

My right to make decisions

**Depriving persons with disabilities of their legal capacity:
recommendations for harmonizing Serbia's national legislation and legal
capacity system with the Convention on the Rights of Persons with
Disabilities**

Kosana Beker

My right to make decisions – depriving persons with disabilities of their legal capacity: recommendations for harmonizing Serbia’s national legislation and legal capacity system with the Convention on the Rights of Persons with Disabilities

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Initiative for Inclusion VelikiMali

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Introduction

The publication **My right to make decisions – Depriving persons with disabilities of their legal capacity: recommendations for the harmonization of Serbia’s national legislation and legal capacity system with the Convention on the Rights of Persons with Disabilities** is part of the project “Creating a legal framework and advocacy actions for advancing the human rights of children and adults with disabilities in Serbia”. The project aims to improve the protection of rights of children and adults with disabilities in Serbia with a special emphasis on quality education, life within the family and respect for self-determination. We want to advance the concept of human rights, equality and to promote the development of an inclusive society.

Resolving the issue of depriving persons with disabilities of their legal capacity is an important step towards the realization of human rights in Serbia. The current legal framework and practice are outdated and mostly discriminatory in terms of protecting rights of persons with disabilities, including their right to self-determination, full participation and right to make decisions. The deprivation of legal capacity represents the loss of all civil and political rights and as such, constitutes a grave violation of human rights. Since the Republic of Serbia ratified the Convention on the Rights of Persons with Disabilities and accepted the international obligation to harmonize its national legislation with international standards and improve and reform its human rights program, we believe that the preconditions for opening dialogue and debate on this issue have been met.

This publication presents the basic problems with the deprivation of legal capacity, relevant national and international legal framework, regional experiences in reforming the guardianship system and practices of the European Court of Human Rights. In addition, we will present the personal stories of several parents from Serbia who deprived their children with disabilities of their legal capacity. We will describe their experience of the process and the consequences of the deprivation of legal capacity on everyday life. During the preparation of this publication, we consulted various sources and used different resources in order to highlight the necessity of changing the system in simple and feasible ways. We also consulted experts and partners from the Centre for Advancing Legal Studies and the Faculty of Law at the Union University Belgrade. The project was implemented in partnership with Mental Disability Rights International, “Nasa Kuca” and with the support of the Delegation of the European Union to Serbia.

The Initiative for Inclusion owes special gratitude to families that decided to share their experiences and tell their stories.

Initiative for Inclusion VelikiMali

Language and terminology

The language and terminology used to talk about persons with disabilities is closely connected to developments in approaches to disability, principles of equality and understanding human rights of persons with disabilities.. The use of terminology is important in terms of respecting a person and his/her full personality. During the past several years, the disability movement and part of the professional public initiated a new debate over terminology used to describe persons with disabilities and concluded that the terminology is frequently discriminatory or offensive.

In order to ensure respect for a person with a disability, it is important to emphasize the adult or child first and then the disability, which is only one characteristic of a person. For example, if we say “disabled person” we observe this person only through his/her disability, with the disability foregrounded as the sole or essential characteristic of that person. The correct term would be “person with a disability”, so the disability is then only presented as one of the person’s characteristics. The Initiative for Inclusion VelikiMali used the term “persons with disability” in this publication. Although we tried to use only correct terminology, you will find other terminology still in use in Serbia, mainly in professional and legal terminology. It is up to all of us to promote the use of politically correct language that will demonstrate respect to every person.

In addition, this publication was written using gender sensitive language. Therefore all professions and roles we have as users of a particular right were written using both genders.

The widespread first association of the term ***inclusion*** is the inclusion of children with disabilities in the mainstream education system. However, we believe inclusion is a broader concept that is not confined to the education system, but rather describes the inclusion of children in all aspects of community life. It means that the first step towards inclusion is to accept a child with disabilities within the family starting from his/her birth. The next step is the creation of a quality place in society for the family as a whole. This is followed by education and the development of skills necessary for an independent life and work within the community. The final outcome of inclusion for the adult with disabilities is an independent and dignified life. Inclusion says a lot about the development and civilization of a society and its respect for the human rights of each of its members¹.

