

# REGIONAL DIAGNOSIS ON THE EXERCISE OF LEGAL CAPACITY OF PERSONS WITH DISABILITIES



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Rapporteurship by Pablo Oscar Rosales,  
Principal Delegate from Argentina to CEDDIS (2010-2014)

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Technical Secretariat of CEDDIS  
Department of Social Inclusion  
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# EXECUTIVE SUMMARY

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (CIADDIS) entered into in 1999, stated in Article I.2, paragraph b) that “If, under a state's domestic law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination.” Eight years later, the Convention on the Rights of Persons with Disabilities (CRPD), introduced a radical change in the interpretation of the scope of the right to exercise legal capacity by setting forth that the States Parties confirm that persons with disabilities have the right to be recognized as legal persons, and their legal capacity to exercise their rights on an equal basis with others is recognised in all aspects of life.

The Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities (CEDDIS), in charge of following-up the implementation of CIADDIS, acknowledged the urgent need to align article I.2, paragraph b) of said Convention to the new paradigm set forth by the CRPD. To this end, on occasion of the Third Meeting of CEDDIS in 2010, it was decided to put together a working group to analyse this issue in more detail and to present its conclusions at the next Committee meeting.

The working group met in October, 2010 in Washington. Its members were Argentina, Brazil, Colombia, Costa Rica, Panama and Peru, who decided unanimously that the declaration of legal incapacity and the corresponding guardianship system are not adequate to guarantee the legal capacity of persons with disability and to eliminate the obstacles to their access to justice. From the study of legal precedents of local courts, there arises that the figure of the declaration of legal incapacity or guardianship in the representation model is usually applied too broadly; that in most cases the scope of the restriction established in the judgement is not clear; that the legal proceedings are long, expensive, and they do not guarantee an effective legal guardianship in every case (considering that there are not always interpreters available or evidence in accessible formats); that there is a general lack of mechanisms to control guardianships which have already been established, among other matters. However, aside from the institution's procedural problems, there is a much stronger argument stating the need to find a new model for the recognition of rights to replace the existing one. This is the change in paradigms according to which the determination of the will of the person with disabilities vis-à-vis their guardian must be replaced by the recognition of their capacity to exercise their own rights with the aids of supports and safeguards, in case it should be necessary, and that said support will only be provided when absolutely necessary and requested by the person with disabilities. This is because the simple fact of being a person with disabilities does not necessarily imply their inability to adequately manage their rights and obligations, nor their inability to carry out legally relevant actions.

Thus, as a way to eliminate the contradiction that exists between the Conventions, and acknowledging the need to harmonize CIADDIS in this respect, given its relevance for the region, the CEDDIS working group agreed to make a general observation which would serve as a criterion to interpret article I.2 b) of CIADDIS, for it to fit the new paradigm that followed the entry into force of CRPD, stating that the text which read “If, under a state's domestic law, a person can be declared legally incompetent, (...) such declaration does not constitute discrimination” must be discarded in future interpretations of the scope of the right to exercise legal capacity. This decision was based on several legal precedents of the Supreme Court of Justice of Argentina, presented by Pablo Oscar Rosales, who was then the Second Vice Chairman of CEDDIS. Based on these, said Court decided that the legitimate interpreters of the same were the Committees or the Courts under the relevant international treaties, and therefore it was necessary to issue a criterion for interpretation which would allow to settle the contradiction between CIADDIS and CRPD, based on such precedents that are used as examples.

Based on the above, the working group prepared a general observation project that was presented and approved by CEDDIS in their First Extraordinary Meeting in May, 2011. This observation recognizes that disabilities constitute a social phenomenon or hindrance, rather than a medical one, for it considers the situation of persons with different deficiencies (physical, sensory, mental and intellectual) who encounter different kinds of barriers to social interaction (legal, judicial, physical, attitudinal, architectural, to name a few) which constitute obstacles to the enjoyment of their rights on an equal basis with others.

The General Observation states that, in order to effectively and fully implement CIADDIS, national legislations must approach disabilities from a social point of view, migrating from the medical-rehabilitation oriented model, which entails dropping specifically medical definitions, articulated according to the kind of deficiency, and acknowledge the fact that persons with disabilities make contributions to society in the same way as those with no disabilities, since their contributions are related to two basic concepts: inclusion and acceptance of diversity and their appraisal. Such are the legal and social arguments which justify the change in paradigm, from an assistance-based model to a human rights-based model that will in no way suppress the rights of the person with disabilities nor their right to exercise their rights on their own.

In this context, the General Observation requests that the States Parties to CIADDIS progressively implement strategies to train judicial actors, revise existing cases of legal incapacity, and cease the declarations of legal incapacity in favor of supported decision making.

In particular, in terms of the exercise of legal capacity, the Observation states the following:

3. To urge the States Parties to the Inter-American Convention to adopt measures, in keeping with Article 12 of the United Nations Convention, to guarantee recognition of universal legal capacity, including that of all persons with disabilities, regardless of the type or extent of disability, and, consequently, to initiate without delay a process for replacing the practice of declaring legal incompetence, guardianship, or any other form of representation that impairs the legal capacity of persons with disabilities, with a practice based on decision-making with support.

The foregoing entails taking steps to:

1. Train the general public, and justice system operators in particular, regarding the new paradigm in effect with respect to the legal capacity of all people with disabilities, including those with severe impairments, through recourse to decision-making support systems.
2. Adopt urgent measures of a regulatory nature to ensure that the judicial system disallows the approval of new declarations of legal incompetence and to foster the gradual development of decision-making support systems, as well as the regulation and implementation of institutions and mechanisms to safeguard against abuse.
3. Facilitate the review of cases in which persons with disability have been declared legally incompetent, with a view to aligning them with the new paradigm, with particular emphasis on those in which there are queries as to the existence of abuse or manipulation of interest.
4. Report to this Committee on measures adopted and any progress made in this process.

The CEDDIS General Observation has great value for it not only amends the final text in paragraph b of article I.2.b) of CIADDIS, but it also includes guidelines for the States on the measures to be adopted in order to guarantee the right of persons with disabilities to exercise their legal capacity in the broader sense. It clearly states that it is the State's responsibility to guarantee access to those in need of support to exercise their legal capacity, with safeguards against abuse, and that said support is to be selected by the person with disabilities. This support is to be based on trust, be provided with respect and never against the will of the person with disabilities, as far as possible.

This means a great challenge to persons with disabilities, civil servants, judges, lawmakers, in order to guarantee that this be observed in the scope of the laws and in court decisions.

This said, What are the mechanisms to recognize the capacity to exercise rights with support and safeguards that are to replace the guardianship system?

CRPD states that this kind of mechanisms must respect the rights and the will of the persons with disabilities, seeking solutions coherent with the person's social and cultural needs, avoiding conflicts of interest, undue influence, or excesses which may give way to a situation similar to incapacity. However, we are at a very early stage of the work, with guidelines that include concrete examples of these mechanisms, which may be taken into account by lawmakers and judicial actors when making laws and issuing court decisions.

CEDDIS has made an effort to fill this void by designing a guide for government stakeholders on how to materialize the mandates arising from the CEDDIS General Observation and Article 12 of CRPD. The first step towards the preparation of the guide was to carry out a comprehensive mapping across the States Parties regarding which mechanisms are being implemented in terms of the exercise of legal capacity (whether the traditional guardianship or new support mechanisms that have not yet been reported). This will allow to make a preliminary diagnosis of the state of affairs in the region. Once the advances and difficulties the region faces to guarantee a broad legal capacity have been identified, an instruction manual will be put together for support and safeguards. A multidisciplinary group will be created for this aim, integrated by representatives of CEDDIS, the civil society, and professionals of different areas (anthropologists, sociologists, lawyers, medical doctors, psychologists, etc.).

This rapporteurship includes the results taken from the compilation of answers given by several OAS Member States, which constitute the first regional diagnosis on the exercise of legal capacity of persons with disabilities taken from information provided by official bodies of the States and the region. The data analysed were provided by means of a questionnaire distributed to the countries in 2012, containing questions about the access to justice of persons with disabilities, the existing legal framework, training of and awareness raising among judicial officials, applicability and effectiveness of the guardianship system for the exercise of the legal capacity of legally incapable persons, and the impact of the change in paradigm arising from Article 12 of CRPD on the countries in the region.

When processing the reported information, the rapporteur saw—as unfavorable results—that States use different criteria to determine what is a disability; that there are no distinctions or definitions of the concepts of mental and intellectual disability; that the concept of psychosocial disability is not clear; that the rehabilitating medicine model is deeply entrenched in the public sphere; that there are barriers to accessibility for persons with disabilities in courthouses; that most government webpages are not accessible; that there is no evidence that legal proceedings in which persons with disabilities take part, whether as those awaiting trial, witnesses, or members of the jury, are specifically adapted for every case; that

in none of the States that responded to the questionnaire does the national legislation include mechanisms for systems or support in favour of persons with disabilities as provided for under Article 12 of CRPD, and that there are no special measures to facilitate the autonomy of persons with disabilities who have been deprived of their liberty; among other results.

On the other hand, the diagnosis revealed some progress, such as the training of judicial operators by means of activities carried out within the judiciary and executive powers, together with the national authorities in charge of disabilities; that the offer of higher education in the region—despite the fact that there is no information on the degree of inclusion as regulated under Article 24 of CRPD—is growing; that there is training on the UN/OAS Conventions on disabilities; that some States have permanently appointed experts and sign language interpreters, others have them upon request of the parties, etc.

Below are the main arguments presented by Pablo Oscar Rosales, Principal Delegate from Argentina to CEDDIS, and special Rapporteur appointed for this project, from which there arise the conclusions above and others, in the light of the information provided by the OAS Member States that participated in this diagnosis on the exercise of legal capacity of persons with disabilities. This is a ground-breaking study in this area, given the diversity of countries and stakeholders involved, which will lead to the elaboration of the first manual on support mechanisms and safeguards as a contribution of CEDDIS, not only for the region but also for the member countries of the CRPD universal forum, which are expected to use it for reference.

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# I. INTRODUCTION

Pablo Oscar Rosales, the special Rapporteur appointed to analyse the results of the “questionnaire on access to justice for persons with disabilities, different systems for them to exercise their legal capacity and the due enforcement of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities” hereby submits this report before the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities Committee (CEDDIS) as requested by the latter at the meeting held on May 4 and 5 in San Salvador.

The above-mentioned meeting approved the General Observation CEDDIS/RES.1 (I-E/11),<sup>1</sup> which provides the criteria to interpret article I.2.b) of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (hereinafter CIADDIS). This meant an important achievement for the Committee, for it materializes early efforts to harmonize CIADDIS with the United Nations Convention on the Rights of Persons with Disabilities (hereinafter CRPD), thus showing the need to create synergies between both Conventions in order to eliminate contradictory mandates for States that are members of both, the OAS and the UN Convention. This within the framework of article 1 of the OAS Charter, that sets forth that: “...Within the United Nations, the Organization of American States is a regional agency...”.

The CEDDIS General Observation is based on the premise of the new paradigm which arose from the entry into force of the United Nations Convention on the Rights of Persons with Disabilities in May 2008, which states that the replacement of the person's will, that is the characteristic of the protection model in force in most Latin-American Civil Codes must be replaced by a new one, based on decision making with support and safeguards.

Since the universal legal capacity model with safeguards that comes with the CRPD is not aligned with the concept of “positive discrimination” as referred to in CIADDIS, there is a need to adopt a General Observation for the Committee to interpret article I.2.b of CIADDIS within the framework of the UN Convention.

The greatest merit of this document is that, apart from explaining the background in terms of conceptual paradigms and stating the reasons that justify the harmonisation of both conventions, it also provides effective measures aimed at orientating the CIADDIS Member States towards the right path, in order to guarantee the full exercise of the legal capacity of persons with disabilities, particularly for the amendment of the legislation currently in force within the framework of the representation model.

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1. The text of the General Convention may be accessed at:  
[http://www.sedi.oas.org/ddse/documentos/discapacidad/CEDDIS\\_1text\\_observaciones\\_rev.doc](http://www.sedi.oas.org/ddse/documentos/discapacidad/CEDDIS_1text_observaciones_rev.doc)

Said measures or recommendations are as follows:

- a. The States Parties review their own internal legislation as compared to the United Nations Convention (Article 4, CRPD).
- b. The States Parties review their internal legislation as compared to the domestic laws of other CIADDIS States in order to take and apply successful examples.
- c. Progressive implementation of training strategies for judicial actors; review of existing legal incapacity cases, and suspension of new legal incapacity cases, advocating for decision making with support.

Once the debate among delegations was concluded, the General Observation was unanimously approved by the plenary.

The conclusions and mandates of the CEDDIS General Observation were as follows:

“As regards the legal mandate, the Committee resolves:

1. To urge the states parties to conduct a comparative study of their domestic laws and the domestic laws of the other States Parties to the Inter-American Convention, with regard to the provisions on the legal capacity of persons with disabilities, in order to ensure that they maintain regulations based on their needs in all their social strata and on their country’s institutional capacity, but within the framework of Article 12 of the United Nations Convention.

As regards the practical mandate, the Committee resolves:

2. To request the OAS Secretary General to order a revision, by the appropriate legal bodies, of Article 1.2(b) in fine of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, with a view to aligning it with Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and recommending whichever is best: its non-application in practice or its repeal.
3. To urge the States Parties to the Inter-American Convention to adopt measures, in keeping with Article 12 of the United Nations Convention, to guarantee recognition of universal legal capacity, including that of all persons with disabilities, regardless of the type or extent of disability, and, consequently, to initiate without delay a process for replacing the

practice of declaring legal incompetence, guardianship, or any other form of representation that impairs the legal capacity of persons with disabilities, with a practice based on decision-making with support.

The above involves taking steps to:

1. Train the general public, and justice system operators in particular, regarding the new paradigm in effect with respect to the legal capacity of all people with disabilities, including those with severe impairments, through recourse to decision-making support systems.
2. Adopt urgent measures of a regulatory nature to ensure that the judicial system disallows the approval of new declarations of legal incompetence and to foster the gradual development of decision-making support systems, as well as the regulation and implementation of institutions and mechanisms to safeguard against abuse.
3. Facilitate the review of cases in which persons with disability have been declared legally incompetent, with a view to aligning them with the new paradigm, with particular emphasis on those in which there are queries as to the existence of abuse or manipulation of interest.
4. Report to this Committee on measures adopted and any progress made in this process.

# II. IMPLEMENTATION OF THE MANDATE

## I. QUESTIONNAIRE

On February 1, 2012 a questionnaire was distributed to the Missions of the OAS States Parties, intended for government officials in the Judiciary and Legislative Powers, Ministries, Councils or Secretariats for Social Inclusion, Social Development, Infrastructure Ministries or national offices which mission or organizational aim has to do with disability policies, whether exclusively or as government advisors (CONADIS or similar). The aim of the questionnaire was to gather the necessary information to elaborate a diagnosis and a preliminary regional proposal to spot the main difficulties facing the countries of the American continent that have ratified the United Nations Convention on the Rights of Persons with Disabilities in the enforcement of Article 12 of said Convention on the exercise of legal capacity (determining whether said impairments are of a legislative, institutional, cultural, or financial nature).

This questionnaire originated from the change in paradigms that resulted from the entry into force of the United Nations Convention in May, 2008, under which the subrogation of the exercise and enjoyment of the rights typical of the representation-based model in force in most Latin-American Civil Codes (which generally consists of declarations of legal incapacity for persons with intellectual or mental disabilities) must be replaced by the new system, based on decision-making with support and safeguards. The questionnaire included three groups of questions, as follows:

Part I: Access to justice for persons with disabilities in terms of:

- The existing legal framework.
- Training and awareness-raising for judicial officials.
- Architectural accessibility of courthouse facilities.
- Availability of tools to facilitate communication.
- Existence of adequate procedures when a party or a witness in a trial is a person with disabilities.

Part II: The applicability and effectiveness of the guardianship system for the exercise of legal capacity by persons declared legally incompetent.

### Part III: Impact of the paradigm shift under Article 12 of the United Nations Convention on the countries in the region.

The Special Rapporteur will process the information contained in the answers to the questionnaire in order to identify the greatest difficulties the countries in the region are facing in order to guarantee that persons with disabilities will have the right to fully exercise their legal capacity.

