2015 ([Full text](#), last accessed 30 July 2016), para. 27; UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the Czech Republic*, CRPD/C/CZE/CO/1, 15 May 2015 ([Full text](#), last accessed 30 July 2016), para. 27; UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Denmark*, CRPD/C/DNK/CO/1, 29 Oct 2014 ([Full text](#), last accessed 30 July 2016).

⁷⁹ Article 2 of the CRPD.

⁸⁰ UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of China*, CRPD/C/CHN/CO/1, para 22 and UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Austria*, CRPD/C/AUT/CO/1, para. 28. In addition to this, the CRPD Committee has restated these requirements in its General Comment No. 1, fn 15, paras. 17-18.

type and intensity of support to be provided will vary significantly from one person to another owing to the diversity of persons with disabilities;

- i. The availability of supported decision-making cannot be limited to certain persons with disabilities, such as those with less severe impairments, as this is in clear violation of Article 12 of the CRPD whereby “States Parties shall take appropriate measures to provide access by persons with disabilities [no limitation of scope to *certain* persons with disabilities] to the support they may require in exercising their legal capacity”,⁸¹ read together with Article 1, according to which the CRPD’s purpose is to “[...]promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by *all* persons with disabilities [...]”⁸² (emphasis added).
 - ii. The Council of Europe Commissioner for Human Rights states that the design of adequate support will “depend on individual needs as well as the type of challenges persons with disabilities face when trying to exercise their legal capacity in a given national context. As individuals will need and want different types of support, member states should strive towards developing a range of different support options rather than trying to find one model for all.” Some of the types of support the Commissioner refers to include powers of attorney, advance directives, communication support or someone with whom to discuss complex options and decisions.⁸³
- b. In light of the right to live independently in the community with choices equal to others (Article 19, CRPD), the Committee has recognised that “support in the exercise of legal capacity should be provided through a community-based approach. States parties must recognize that communities are assets and partners in the process of learning what types of support are needed in the exercise of legal capacity... This is consistent with the Convention’s emphasis on the full inclusion and participation of persons with disabilities in the community”.⁸⁴ Informal support is provided daily to people with and without disabilities by their families, friends and community through, for example, simply being a discussion partner. These forms of supported decision-making must be recognised and validated where they exist and facilitated where they do not.
 - c. At all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected. Regulations to ensure that support respects the person’s will and preferences, including the establishment of feedback mechanisms to ensure that support is meeting the person’s needs;
 - d. Such supported decision-making regimes and measures must include safeguards to balance the powers of the supporter so as to prevent abuse.
 - e. Reasonable accommodations (adjustments) and access to support where necessary to exercise legal capacity;

⁸¹Article 12(3) of the CRPD (Interpretative note added).

⁸²Article 1 of the CRPD.

⁸³ “Who Gets to Decide: Right to legal capacity for persons with intellectual and psychosocial disabilities”, fn 13, at para. 5.2.

⁸⁴ Ibid, at para. 45.

- f. The right to support cannot be limited by conditions of proportionality or undue burden and the obligation on the State to provide access to support in the exercise of legal capacity is absolute.⁸⁵
 - g. Legal recognition of everyone's legal capacity and their right to exercise it;
52. This means that governments should develop legislation that recognises the right to legal capacity of everyone with disabilities. They must take deliberate, well-planned steps towards the realisation of the rights contained in Article 12 in consultation with and with the meaningful participation of people with disabilities.⁸⁶ The new structures should:⁸⁷
- a. Recognise that supported decision-making must be built on relationships of trust;
 - b. Assign clear roles to supporters to provide information to help people with disabilities to make choices and to assist them to communicate their choices to third parties (such as banks, doctors, employers, etc.); and
 - c. States must provide training for people receiving support so that they can decide when less support is needed or when they no longer require support.⁸⁸ In other words, support should be centred on facilitating the individual as a subject of rights rather than substitute decision-making which posits individuals as objects to be 'decided about'. The individual concerned must be able to choose whether to accept support, what sort and level of support they require, how the support is to be provided and when that support will end.
53. Thus, a number of clear, specific obligations fall on States under Article 12, which enshrines a set of civil and political rights which must be realised immediately and are not subject to the principle of progressive realisation⁸⁹.
54. Detailed guidance on the provision of supported decision-making regimes is contained in paragraph 29 of General Comment 1. Paragraph 29(f) specifically prohibits States from allowing support in decision-making to "be used as a justification for limiting other fundamental rights of persons with disabilities, especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty."⁹⁰

PRACTICAL EXAMPLES

⁸⁵ Ibid.