Inclusion is a movement within **the social model** that views society’s attitude towards diversity (intellectual, physical, cultural, linguistic and other diversities) as its most important issue. Fear, prejudices and ignorance lead to the exclusion of

¹ AntiDefect – holistic approach to children with disabilities, individual support plan, inclusion throughout the fieldwork of the NGO VelikiMali, authors Valentina Zavisic and Teodora Gajic Bakic, VelikiMali Pancevo, 2004;

those who are different. Attitudes are changed through interaction and shared experiences in the community. Therefore, the social model emphasizes the need to create positive conditions in the society rather than changing the person who is different. We do not try to “cure” the one who is different but to “heal” the society.

Legal capacity

Legal capacity has great importance in every person's life. The right to choose a place to live, person to live with, school or university to attend, political party to vote for, whether to get married, have children or a job – all are rights that the majority of people do not question or presume can be taken away. However the majority of persons with disabilities in our country are faced with such problems.

It is important to know that there are two types of capacities in Serbia's legal system – legal recognition at birth² and legal capacity.

Legal recognition is a broader category and means that a person is a bearer of rights and obligations. It is gained by birth, terminated by death and cannot be limited or deprived. In previous periods of history (e.g. in old Rome) this was not the case. Legal recognition was a privilege of certain groups of people. However, in contemporary societies everybody has general and full legal recognition regardless of his/her sex, gender, age, nationality, race, religion, mental health or disability. However, this is not some natural state of society, but rather the result of the development and improvement of society. Our Constitution grants legal recognition to every person.

The Constitution of the Republic of Serbia, Article 37, paragraph 1.
Everybody has legal recognition at birth.

Legal capacity determines a person's capacity to make independent decisions, exercise certain rights, accept certain obligations and have various legal relations by her/his own statements and volition. This capacity is, as a rule, gained with majority (lawful age).

The Constitution of the Republic of Serbia, Article 37, paragraph 2.
With the age of majority, a person gains capacity to freely and independently decide about her/his rights and obligations. Majority is gained when a person is 18 years old.

In practice, legal recognition means that a person can own some property before he or she is 18 years old. For example, a child can inherit some property when the parents die, but the child cannot do anything with this property until he/she is legally mature and turns 18. At that point, he/she gains **legal capacity** which means that a person can independently decide what to do with the property – use it, sell it, rent it or gift it.

² NB by the translator: in the rest of the text, the term used will be *legal recognition*

This situation is the consequence of the legal assumption that every person who makes decisions (e.g. selling a house) and takes certain legal actions (e.g. signing a contract) has to be in the appropriate mental state and has the capacity to understand his or her decisions, consider all available options and understand the consequences of his/her actions. He/she must also have the capacity to communicate this decision. In most countries, it is assumed that legal capacity is gained with majority.³

The current Serbian legislation contains some exceptions to these rules. A mature person can be **fully deprived of his/her legal capacity** if he/she has a mental or intellectual disability that makes her/him “incapable of normal reasoning”,⁴ with the presumption that he/she is not capable of taking care of his/her own rights and interests. If a person has mental or intellectual disabilities and, as a result of his/her actions, directly threatens his/her own rights or interests or the rights or interests of others, the **partial deprivation of legal capacity is also possible**.

An adult’s inability to understand the meaning of his/her actions is not one of the conditions for the partial deprivation of legal capacity.

Persons deprived of their legal capacity are put under guardianship,⁵ which will be elaborated upon shortly. It is important to note that although it exists in law, the partial deprivation of legal capacity is rarely applied in Serbia. As a rule, persons with disabilities are fully deprived of their legal capacity, in contrast with more modern legislation and the UN Convention on the Rights of Persons with Disabilities recently ratified by Serbia.⁶

One of the ways a person’s legal capacity is deprived is through the extension of parental rights. Parental rights can be extended after a child turns 18 if a child, as a result of illness or difficulties in psychological or physical development, is unable to take care of himself/herself and protect his/her rights and interests or if his/her actions threaten the rights or interests of others.

It is important to highlight one illogical situation. The Constitution of the Republic of Serbia grants equality for everybody before the Constitution and the law. As previously mentioned, the Constitution guarantees every citizen legal capacity and the capacity for independent decision-making at the age of majority.

With regard to limiting human and minority rights, Article 20 of the Constitution guarantees:

³ The age of majority is usually 18 years, but there are countries with different legal distinctions.