The Special Rapporteur submitted a progress report on the state of affairs at the CEDDIS meeting held on November 27-29, 2012 in Santiago de Chile. He presented a summary of the answers to the questionnaires regarding the existing legal frameworks for access to justice of persons with disabilities; training and awareness-raising for judicial officials; architectural accessibility of courthouse facilities, among other aspects. The Rapporteur invited the delegates to take part in the preparation of a rapporteurship report, and asked the authorities and other colleagues to express their opinions<sup>2</sup>

The authorities of the Committee authorised the Special Rapporteur to work closely with other experts or organisations of persons with disabilities for the preparation of the report. There was an express recommendation for him to work with María Soledad Cisternas Reyes, a special guest at the meeting in her capacity as Vice-chairperson of the UN Committee on the Rights of Persons with Disabilities—current Chair of the UN Committee—, and with the Trust for the Americas. The authorities of the Committee also recommended that the report take into account the States' current policies on disabilities and their actual implementation, and requested that it be written in technical language so as to make it more user friendly. The Trust for the Americas visited CEDDIS twice, with a report that is incorporated as a source for these presents. Article 35 of the UN Convention on the Rights of Persons with Disabilities is also added as a source for consultation for the reports submitted by the States Parties in the region, which were assessed by the UN Committee by the date of this rapporteurship.

Once the preliminary diagnosis has been made, and the final text of the Rapporteurship has been approved, the CEDDIS Committee will make a decision regarding the establishment of a working group made up of representatives of CEDDIS, the civil society, and professionals of different areas (anthropologists, Sociologists, lawyers, medical doctors, psychologists, etc.). This group will be in charge of developing an instruction manual that will allow to translate the General Observation into concrete terms regarding the legal capacity of persons with disabilities adopted in the First Meeting of the Committee for the Elimination of All Forms of Discrimination Against Persons with Disabilities, held in May, 2011. Said instruction manual will be addressed to judicial actors, lawmakers and other state officials in

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<sup>2</sup> Final Report of the Fourth Meeting of the Committee for the Elimination of All Forms of Discrimination Against Persons with Disabilities (CEDDIS), November 27-29, 2012, Santiago de Chile.

the States of the region, in order to cooperate in unveiling the “how” component of the establishment of supports and the implementation of the safeguards referred to in Article 12 of the UN Convention, particularly focusing on the needs that will be identified by means of this questionnaire.

The report will present a survey of the three groups of questions answered in the questionnaire, substantiated with the regional reports added to CEDDIS, based on the work of Civil Society Organizations and organizations of persons with disabilities, with a special focus on the following conceptual lines:

- (i) Legal capacity and exercise of the rights of persons with disabilities and the impact of the model set forth in Article 12 of the UN CRPD on the region.
- (ii) Assessment of the status of the representation model of guardianship or declaration of legal incapacity.
- (iii) Situation of access to justice for persons with disabilities based on the existing legal framework, accessibility, existence of adequate procedures and training of judicial officials.

## 2. PROCEDURE AND METHOD

The Special Rapporteur will base his report on at least two kinds of information. Firstly, he will examine the written answers to the questionnaire. Secondly, he will use the results of enquiries with key informers in the region, and documents submitted before the CEDDIS Committee, particularly the mapping report of the Trust for the Americas.

Upon taking office, the Special Rapporteur consulted with several people, collecting advice and exchanging opinions on the approach to be used for the compilation of best practices.<sup>3</sup> The first decision was to focus on “good practices,” based on the fact that different methods may be equally good in different contexts, and particularly that, as it is conveyed in the CEDDIS General Observation, we are in a transition stage, moving from a medical care approach to disability towards a social model reflected in the text of said document.

The Special Rapporteur's work will be based on the thorough study of the answers to the questionnaire, supplemented with consultations with regional and international persons of reference and key informers, both, members of civil society and of the government. It will also look at OAS documents, particularly the “Mapping report of the exercise of legal

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3 The Rapporteur would like to express his gratitude to María Soledad Cisternas, Pamela Molina, Luis Miguel del Aguila, Agustina Palacios and Luis Fernando Astorga.

capacity of persons with psychosocial disabilities in six Latin American countries,” carried out by the Trust for the Americas, and submitted before the CEDDIS Committee at the meetings held on May 4 and 5, 2011 in San Salvador, and at the Fourth CEDDIS meeting held on November 27-29, 2012 in Santiago de Chile.

The mapping<sup>4</sup> analyzed the following factors: Social-demographic data of the population with disabilities in general and specifically of persons with psychosocial disabilities; the existence of public institutions and policies related with psychosocial disabilities; the general human rights status of the population under study; applicable national and international legal frameworks; existing initiatives for the effective implementation of the UN Convention and its Article 12; identifying leaders and key actors in each country that are committed to the issue from a human rights paradigm, among other factors.

The main conclusions of the mapping were as follows:<sup>5</sup>

- (i) There is general ambiguity in concepts, lack of statistical accuracy and lack of population data. The concept of disability is not clear, there is no definition or recognition of psychosocial disability, which causes invisibility and inconsistent statistical data.
- (ii) There are severe social and cultural barriers and stigma. The prevailing definition of “persons with disabilities” is still medically oriented, not centred on the social and human rights model, as is the UN Convention. Psychosocial disabilities have become a reason for discrimination, exclusion, associated with potential danger, rejection, abuse, and serious human rights violations.
- (iii) There prevails the abuse, ill treatment, abandonment and exploitation, particularly in the case of persons with disabilities who are institutionalized. It is therefore necessary to carry out specific studies on the violations of the human rights of persons with disabilities who are institutionalized, as it was done in Mexico and Argentina.
- (iv) The family of the person with disabilities may be a very valuable support, as well as a factor that restricts their rights.
- (v) Judges, prosecutors and public defenders are not aware of the international regulations and tend to apply domestic rules (contrary to Article 12 of the UN Convention and the CEDDIS General Observation), which sustain a patriarchal

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4 Final Report of the Fourth Meeting of the Committee for the Elimination of All Forms of Discrimination Against Persons with Disabilities (CEDDIS), November 27-29, 2012, Santiago de Chile.

5 The conclusions have been taken from the final report of CEDDIS presented at the meeting held in Santiago de Chile in 2012, and from the mapping report itself.

care-based vision, that mostly protects the person's estate, creating the “declaration of legal incapacity” system. Justice operators are not aware of the practical application of the UN-OAS Conventions, and in many cases they do not know of them at all. There is also a lack of oversight mechanisms to follow up the cases of declaration of incapacity.

In the light of these conclusions, the Trust for the Americas has recommended several lines of action such as fostering amendments to the Civil Codes affecting the legal capacity of persons with disabilities in order to align them with the new paradigm of the UN Convention; training and educating justice operators on the international conventions governing the issue; carrying out public campaigns to eradicate discrimination associated with psychosocial disability; exchanging experiences related to progress in the practical application of support mechanisms under Article 12 of the UN Convention; attendance-based and virtual workshops aimed at persons with disabilities in order to raise awareness about their identity and rights; creating an observatory of the rights of persons with disabilities to hear complaints on the issue, among others.

On the other hand, the Vicechairperson of the UN Committee on the Rights of Persons with Disabilities—current Chair of the UN Committee—, María Soledad Cisternas Reyes, took part in the CEDDIS meeting in Chile, where she explained that an effort is also being made within the framework of the UN, in order to unify criteria for the application of Article 12 on legal capacity that has been colloquially named “the heart of the Convention.”

She explained that a working group on legal capacity had been created at the heart of the Committee, that is working with different aspects of the issue. They have received the advice of different experts, organisations of persons with disabilities, national and international NGOs, as well as the vision of the States Parties, in order to consolidate the guidelines, by means of a “General Comment.”

Along those lines, it was proposed that CEDDIS make available to the UN Committee the Report it would prepare in its capacity as regional body, representing the vision of the American continent. Ms. Cisternas reminded the meeting of her ongoing offer to cooperate with CEDDIS, as well as her willingness to receive any input that the Committee may kindly provide her with about the overall situation in the region.

Ms. Cisternas highlighted that the enforcement of Article 12 of the UN Convention is a “bridge” for the exercise of other rights, such as access to justice, freedom and personal safety, prohibition of torture and other cruel, inhumane, or degrading treatment or punishments; prohibition of violence, exploitation, or abuse; the right to live as a part of the community; the right to form a family, to personal integrity; the political right to vote; etc. The UN Committee

has expressed its opinion on these areas, through the Final Observations made to the States Parties which have already submitted their report on the UN Convention, implementing the “constructive discussion” mechanism with the Committee. Said Observations contain recommendations related to Article 12 of the Convention and other related ones, all of which can be used as valuable input for the work done by CEDDIS. Ms. Cisternas Reyes stated that she was making her presentation as an individual expert and a member of the organisation of the Treaty, since the UN Committee as such acts as a collegiate body.

### 3. SURVEY OF THE GENERAL RESPONSES TO THE QUESTIONNAIRE

- (i) The methodology used to process the answers to the questionnaire will include the general responses to basic questions, such as the existing legal framework, situation of the State in relation to both conventions, application of the Brasilia Regulations, etc. The second step will be to analyse the answers related to Article 12 of the CRPD. The third step will be to analyse the supplementary answers that will allow to make an integrated diagnosis for the region.
- (ii) The Missions of the 34 Member States of the OAS were notified of the questionnaire by the Secretariat of the CEDDIS Committee, despite the fact that only 20 of them have signed and 18 of them have ratified the CIADDIS.<sup>6</sup> To the effects of this Rapporteurship, the cut-off date for information is January 31, 2013.

A total of 14 States submitted their responses to the questionnaire. Mexico, Panama, Costa Rica, Ecuador, Peru, Paraguay, Uruguay, Argentina, El Salvador, Bolivia, Chile, Brazil, Guyana and Bahamas.

All of the States that answered the questionnaire have signed and ratified both conventions, with the exception of Guyana, that has not signed CIADDIS and still has not ratified the UN Convention, and Bahamas, that has not signed either convention. Brazil is the only country that has given CRPD the status of constitutional amendment, and El Salvador has a reservation to Article 12 of CRPD.

- (iii) The 100 Brasilia Regulations Regarding Access to Justice for Vulnerable People have the aim “to guarantee the conditions of effective access to justice for vulnerable people, without discrimination, encompassing the group of policies, measures, assistance and support that allow these people to fully enjoy the services of the judicial system”<sup>7</sup>

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<sup>6</sup> <http://www.oas.org/es/sedi/ddse/paginas/index-4.asp>

<sup>7</sup> 2008 GLOBE Brasilia Legislators Forum, March 4-6, 2008, Section 1, item 1).

persons with disabilities are among this group of people. Seven of the 14 States have reported that the application of these Regulations is mandatory in their territory, and six of them have materialised this by means of agreed provisions or similar provisions of the Supreme Courts of the States. The remaining States report that in six of them, the Regulations are not mandatory because they do not have the same binding power as the legal provisions under local or international law, but are applied as “soft law”<sup>8</sup>.

In conclusion, until the cut-off date, the Brasilia Regulations were of mandatory application in half of the countries that answered the questionnaire.

- (iv) Most States have rules protecting persons with disabilities in their access to justice, or the general public, even prior to the entry into force of CIADDIS or CRPD. They are included in specific internal legal provisions<sup>9</sup> or arise from the national constitutions<sup>10</sup> in which case they are added as specific regulations or within the framework of anti-discrimination regulations.

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<sup>8</sup> Answers to question 1 in the questionnaire.

<sup>9</sup> Mexico, Uruguay, Panama, El Salvador, Chile.

<sup>10</sup> Costa Rica, Argentina, Peru, Ecuador, Paraguay, Guyana, Bolivia, Brazil and Bahamas. In some cases, they are specific regulations, in others they are included as one more element in a list of non-discrimination cases.

## 4. PRELIMINARY CONSIDERATIONS FOR THE STUDY OF THE CAPACITY TO EXERCISE RIGHTS UNDER ARTICLE 12 OF CRPD

### A. Determining disability

In order to analyse the system that regulates the legal capacity and the exercise of the rights of persons with disabilities in each State's domestic regulations, mainly in their Civil Codes and the way in which they have adapted to Article 12 of CRPD, within the framework of the General Observation of CEDDIS, it is useful to assess the manner in which the concept of disability is measured and determined, and its legal framework.

Article 1 of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (CEDDIS) sets forth that the term “disability” means a physical, mental, or sensory impairment, whether permanent or temporary, that limits the person's capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment. This definition, based on deficiency, is overruled by Article 1, second paragraph of CRPD, which sets forth that: “Persons with disabilities are 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.” Social barriers are thus seen as hindrances to the full and effective participation of persons with disabilities in society, on an equal basis with others. Neither the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, nor the UN Convention on the Rights of Persons with Disabilities (CRPD), establish any kind of classification for the measurement or determination of disabilities. However, the UN Committee receives the International Classification of Functioning, Disability and Health (ICF) as the most appropriate classification to determine disability within the framework of the social disability model, despite opinions against this position. This classification is not exclusively for disability, it is a general functionality classification, which defines “health conditions.”

The ICF classification defines health components and some “health-related” components. and “well being” (those included in ICF may be considered as health domains and “health-related” domains. These domains are described from the point of view of the body and

the individual, and through two basic listings: (1) Body structures and functions; (2) Activities-Participation.<sup>11</sup>

The introduction to ICF provides a good example of its methodology: “As a classification, ICF systematically groups different domains for a person in a given health condition (e.g. what a person with a disease or disorder does or can do). Functioning is an umbrella term encompassing all body functions, activities and participation; similarly, disability serves as an umbrella term for impairments, activity limitations or participation restrictions. ICF also lists environmental factors that interact with all these constructs. In this way, it enables the user to record useful profiles of individuals’ functioning, disability and health in various domains.”<sup>12</sup>

WHO classifies health conditions (diseases, disorders, injuries, etc.) based on its International Statistical Classification of Diseases ICD-10,<sup>13</sup> which provides an aetiology-based conceptual framework. ICD classifies functioning and disability associated with health conditions. Therefore, ICD-10 and ICF are supplementary,<sup>14</sup> and it is recommended that users use both of these elements belonging to the family of international WHO classifications.

ICD-10 provides a “diagnosis” of diseases, disorders or other health conditions, and this information is enriched by the additional information given by ICF on functioning (with the comments made above). An explanation of the combined methodology allows us to state that “Together, information on diagnosis plus functioning provides a broader and more meaningful picture of the health of people or populations, which can then be used for decision-making purposes.” Unfortunately, there is still a tendency to have this task performed by medical boards or doctors, or to not take into consideration—adequately—the opinion of interdiscipline.

Coming back to the brief presentation of the classification, ICF has moved away from being a “consequences of disease” classification (1980 version) to become a “components of health” classification. “Components of health” identify the constituents of health, whereas “consequences” focus on the impacts of diseases or other health conditions that may follow as

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11 These concepts replace the former “deficiency,” “disability” and “handicap” (which used to be represented in the CIDDIM classification), and broaden the scope of the classification in order to allow for the description of positive experiences. It must be borne in mind that these concepts are used with a specific meaning which may differ from their everyday use.

12 A domain is a practical and meaningful set of related physiological functions, anatomical structures, actions, tasks, or areas of life.

13 International Statistical Classification of Diseases and Related Health Problems, 10th Revision, Vol. 1-3. Geneva, World Health Organisation, 1992-1994.

14 There is a particular relationship between ICD-10 and ICF. Both classifications begin with body systems. Deficiencies refer to body structures and functions, which are usually a part of the “disease process” and are therefore also used in the ICD-10 system. However, the ICD-10 system views deficiencies (such as signs and symptoms) as parts of a whole, configuring a “disease,” or as reasons to contact a health service provider; whereas the ICF system views deficiencies as bodily function issues associated with health conditions. Two persons with the same disease may have different degrees of functioning, and two persons with the same degree of functioning may not suffer from the same health condition. Therefore, data sharing enhances the quality of health data. ICF should not replace the use of usual diagnosis procedures. In other cases, ICF may be used separately.

a result. ICF is a classification designed with multiple purposes, to be used in several disciplines and in different sectors.