⁸⁶ CRPD Committee General Comment No. 1, fn 15, at para. 30.

⁸⁷ As *Legal Capacity in Europe A Call to Action to Governments and to the EU*, fn 18, pp. 19-21.

⁸⁸ CRPD Committee General Comment No. 1, fn 15, at para. 24.

⁸⁹ CRPD Committee General Comment No. 1, fn 15, at para. 30.

⁹⁰ See also CRPD Committee General Comment No. 1, fn 15, at para. 33: "The need for support and reasonable accommodation in making decisions shall not be used to question a person's legal capacity."

55. Increasingly, States and other initiatives across the globe are working towards integrating CRPD standards and creating legislation, policies and practices aimed at ensuring striving environments for people with disabilities. Bellow you can find a few examples of promising national legislative reforms, as well as a few examples of supported decision mechanisms which are currently being used abroad.

National legislative reforms

56. State across the world, including in Central and Eastern Europe, have started reforming their legislations, policies and practices after ratifying the CRPD. While the procees has been more efficient in some states and slower in other, reforming is deffientely the trend. Bellow there are a few examples of legislative reform process taking place at the national level.

Bulgaria

57. Bulgaria ratified the CRPD in January 2012. Nine days previously, the European Court of Human Rights delivered its judgment in the case of *Stanev v. Bulgaria*, in which the applicant was represented by the Bulgarian Helsinki Committee and MDAC. In March 2012 the Ministry of Justice established a working group to prepare a new legal capacity law.

58. In the Plan of Action submitted on 30 June 2015 to the Council of Europe in relation to the implementation of the *Stanev v. Bulgaria* judgmenet, the Bulgarian Government explained that a major legislative reform has been initiated. The reform would modify a series of legislative acts with the purpose of abolishing the guardianship system and introduce a system of supported decision making.⁹¹ In such a system people retain their legal capacity while in the same time receiving, when necessary, support in making decision. They would not have anymore somebody else taking decisions on behalf of them, but would receive, if requested, support in making decisions.

59. The Bulgarian Government stated that the reasoning of the legislator at the basis of such reform is to ensure the people concerned have their rights, will and preferences respected.⁹² In preparing the Draft law on supported decision making, which would abolish all forms of guardianship and introduce alternatives to substituted decision making, the Government managed to establish a transparent, coherent and efficient process. It involved all relevant actors, from experts to members of the civil society and representatives of people with disabilities.

Hungary

⁹¹ Plan of action, p. 5.

⁹² Plan of action, page 5.

60. Hungary was the first European country to ratify the CRPD on 30 March 2007. It was also the first country in the world to create new legal capacity legislation inspired by the CRPD: its 2009 draft Civil Code amendments abolished plenary guardianship and introduced supported decision-making and advance directives. That new law however never came into force. In February 2013, another new Civil Code was adopted, which, while maintaining guardianship, does introduce supported decision making, professional supporters and preliminary legal statements.⁹³
61. It is also worth mentioning that there is some progressive jurisprudence in Hungary, which shows how supported decision-making, even if informal, can contribute to respecting the person's right to legal capacity. In *Guardianship authority of Visegrád v E.M.* Hungarian, a court did not place a person with a psycho-social disability under guardianship because of an existing support network around her. E.M. is a person who was diagnosed with schizoaffective disorder in 2001. Four years later she decided to move to a social care home for elderly people. After she had moved to the home she had several conflicts with the management. In 2009 the director of the institution requested the guardianship authority to initiate proceedings to place E.M. under guardianship. The guardianship authority designated a temporary guardian for her. During the judicial procedure, two experts recommended that E.M. should be placed under partial guardianship while her own psychiatrist insisted that E.M.'s mental health had improved during the previous year. E.M. and her psychiatrist compiled a list of early symptoms which helped her to identify if her mental health got worse. It provides her with sufficient security and guidance for her participation in society and in the solution of the possible difficulties of her illness." The court found that, due to the protective net, placement under guardianship was not necessary.