⁴ The terminology used in the legislation is quite outdated and incorrect and was therefore placed inside quotation marks.

⁵ The guardian of a person fully deprived of legal capacity has the duties and rights of the guardian of a younger minor, and a guardian of a person partially deprived of legal capacity has the duties and rights of the guardian of minor who has turned 14 years of age.

⁶ Convention of the Rights of Persons with Disabilities will be discussed later in this publication.

“Human and minority rights guaranteed by the Constitution can be legally limited if such limitation is granted by the Constitution, in purposes allowed by the Constitution, to the extent necessary for satisfying the purpose of the constitutional limitation in a democratic society and without imposing the essence of the guaranteed right”.

Furthermore, the Constitution does not provide (or allow) any kind of limitation to legal capacity, namely capacity of independent decision-making. The logical question derived from this contradictory situation is – what are the grounds for depriving a mature person of their legal capacity in Serbia?

The decision to deprive a person of his/her legal capacity has serious practical, legal, social and psychological consequences. A person deprived of his/her legal capacity finds his/herself in a situation known in old Rome as “civil death”. This person cannot make decisions about his/her life. Someone else makes these decisions for them based on the assumption that the guardian knows what the best interests of that person are. Persons deprived of legal capacity lose political rights, including the right to vote. They lose the right to take legal actions, in lawsuits or litigation.⁷ These persons cannot be employed and completely lose their right to work. In the case of the partial deprivation of legal capacity, these persons can make employment contracts with the consent of the guardian or guardianship authority, but as previously mentioned, the partial deprivation of legal capacity is rare in Serbia⁸. Persons deprived of legal capacity lose the majority of their property rights, except for things of a smaller value – an area open to abuse. These persons also do not have the right to get married, have families of their own or choose a place to live. They are deprived of the right to be members of associations or political parties. Persons fully or partially deprived of legal capacity cannot even be volunteers.⁹ They do not have the right to make a valid will. Person deprived of his/her legal capacity can be placed in a residential institution without consent and without the possibility of lodging a complaint. In addition, these persons are not accepted by society and are usually the victims of stigmatization.

Current legal remedies in Serbia are outdated and not in compliance with the international standards and legal framework. The objective of this publication is to suggest changes to the existing legislation in Serbia in order to improve the position of persons with disabilities in society as well as their overall quality of life.

⁷ Capacity to participate in lawsuits as parties and to take independent actions during the procedure.

⁸ The author of this text is not familiar with such cases.

⁹ Law on volunteering, Article 13, paragraph 4 (Official Gazette 36/10); the law was adopted on 25th May 2010;

Historical overview of the development of legal capacity

Marijana Maric, Law student

In contemporary legislation, every human being has the same quality and degree of the legal capacity¹⁰ regardless of his/her sex, age, mental state, health, nationality, race or religion. The legal capacity of citizens is general and complete. It is gained by birth and terminated by death. However, these are the achievements of modern times and in the past, there were systems that fully deprived or limited some categories of citizens of their legal capacity. For example, legal capacity in old Rome consisted of four rights:

- The right to enter into a valid marriage
- The right to trade or close businesses, to gain property and be a party in a lawsuit
- The active right to vote, and
- The right to “honors” or passive right to vote

Not everyone had full legal capacity. In order to be the bearer of these rights and duties, a person had to fulfill the conditions described in three statuses:

- Status libertatis – related to the social status, namely an individual’s status as a free person or a slave. Only free persons could have legal capacity.
- Status civitatis – free citizens could be cives, meaning full Roman citizens. Latins, the people of central Italy and Peregrines, were the free citizens of conquered nations. All rights granted by *ius civile*¹¹ were only granted to Roman citizens if they had a certain position within the family.
- Status familiae – this status determined whether a person had self-authority or was dependent on the authority of the family elder, living under of the rights of another. A person under the right of *pater familias*¹² could be married and had active and passive voting rights but had limited trading rights. This meant that their legal capacity was limited.

Only if all conditions were fulfilled could a person have legal capacity from birth until death. An especially interesting fact is that legal recognition could also be lost before the person’s death by losing social status. Loss or change of the status was called **capitis deminutio** by Roman lawyers, literally meaning “head cutting”. This strange term derived from situations in which a person changed his/her status by losing liberty or citizenship. In this instance, Roman citizens said that the person had been “decapitated” – *Civitas romana capite deminuta est*.