The answers to the questionnaire show that most States use different classifications, showing differences between them, despite a common thread: that the medical classification of disability is still predominant in most countries, ICF being used only in half of them: Five States have reported that they use ICF to determine disability,<sup>15</sup> two of them with CIDDIM,<sup>16</sup> two others use CIE10,<sup>17</sup> and the rest use other means to determine disabilities.<sup>18</sup> On a positive note, there arises from the questionnaires that most of the States that are currently not applying ICF have stated that they are in the process of training and applying the classification.

## B. Definitions of mental or intellectual disability- Concept of mental health

Question 16 enquires about the existence of legal definitions of mental or intellectual disability in the States' domestic regulations, what those regulations are, whether they differentiate between the different kinds of mental or intellectual disability, and whether there are any mental health regulations in force.

No state has reported to have a definition that clearly states the concepts of mental and intellectual disability in their domestic regulations, and no country has a definition for psychosocial disability.<sup>19</sup> However, some definitions of disability have been reported, most of which are based on a model based on the ways in which disability is determined above, and, in general, comparing it to parameters of “normality.” Some States have specific mental health regulations or incorporate the concept of mental health in other general rules.

The reported definitions of disability are as follows:

- (i) Argentina: Law 22.431, Art. 2 - “To all effects of this law, a person with disabilities shall be a person suffering a permanent or prolonged functional alteration, whether physical or mental, which, in relation to their age and social environment may

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15 Argentina, Costa Rica, Mexico, Paraguay and Guyana.

16 Ecuador and Bolivia.

17 Peru and El Salvador.

18 Uruguay has reported “not to have unified criteria for the classification of disabilities.” Panama has reported that “We are currently working to enact disability-related regulations, and organizing an Awareness-Raising and Training Symposium aimed at providing certification and appraisal. This is the reason why we are not providing documents certifying a person's disability at this stage.” Chile has stated that “The system for the classification of disabilities which is currently in force in Chile stems from the previous regulations, Law No. 19284, which does not include the ICF regulations.” Brazil and Bahamas have not reported which criterion they use.

19 Argentina reported that the concept is included in its mental health law.

imply considerable disadvantages for their family, social, educational or work integration.” This law dates back to 1981.

- ( ii ) Peru: Article 2 of Law No. 27050, General Law of Persons with Disabilities, defines a person with disabilities as: “A person who has one or more deficiencies that are evident through the loss of one or some of their physical, mental or sensory functions, which may imply the reduction or absence of their ability to perform an activity in ways or within the limits of what is considered normal, thus limiting them in their performance of a role, function or the exercise of activities and opportunities to participate in society in an equitable manner.”
- ( iii ) Mexico: Official Mexican Regulation NOM-173-SSA1-1998, for the integral care of persons with disabilities, sets forth that “Disability is the absence, restriction or loss of the ability to perform a certain activity in the manner or within the limits of what is considered normal for a human being” and “Intellectual disability is a permanent impairment in the mental functions, resulting from a prenatal, perinatal or postnatal alteration, limiting the person in their performance of the necessary activities to adapt to the family, social, academic or work environment.”
- ( iv ) Panama: Article 517 of the Family and Juvenile Code classifies mental and intellectual disabilities as follows: “Article 517. A disabled person is one who suffers from any kind of restriction or impairment for the performance of an activity, as a result of a deficiency in the form or within the boundaries of what is considered normal for a human being. It is the State's duty to establish a coordination between sectors and institutions to guarantee their integral development as well as their social inclusion.”
- ( v ) El Salvador: The Equal Opportunity Law for People with Disabilities sets forth that persons with disabilities are those who “for different reasons, whether acquired or congenital, may have restricted physical, mental, psychological or sensory capacities, thus creating a condition which places them at a disadvantage with their equals and hinders their full integration to society, therefore making it necessary to take measures to allow persons with disabilities to be a part of society and not be discriminated against.” According to this concept, disabilities may be divided into physical, sensory, psychological, and intellectual.
- ( vi ) Bolivia: Article 5 of Law 223, General Law for Persons with Disabilities, sets forth that disability “Is the result of the interaction of the person with deficiencies in their physical, psychological, intellectual and/or sensory functions, whether in the long term or permanent, with different physical, psychological, social, cultural, and communication barriers.”

- (vii) Chile: Law No. 18600, which sets forth regulations regarding mentally impaired persons, includes a definition: “A mentally disabled person is one who, as a consequence of one or more psychological, congenital, or acquired limitations, of the permanent kind, no matter their cause, sees their educational, work or social ability limited by at least one third.” The State further reports that Law 20422, of a later date, sets forth a general definition of persons with disabilities, stating that “A person with disabilities is one who having one or more physical or mental deficiencies, whether of psychological, intellectual or sensory origin, temporary or permanent, sees their full and effective participation in society either hindered or restricted, on an equal basis with others.”
- (viii) Brazil has reported that upon its ratification of the UN Convention as an amendment to the Constitution, it has started a process aimed at adapting the terminology in the domestic legislation to the language proposed in the Convention. Pursuant to Article 4 of Decree 3.298/1999, as amended by Decree No. 5.296/2004, a person with disabilities is someone who falls into one of the following categories: “Mental disability: intellectual functioning significantly below average, which appears before the age of 18, and the limitations associated with one or more areas of adaptive skills, such as:

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|--------------------------------|-----------------------|
| a) communication;              | e) health and safety; |
| b) personal care;              | f) academic skills;   |
| c) social attitudes;           | g) leisure, and       |
| d) use of community resources; | h) work”              |

Brazil has not reported any other definition of disability.

- (ix) Lastly, Costa Rica has reported that “The Family Code does not identify different kinds of psychosocial or intellectual disabilities; the international conventions are applied.” Ecuador has reported that “There are no legal definitions of mental or intellectual disability in the national legislation, other than those adopted and provided for by the World Health Organisation.” Paraguay reported that: “In the domestic legislation in force there is currently no legal definition of mental or intellectual disability.” Several States have reported having specific mental health<sup>20</sup>

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<sup>20</sup> Mental health Act No. 26.557 in Argentina; Peru: “For the specific case of mental health, article 1 of Law No. 26842, amended by Law No. 29889, General Health Law, sets forth that all persons have a right to the recovery, rehabilitation and promotion of their mental health. Therefore, mental health care is primarily the family’s responsibility as well as the State’s.” Mexico: “Article 2 of the Federal District Mental Health Law defines mental health as: “... psychological well-being experienced consciously by an individual as a result of the good functioning of their cognitive, affective, and behavioural aspects, which allow them to develop their individual potential for coexistence, work and recreation, in order to be able to make contributions to their community.” But it is not related to the concept of disability. Bahamas: “However, pursuant to section 2 (1) of the Mental Health Law, there appear the following terms and definitions: “mental disorder” meaning mental illness, arrested or incomplete development of the mind, psychopathic disorder and any other disorder or disability of mind, and “mentally disordered” shall be construed accordingly. “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including

regulations, and others have incorporated the concept into other related regulations.<sup>21</sup>

In conclusion, a) the concept of “disability” is defined in every State, b) the definition relates to the manner in which disabilities are determined, within the framework of the medical model and in relation to “normality” as a parameter, and in most cases, there is no distinction between mental (or psychosocial) disability and intellectual disability; and c) the concept of mental health is growing and being developed in the region.

## C. Stereotypes, circulating images, or negative perceptions of persons with disabilities in the judiciary power

“Stereotype” can be defined as a “model, pattern or set rule of qualities, behaviour, etc.”<sup>22</sup> or “an image or idea which is usually accepted by a group or society as immutable.” This definition includes immutability, which is a dominant characteristic of this concept.<sup>23</sup> Stereotypes are a group of beliefs on the attributes of a given social group, behaviour models which become deeply rooted schemes in our mentalities, to the point where we take them as part of human nature. The term is most usually associated with a simplified way to refer to communities or groups of people who have certain common characteristics. These mental representations are quite vague, and usually focus on apparent defects of the group in question. They are built around prejudices about people who come from other parts of the world or who are part of a given group. These prejudices are not put to the test, and therefore most of the times they are not even faithful to the identity baggage of the group they are linked with. Question 3 looks into these figures, specifically in the legal field, and gathers a few elements which allow for the identification and classification of current stereotypes.

Some States report having detected a variety of stereotypes, circulating images or negative perceptions which affect persons with disabilities in different areas, including the judicial area. They are ordered according to their prevalence in the answers.

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subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and requires or is susceptible to medical treatment.”

There are no mental health regulations to this date, but there is a mental health rule (ACT), as stated in Volume III of the subsidiary legislation of the Bahamas.”

21 Panama: “Mental health in Panama is governed by the Political Constitution, different codes, laws and resolutions, where some topics appear...” Lastly, Chile: “Regarding the question referring to the existence of national mental health regulations, we must point out that several laws have been passed which govern the subject. Law No. 20584 which governs the person's rights and obligations in relation to actions related to their health care... Law No. 18600, which sets out rules on mental deficiency. Health Ministry Supreme Decree No. 2505 of the year 1995, ruling the Assessment and Classification of Disability referred to in Law No. 19284 (no longer in force). These regulations, as it can be seen, govern the rights and obligations of patients and the treatments they would be subject to, but there is no organic treatment of the topic.

22 Entry in “Gran Enciclopedia Universal Espasa Calpe”, 2005.

23 Dictionary of the Spanish Language, 21st ed., vol. 5.

- (i) The deeply rooted medical-rehabilitation model, that makes the person with disabilities responsible for their impossibility of personal realization, unable to make decisions which enable them to voice their own rights, appears as the most frequent one, in these words: “the medical-rehabilitation concept, that makes the person with disabilities responsible for their lack of personal realization, unable to make decisions which enable them to voice their own rights”<sup>24</sup> or “(there still) persist elements such as social discrimination, lack of opportunities and the non-compliance with laws and regulations aimed at guaranteeing their access to jobs and work stability”<sup>25</sup> “it is generally perceived that the society as a whole has not moved from the traditional concept of persons with disabilities, and situations of discrimination are ongoing in all areas of society, as can be seen in the statistics of the National Committee for the Prevention of Discrimination (CONAPRED)<sup>26</sup>, where disability is the second reason for claims and complaints... there still are some rules based on prejudices regarding the role the person with disabilities plays in the family or in society, with a welfare-based vision that denies the ability of the person with disabilities to make decisions.”<sup>27</sup>
- (ii) Inadequate recognition of the capacity to exercise rights: This concept is also paired with the lack of awareness or the partial recognition of the ability of the persons with disabilities to exercise their own rights: “Together with these rules, which set forth the causes of legal incapacity, there still persist some rules based on prejudices about the role of persons with disabilities in the family or in society, with an absolute assistance-based conception, which denies the ability to decide of the person with disabilities.”<sup>28</sup> In some cases, these situations are described as political proposals which imply good practices: “The Brazilian government has started to carry out actions to allow the transformation of the welfare model, which traditionally limits the conditions which allow persons with disabilities to be the protagonists of their emancipation and citizenship, thus contributing to the development to the development of the country,”<sup>29</sup> or in historical-cultural terms which refer to a different approach: “The Judiciary Power stems from culture and persons stem from culture. The Judiciary Power needs education and awareness-raising.”<sup>30</sup>
- (iii) Lack of awareness of the value and lack of respect for human diversity: The topic of respect for diversity and the cross-cutting nature of the issue arise both from CIADDIS and from the different articles of CRPD. The different States have

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24 Peru.

25 Ecuador.

26 Mexico National Committee for the Prevention of Discrimination (CONAPRED) (<http://www.conapred.org.mx/>).

27 Mexico.

28 Mexico.

29 Brazil.

30 Bahamas.

expressed this from different perspectives: "...in terms of stereotypes and negative perceptions, their eradication implies sustained awareness-raising and training efforts in order to achieve their total elimination. The different stages of training in the Judiciary Power (...) have been preparing the ground to foster plurality, solidarity, respect for diversity and the elimination of all kinds of discrimination through training and awareness-raising from a paradigm of respect for human rights, with excellent results."<sup>31</sup> Or from an active work proposal: "Peru still has to raise awareness on the value and respect for human diversity, which involves judicial operators who are in charge of making justice."<sup>32</sup> Most States report the existence of prejudice and how difficult it is to eradicate, together with the difficulty to recognize and value diversity: "The most significant prejudice for judicial practice is seeing disability as an undifferentiated whole, as if it were a uniform block of problems..."<sup>33</sup> As a proposed good practice for the eradication of these stereotypes or prejudices, there is an acknowledgement of the value of diversity that: "all judicial or jurisdictional actions must stem from social and other differences between human beings. Their needs, interests, functions and resources must be considered when defining their potential impact on one area or the other, and therefore, eliminate all such practices and habits stemming from an alleged patriarchal neutrality, that results in discrimination."<sup>34</sup> Some proposals aim at the need for adequate information: "In the Judiciary Power there are no stereotypes, images or negative perceptions of persons with disabilities. Rather, there is misinformation, lack of knowledge and absence of optimum mechanisms and procedures adapted to the needs of persons with disabilities..."<sup>35</sup>

- (iv) Need to eradicate "invisibility." The invisibility of persons with disability is a residual effect of the idea that disability is a problem inherent to the person and their social environment, as if it were a uniform block of problems. This invisibility refers mainly to the labour aspect: "It is clear that there are still signs proving the opposite, mostly in the world of work, where certain elements, such as social discrimination, lack of opportunities, and the breach of laws and regulations aimed at guaranteeing their access to jobs and work stability, still persist. In spite of the above, the relevant aspect of the situation has been the eradication of this "invisibility."<sup>36</sup> Invisibility also appears linked to the lack of accessibility, particularly when it comes to movement: "It is worth mentioning that in the family, work, and community environment there still persist stereotypes which generate discrimination and marginalization of the persons with disabilities, such as, for

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31 Costa Rica.

32 Peru.

33 Mexico.

34 Panama.

35 Chile.

36 Ecuador.

example, not taking their mobility and communication needs into consideration ...<sup>37</sup> added to the fact that it is not easy for persons with disabilities to be considered as workers.

- (v) Standardized judicial proceedings and lack of official studies on these negative practices: The lack of accessibility and adequacy of judicial proceedings, which tend to be standardized, is an element of concern, as well as a proposal from many States: “standardised judicial proceedings are an ongoing issue for the participation of persons with disabilities in said proceedings, but work is being done in this sense.”<sup>38</sup> Despite the fact that most States claim not to have official studies on stereotypes, prejudice, and negative practices affecting persons with disabilities in judicial proceedings, several have pointed out that they are in the process of creating programs or integrating the issue into existing judicial training programs, all of which constitutes good progressive practices.<sup>39</sup>

## D. Training of Judicial Officials – Contents of the training program

Having acknowledged the stereotypes and perceptions regarding persons with disabilities in the judicial sphere, the States answered question 4, regarding whether the judges or the court administrative staff have been trained or educated on the rights of persons with disabilities, and their need to have their capacity for action recognized, and if so, what kind of training they have received.

Training of judicial officials is actively promoted in the region, through activities carried out within the Judiciary Power or jointly with programs or bodies of the Executive Power (mainly CONADIS or similar bodies). It is done in the form of programs together with CONADIS<sup>40</sup>,

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37 El Salvador and Argentina.

38 Argentina.

39 Costa Rica through the “Basic Judicial Education Program” of 2012, Ecuador through the government program “Ecuador without Borders”, Panama: “The Judicial body of the Republic of Panama, in the year 2009, carried out an institutional diagnosis called “Equality in the Access to Justice for Women, Persons with Disabilities, and Teenagers in Conflict with the Law in Panama.” This document set the basis for the Institutional Policy for Access to Justice and Gender, as a response that cuts through the principles of equality and non-discrimination, developed in the international instruments for the protection of Human Rights, including the gender perspective.” Chile, by way of Resolution No. 165 of the Supreme Court of Justice issued by virtue of the Regulations on “Rules applicable to persons with disabilities applying for positions with the Judicial Power.”