Moldova

62. Moldova ratified the CRPD on 22 September 2010. Immediately after discussions started in relation to the reform of legislation relevant for legal capacity. A draft law was prepared which abolishes plenary guardianship and introduces a variety of support measures.
63. For example, proiectul de lege⁹⁴ introduce instituția „asistenței la luarea deciziei” (Subsecțiunea 2 propusă a fi introdusă în Codul Civil). Acest pas este unul conform CDPD, care ar putea avea un impact pozitiv important asupra vieților celor care astăzi sunt lipsiți de capacitate juridică. Aceste prevederi oferă persoanei posibilitatea de a primi sprijin sau asistență în luarea de decizii de la unul sau mai mulți asistenți. În timp ce persoana/persoanele care oferă asistență nu pot substitui persoana în procesul decizional, acestea pot fi prezente la luarea deciziei, pot facilita comunicarea dorințelor către terți și pot discuta informațiile

⁹³ For more details see AJUPID. (2015). *Comparison of legal systems in access to justice for persons with intellectual disabilities in the following countries: Bulgaria; Finland; France; Hungary; Ireland*, available at

<http://ajupid.eu/images/research/AJuPID%20FINAL%20RESEARCH%20REPORT%20MAY%202015.pdf>

⁹⁴ <http://parlament.md/ProcesulLegislativ/Proiectedeactelelegislative/tabid/61/LegislativId/3322/language/ro-RO/Default.aspx>

disponibile. Pozitiv este și faptul că această asistență poate fi formalizată, existând în registrele autorității tutelare, precum și faptul că poate fi desființată oricând de persoana care este asistată.

64. O altă instituție juridică a căror introducere o salutăm este mandatul de ocrotire în viitor care permite unei persoane să împuternicească unul sau mai mulți mandatar pentru a o reprezenta la un moment în care aceasta ar putea să aibă dificultăți în a-și exprima voința sau conștientiza acțiunile. Avantajul unei astfel de instituții juridice îl constituie faptul că persoana în cauză își poate alege drept mandatar o persoană sau un număr de persoane în care are deja încredere pentru viitorul nesigur în care ar avea nevoie de suport. Astfel de instituție trebuie să fie întotdeauna însoțită de garanții procedurale adecvate, pentru a se asigura că mandatarul nu face abuz de atribuțiile care i-au fost conferite.
65. Other important steps that were taken by Moldova during the legislative reform were ensuring all people with disabilities enjoy their right to access to justice, by making sure they have access to all courts on their own, even when placed under guardianship, without having to go through a guardian, in criminal and civil matters, particularly when it comes to challenging placement under guardianship.
66. It is also worth mentioning that the Government has consulted extensively with civil society since 2012 in relation to these reforms of legislation.

Russia

67. On 3 May 2012, the Russian President signed a law on ratification of the CRPD,⁹⁵ and on 30 December 2012 the parliament adopted amendments to provisions of the Civil Code related to legal capacity. The law introduced measures that are less restrictive than plenary guardianship.⁹⁶ Besides the ratification of the CRPD and the decision of the EctHR in the Shtukaturv v. Russia case, already discussed above, the amendments were also based on the judgment of the Russian Constitutional Court in the the case of Delova,⁹⁷ a case in which the Court held that “(t)he federal legislator must – based on the requirements of the Constitution of the Russian Federation and in view of this judgment – amend before 1 January 2013 the existing civil regulation with the view of achieving the most comprehensive protection of the rights and interests of the persons with mental disorders.” According to the new provisions, a person with restricted legal capacity will be able to carry out everyday transactions on their own and more serious ones with the consent of their guardian.
68. This law is again not in full compliance with the CRPD, but it is an example of a reform undertaken by a State Party towards the full implementation of this

⁹⁵ 4 See http://www.mdac.info/en/10/05/2012/russia_ratifies_crpdc (last accessed: 8 Oct 2013)

⁹⁶ Federal law of 30 December 2012 no. 302-FZ “On amendment of chapters 1, 2, 3 and 4 of part 1 of the Civil Code of the Russian Federation”.