There were three types of capitis diminutio – maxima, media and minima.

¹⁰ Every human being can be a bearer of rights and duties.

¹¹ Civil right that was only available to Romans.

¹² Father of the family, the elder, the “head” of the family.

Capitis deminutio maxima, meaning “civil death” or loss of liberty – happened when a free citizen became a slave. This happened as a consequence of punishment, when, for example, the state sold a citizen who failed to enroll in the census or avoided obligatory military service. Civil death could also happen as a result of enslavement by the enemy. When a citizen of Rome, by punishment or any other action (e.g. adoption), became a Latin or peregrine the state of ***capitis deminutio media*** – loss of the citizenship -occurred. A ***Capitis deminutio minimum*** was a consequence of adoption or getting married that applied only to women. As a result of the status change, the previously free citizen was subjected to the authority of the family elder. The property of a person who suffered this loss of status was transferred to the one granted *capitis deminutio* benefits – the state, new family elder or husband. Their duties and obligations were lost or were transferred to the person receiving the property. All of this affected legal capacity to a greater or lesser extent, as it was either limited considerably or fully deprived.

In the more recent history of the 19th century, partial civil death existed in cases in which an individual was sentenced to death, given a life sentence in jail or deported. For example, according to the French *Code civile*, when persons received such a sentence, their property was transferred to their heirs and their marriage was terminated, while their continued physical existence prevented the full loss of their legal capacity. They could receive gifts and property to the extent that it was required for a minimal standard of living, and they had a special guardian to protect their rights before the court. Civil death was cancelled in France in 1854.

Although legal recognition and legal capacity were not as clearly defined throughout history as they are today, we can say that the deprivation of legal capacity of persons with disabilities and their placement under guardianship had its roots in the Roman legal tradition. The Roman legal writer Julius Paul said *Furiosus nullum negotium contrahere potest* or “persons with mental illness cannot take any kind of legal action”. The Law of the Twelve Tables stated that “insane persons and spendthrifts” should be deprived of their legal capacity and placed under a special kind of guardianship called **cura**. *Cura* was a type of guardianship over adults who could not take care of their own property. Their guardians were persons who had a legal right to their property for the protection of potential heirs. Only if a person did not have legal heirs or if they did not want to become guardians could the praetor¹³ appoint some other person. This solution was a consequence of the fact that guardianship in Roman law was created not to protect the right of the protégé but rather the property interests of his/her potential heirs. In the time of classical Roman law, the appointment of guardians by other legal bodies known as magistrates was introduced.¹⁴

¹³ Roman legal body

¹⁴ It is interesting that determination of the guardian by the testament did not have legal force though the magistrates usually assigned as guardian a person determined by the *pater familia*.

The bodies authorized to deprive persons of legal capacity or assign guardianship were Roman legal magistrates, rulers of provinces or city “managers”. No special decision for the termination of guardianship was needed because the guardianship ended with the death of a person, when a person with mental illness became well or when a spendthrift improved his/her behavior. The duties of the guardians were to protect the property, health and life of a protégé.

There were two types of guardianship over persons with disabilities:

- ***Cura furiosi*** – the type of guardianship prescribed for the care of persons with mental illnesses. Roman law stated that persons with mental illnesses did not have a legally relevant will – “*Furiosi nulla voluntas est*”. As a result, they could not take many important legal actions: they could not get married, own property or be held responsible for crimes they had committed. In the beginning, this applied only to persons with permanent or severe mental illness (*furiosi*), but it later applied to those who demonstrated less severe forms of “madness”¹⁵ (*mente capiti*). It is interesting that these persons were considered legally capable during “lucid intervals”, as they were called (*lucida intervala*).
- ***Cura debilium personarum*** – was a type of guardianship that applied to persons with hearing or visual impairments, or with a physical disability (persons with paralysis, the elderly or persons with certain illnesses). These persons were regarded as incapable of performing certain legal actions as formal Roman law demanded ceremonial formulas and physical gestures to establish the full legality of certain actions. Therefore, a guardian was appointed to compensate for the person’s disability by fulfilling these formal, physical demands.