40 Argentina and Peru: “The Judiciary Power, as per Administrative Resolution No. 266-2010-CE-PJ, is developing a program for the modernisation of Justice Services. This project includes training and awareness-raising of the Judiciary Power in disabilities. Relevant activities have been coordinated with the National Council for the Integration of Persons with Disability (CONADIS)”. Chile: “The joint efforts of Senadis and the Judiciary Power have given way to the creation of a space for training, which is intended to be given in training courses for judges, as well as as a training course for people who are members of the judiciary. As of this year, the Judiciary Academy—a public law organisation aimed at educating and training the members of the Judiciary—will give a course called “National Regulations and International Conventions on Persons with Disabilities,” as part of their further education program, aimed at the higher rank, which is mainly composed of the Members of the Supreme Courts, Judges and Clerks.”

mainstreaming of the issue in law schools,<sup>41</sup> specialized workshops,<sup>42</sup> training sessions within the Judiciary Power,<sup>43</sup> courses with a focus on accessibility<sup>44</sup> and in other cases it is treated within other courses in a generic manner.<sup>45</sup> Most States are planning new options for future training, and within the framework of Article 4 of CRPD the “knowledge of the management of disability and the formulation of policies which cut through all the regulations in force”<sup>46</sup> and “The most relevant training for the judicial staff is one that mainstreams the human rights perspective as the main focus for the access to justice of persons with disabilities, and in general in a situation of vulnerability.”<sup>47</sup>

Question 6 supplements the previous one by requesting the States to report what they think should be the content of an adequate training program for civil servants working with persons with disabilities, stating the order of importance of the main contents proposed. The States reported that the main content of the training programs should be the study of both Conventions on disability. The remaining main topics are presented below, in order of preference, as reported:

- (i) Knowledge of the UN Convention on the Rights of Persons with Disabilities, of the OAS CIADDIS and of the disability regulations in general: Most States require that the training programs include the study of the international regulations on disability (which includes both conventions), as well as their own domestic law and their jurisprudence. There is even a proposal for a regional policy regarding the States which have not signed the Conventions: “Understand the compliance with the Convention by those countries which are not members, such as Guyana, or which are considering signing it,”<sup>48</sup> supplemented by the decision of CEDDIS to encourage those States in the region that have not signed CIADDIS to do so.
- (ii) Raising awareness and acknowledging the free will of persons with disabilities and the social disability model: These contents are related to the aims expressed in the determination of stereotypes and practices affecting persons with disabilities, and hint at the need for public dissemination among State operators (not only judicial), to improve awareness raising on the issue: “Dissemination of information on institutions promoting the self-realisation of persons with disabilities”<sup>49</sup> and

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41 “Basic Judicial Training Program” in Costa Rica, and “One of the aims of the Capacitate Móvil program of Human Resources is to provide efficient access to the Internet or Intranet to the population.”

42 Costa Rica.

43 Mexico: “Since 2010 the Electoral Board of the Judiciary Power of the Federation has been promoting an Institutional Accessibility Program for Persons with Disabilities,” as well as workshops organised by the Supreme Court, CONADIS; and Paraguay “for since 2010, the Judiciary Power has included in the calendar of activities, through the Committee for Access to Justice, several training sessions, seminars, workshops, congresses and awareness-raising sessions, directed to judges, prosecutors, lawyers, justice workers and officials.”

44 El Salvador: “Likewise, the security personnel in the buildings receive training to facilitate, as much as possible, the most adequate access to the facilities for persons with disabilities. There are wheelchairs available to facilitate their movement.”

45 Uruguay.

46 Argentina.

47 Costa Rica.

48 Guyana.

49 Uruguay.

“raising awareness with (...) life stories and field visits<sup>50</sup>...”, “National-level regulations, change of paradigm regarding the disability model,”<sup>51</sup> and in terms of the social model, this has been proposed “...two crucial circumstances have been proposed in terms of the rights of persons with disabilities: a) erroneous understanding of the concept of what disability is (attitudes, stereotypes, social conceptions); b) discrimination against these people ranging from urban design and architectural accessibility to the actual access of this population to the right to work and to an education... a humane approach to disability (less clinical and more social-historical).”<sup>52</sup> Along these same lines, the previous step proposed is: “To identify deeply-rooted myths and misconceptions related to disabilities and persons with disability.”<sup>53</sup> Another proposal is that “...training should be aimed at analysing and applying the main international instruments for the protection of human rights within the context of disabilities, from a human rights perspective in the different fields of expertise” as well as “...the formulation of objectives, ideal and possible targets, achievement and performance indicators, which ensure the effectiveness of all public interventions in the fight against poverty and social exclusion of persons with disabilities.”<sup>54</sup> To sum up, all States acknowledge the need for the dissemination of the rights of persons with disabilities, despite the scarce mention of comprehensive campaigns aimed at the general public.<sup>55</sup>

- (iii) Fight against the negative stereotypes affecting persons with disabilities in the public and private sphere, in order to value and include diversity, as well as to identify discriminating actions: The States include in their training programs the identification of myths and deeply rooted erroneous concepts which surround disability and persons with disabilities, as well as the identification of discriminating actions.<sup>56</sup> They included the stigmas and negative perceptions, and most of them included the prevention and elimination of all forms of discrimination against persons with disabilities. As a supplement to the identification of myths and stigmas, they proactively propose that the consequences of these practices in the person's daily life be approached: “To recognise how these false ideas are translated into everyday language and respect in communication.”<sup>57</sup> “To provide the information the staff need to respond adequately to discrimination cases, including information about legislation, services available, the rights of persons with intellectual disabilities, and the way to respond in solidarity.”<sup>58</sup>

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50 Costa Rica.

51 Uruguay.

52 El Salvador.

53 Guyana and Chile.

54 Peru.

55 CIADDIS Article III.2.c refers to this in the following terms: “c) Increasing public awareness through educational campaigns aimed at eliminating prejudices, stereotypes, and other attitudes that jeopardize the right of persons to live as equals, thus promoting respect for and coexistence with persons with disabilities.”

56 Chile.

57 Guyana.

58 Guyana.

- (iv) Accessibility for persons with disabilities<sup>59</sup>: Accessibility is a cross-cutting element in the proposed contents for training programs. Physical accessibility is predominant. The States have expressed both a concern and an interest in the accessibility of contents and the use of TICS. This aspect is incorporated as “Accessibility and participation”<sup>60</sup> with a “concept and main practices that make it effective”<sup>61</sup> approach, the need for “universal accessibility,”<sup>62</sup> as “training for engineering, maintenance and security personnel for internal signalling, covering the scientific-technical areas, which can provide solutions to the issues of accessibility to the facilities,”<sup>63</sup> the use of special computer software “...the use of the 'JAWS' oral translator for the visually impaired, the use of the verbal interface software “DUSBURY,” Braille and LESCO translator”<sup>64</sup> and as systematic work documents: “Protocols with international standards for architectural design and physical accessibility in public facilities, such as courts of justice and prosecutors' offices.”<sup>65</sup> In conclusion, we may say that: a) there have been several different proposals by the States regarding accessibility in training sessions on the rights of persons with disabilities, b) the different modes will allow for the exchange of positive regional experiences.
- (v) Workshop techniques: These specific training techniques are recommended by the States as ways to facilitate access to the community and specifically as a way to improve the perceived relationship between law and practice. The workshop technique is part of most of the judicial powers' training programs<sup>66</sup> as a supplement for basic training.

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59 Article 9.1 of CRPD points out the contents of this right, despite the fact that accessibility is cross-cutting in several articles, as follows: “1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take relevant measures to guarantee access for persons with disabilities, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communication technologies and systems, and to other facilities and services, either open to the public or for public use, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia: (a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces; (b) Information, communications and other services, including electronic services and emergency services.”

60 Peru.

61 Mexico.

62 Uruguay.

63 El Salvador.

64 Bolivia.

65 Chile.

66 Costa Rica. “workshop “Human Rights of Persons with Disabilities and Access to Justice,” with the participation of judicial staff and persons with disabilities, in eight judicial circuits” within the framework of the Basic Judicial Training Program; Paraguay: “... seminars and workshops to show methodologies and recommendations for treatments that are adequate for persons with disabilities.” El Salvador: “Workshops on technical computer-based assistance, and including sound in the webpage.” Bolivia proposes a training program based on community workshops: “The first part of the training will be in coordination with all the servers of the Judicial Body and which have any relation with Justice. The first workshop would be: “Eliminating barriers, building opportunities,” and the possible topics to be discussed could be the concepts of disability, kinds of disabilities, care models for persons with disabilities... A second stage would focus on Workshops for the validation of the declaration of the accessibility policy, for persons with disabilities in the Judicial Power. A third round of workshops would be focused on the enforceability of the rights of persons with disabilities.” Chile has also proposed a general workshop methodology.

## E. University Education - Higher Education

Several States have started to include the topic of disabilities in their higher education curricula, mainly in law schools, but also in other areas. The topic of disabilities appears in some graduate and undergraduate courses, as a specific subject or as part of other courses, mainly in the areas of psychology and social work.

A regional network of universities is under development, with a focus on disabilities. The Chilean academics Alberto Madrid Rojas and María Paz Iturriaga, were present at the Fourth Meeting of the CEDDIS Committee held in Santiago de Chile in November, 2012<sup>67</sup>, where they introduced the “Latin American and Caribbean Inter-University Network on Disability and Human Rights,” made up of academic institutions in Argentina, Brazil, Chile, Colombia, Mexico, Panama, and Uruguay<sup>68</sup>, whose main interest was the recognition of the human rights of persons with disabilities in the university environment and the impact of inclusive higher education on the quality of life of persons with disabilities.

The universities in the region have included disabilities in their undergraduate courses,<sup>69</sup> whether in their curriculum or in cross-cutting subject,<sup>70</sup> and through post-graduate courses<sup>71</sup> or master's degrees.<sup>72</sup>

In view of the information provided, it is possible to say that the higher education offer in the

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67 Final Report of the OAS Meeting / Ser.L/XXIV.3.1, CEDDIS/doc.10 (VI-O/12) of 30-Jan-2013, page 25

68 As it arises from the Minutes of the CEDDIS meeting in Chile, the Network is currently made up of the following universities: Argentina: National inter-university commission “Disability and Human Rights” and La Plata National University (as coordinator). Brazil: Instituto Toledo de Ensino; Chile: Inclusive Education Network; Colombia: Colombian University Network for Disabilities. Costa Rica: Inter-university Institute for Access to Higher Education (CIAES); Panama: Technological University of Panama. Uruguay: ReTeDis; Venezuela: Universidad Pedagógica Libertador de Venezuela; Ecuador: CONADIS and Guatemala: University of San Carlos de Guatemala.

69 Mexico: “Course given by the Technological University of Santa Catarina in the State of Nuevo León on Inclusion of persons with disabilities” and in Law studies: “Law studies in most universities offering law degrees include Human Rights as part of their study plans.” “Universidad Iberoamericana coordinates a project entitled “Building Bridges” to protect the rights of persons with intellectual disabilities.” Uruguay: “The Law School of the University of the Republic offers courses on the rights of persons with disabilities, as does the School of Psychology, among others.” Panama: “The Judicial Body, the National Secretariat for Disabilities, and the Criminology Institute of the University of Panama have created the degree in “Human Rights, Disabilities and Victimization in the access to Justice,” and Bahamas: “The Law School of Bahamas offers a course on Persons with Disabilities which is available in Bahamas.”

70 Bolivia: “San Andres de La Paz University, one of the largest and most prestigious universities in Bolivia, has created the degrees in Speech and Occupational Therapy, to educate students in the study of specific disabilities. These courses include subjects related to the legal framework which regulates the situation of persons with disabilities. In the fourth semester of Occupational Therapy studies at Universidad Mayor de San Simón de Cochabamba, students use the Research Center for Persons with Disabilities.”

71 Argentina: “The different national universities have different approaches to the issue. The Law School of the University of Buenos Aires offers a postgraduate course on Disabilities and the Convention (it has recently incorporated subject such as mental health and ageing), the School of Social Sciences offers an undergraduate seminar for its four main degrees. The national public universities have all been offering the Disabilities and University program for at least seven years, and a national meeting is held every two...” In 2013, University of Lanús (UNLA) started offering an undergraduate course entitled “Interpreting and translation of non-verbal forms of communication,” and three provinces offer sign language interpreting studies.

72 Costa Rica. “the University of Costa Rica offers a specific Master's degree on disabilities.”

region is growing, in terms of the local offer and regional university networks or by means of international cooperation, despite the fact that there is no information on the degree of inclusion and accessibility, pursuant to Article 24 of the CRPD.

## F. Architectural accessibility

The architectural accessibility of judicial buildings is an outstanding debt in the region. Most States have reported the existence of obstacles to accessibility for persons with disabilities. In some cases, buildings are completely inaccessible, in others there is a difference between buildings built prior to the UN Convention and the new ones, which are accessible indeed. Some buildings are accessible (mainly physically by means of ramps), but there are still issues with accessibility to proceedings, physical spaces, elevators, toilets, and information technology tools. In some places there are no adequate parking spaces or specially designated parking areas for persons with disabilities.

Accessibility has been slowly promoted in Judicial Power facilities, and States which are currently undergoing this kind of processes have reported that new buildings have been built pursuant to universal accessibility standards. Several States have reported to be in the process of making all public facilities accessible for persons with disabilities, despite the fact that most governments do not have detailed inventories or details about the degree of accessibility of the facilities.

## G. Availability of tools to facilitate communication

Questions 8 and 9 in the questionnaire assess the existence of tools to make communication easier for persons with disabilities.

The first question is whether the States' web pages are generally accessible for persons with disabilities, mainly those with some kind of sensory disability (hearing or visually impaired). Most government web pages are still not accessible. However, it is positive to see that most States have enacted regulations making accessibility mandatory.<sup>73</sup> Some official government pages and those related to disability are reported to be accessible, and the rest are in the

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73 Argentina: "Several government web pages are accessible to persons with disabilities. Decision No. 69/2011 of the Ministerial Cabinet of the Executive Power approved an Accessibility Handbook for National Public Sector Websites. The Handbook is public and its use is recommended for all government bodies. Decision 1162/2008 of COMFER approved the First Stage of the Plan for the Implementation of Decision No. 679/2008, implying a progressive annual increase in the number of hours of programs broadcast with the Closed Captioning system." Peru: "The State of Peru, by virtue of Law No. 28530, for the promotion of Internet access for persons with disabilities and for the physical adaptation of public internet access facilities, sets forth conditions and technical specifications for access to the use of the Internet and information technologies for persons with disabilities, and the phasing-out of physical and technological barriers which prevent their integration to the information society and their inclusion in the labour market." Ecuador: "By means of Decision 193-07-

process. At least 20% of the States still do not have web accessibility, but they report to be working on it.

The States have advanced in their good practices from different perspectives in terms of using sign language interpreters and having accessible reading tools available for the visually impaired within the framework of judicial proceedings, as well as in the specific training of experts or assistants with a view to the participation of persons with disabilities awaiting trial or being assessed by experts. Most of them have some form of legal regulation for these tools.

Some States have sign language experts or accessible reading tools on a permanent basis<sup>74</sup> (in these cases they are generally regulated by laws or regulations) and others provide these accessibility tools on demand,<sup>75</sup> with State financing.<sup>76</sup> Other States are still in the process of establishing the relevant legal framework, or organizing these tools, even determining which area of the State will be in charge of defending people with disabilities,<sup>77</sup> such as the creation

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CONATEL – 2009 dated 25 May, 2009, CONATEL approved the making of agreements between the National Secretariat for Higher Education, Science and Technology (SENESCYT) and the Higher Polytechnical Schools (Escuelas Superiores Politécnicas del Litoral)—ESPOL and the Army—ESPE, to cofinance the project “Open code web content management system for the inclusion of visually impaired persons, through a holistic assessment methodology” and “The website [www.supertel.gob.ec](http://www.supertel.gob.ec), which has been designed pursuant to W3C standards (www Consortium).” Mexico: “All of the pages of the Federal Executive Power have a basic level of accessibility, complying with at least level A as set forth by the World Wide Web Consortium.” El Salvador: “the official websites of public offices are being designed in order to fully comply with the regulations and directions related to the technical aspect of WAI (Web Accessibility Initiative) and WCAG (Web Content Accessibility Guidelines).” Chile: “In Chile, authorized sites and sites which have accessibility certificates are mostly related to or deal with the issue of disability; this is the case of the National Service for Disabilities.”