⁹⁷ Case no. 15-P, 27 June 2012. See http://mdac.info/en/28/06/2012/Russian_Constitutional_Court_criticises_abusive_guardianship_law (last accessed: 8 Oct 2013).

Convention. Besides the introduction of partial guardianship, the Russian Federation also took other steps aimed at ensuring respect of the human rights of people with disabilities, such as adopting a series of procedural safeguards to protect people with disabilities placed under guardianship and detained in psychiatric hospitals.⁹⁸The safeguards include the obligations on courts to notify an individual of a legal capacity case initiated against him or her and always conduct legal capacity proceedings with the participation of the person concerned. Under the new rules, a person deprived of legal capacity has the right to consent to or refuse any healthcare intervention, and may apply to court in order to seek restoration of his or her legal capacity

Examples of how supported decision-making can be provided

69. The CRPD requires the creation of supported decision-making options, which must be made available to people with disabilities in practice – systems that aim to replace the excessive restrictions imposed through all forms of guardianship. In practice, these systems can take a variety of forms and are already being successfully implemented in many countries.

70. For example, a pilot project in Bulgaria is called 'Empowering People with Intellectual Disabilities'. An NGO report documenting it explains that:

"This form of supported decision-making starts with establishing a network of support for the person. In order to identify the people who will be included in the network of support, a personal profile is made and the members of the network of support are chosen by the concerned person – a relationship of trust between the person and the members of the network is essential. The network provides the necessary support to the person concerned according to their wishes and choices. The whole process is guided and monitored by a facilitator."⁹⁹

71. The types of decisions which are covered by this supported decision-making model include decisions related to accommodation (for example, the type of accommodation, location, whether to live alone or with others), relationships and lifestyle (including choosing with whom to spend time and what activities to undertake), choices about work, education and recreation, health issues (consideration of advice from health professionals, including making choices about treatment options), financial decisions (how to manage, spend or save money) and contracts (providing the necessary support to the person in order for him/her to understand the meaning of a contract before engaging in it).¹⁰⁰

⁹⁸ See <http://mdac.info/en/news/russia-strategic-litigation-leads-law-reform> (last accessed: 8 Oct 2013).

⁹⁹ *Guide of promising practices on legal capacity and access to justice*, (AJUPID, 2015), at 7, available at http://www.ajupid.eu/images/documents/promising_practices/BAG_AJUPID_UK_2015_BV.pdf (last accessed 30 July 2016).

¹⁰⁰ For more details see *Guide of promising practices on legal capacity and access to justice*, fn 78, pp. 6-8.

72. Similar initiatives exist in other countries, including through what are often called 'Circles of Support'. In Ireland, for example, a:

"...Circle of Support involves a small number of people coming together regularly to provide support to a person with a disability, who they care about. They might gather once a month, or once every few weeks. It might depend on the nature of the circle, the members or the support needs. Some people use Circles of Support for specific things they wish to achieve (such as finding a place to live or getting a job). Such issue-specific Circles may therefore be time-limited and only last for the duration of the issue. Other Circles go on for much longer and may serve as a source of constant support and counsel for the person over a person's whole life. Professionals serve as facilitators or can help establish a Circle, though the intensity of their role will vary."¹⁰¹

73. Finland has been developing a "self-directed support" practice (SDS), which allows persons with disabilities to organise their social care, by giving them control over the funds they are receiving from the government for social services. This is done in steps, involving person-centred planning, where the person's wishes, aspirations and strengths are discussed and described with the person and those closest to her/him. Then there is an evaluation of support needs, which was previously led by a social worker, but is now done by giving the person concerned the possibility to make choices. Following this a personal budget is created and a plan for the way money will be spent and what services will be offered.¹⁰²