Similar policies were still present several centuries later in the Austrian General Civil Code of 1811. Article 269 of this code stated that “Persons who cannot take care of their own acts and cannot protect their rights will be appointed a guardian by the Court if there is no paternal or tutor authority”. Guardianship was imposed for minors and adults who were “insane”,¹⁶ “feeble minded”,¹⁷ spendthrifts or absent or convicted felons. Following an investigation into an individual’s condition and a doctor’s testimony, persons could be declared “mad” or “feeble minded”.

Centuries after the fall of the Roman Empire, traces of its legal institutions remain. The Law of the Twelve Tables stated “*Si furiosus exciit, adgnatum gentiliumque in eo pecuniaque eius potestas esto...*”.¹⁸

The Law of the Twelve Tables was brought into force in 450 BC. Today, in 2010, some legal provisions regarding legal capacity still have many similarities with these archaic laws.

¹⁵ Archaic and incorrect terminology used by the legislation during that time was placed inside quotation marks.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ If someone is mentally ill, let the agnati and gentili manage his/her property...

International legal framework

Factsheet on persons with disabilities¹⁹

- Around 10 per cent of the world's population, or 650 million people, live with a disability. They are the world's largest minority.
- This figure is increasing through population growth, medical advances and the aging process, according to the World Health Organization (WHO).
- In countries with life expectancies of over 70 years, individuals spend an average of about 8 years, or 11.5 percent of their life span, living with disabilities.
- Eighty percent of all persons with disabilities live in developing countries, according to the UN Development Program (UNDP).
- Disability rates are significantly higher among groups with lower educational attainment in the countries of the Organisation for Economic Co-operation and Development (OECD), according to the OECD Secretariat. On average, 19 percent of less educated people have disabilities, compared with 11 percent of better educated people. In most OECD countries, women report higher rates of disability than men.
- The World Bank estimates that 20 percent of the world's poorest people have some kind of disability, and tend to be regarded in their own communities as the most disadvantaged.
- Women with disabilities are recognized to be multiply disadvantaged, experiencing exclusion on account of their gender and on account of their disability.
- Women and girls with disabilities are particularly vulnerable to abuse. A small 2004 survey in Orissa, India, found that virtually all women and girls with disabilities were beaten at home, 25 percent of women with intellectual disabilities had been raped and 6 percent of women with disabilities had been forcibly sterilized.
- According to UNICEF, 30 percent of street youths have some kind of disability.
- Mortality rates for children with disabilities may be as high as 80 percent in countries where under-five mortality as a whole has decreased below 20 percent, according to the United Kingdom's Department for International Development, adding that in some cases it seems as if children are being "weeded out".
- Comparative studies on disability legislation show that only 45 countries have anti-discrimination and other disability-specific laws.
- Ninety percent of children with disabilities in developing countries do not attend school, says UNESCO.

¹⁹ Facts taken from the UN website - <http://www.un.org/disabilities/default.asp?id=18> (accessed on 13 September 2009).

- The global literacy rate for adults with disabilities is as low as 3 percent, and 1 percent for women with disabilities, according to a 1998 UNDP study.
- An estimated 386 million of the world's working-age people have some kind of disability, says the International Labour Organization (ILO). Unemployment among the persons with disabilities is as high as 80 per cent in some countries. Often employers assume that persons with disabilities are unable to work.
- A 2004 United States survey found that only 35 percent of working-age persons with disabilities are in fact working, compared with 78 percent of those without disabilities. Two-thirds of the unemployed respondents with disabilities said they would like to work but could not find jobs.
- For every child killed in warfare, three are injured and acquire a permanent form of disability.
- In some countries, up to a quarter of disabilities result from injuries and violence, says WHO.
- Research indicates that violence against children with disabilities occurs at annual rates at least 1.7 times greater than for their peers without disabilities.