74 Argentina: “There are expert language sign interpreters in the Supreme Court of Justice and in Federal Courts. The National Program for the Assistance of Persons with Disabilities in their Participation in Legal Proceedings (ADAJUS) was created in the Justice Secretariat by virtue of Decree 1375/2011 in order to facilitate the access of persons with disabilities as persons awaiting trial, lawyers, witnesses or any party in the legal proceedings. Moreover, language sign interpreters have also been included for all official acts of the Ministry of Foreign Affairs since 2012. The above notwithstanding, not all courts have interpreters to serve the public.” Costa Rica: “It is worth mentioning that there are rules of procedure for the Judiciary Power, which regulate the function of the interpreters, translators, experts and enforcers within the Judiciary. The Office of the Executive Director has an official register of Costa-Rican sign language interpreters that are called to interpret at hearings. These services are paid for by the Judiciary Power... In order to cater for the primary needs of the hearing impaired, in 2008 the Training Section of the Human Management Department, started offering an ongoing training program in Costa-Rican sign language, which has resulted in more than 200 people trained in the first four levels, appointed to the different judicial circuits in the country... Licences for the JAWS software have been installed in every judicial circuit. This software turns written text into voice, in order to allow visually impaired persons to read files that involve them.” Peru: “Law No. 29535 was passed on May 21, 2010, officially acknowledging the Peruvian sign language... Furthermore, Law No. 29524, recognized deafblindness as a unique disability. By virtue of Ministerial Resolution No. 0325-2012-ED, dated 1st September, 2012, the Ministry of Education resolved the validation of the alternative communication systems for deafblind persons.”

75 El Salvador: “There are no sign language interpreters to assist hearing impaired persons in court proceedings on a permanent basis; they are hired for specific cases. Moreover, there are no accessible reading and writing methods for persons with visual disabilities.” Chile and Guyana: Experts are hired for cases involving persons with disabilities. Chile demands that “Experts working with persons with disabilities must have the necessary knowledge to relate to persons with disabilities, for their role consists in giving an expert opinion about them, based on their specialised knowledge.”

76 Ecuador: “Pursuant to the law, the Ministry for Economic and Social Inclusion shall finance the services provided by Ecuadorian sign language interpreters for hearing impaired persons who shall so require, in the defence of their rights, legal matters, events and others for the protection of the same and their family members in difficult conditions, as well as the dissemination on Braille documents for the visually impaired.”

77 Ecuador: “CONADIS has created the Office for Disabilities as an affirmative action measure. The unit is made up of legal professionals whose work is aimed towards the enforcement of the rights of persons with disabilities, in order to provide them with equal opportunities for different judicial proceedings; they have acted before the justice administrators in different legal areas (civil, criminal, childhood and family, income, labour, etc.). This work has been ongoing since March, 2007 nationwide; they act both, at the judicial and administrative level to defend the rights of persons with disabilities...”

of the “Office for Disabilities [Procuraduría de Discapacidades].” Some countries have teams of sign language interpreters on a permanent basis.<sup>78</sup> So far, no State has reported to have both tools across the Judiciary branch, but they all acknowledge the need to develop them.

## H. Existence of adequate proceedings

The aim of questions 10-15 of the questionnaire is to map the status quo of the accessibility to judicial proceedings involving persons with disabilities.

The general rule in every State is that when a person with disabilities takes part in judicial proceedings, they are represented by a third party, sometimes known as “guardian”<sup>79</sup> or “tutor,” or a person they know and trust<sup>80</sup> or a body of the Judiciary Power<sup>81</sup>

In all the States surveyed there is some form of legal aid or sponsorship for persons with disabilities offered at no cost by the government, all of which work in different ways. In some countries, there are specific government areas or bodies<sup>82</sup> or

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78 Mexico: “So far, Mexico has 45 Mexican sign language interpreters who are certified according to the Standard for Professional Competence to provide interpreting services in Spanish and Mexican sign language. Paraguay does this by appointment for specific cases.

79 Argentina: The figure of the curator exists, as does the compulsory intervention of the public prosecutor. However, the Civil Code is currently undergoing an advanced amendment process. Costa Rica: “there is no compulsory representation. There is a possibility to have a guardian or tutor, this is a public order figure held by a private person, it is not a government body, but a private person...” Peru: “The judge appoints a guardian for the proceedings or accepts the one proposed by the legally incapacitated person when there is a suit against a legally incapacitated person.” Ecuador: “in judicial proceedings involving persons with disabilities requiring the declaration of legal incapacity or guardianships, the intervention of the Public Prosecutor is mandatory...” Mexico: “There is no specialised prosecutor or public counsel for persons with disabilities... The widespread model is that of legal incapacity, where the judge appoints a guardian to act in the name and on behalf of these persons in all legal acts, including proceedings.” Paraguay and Uruguay; Panama: Despite the fact that it is not clear whether it is a guardian, the figure mentioned is the tutor, and the representation model is in force: “The competent authority shall take the necessary measures to guarantee the care of the persons and their property until the appointment of a tutor, should there not be any lawfully apt persons to comply with this obligation.” Bolivia and Guyana: The representative is appointed by the judge, but in the case of Guyana it may be a lawyer. Chile: representation is mandatory by means of a general guardian.

80 Bahamas: It may be a close friend or a guardian.

81 El Salvador: “The Office of the Solicitor General includes different user service units, among which there is the Family, Childhood, and Adolescence Unit, which is also in charge of catering for the rights of persons with disabilities. For this aim, it comprises different professionals, among which there are family public defence attorneys, solicitors general in family matters, psychologists and social workers who act when there is a need for legal assistance in favor of a person with disabilities in any kind of legal proceedings, in order to determine whether it is necessary to provide legal assistance, in favor of the freedom and autonomy of the persons who are to be declared legally incapacitated, or to extend the legal representation of their parents by reinstating the figure of parental authority.”

82 Ecuador: Apart from the abovementioned Office for Disabilities, there is “...the Office of the General Public Defender, an institution that has lawyers to defend those persons who belong to the priority assistance group as defined in the Constitution” both services are free of cost, and offer both, legal aid and sponsorship. Peru: “the Directorate for Legal Aid and Defence of Victims of the Directorate for Public Defence and Access to Justice, line agency in charge of managing, regulating, promoting, coordinating and supervising the Public Defence service.” Mexico: “The General Law for the Inclusion of Persons with Disabilities sets forth that persons with disabilities have the right to free legal aid and representation for administrative and judicial proceedings. However, it has not been determined which government body or which institution is responsible for the service. To this day, a general system including the three branches of government has not been implemented in terms of free legal aid or representation for persons with disabilities.” Bolivia: “... the assistance provided at the central government level is provided by the Executive Power, mainly through the Ministries of Justice, Education, Labour, Office of the President, Planning, Communication, and Culture. In the Autonomous Departmental Governments, there are Departmental Commissions for Persons with Disabilities (CODEPEDIS), and the Autonomous Municipal Governments have their Municipal Assistance Units for Persons with Disabilities (UMADIS).”

the Judiciary Power<sup>83</sup> in charge of this agency, whether directly or by means of agreements with private organizations<sup>84</sup> or through a general area of government.<sup>85</sup> In some cases, the assistance provided is in the form of active legal sponsorship, whereas in others it is limited to advise<sup>86</sup> for persons with disabilities.

Regarding accessibility to court proceedings involving persons with disabilities, whether they be persons awaiting trial, witnesses or members of the jury, none of the countries have reported to have any kind of special procedural proceedings. Despite the fact that codes of procedure are applicable to the population in general, some specific tools are used when persons with disabilities participate. Some countries apply the Brasilia Regulations<sup>87</sup>, in criminal cases, the defence may request special security measures proceedings, as set forth in the Code of Criminal Procedure,<sup>88</sup> or determine that the person be accompanied by professional lawyers of the CONADIS Office for Disabilities, in order to guarantee the due process at all judicial stages as they may be requested,<sup>89</sup> or use of other resources such as interpreters or the necessary assistance for projected ethnography,<sup>90</sup> to have the assistance of a specialised professional,<sup>91</sup> or, at the criterion of each one of the prosecutors, seeking to guarantee the presence and/or the participation of the person with disabilities, if strictly necessary, for example, by obtaining wheelchairs, interpreters, vehicles to transport them to the place where the proceedings or the investigation are taking place.<sup>92</sup>

To sum up, despite the fact that every State has its own mechanisms to provide support to persons with disabilities, the full adaptation of the rules for judicial proceedings is still pending. A judge's personal interview with the person awaiting trial contributes to the immediacy of justice, and the questionnaire studies whether it is compulsory for the judge to listen to or personally interview persons with disabilities in trials for the declaration of legal incapacity, in order to know their personal preferences.

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83 Argentina: Within the framework of the Judiciary Power, the Office of the Public Prosecutor provides legal aid and in some cases, legal sponsorship. This, added to the fact that "Bar Associations nationwide, and the judicial system in general must provide free legal advice by means of free legal sponsorship." El Salvador: "Integrated Judiciary Centres in Salvador, with a representative of the Courts, of the Office of the Solicitor General and of the General Prosecutor's Office on site, as well as a multidisciplinary team of psychologists and social workers." Brazil: The service is provided through the Office of the Public Prosecutor.

84 Chile: "SENADIS has entered into agreements with public and private entities nationwide, in order to cater for the needs of persons with disabilities. Thus, agreements have been entered into with private institutions, such as Fundación Pro Bono, the Concepción Bar Association, Central University, and the network is expanding. Moreover, agreements have been entered into with the Judicial Assistance Organizations (CAJ) at the national level, which seek to provide assistance to persons with disabilities in need of legal aid, and to train professionals and civil servants in said entities in issues related to disabilities."

85 Panama: The Judicial Body has an Access to Justice and Gender Unit, established by virtue of Agreement No. 806, dated 11 September, 2008" as well as the free legal assistance office for the general public.

86 Uruguay: "The service is provided at no cost by the National Disabilities Program of the Ministry of Social Development (PRONADIS)."

87 Argentina has expressed it in full, but it is deemed applicable by all such states as apply the Regulations, as mentioned above.

88 Costa Rica.

89 Ecuador.

90 Mexico, Argentina, Bolivia.

91 Paraguay.

92 El Salvador.

In spite of the existence of regulations establishing this as compulsory in most States,<sup>93</sup> most of them encourage an interview or at least that the person appear in court, mainly in proceedings for the declaration of legal incapacity or insanity.

The different States take different measures in cases in which the judge or the administrative staff notice some kind of physical or intellectual disability in one of the parties to the case or one of the witnesses. Firstly, the measures taken by the Judiciary Power are directly related to the degree of visibility of the disability in question.<sup>94</sup> The most common measure is determining whether or not the person needs an agent<sup>95</sup>, with the corresponding adjournment of the proceedings until a decision has been made: “In the event it is one of the parties, the proceedings are stopped, in order to determine whether the person is capable to act. Should it be determined that they are not capable, the proceedings are stopped until the person is declared incapable or insane, and a representative has been appointed. Should it be determined that the person has the capacity to act, the proceedings will continue. There is a difference in the case of a witness with a physical, intellectual, or psychosocial disability.”<sup>96</sup> None of the national legislations of the countries in question provide for support mechanisms in favour of persons with disabilities pursuant to Art. 12 of CRPD. In some cases, the “support” requested is that of an expert or a medical doctor.<sup>97</sup> In other cases, the Brasilia Regulations apply.<sup>98</sup>

## I. Persons with disabilities who have been deprived of their liberty

The situation of persons with disabilities who have been deprived of their liberty<sup>99</sup> is a concern due to the difficulties they must face in terms of accessibility, communication, access to medicines and medical treatments, etc.

It is necessary to know what the treatment offered would be for a person with disabilities who has been deprived of their liberty, and whether there are prisons or jails offering special measures or measures of any kind aimed at facilitating the autonomy of persons with

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93 There is no such obligation in Peru, Mexico, El Salvador, Guyana, Bolivia, Bahamas; while it is compulsory in Argentina, Costa Rica, Ecuador, Paraguay, Uruguay, Panama, Chile, and Brazil, and upon request of the person before the High Court in Peru.

94 Question 14 of the questionnaire.

95 El Salvador: “From the moment the request is filed, the Court Clerk notes if there is a person with physical or intellectual disabilities among the parties, and upon request of the judge, the person is referred to the Legal Medicine section, for the extent of their disability to be determined. Thus, the judge determines their exemption or the appointment of a representative.” Guyana, Chile and Bolivia have similar systems based on the perception on site.

96 Costa Rica.

97 Mexico expresses it directly, but in states where the need for declaration of incapacity is previously determined, it is usually the same professionals that make the decision.

98 Uruguay: “Should the legal expert observe some kind of disability in one of the parties, they may request an examination by a person of their trust in order to determine the extent of the same. The applicable regulations are the Brasilia Regulations on access to justice, the directions and measures whereof may be adopted.”

99 Question 15 of the questionnaire.

disabilities, and in such case, what these measures are and how they are regulated.

The lack of special measures aimed at facilitating the autonomy of persons with disabilities in this scenario is the reality of all States, specifically for persons with mental or psychosocial disabilities and persons with sensory disabilities (hearing and visually impaired) and particularly the lack of architectural accessibility for persons with motor disabilities. Some countries have created programs for access to justice, particularly for persons who have been deprived of their liberty<sup>100</sup> or have protocols for the treatment of persons with disabilities in prisons.<sup>101</sup> Other proposed alternatives have been specific centres that work with this population.<sup>102</sup> There is a wide range of difficulties:

- ( i ) Detention centers are not suitable for persons with disabilities.
- ( ii ) Prisons do not have measures or structures suitable for persons with physical disabilities.
- ( iii ) The federal organization gives exclusive powers to the different states, thus hindering the possibility of having homogeneous proposals.
- ( iv ) Lack of information regarding the living conditions of persons with disabilities.
- ( v ) Small, overcrowded facilities.
- ( vi ) Hearing impaired inmates are at a disadvantage for they cannot communicate with other inmates or with the guards, due to the lack of knowledge of sign language.

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100 ADAJUS program in Argentina.

101 Peru: "Presidential Resolution No.411-2008-INPE/P, dated 18 July, 2008, approved the "Human Rights Handbook applied to prisons," which sets forth that persons with disabilities who are deprived of their liberty must be held in environments where they may be able to lead a daily life where they can develop without hindrances. Health services at prisons must give preference to inmates with disabilities, providing continued care in the areas in which they may so require as a consequence of their disability."

102 Costa Rica: "Costa Rica has a Care Centre for Persons with Mental Disabilities who are in conflict with the law, established on 29 July, 2011, which fills an ongoing void in the national prison system". Chile: "The Chilean Gendarmerie: an institution in charge of keeping peace, security, and law enforcement in prisons, has regulations setting forth that the inmate population is to be separated in modules, depending on the characteristics of each inmate. Thus, there shall be a special module for persons with disabilities."

## 5. LEGAL CAPACITY REGIME AND APPLICABILITY OF AGENCY SYSTEMS FOR PERSONS WITH DISABILITIES<sup>103</sup>

Article 12 of the UN CRPD, source of the General Observation of the CEDDIS Committee, by means of which article 2.I.b of CIADDIS was interpreted, sets forth that:

### Article 12 - Equal recognition before the law

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

This article, together with Article 4, demands that the States Parties revise the representation of persons with disabilities in the national legal system, and the incapacity/insanity/ guardianship regulations, which still refer to persons with mental, intellectual, or psychosocial disabilities as “insane” or “demented”, and which set forth the “declaration of legal incapacity” for persons with disabilities to be legally represented. Article 12 of CRPD proposes a decision-making

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103 Questions 31 to 37 of the questionnaire.

based model with support and safeguards, in an innovative effort to acknowledge and recognise the interests of all persons with disabilities.

CRPD recognises the right of persons with disabilities to run their own risks in all areas of life, based on the recognition of their legal personality and their broad capacity to exercise their rights.

CEDDIS has interpreted CIADDIS by means of the General Observation within the framework of Article 12, and requested that the States Parties adapt both, the internal legislation and the regulations referring to judgements to the same. Against this backdrop, and with the aim of providing a guide for the States Parties, the questionnaire was designed to include a series of questions related to legal capacity, in order to have a map of the region within the framework of the General Observation and to contribute to the gradual application of the same.<sup>104</sup>

The third part of the questionnaire looks into the impact of the change in paradigms brought by Article 12 of CRPD on the countries in the region, and its influence on the model according to which persons with disabilities are represented, which is materialized through the legal figure of the declaration of legal incapacity or guardianship.