74. In France people who need support can choose multidisciplinary support as an alternative to legal guardianship. When they have difficulties in making decisions, they can sign a contract with a local authority for a defined period of time and receive support in decision-making from a social worker. The person concerned decides what the objectives of the contract should be and they may include financial issues, health-related issues, finding employment etc. This helps people gain autonomy and self-confidence. No judge or psychiatrist is involved in the management of these contracts; there is no restriction of legal capacity nor any management of finances without the consent of the person concerned.¹⁰³

75. Sweden has a service called the Personal Ombud (PO). The PO supports people in all kind of matters, including housing or occupation, but also existential matters (Why should I live? Why has my life become the life of a mental patient? Have I any hope for a change?), sexuality and problems with relatives. A PO is also skilled to be able to argue effectively for the client's rights in front of various authorities or in court. Most POs are trained social workers, but some are lawyers and some have other specialised training. A PO spends a lot of time talking with their clients. He/she doesn't work Monday-Friday office hours like most other services. The week

¹⁰¹ For more details and personal stories see *Guide of promising practices on legal capacity and access to justice*, fn 78, pp. 26-29.

¹⁰² For more details and personal stories see *Guide of promising practices on legal capacity and access to justice*, fn 78, pp. 9-13.

¹⁰³ For more details and personal stories see *Guide of promising practices on legal capacity and access to justice*, fn 78, pp. 14-17.

has 7 days and each day 24 hours and the PO must be prepared to work at all these various hours, because their clients' problems are not concentrated to office hours and it is easier to contact some people at evenings and weekends. The PO does not have an office because "office is power". The PO works by telephone or internet from her/his own home and meets clients in their home or at neutral venues in town.¹⁰⁴

76. In Australia the *South Australian Office of the Public Advocate (OPA)* has developed a supported decision-making project. Within the project people with intellectual and cognitive disabilities or brain injury who were at the risk of being placed under guardianship were helped to sign supported decision-making agreements with someone they trust. This meant the person would help them in making decision regarding their accommodation, health, lifestyle and other welfare matters. Potential participants were interviewed to find out what was most important to them and the contracts were tailored for the individual needs of every person. After a careful assessment of the practice, personal empowerment, self-esteem, confidence in decision-making and increase in support networks were listed as some of the general benefits for the individuals involved in the project. Many participants also reported that they felt more in control of their lives and there was an increase in their self-confidence.¹⁰⁵
77. British Columbia in Canada offers people the possibility of concluding a "Representation Agreement" which deals with personal planning/advance care planning. A Representation Agreement offers people, including people with disabilities, a way to authorize someone — called a representative — to assist them or to act on their behalf for health care and personal care matters. It can also cover routine financial affairs and legal matters. A representative has legal authority to help people manage their affairs and carry out their wishes when they need temporary or ongoing assistance due to illness, injury or disability.¹⁰⁶
78. Clearly, there are several systems available to replace guardianship which respect people's will and preferences, are less likely to condone abuses and are in accordance with international law. These are practices every State should consider in developing its own system of supported decision-making in line with its obligations under international law.

CONCLUSIONS

For the reasons set out above, we ask the Constitutional Court to find that every person has a right to equal recognition before the law; that people with disabilities have a right to legal capacity on an equal basis with others; and that guardianship, as a system of substitute decision-making, is in violation of Articles 5 and 12 of the CRPD and, in accordance with Article 11(1) (fulfilling in good faith obligations

¹⁰⁴For more details see the webpage of the Personal Ombud at <http://po-skane.org/in-foreign-languages/> (last accessed 30 July 2016).

¹⁰⁵For more details see the webpage of the South Australian Office of the Public Advocate at http://www.opa.sa.gov.au/resources/supported_decision_making (last accessed 30 July 2016).

¹⁰⁶For more details see Canada, British Columbia, Victoria, Representation Agreement Act, RSBC 1996, Chapter 405.



deriving from treaties) and Article 20 (the supremacy of international treaties) of the Constitution of Romania is thereby unconstitutional.

We also ask the Constitutional Court to direct the Romanian Parliament towards introducing an alternative system of supported decision-making to safeguard the rights of people with disabilities who require support in the exercise of their legal capacity.