Short overview of the development of disability rights

Persons with disabilities have been treated differently in various societies throughout history. One fact is certain: the treatment of persons with disabilities has never been equal to the treatment of persons without disabilities. Without delving much deeper into the changes in social awareness around disability issues, it is sufficient to say that modern societies are now in a phase of trying to include persons with disabilities in society without discrimination and on the basis of equality and respect for human rights. Persons with disabilities themselves have made significant contributions to this change by fighting for their rights with the slogan “Nothing about us without us”. The United Nations has also been very active in this field, placing human rights and disability on its agenda several times before the adoption of the Convention on the Rights of Persons with Disabilities. The General Assembly of the United Nations adopted the World Action Program for Persons with Disabilities which promoted the full participation and equality of persons with disabilities in society in every country of the world, regardless of the state’s development²⁰. The United Nations declared the period 1983-1992 the “Decade of persons with disabilities”, in an attempt to encourage member states to create better conditions for persons with disabilities by applying the World Action Program. At a conference in Stockholm in 1987, participants suggested the adoption of a convention that would outline and guarantee the rights of persons with disabilities, but this suggestion did not gain sufficient support. Later, in 1991, the General Assembly of the UN adopted “Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care”,

²⁰ Resolution of the UN General Assembly 37/52 from 3rd December 1982.

a document known as “MI Principles”.²¹ These principles established standards and guarantees for the protection against the most severe violations of human rights that are possible in an institutional setting (e.g. abuse or inappropriate use of physical restraint, sterilization, isolation, psychosurgery, etc). Although the MI Principles were considered innovative when they were adopted, they are regarded as outdated today.

The next important document for persons with disabilities was the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the UN General Assembly in 1993.²² This document stated that boys, girls, men and women with disabilities are equal members of society and have the same rights and duties as other members of society. The document also asked that states remove any barrier preventing persons with disabilities from achieving equal rights in society. Though not legally binding, the Standard Rules were very beneficial to many states as guidelines for improving conditions and harmonizing legislation and state practices with international human rights standards. Other documents adopted during the last three decades also deal exclusively with the human rights of persons with disabilities.²³ It is important to emphasize that all other human rights documents (e.g. the Universal Declaration on Human Rights) apply equally to persons with disabilities, even when this is not explicitly stated. The Convention on the Rights of the Child was the first international treaty that explicitly forbade discrimination against children on the basis of their disability. International treaties adopted before this convention do not make explicit reference to persons with disabilities and do not grant them any special protections.

Convention on the Rights of Persons with Disabilities

At the meeting of the UN General Assembly in December 2001, the Government of Mexico suggested the formation of an ad hoc committee to evaluate and examine the need for the adoption of a comprehensive international convention for the promotion and protection of the rights and dignity of persons with disabilities. The ad hoc committee²⁴ met eight times during the period between 2002 and 2006 and worked on drafting the convention with procedures ensuring the inclusion of civil society, along with other crucial and technical details until the final text of the Convention and optional protocol were complete. UN General Assembly unanimously adopted the Convention on the Rights of Persons with Disabilities and Optional Protocol on 13 December 2006. Since 30 March 2007, both the Convention and Optional protocol have been open for signature and ratification.

²¹ Principles for the protection of persons with mental illness and improvement of mental health care.

²² Standard Rules on equalization of opportunities for persons with disabilities.

²³ UN and ILO documents: Declaration on the Rights of Mentally Retarded Persons from 1971, Declaration on the Rights of Disabled Persons from 1975, Tallinn Guidelines for Action on Human Resources Development in the Field of Disability from 1990;

²⁴ One of the ad hoc committee’s member was Dr. Damjan Tatic, expert from the Ministry of Labor, Employment and Social Policy of the Republic of Serbia and representative of the Organization of Persons with Disabilities.

The Republic of Serbia was one of the first member states to sign the Convention and ratified it on 29 May 2009.²⁵ Today, the Convention has been signed by 143 states, and ratified by 72 while the Optional protocol has been signed by 87 and ratified by 45 states.²⁶

Adoption of the Convention and the creation of new mechanisms for the protection of human rights should greatly improve the protection of persons with disabilities. The Convention lists all the rights that a person with disabilities is entitled to, as well as the duties and obligations of the state and other stakeholders with the ultimate aim of the full realization of human rights.