## A. Opinion about the broad capacity to act conferred by Article 12<sup>105</sup>

Most States have expressed their agreement with the change proposed by the entry into force of Article 12,<sup>106</sup> expressing their need to apply it gradually in order to overcome the existing negative stereotypes regarding the capacity of persons with disabilities to exercise their rights.<sup>107</sup>

The States, within the framework of Article 4 of CRPD and the CEDDIS General Observation, have expressed that the provisions of Article 12 require that the States adapt and

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104 This rapporteurship includes the conclusions transcribed in the regional mapping of the “Trust for the Americas.”

105 Question 31 of the questionnaire.

106 Chile: “We see Article 12 of the Convention with positive eyes, for it confirms the legal capacity of persons with disabilities for the simple fact that they are persons, to the same extent as other members of society; declaring the principle of equality before the law, without prejudice of any physical or psychological circumstances that may affect them”

107 Argentina: “The recognition of the broad capacity to act set forth in Article 12 of CRPD is a step forward in the recognition of the exercise of the rights of persons with disabilities, and it implies a change in the existing representational paradigm.” Costa Rica: “It is the recognition of the autonomy of persons with disabilities, of their rights as human beings, it is a new conception that requires that measures be taken in order to change the underlying law, and to question the figures of insanity and the declaration of legal incapacity. This regulation has changed the traditional paradigm, moving us into a social, human rights based paradigm.” Mexico: “This recognition is necessary to give dignified treatment to the person with disabilities, leaving behind the concept which annulled their legal personality and their capacity for self-determination. This recognition means that the incapacity to act or the substitution of the will of the person with disabilities is a last resort...”

amend their domestic regulations.<sup>108</sup> Thus, they are in the process of amending their domestic regulations, mainly their Civil codes, in order to achieve this aim gradually and firmly,<sup>109</sup> proposing their concrete application in the meantime, as an interpretive supplement to the regulations in force.<sup>110</sup>

Summing up, there is consensus among the States regarding the material application of Article 12. However, they also state the need to make amendments to the domestic law to improve implementation. However, the answers to question 33 of the questionnaire,<sup>111</sup> which make reference to the compatibility of both systems, provide a supplementary map between the provisions of Article 12 of CRPD and the difficulty to perceive the implementation of the same in actual practice.

## B. Proposed legislative and judiciary measures for the full application of Article 12 of CRPD<sup>112</sup>

Apart from this consensus regarding the enforcement of Article 12, there is a need to keep making adaptations that imply changes in the interpretation of laws and regulations, and good practices to improve the synergy of the legal operators with the social model of disabilities represented in the UN Convention. Most States propose the amendment of their Civil Codes.

The States have expressed the need to gradually apply some measures to facilitate the efficient application of the model proposed by Article 12, expressed as priorities, to wit:

### B.1 LEGISLATIVE MEASURES

- (i) Adaptation of the relevant codes, mainly civil and criminal, prioritizing the review of articles within the framework of Article 12 of CRPD and the General

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108 Peru: "However, capacity to act, in the case of certain kinds of disabilities requires certain adaptations and amendments which are necessary for the person with disabilities to be able to express their will, and thus exercise their rights on an equal footing with the others. There are no regulations in the Peruvian Civil Code in force, which rule the implementation of the adaptations and amendments mentioned in order to guarantee the exercise of the rights of persons with disabilities... to assess and implement the necessary measures to guarantee the exercise of the person's legal capacity, in order to correct the existing substitution model for decision making." Bahamas: "Special measures must be taken in order to guarantee the enforcement of Article 12 of CRPD."

109 Mexico: "However, there are significant material challenges in the design of the new support system required for its actual application, as well as in the training of those working in law enforcement, who must guarantee said enforcement. Likewise, there is a challenge in making sure that the change in paradigms will not mean damages or impairments in the legal safety of bona fide third parties."

110 Uruguay: "It is necessary that it be enforced by the legal system, thus, law enforcement officers and persons working in the area will have a power tool to enforce the rights given by the law." Bolivia: "It is significant, for disabled or not, all persons must be equally considered as such before the law, and in the case of persons with disabilities, they must receive preferential treatment on an equal basis; in case the States Parties reaffirm that persons with disabilities have the right to be recognized as legal persons, in agreement..."

111 See section 4.c of this Rapporteurship.

112 Question 32 of the questionnaire.

Observation of CEDDIS/RES1. I-b/11 dated 4 May, 2011. <sup>113</sup>

- (ii) Adaptation of the Codes of procedure. <sup>114</sup>
- (iii) Revision and amendment of such general laws, including those on disabilities, as set forth that persons with disabilities must exercise their rights through a legal representative at all times. <sup>115</sup>
- (iv) Creating a support system by law: Implementing support policies for persons with disabilities as provided for in Article 12 of CRPD, by law. <sup>116</sup>
- (v) Adapting subnational law, including subnational constitutions, to the CRPD regulations. <sup>117</sup>
- (vi) Eliminating regulations or laws which make a person unfit for a position or function due to their disability. <sup>118</sup>

## B.2 JUDICIAL MEASURES

- (i) Judgements must interpret the local laws and codes within the interpretive framework of international law, mainly that of human rights. <sup>119</sup>

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113 Argentina; Peru: "The Peruvian legislation does not provide for the implementation of adaptations or supports to allow the person with disabilities to exercise their capacity to the fullest. It is therefore necessary to amend the Peruvian Civil Code." Ecuador: "A proposal is under way for information to the Peruvian legislative body, for the amendment and redefinition of the expressions used in the Civil Code, particularly as refers to legal capacity, as is provided for in Article 1462 and following articles, which state: "All persons shall be legally capable, with the exception of those who have been declared incapable (...)." Said incapacity must be determined by means of a legal process, for otherwise, all persons are free to exercise their rights and benefit from them... (despite the fact that) Ecuadorian law does not restrict full legal capacity based on disability... The CONADIS Office for Disabilities insists on the need to safeguard this assisted model, preventing the person from being declared legally incapable for the simple fact of having a disability. On the contrary, it has tried to make sure that persons with disabilities are not limited in their ability to make decisions, and that they are declared as legally incapable only in those cases in which their disability is determinant and prevents them from managing or deciding by themselves." Mexico: "Regarding legislative measures, the Federal Civil Code must be revised, as well as the civil codes of the 32 federal units and the corresponding codes of procedure, which govern the declaration of incapacity and the appointment of guardians." Guyana agrees with the need to make amendments to the legislation, and Bolivia mentions the need for a thorough revision of the internal legislation, prioritizing the capacity to act: "In the sphere of civil law, the laws which govern the declaration of incapacity and guardianship must be a priority for the analysis and amendment of the law."

114 Argentina.

115 Argentina.

116 Mexico's proposal recommends the drafting of an international legal document to implement supports.

117 Argentina.

118 Bolivia.

119 Argentina; Mexico: "From the jurisdictional point of view, provisions annulling, replacing or altering the decision of a person with disabilities may be removed, establishing controls for the actions of guardians or tutors, mandating that they act in the manner prescribed in CRPD. This is possible for it is stated in Article 1 of the Constitution, after its June 2011 amendment, which acknowledges the ex-officio conventionality control, the interpretation of the law pursuant to international conventions, and the pro persona principle in the application of the law."

- (ii) Reducing processes of insanity or declaration of legal incapacity until their complete elimination, and replacing them with the recognition of the broad capacity and/or a support system with safeguards.<sup>120</sup>
- (iii) Legal measures for the interpretation of the regulations in force, within the framework of Article 12: Strengthening the legal presumption of capacity to act of persons with disabilities, based on the text of CRPD, and maintain a rigid and restrictive interpretation of the causes for legal incapacity, as well as a standard of evidence based more on elements which take into account the social environment and the particular circumstances of every person, and not only the medical diagnosis.<sup>121</sup>

### B.3 OTHER PROPOSED MEASURES

- (i) Training: It is necessary to include the experts in this training, so that they know what content should be included in their reports, which acts a person may be capable of performing or not, thus preventing reports that in general limit a person's capacity to act in all acts.<sup>122</sup>
- (ii) Implementing a care protocol for persons with disabilities, establishing practices aimed at providing supports and safeguards to help persons with disabilities in the decision-making process. These could include judges, government agents and care institutes for persons with disabilities.<sup>123</sup>
- (iii) Panama has proposed, along the lines of the last paragraph of Article 12, the adaptation of the banking regulations of the Bank Superintendence, the adaptation of the insurance regulations of the insurance superintendence, and the adaptation of domestic regulations for admission to public and private universities.

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120 Argentina; Costa Rica: "It is necessary to amend the law in order to phase out the figure of guardianship, and to implement laws in line with the Convention, such as those proposed in the draft Personal Autonomy Bill, which is being considered in Parliament, drawn with the participation of different actors, such as representatives of the Judiciary and Legislative Powers, Ombudspersons, National Rehabilitation and Special Education Council, National Senior Citizens' Council, National Psychiatric Hospital, and Civil Society with Disabilities."

121 Mexico's proposal. It is supplemented with "Legislating and issuing jurisprudence criteria restricting the intervention of third parties, proportionally to the need of every disabled person, and to the act they intend to perform. It will be necessary to design a support and safeguard system, taking into account the experience of other countries which have already adopted this model."

122 Costa Rica.

123 Mexico.

## C. Scope of the compatibility of the declaration of legal incapacity or guardianship and Article 12 of CRPD

The States are required to give their opinion on the compatibility of the declaration of insanity/legal incapacity and guardianship (as a representation system for decision making) with CRPD<sup>124</sup>. The issue also involves an observation of the synergy between the legal model in force in the region in terms of capacity and that set forth in Article 12 of CRPD, which establishes a new human rights model and the relationship between said models and the current functioning if these concepts in the perception of what is possible.

Most States use different arguments to express the incompatibility of both models. However, the supporters of the representation model for persons with disabilities seem to share opinions. For example, those who think the models are incompatible, claim that the guardian does not only represent the person with disabilities, but also annuls their will,<sup>125</sup> acknowledging pre-existing drawbacks of the structural kind which make it difficult to apply the human rights model: “The problem is that there has been a significant change in the formal component of the law, but not in the structural one, given the “old fashioned” mentality of the judges, which is reflected in their judgements and in the proceedings in general, for, despite the Convention, insanity is regarded as civil death.”<sup>126</sup> Those who agree with this line of thought also claim that “It is not compatible, for that model of legal representation tends to replace, in whole or in part, the will of the person who has been declared legally incapable, at the expense of the principles of dignified treatment, individual autonomy, and independence of the person with disabilities.”<sup>127</sup> It is furthermore stated that: “Despite the fact that the figure of the guardian was created as a mechanism to protect persons with disabilities, these figures do not reflect the regulatory progress reflected in human rights instruments ratified by Chile. It is therefore necessary to revise the domestic regulations on the issue,”<sup>128</sup> understanding as well that any and all decisions must be made with a prior consultation to civil society.

Other States consider that the protection of property or estate is no reason to keep up the representation model: “Although on some occasions, the possibility of making decisions regarding property or obligations in general, is naturally and functionally limited for persons with mental disabilities, there is no reason to justify their complete loss of autonomy... For until now, despite some regulatory progress in Bolivia, as described above, persons with disabilities have not been allowed to exercise their civil, political and economic rights.

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124 Question 33 of the questionnaire.

125 Costa Rica

126 Costa Rica.

127 Brazil, Paraguay and Uruguay also deem both models to be incompatible.

128 Chile.

Therefore, assisted decision-making is the option to replace the system in force, for it is aligned with the Convention on the Rights of Persons with Disabilities, and thus respectful of Human Rights.”<sup>129</sup>

Other States have found a certain degree of practical compatibility between both models, conditional upon the need to materialize changes: “...there is a certain degree of compatibility, but progress must be made in the formulation of bigger safeguards to guarantee the exercise of a legal capacity that respects the rights, the will and the preferences of the persons on an equal footing.”<sup>130</sup>

Another view states that the declaration of legal incapacity or the guardianship are only valid when decided by a court with the intention of protecting the person with disabilities<sup>131</sup> or because practice has shown positive results<sup>132</sup> and other states understand that this interpretation arises from the UN Convention itself.<sup>133</sup>

Some States have proposed that the figure of legal incapacity or guardianship not be eliminated, rather that it be maintained for very specific cases: “The path to be taken is not the elimination of the figure of guardianship, for if there are cases in which it is necessary to appoint a guardian, the complete impossibility to manage property may so require, for example. There should be laws establishing more control by the justice system for those cases in which a guardian has been appointed, and to make sure that said guardianship is actually necessary, based on reports, not only issued by professionals appointed by a civil judge, whose reports shall entail civil or criminal responsibilities, but also to have more control and information regarding the situation of the person and their environment, in order to determine the need for said declaration.”<sup>134</sup>

Lastly, we have seen that between the positive acceptance of the model proposed in Article 12 and the perception of its material application, there is still substantial margin for an approach in stages, as well as to overcome the inertia of decades of validity and consolidation of the model based on legal representation, by means of the declaration of legal incapacity or guardianship, which is accepted in many cases as a “successful protection model” for persons with disabilities.

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129 Bolivia.

130 Ecuador.

131 Panama: “In our country only by operation of law do we conceive judicial declaration of legal incapacity, tutorship and guardianship as a system of representation in the person's decision-making, because they were declared by means of a judicial procedure in order to represent the rights of persons with disabilities or sick persons, but it is quite limited.”

132 El Salvador: “... for, until now, it has been fruitful to guarantee that persons who have been declared legally incapable will have a guardian to follow up and timely follow-through for property administration”.

133 Guyana: “The Convention allows for the full support or the replacement of decision-making with supports which set forth that decisions will be made in the name of a person, only in such cases as those agreements are necessary, as a last resort and subject to the relevant safeguards. Article 12 obviously allows for the substitution and to support decision-making with support under adequate circumstances and pursuant to the law.”

134 Ecuador, answer to question 34 of the questionnaire.

## D. Comprehensive and procedural amendments to phase out the figure of legal incapacity and/or guardianship: How and with whom

Question 34 of the questionnaire requires the States to state, in case it should be necessary to make comprehensive and procedural amendments, how they think the process of phasing out legal incapacity and guardianship towards a broad capacity model as set forth in Article 12 of CRPD should be carried out, determining who (key political and technical actors) should take part in the design of proposals to any of these effects.

The proposals are as follows:

### D.1 COMPREHENSIVE AND PROCEDURAL AMENDMENTS

- (i) Amendments to the National Constitutions of the States in order to adapt them to the Convention.<sup>135</sup>
- (ii) Need to promote gradual and constant amendments to the legislation, starting with the basic codes, mainly the civil code.<sup>136</sup>
- (iii) The changes may be implemented gradually, considering the starting point: “The change must be carried out gradually and with clear directives.”<sup>137</sup>
- (iv) There still exist appointed guardians, legal situations created in the previous model. There is also a lack of infrastructure to fully operate the supports and safeguards to be applied by virtue of the new model.”<sup>138</sup>
- (v) The education of experts is key, for it is them who define which acts a person can and cannot perform.<sup>139</sup> Within this same framework: “Another interesting change is that there be an amendment to make the home or office visit binding.”<sup>140</sup>
- (vi) Analysing the legal framework in force for the legal incapacity procedure (civil, procedural civil, criminal and criminal procedural) working in coordination with the executive (federal and state), legislative and judiciary powers.

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135 Costa Rica: “...amending the Political Constitution which currently sets forth in Article 90 that citizenship is suspended for “court ordered declaration of legal incapacity,” that the report states that it is a “constitutional unconstitutional “ (sic) provision.

136 Argentina.

137 Uruguay: “The change process must be slow, and depending on each country's legal structures, there must be an agreement on the part of the majority of the people involved, such as experts and non experts in the field. The actors must be lawmakers, lawyers, social workers, etc.”

138 Mexico.

139 Costa Rica.

140 Costa Rica.

- (vii) Need for a specific budget for training and infrastructure.<sup>141</sup>
- (viii) Public campaigns: “Designing a dissemination campaign on the topic of the rights of persons with disabilities, particularly on legal capacity. This requires the cooperation of the executive power and national and international Human Rights protection agencies.”<sup>142</sup>
- (ix) The amendments to the disability legislation in force must be made both at the substantial and procedural levels: “Linguistic revision of inadequate terms, reform of the guardianship system, institutional guardianship, vigilance and control, creation of an efficient support system, thorough revision of the Civil Code, family and inheritance law, participation of persons with disabilities in legal acts and transactions, competence of judges and courts, to the right of the person presumed to be incapable, of the content of the judgement amending the person's capacity, etc.”<sup>143</sup>
- (x) Need to improve the relationship between justice and citizenship: “In order for it to enter fully into force, there must be basic mechanisms and measures in order to improve the relationship between justice and citizenship, so as to guarantee the legal safety of all the people involved in the issue of justice.”<sup>144</sup>
- (xi) Fight discrimination and encourage independent life: “Legal accessibility must not be limited to the elimination of the abovementioned barriers, because it would be useless. If there still remain regulations which discriminate based on disability, on the other hand, legal accessibility will imply the adaptation of domestic regulations to the principles of the new paradigm, the Convention on the Rights of Persons with Disabilities and the philosophy of the Independent Life Movement.”<sup>145</sup>
- (xii) Active participation of the Civil Society and the State in legislative changes: “Any amendment of the law that may be proposed to this respect, must be necessarily based on the results obtained from consultations to the civil society, regarding the participation of persons with disabilities and related institutions, as well as the opinion and the vision of all government bodies involved in the making of an agreed project, which will represent the needs and the necessary adaptations to arrive at an optimum situation that respects the rights of persons with disabilities.”<sup>146</sup>

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141 Peru: “It is also deemed necessary to have timely and efficient budgets available to hire specialized professionals, as well as to have service infrastructure, medicines, and community assistance available.”

142 Mexico. Guyana made the following proposal: “If it is necessary to make substantial and procedural reforms, the best way to phase out guardianship or the insanity model is through promotion and the support of self-promotion, using the main mechanisms to protect the best interest of the person, replacing a system of supported decision-making with traditional guardianship (acknowledging the need for a transition between both phases).”

143 El Salvador.

144 Bolivia.

145 Bolivia.

## D. 2 KEEPING THE FIGURE OF LEGAL INCAPACITY OR GUARDIANSHIP IN FORCE

- (i) Keeping the figure of legal incapacity or guardianship in force, while regulating a proceeding aimed at determining the circumstances of every particular case: “It is necessary to legislate more control of law enforcement for those cases in which guardianship has been declared, and for those cases in which it is still in process, making sure that there is a real need for said guardianship, with previous reports by professionals appointed by a civil judge, whose reports shall entail civil or criminal responsibilities, but also to have more control and information regarding the situation of the person and their environment, in order to determine the need for said declaration.”<sup>147</sup>
- (ii) Keeping the figure of declaration of legal incapacity and guardianship, but reinforcing the guidelines: “We do not deem it necessary to eliminate the figure of guardianship, it must be reinforced pursuant to the guidelines for legal capacity, and the federations of associations of parents of persons with disabilities and other organizations that fight for the rights of persons with disabilities and the actors to approve the proposals must take part in the design of the proposals, through legislative systems consisting of deputies and key experts who would provide guidance such as psychologists, lawyers, and other specialists.”<sup>148</sup>

Concluding, the full application of Article 12 of CRPD does not appear in the region as a consolidated alternative to the representation model, in relation to which there currently seems to be a certain degree of consensus to keep it limited to specific cases.

## E. Legislative provision of supports<sup>149</sup>

Within this framework of proposed reforms, the questionnaire asks the States if their courts of justice provide for procedures to “adapt the legal capacity to act,” (or of “provision of supports for decision making”), within the framework of Articles 12 and 13 of CRPD, and whether they have received the training set forth in the second paragraph of Article 13 of CRPD.<sup>150</sup>

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146 Chile.

147 Ecuador: “It is the organisations of persons who care for persons with mental or intellectual disabilities that must design and take part in the proposals, so that adequate and effective safeguards be given to the exercise of legal capacity, in order to prevent abuse when granting tutorships or guardianships, so as to allow to guarantee the right of persons with disabilities, on an equal footing with others.”

148 Panama.

149 Question 35 of the questionnaire.

150 Article 13 sets forth that: “Access to justice: 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including investigative and other preliminary stages.

## E.1 ADAPTATION OF PROCEDURES

In some cases, amendments to the legislation have influenced court decisions: “The ” substitution decision-making” model (tutoring or guardianship) under the Civil Code was moderated by virtue of Mental Health Law No. 26.657 dated December, which set forth a model very similar to Article 12 of CRPD. Several of those provisions have been expressed in the new proposed Civil Code, which added a new article (152 ter.), allowing judges to adapt their judgements as much as possible to a scheme which reduces institutionalization, removing their power to institutionalize (conferring this power to an interdisciplinary team), and judgements have been gradually adapted to this law and to law No. 26.378.”<sup>151</sup>

In other States this regulatory provision arises from the national constitution,<sup>152</sup> as well as from basic documents used as foundation for the training programs.<sup>153</sup>

In other cases, the adaptations have not been provided for by law, which does not mean that they are not carried out pursuant to the supralegal status of the Convention.<sup>154</sup>

Despite the fact that the federal structure of some States is a hindrance to the implementation of nationwide training programs,<sup>155</sup> it is not an obstacle. Some States use the Brasilia Regulations as a source for their training courses,<sup>156</sup> others have made the procedural adjustments from the jurisdictional point of view.<sup>157</sup>

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2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

151 Argentina.

152 Ecuador: “The Constitution of the Republic of Ecuador, provides for the adoption of affirmative measures promoting actual equality in favor of the holders of rights in conditions of inequality. (Art. 11.2)”. The Argentine Constitution contains affirmative actions in Article 75 since 1994.

153 Ecuador: “After the events that led to its issuance, the Agenda for Equality in Disabilities stated that justice services do not have the necessary technical adaptations or support for persons with disabilities; Lack of a specific budget to cater for the special needs of persons with disabilities nationwide; Lack of awareness of disability-related issues among the human resources of the justice system; The topic of disability is not addressed in the education of justice-related professionals; Lack of vigilance, control and enforcement of the compliance with policies, legal framework, and legal services provided to persons with disabilities; and lack of dissemination and promotion of the rights of persons with disabilities, hinder their access to justice. In 2009, the employees and civil servants of 41 Social Rehabilitation Centres were trained, with a focus on medical staff, lawyers, social workers and prison guard representatives.”

154 Costa Rica: “They are neither provided for in the Civil Code of Procedure, nor in the Family Code; but this does not mean that it cannot be done... The Judiciary Power has carried out activities to educate their personnel, seeking to eliminate barriers, mainly in terms of attitudes and communication, which have been the responsibility of the Judiciary School, Public Training Units, Public Defence, and the Judicial Research Body.”

155 Mexico: “Federal courts have not established procedures by virtue of Articles 12 and 13 of CRPD. Given that there is a continental system, the courts do not establish procedures or general rules, except for such cases as are regulated by law. This does not prevent them from issuing procedural or fundamental decisions which respect international human rights law. In any case, they translate in separate solutions, adequate for each case, but which do not mean the regulation or the establishment of a procedure. There are legal criteria regarding the respect of the right to a hearing in the proceedings leading to the declaration of legal incapacity, as well as those related to the right to assistance... However, the Judiciary Power of the Federation plays a very significant role in determining the legal criteria to determine which legal provisions and court decisions respect CRPD, as well as the protection of human rights as required by the Constitution.”

156 Uruguay: “The prescribed procedures are those regulated under the Brasilia Regulations on Access to Justice”.

157 Panama: “The legislation and the agreements approved by the Supreme Court of Justice provide for adjustments in procedures in order to facilitate the carrying out of effective functions of persons with disabilities as direct and indirect participants.” Bolivia: “The Courts of Justice have the corresponding proceedings to adapt the legal capacity to act, based on experts' reports, and following the prudent and reasoned judgement of the Judges. There are no official training plans, but the staff of the judicial body are progressively trained through stand-alone initiatives.”

## E.2 TRAINING UNDER ARTICLE 13, PARAGRAPH 2 OF CRPD

Some States have specific training programs in force for the criminal area: "... it has been given by the Federal Police University for several years, and the National Prison Service is currently training medical doctors and prison staff to improve their relationship with persons who have been deprived of their liberty, through the ADAJUS program and others."<sup>158</sup>

Another commonly used methodology are specific trainings through workshops with the communities<sup>159</sup>; some States are working towards training personnel for the implementation of ICF.<sup>160</sup>

Other States approach training in terms of finding agreed general criteria: "Judicial and administrative training is provided for the staff of the Judicial Body on equitable justice enforcement. There are even nationwide programs for the communication or dissemination of justice, which adapt the necessary tools for a better understanding of access to justice for all citizens with no exceptions, and are easy to understand for persons having some kind of disabilities; and the work may even be done at their homes."<sup>161</sup> Other States use stereotypes which create discrimination: "There are procedures that offer a proposed exercise of the legal capacity of measures to support decision making within the framework of Articles 12 and 13 of CRPD. It should be noted that the 2010 Law on Persons with disabilities also defends constitutional rights, particularly the clauses against discrimination, in order to protect citizens from being discriminated against due to their disability."<sup>162</sup>

To sum up, most States offer training. Some training originates from a normative mandate or as part of the curricula of law schools, particularly regarding supports or in other cases combining work with the stereotypes that give way to discriminatory behaviours against persons with disabilities.

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158 Argentina.

159 Costa Rica: "the Commission for Access to Justice has developed workshops aimed at the civil population with disabilities in coordination with the National Council for Special Rehabilitation and Education, and the Justice and Gender Foundation..."

160 Peru: "Despite the fact that it is true that the Peruvian Judiciary Power does not provide for procedures to adapt the legal capacity to act, we must note that the Executive Power has been working on a system of articulated multi-sector interventions that will allow for the implementation of ICF, based on the conceptual framework for disability set forth in the Convention, and to use it as a basis to develop policies to respond to the actual needs of persons..."

161 El Salvador.

162 Guyana.

## 6. GOOD PRACTICES FOR THE REPLACEMENT OF THE REPRESENTATION MODEL IN ORDER TO ADAPT IT TO THE BROAD CAPACITY MODEL WITH SUPPORTS AND SAFEGUARDS AS PER ARTICLE 12 OF CRPD<sup>163</sup>

In the answers given in question 36 of the questionnaire, the States provided examples of good practices to replace the representation model or use it, while limiting it to particular cases. Some examples of these practices are as follows:

- (i) Mass campaigns aimed at changing negative stereotypes affecting persons with disabilities and their rights.<sup>164</sup>
- (ii) Mainstreaming disability in all government programs and policies.<sup>165</sup>
- (iii) Promoting the elimination of stereotypes and the elimination of harmful practices affecting civil servants.<sup>166</sup>
- (iv) Disseminating and raising awareness among judges about the need to reinforce the presumption of legal ability to act in their criteria, in favour of all persons with disabilities, as well as all the implications of said reinforcement when interpreting the law.<sup>167</sup>
- (v) Listening to the persons (or associations of persons) with disabilities<sup>168</sup>.
- (vi) Working with persons with disabilities and their families in order to accompany the changes in paradigms towards the concept of autonomy and independent life, that is affected by the abovementioned practices across the region.<sup>169</sup>

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163 Question 36 of the questionnaire.

164 Argentina. Mexico has also proposed: "Disseminating information about the rights of persons with disabilities aimed at the general public, through public and private media."

165 Argentina: Pursuant to Article 4 of CRPD, to "Strengthen the functions of Observatories on Disability in order to turn them into cross-cutting points of reference for government policies."

166 Argentina: "Work for the elimination of harmful practices and the perceptions of employees of the three powers of the state, which usually exceed the regulations in force and become customary rules, by training those who work for the state in disability-related areas."

167 Mexico.

168 Uruguay.

169 Argentina.

- (vii) Discouraging and limiting safety measures, mainly prolonged hospitalizations, which affect persons with disabilities and those who suffer from mental health issues.<sup>170</sup>
- (viii) Limiting the declarations of legal incapacity to extreme cases within the framework of government institutions (legal units) that take an active role in defending the rights of persons with disabilities.<sup>171</sup> It is also proposed: “To identify the kinds of acts that require that more attention be given to the support and safeguards system, so that the institutions involved in said acts may receive priority training and design relevant care protocols.”<sup>172</sup>
- (ix) Raising awareness through education by including the rights of persons with disabilities and diversity in the study plans.<sup>173</sup>
- (x) Training that is not only aimed at civil servants<sup>174</sup>, but also at the private sector.
- (xi) Foster immediacy and dialogue between the Judiciary Power and persons with disabilities in judicial proceedings.<sup>175</sup>

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170 Peru: “The lack of recognition of the right of persons with mental disabilities to make decisions regarding their own lives may result in their institutionalization, that is, to the commitment of the person in a mental health facility against their will, and on a permanent basis, violating their right to live in freedom and in a community. We therefore deem it necessary to promote the elimination of the substitution model for decision making, for it is incompatible with the purpose of the Convention. Therefore, the only valid measure should be hospitalization and not the commitment of persons with mental disabilities to an institution in cases of extreme emergency, i.e. cases of loss of consciousness or crisis, and this commitment must be revised on a constant basis and be temporary... In Peru, a Swedish model is used, based on a system of homes with tutors where persons with disabilities share a home with other persons with mental disabilities with the support of a specialized professional. It has proved a successful experience which has allowed persons with disabilities who were institutionalized in Larco Herrera Hospital to live independently in a home located in the Pueblo Libre district in Lima.”

171 Ecuador: “A clear example mentioned earlier is that related to the implementation of an Office for Disabilities within CONADIS, a legal unit that, prior to the support required to proceed to the declaration of legal incapacity of persons with disabilities, undertakes to a thorough study of the case with lawyers and social workers, in order to determine whether there is a real need to declare legal incapacity or to appoint a guardian.” On this same subject, Mexico proposes as follows: “Interpreting the provisions governing the demonstration of the causes of incapacity in a restrictive manner, based on the model and on the definition of disability as per CRPD... Restricting the representation powers arising from tutorship to cases in which it may be strictly necessary, depending on the kind of act to be performed, as well as on the specific situation of each person with disabilities.”

172 Mexico.

173 Mexico.

174 Mexico: “Training private sector staff”.

175 Chile.

## 7. TRANSITIONAL MEASURES

Question 37 of the questionnaire requires the States to report, bearing in mind that CRPD is a human rights convention, whether they deem it necessary to adopt a transitional solution while the regulations in force are being revised, or whether they understand that work must be done immediately to change the paradigm, and in this case, what measures must be taken for the time being, and in which particular cases.

This question is directly related to the two previous ones (No. 35 and 36). Following the same scheme, we will divide the answers in two sets: one which supports the option of revising the existing legislation, and the other one which supports the idea of moving from a representation model to a human rights model.

### A. Proposed transition prior to the application of the model set forth in Article 12 with a revision of the legislation in force

- (i) Some States propose the adaptation of the domestic legislation to the Convention: “Significant progress has been made in the country regarding the adaptation of national legislation to the UN Convention. Said progress is reflected in the Constitution passed in October, 2008. Likewise, we are in the process of passing a new law on disabilities, which includes the provisions of the Conventions in the Human Rights sphere.”<sup>176</sup>
- (ii) Others bring up the need for a gradual process to amend the domestic law prior to the application of the model proposed by Article 12: “It is indeed appropriate to adopt a transitional solution while the new laws which incorporate the model set forth in the Convention are passed. This transitional stage involves the adjustment of the tutorship systems in force in Mexico, interpreting them in the light of CRPD, bearing in mind the degree of institutional development of each place, and that the different rights, even those of bona fide parties, are guaranteed.”<sup>177</sup>
- (iii) Other States deem it necessary to begin preliminary legislative studies: The Convention on the Rights of Persons with Disabilities is part of the national legal system, and it is thus relevant to carry out the necessary legislative studies to allow for its reconciliation with the legal provisions in force.”<sup>178</sup>

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176 Ecuador.

177 Mexico.

178 Chile. Bahamas shares a similar criterion: “It would be ideal to formulate a provisional solution while the regulations in force are being revised.”

## B. Immediate application of the model provided for in Article 12 of CRPD

- (i) “The representation-based system for persons with disabilities through guardianship and declaration of insanity has been very strong for decades. This has not only had an impact on the regulations in force, but also on the mentioned practices (for instance, requesting guardianships in order to be entitled to social, health, pension rights, etc.). This system is based on the state, as well as on the professionals, the institutions, the persons with disabilities themselves, and their families. Work must be done immediately in order to move towards the paradigm proposed in Article 12 of CRPD and the General Observation of CEDDIS.”<sup>179</sup>
- (ii) Other States have stated that the model proposed in Article 12 must be applied immediately in all cases, due to the hierarchy of the Convention in their internal legal system: “It must be applied immediately due to its status in our legal system. Costa Rica deems the Convention as binding and having a supra constitutional status.”<sup>180</sup>
- (iii) For other States, the immediate application of the model proposed in Article 12 must be accompanied by the corresponding training, widespread dissemination and promotion of rights: “The provisions that violate the recognition of the capacity of persons with disabilities, when applicable must be amended immediately... Likewise, a system must be put in place for the dissemination and the promotion of the rights of persons with disabilities at the national level, with the participation of Universities, civil society, social volunteering programs, health and education networks, private sector. Public and private institutions and particularly the community and their political and social representation organizations.”<sup>181</sup>
- (iv) The transition towards the social model was also considered unnecessary, what matters is rather to understand said model: It is not necessary to provide a transitional solution, it is necessary to raise awareness and to create the capacity to

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179 Argentina proposes the immediate adoption of the paradigm set forth by Article 12, applying both, CRPD and the General Observation, but acknowledges that some issues need to be approached gradually due to the long period of validity of the representation model: “The above notwithstanding, we believe that it is necessary to have a transitional period (as per Article 4 of CRPD), that will be accompanied by what is proposed in the answer to question 36. The first step is to phase out guardianships and insanity as a way to “protect” persons with disabilities, and to replace them with legal tools based on supports and safeguards, which in most cases can be done immediately, taking the broad capacity to act as a rule. That is to say, to work towards breaking the assumptions that lead civil servants and judicial actors to consider persons with disabilities a priori, as persons who need to be represented by third parties, based on the fact that they are considered incapable of acting by themselves.”

180 Costa Rica.

181 Peru.

understand what disabilities consist of and the regulations passed in our country; this will allow us to change the paradigm and apply the Convention on the Rights of Persons with Disabilities”<sup>182</sup>

- (v) El Salvador is the only country that reported an exception to Article 12 of CRPD, explaining the following in their answer to the questionnaire: “It is not necessary to adopt transitional measures, our country is subject to the reservations under which the Convention and its protocol were accepted, unless the proceedings set forth in paragraph 1 of Article 34 are followed.”

These two options summarize the position of the States that explained their opinions, with the exception of those that did not express a precise position or do not have a solid one.

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182 Uruguay: “But currently the most received specialized doctrine has found that there is no stronger argument to prove that a right is inherent to the human personality than the fact of it being recognized—with some variations—in one, two, or more international treaties ratified by the Republic. Therefore said international regulation helps overcome doubts and alleviate the problems which used to arise from the application of Article 72 of the National Constitution.”

### III. CONCLUSIONS OF THE RAPPORTEURSHIP

As the main conclusion, we would like to make reference to one of the main elements of the questionnaire: the scope of the representation model for persons with disabilities through agents such as guardians or tutors, and the actual validity of the social human rights model proposed in Article 12 of CRPD, which sets forth that persons with disabilities are always able to exercise their own rights, with support and safeguards when necessary. The representation model still prevails strongly in the region, through guardianships or insanity, which are deemed to be a way to protect persons with disabilities. Nevertheless, the expression of interest to apply the model proposed in Article 12 has been positive, despite the fact that there is still a belief that either both models may coexist by limiting representation to very specific cases, or there must be a transitional period towards the model proposed in Article 12.

The remaining general conclusions are presented below:

1- The Missions of the 34 States Members of the OAS were notified of the questionnaire by the Secretariat of the CEDDIS Committee, despite the fact that only 20 of them have signed and 18 of them have ratified the CIADDIS . To the effects of this Rapporteurship, the cutoff date for information is January 31, 2013.

2- A total of 14 states submitted their responses to the questionnaire. Mexico, Panama, Costa Rica, Ecuador, Peru, Paraguay, Uruguay, Argentina, El Salvador, Bolivia, Chile, Brazil, Guyana and Bahamas.

3- All of the States that answered the questionnaire have signed and ratified both conventions, with the exception of Guyana, that has not signed CIADDIS and still has not ratified the UN Convention, and Bahamas, that has not signed either convention. Brazil is the only country that has given CRPD the status of constitutional amendment, and El Salvador has a reservation to Article 12 of CRPD.

4- Until the cut-off date, the Brasilia Regulations were of mandatory application in half of the countries that answered the questionnaire.

5- Most States have rules protecting persons with disabilities in their access to justice, or the general public, even prior to the entry into force of CIADDIS or CRPD.

6- The different States determine disability in different ways. However, there is a common

axis where medical classifications of disabilities prevail, known as the International Classification of Functioning (ICF), only used by half of the States: Five States have reported that they use ICF to determine disability, two of them with CIDDIM, two others use CIE10, and in the rest disabilities are determined by other means. On a positive note, there arises from the questionnaires that most of the States that are currently not applying ICF have stated that they are in the process of training and applying the classification.

7- No state has reported to have a definition which clearly states the concepts of mental and intellectual disability in their domestic regulations, and no country has a definition for psychosocial disability. However, some definitions of disability have been reported, most of which are based on a model that is in line with the methods used to determine disability mentioned above, and, in general, comparing it to parameters of “normality.” Some States have specific mental health regulations or incorporate the concept of mental health in other general rules. To sum up: a) The concept of “disability” has been defined in every State, b) definitions depend on the manner in which disabilities are determined, within the framework of the medical model and with “normality” as a parameter and in most cases there is no distinction between mental (or psychosocial) disability and intellectual disability, and c) the concept of mental health is growing and being developed in the region.

8- Some States report having detected a variety of stereotypes, circulating images or negative perceptions which affect persons with disabilities in different areas, including the judicial area. The main stereotypes identified by the informers are: a) deeply-rooted presence of the medical rehabilitation model; b) inadequate recognition of the capacity to exercise rights; c) lack of awareness of the value and respect for diversity among humans; d) the invisibility of persons with disabilities; and e) standardized judicial proceedings and lack of official studies on these negative practices.

9- Training of judicial officials is actively promoted in the region, through activities carried out within the Judiciary Power or jointly with programs or bodies of the Executive Power (mainly the CONADIS or similar bodies). It is done in the form of programs together with CONADIS, mainstreaming of the issue in law schools, specialized workshops, training sessions within the Judiciary Power, courses with a focus on accessibility and in other cases it is treated within other courses in a generic manner. Most States propose new training options for the future.

10- The States reported that the main content of the training should be the study of both Conventions (UN-OAS) on disability. There is specific reference to: a) awareness raising and acknowledgement of the will of persons with disabilities and of the social disability model; b) fight against negative stereotypes regarding persons with disabilities in the public and private spheres in order to allow for the appreciation and inclusion of diversity and the identification of discriminatory actions; and d) trainings based on workshop techniques.

11- The higher education offer in the region (despite the lack of information regarding the degree of inclusion in terms of Article 24 of CRPD) is growing and developing. This can be seen through the local education offer, regional university networks, or through international cooperation.

12- The architectural accessibility of judicial buildings is an outstanding debt in the region. Most States have reported the existence of obstacles to accessibility for persons with disabilities. In some cases, buildings are completely inaccessible, in others there is a difference between buildings built prior to the UN Convention and the new ones, which are accessible indeed. Accessibility has been slowly promoted in Judicial Power facilities, and States which are currently undergoing this kind of processes have reported that new buildings have been built pursuant to universal accessibility standards. Several States have reported to be in the process of making all public facilities accessible for persons with disabilities, despite the fact that, in most cases the government does not have detailed inventories or details about the degree of accessibility of the facilities.

13- Most government web pages are still not accessible. However, it is positive to see that most States have enacted regulations making accessibility mandatory. Some official government pages and those related to disability are reported to be accessible, and the rest are in the process. At least 20% of the States still do not have web accessibility, but they report to be working on it.

14- Some States have sign language experts or accessible reading tools on a permanent basis (in these cases they are generally regulated by laws or regulations) and others provide these accessibility tools on demand for each particular case, financed by the State. Other States are still in the process of establishing the relevant legal framework, or organizing these tools, even determining which area of the State will be in charge of defending people with disabilities. So far, no State has reported to have both tools across the Judiciary branch, but they all acknowledge the need to develop them.

15- Regarding court proceedings, the general rule in every State states that when a person with disabilities takes part in court proceedings, they are represented by a third party, sometimes known as “tutor” or “guardian”, or a person they know and trust, or a body of the Judiciary Power. All the States surveyed have some form of legal aid or sponsorship for persons with disabilities offered by the government at no cost, all of which work in different ways.

16- Regarding accessibility to court proceedings involving persons with disabilities, whether they be persons awaiting trial, witnesses or members of the jury, none of the countries have reported to have any kind of special procedural proceedings. Despite the fact that codes of procedure are applicable to the population in general, some specific tools are used when

persons with disabilities are involved. To sum up, despite the fact that every State has its own mechanisms to provide support to persons with disabilities in these situations, the full adaptation of the rules for judicial proceedings is still pending.

17- The different States take different measures in cases in which the judge or the administrative staff notice some kind of physical or intellectual disability in one of the parties to the case or one of the witnesses. Firstly, the measures taken by the Judiciary Power are directly related to the degree of visibility of the disability in question. The most widely used measure is to determine whether the person needs to be represented or not, with the corresponding suspension of the proceedings until a decision has been made.

18- None of the national legislations of the countries in question provide for support mechanisms in favour of persons with disabilities pursuant to Art. 12 of CRPD. In some cases, the “support” requested is that of an expert or a medical doctor. In other cases, the Brasilia Regulations apply.

19- Regarding persons with disabilities who have been deprived of their liberty, all the States present the same situation in terms of a lack of special measures to facilitate the autonomy of persons with disabilities in this scenario, with a focus on persons with mental or psychosocial disabilities and persons with sensory disabilities (blind and deaf) and particularly a lack of architectural accessibility for persons with motor disabilities. There is a variety of hindrances: a) detention centers are not adequate for persons with disabilities; b) prison facilities are not adequate or have not been adapted for persons with physical disabilities; c) federal systems grant exclusive powers to the different states or provinces, thus making it difficult to homogenize proposals; d) lack of information on the conditions in which persons with disabilities are imprisoned; e) overcrowded spaces, small infrastructure, and in most cases the capacity of the facilities is exceeded; and f) hearing impaired inmates are at a disadvantage for they cannot communicate with other inmates and with the guards, due to a lack of knowledge of sign language.

20- Regarding the training that arises from Article 13, paragraph 2 of CRPD, most States offer training, some of which originates from a normative mandate or as part of the curricula of law schools, particularly regarding supports or in other cases combining work with the stereotypes which create discriminatory behaviours against persons with disabilities.

21- Regarding the capacity to act of persons with disabilities, most States have expressed their agreement with the change proposed by the entry into force of Article 12, expressing their need to gradually enforce it in order to overcome the existing negative stereotypes regarding the capacity of persons with disabilities to exercise their rights. There is consensus among the States regarding the material application of Article 12. However, they also state the need to make amendments to the domestic law to improve implementation. Most States

propose the amendment of their Civil Codes. However, the States have expressed the need to apply some measures gradually, to facilitate the efficient application of the model proposed by Article 12, expressed as priorities, as stated in items: 5.b.1, 5.b.2. and 5.b.3 of the Rapporteurship.

22- Regarding the scope of the compatibility between the declaration of incapacity or guardianship and Article 12 of CRPD, most States have reported the incompatibility of both models with different arguments, but there seems to be an agreement between those who think that the representation model should also be kept. Other States have found a certain degree of practical compatibility between the two models, conditional upon the need to materialize changes: Another view states that the declaration of legal incapacity or guardianship are only valid when issued by a court of law for the protection of persons with disabilities, or because in practice it has proved to yield good results, while other States understand that this interpretation arises from the CRPD itself. Some States have proposed that the figure of legal incapacity or guardianship not be eliminated, but kept for particular cases. Lastly, we have seen that between the positive acceptance of the model proposed in Article 12 and the perception of its material application, there is still substantial margin for gradual implementation and to overcome the inertia of decades of validity and consolidation of the model based on legal representation, by means of the declaration of legal incapacity or guardianship, which is accepted in many cases as a “successful protection model” for persons with disabilities.

23- Should it be necessary to make comprehensive and procedural amendments, the States were asked how they think the process of phasing out the figures of guardianship or insanity towards the broad capacity model set forth in Article 12 of CRPD should be carried out, determining who (key political and technical actors) should take part in the design of proposals to any of these effects. Three groups of proposals: a) Comprehensive and procedural amendments, b) Maintaining the figure of legal incapacity or guardianship (against Article 12 of CRPD), divided in two groups: b.1) Maintaining the figure of legal incapacity or guardianship, but regulating a procedure aimed at determining the particular circumstances of each case; b.2) Maintaining the figure of legal incapacity or guardianship but reinforcing guidelines. Concluding, the full application of Article 12 of CRPD does not appear in the region as a consolidated alternative to the representation model, in relation to which there currently seems to be a certain degree of consensus to keep it limited to specific cases.

24- Several States deem it necessary to adopt measures to ease the transition from the representation model towards the broad capacity model with support, as provided for by Article 12 of CRPD. The measures proposed may be grouped under the following categories: a) Proposed transition prior to the entry into force of the Article 12 model, revising the legislation which is currently in force. There is a proposed need for a gradual process to

amend the domestic law, prior to the full application of the model set forth in Article 12. Another State deems it necessary to start by carrying out preliminary studies of the law. b) Some States have proposed the immediate enforcement of Article 12, based on the normative hierarchy of CRPD, which must be accompanied by the relevant training, together with the massive dissemination campaign to promote the rights. The transition to the social model was also deemed unnecessary, understanding it was enough. Nevertheless, many States did not express their opinion at all, particularly in this question.

25- In terms of proceedings for the “adaptation of the legal capacity to act,” (or for the “provision of supports for decision making”), within the framework of Articles 12 and 13 of CRPD, in some cases the amendments to the regulations influenced court decisions directly. In other States this regulatory provision arises from the national constitution, as well as from basic documents used as foundation for the trainings. In other cases the adaptations have not provided for by law, which does not mean that they are not carried out pursuant to the supralegal status of the Convention. However, none of the reporting States has regulated the support for persons with disabilities by virtue of the provisions of Article 12 of CRPD.

26- Regarding the examples of good practices that will allow them to replace the representation model or use it, while limiting it to particular cases, the States have proposed the following examples: a) Mass campaigns aimed at changing negative stereotypes affecting persons with disabilities and their rights, b) Mainstreaming disability in all State programs and policies, c) Promoting the elimination of stereotypes and the elimination of harmful practices affecting civil servants, d) Disseminating and raising awareness among judges about the need to reinforce the presumption of legal ability to act in their criteria, in favour of all persons with disabilities, as well as all the implications of said reinforcement when interpreting the law, e) Listening to the persons (or associations of persons) with disabilities, f) Working with persons with disabilities and their families in order to accompany the changes in paradigms towards the concept of autonomy and independent life, affected across the region by the abovementioned practices, g) Discouraging and limiting safety measures, mainly prolonged hospitalizations, which affect persons with disabilities and those who suffer mental health issues, h) Limiting the declarations of legal incapacity to extreme cases within the framework of state institutions (legal units) which take an active role in defending the rights of persons with disabilities. It is also proposed: “To identify the kinds of acts that require more attention in the support and safeguards system, so that the institutions involved in said acts may receive priority training and design relevant care protocols,” i) Raising awareness by means of the education model by including the rights of persons with disabilities and diversity, j) Training that is not only aimed at civil servants, but also to the private sector, and, k) Encourage immediacy and dialogue between the Judiciary Power and persons with disabilities in court proceedings.