The purpose of the Convention on the Rights of Person with Disabilities is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”.²⁷ The Convention does not give strict definitions for the terms “disability” or “person with disability” but understands disability as a concept that can be changed throughout time.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Recognizing “disability” as an evolving concept means acknowledging that society and its attitudes are not static and unchangeable. Such a definition allows for the possibility that new forms of disability may come to be recognized within the wider concept of disability in the future. The Convention also recognizes that “disability” is not in the person but in the society, an important distinction. Therefore, the essence of disability is the inaccessibility of society. If a wheelchair user has obstacles to using public transport, the social barrier is not in the person but in the public transportation system that is inaccessible to wheelchair users. A person with a visual impairment who uses contact lenses is “a person with disabilities” in some societies because he/she could not independently move about or go to school or work if contact lenses were not available. In another society, this person could fully participate in all aspects of life, provided contact lenses were available. Children with disabilities are often excluded from the education system or are isolated in special schools. This problem could be solved with the development of an individualized curricula and teaching methodology, along with a simple change in attitude towards children with different capacities to learn. There are numerous similar examples and they are evident in every aspect of public life. States should provide accessible

²⁵ Law on Ratifying the Convention on the Rights of Persons with Disabilities, Official Gazette of the Republic of Serbia – International Treaties, number 42/2009 from 29 May 2009.

²⁶ UN Enable, <http://www.un.org/disabilities/> (accessed on 14 November 2009).

²⁷ Article 1, paragraph 1 of the Convention on the Rights of Persons with Disabilities

environments and promote changes in attitude towards persons with disabilities so that they may fully enjoy their rights and become equal members of society.

General principles of the Convention on the Rights of Persons with Disabilities provide guidelines for states to interpret and implement the Convention. The general principles are:²⁸

- a. Respect for inherent dignity and individual autonomy, including the freedom to make one's own choices and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The Convention is comprehensive and protects and promotes the human rights of persons with disabilities in economic, social, political, legal and cultural life. It calls for the prohibition of discrimination and protection of equality everywhere and for every person.

The rights explicitly guaranteed by the Convention are:

- Equality and non-discrimination
- Right to life, liberty and security of the person
- Equal recognition before the law (including legal capacity)
- Freedom from torture or cruel, inhuman or degrading treatment or punishment
- Freedom from exploitation, violence and abuse
- Protecting the integrity of the person (physical and mental)
- Liberty of movement and nationality
- Living independently and being included in the community
- Freedom of expression and opinion and access to information
- Respect for privacy
- Respect for home and the family
- Education
- Health (standards of health services)
- Work and employment
- Adequate standard of living and social protection
- Participation in political and public life
- Participation in cultural life, recreation, leisure and sports

²⁸ Convention on the Rights of Persons with Disabilities, Article 3

The Convention does not impose any new right, as these rights have already been guaranteed by other international treaties. The innovation of the Convention is that the focus is on activities that states parties can implement to ensure practical and full enjoyment of rights. The Convention states that some persons are victims of discrimination not only on the grounds of their disability but also on the grounds of their sex, age, nationality etc. Therefore, the Convention has special articles relating to women with disabilities and children with disabilities, who are often victims of multiple forms of discrimination. In order for persons with disabilities to enjoy their rights fully and equally, the Convention provides that states parties should ensure a suitable environment for these persons. In addition, the states parties should pay particular attention to: raising awareness (everybody, including persons with or without disabilities should understand their rights and duties); accessibility (the basic precondition for the realization of rights and an independent life); access to justice; personal mobility of persons with disability; habilitation and rehabilitation and statistics and data collection.

General duties undertaken by the Republic of Serbia with the signing and ratification of the Convention on the Rights of Persons with Disabilities are:

States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:²⁹

- a. To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
- b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination³⁰ against persons with disabilities;
- c. To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programs;
- d. To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
- e. To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;
- f. To undertake or promote research and development of universally designed goods, services, equipment and facilities,³¹ as defined in article 2 of the present

²⁹ Convention on the Rights of Persons with Disabilities, Article 4, paragraph 1

³⁰ Discrimination on the grounds of disability means "making any distinction, exclusion or restriction based on someone's disability, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

³¹ Universal design means "the design of products, environments, programs and services to be usable by all people to the greatest extent possible without the need for adaptation or specialized design. Universal design shall not exclude assistive technology or devices for particular groups of persons with disabilities where this is needed."

Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

- g. To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;
- h. To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;
- i. To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.“

The state also undertook the obligation to consult closely with and actively involve persons with disabilities (including children with disabilities through representative organizations) in the development and implementation of policies and legislation in harmony with the Convention, as well as in other decision-making processes concerning issues related to persons with disabilities.³²

³² Convention on the Rights of Persons with Disabilities, Article 4, paragraph 3

The Council of Europe – Action plan to promote the rights and full participation of persons with disability in society

The Council of Europe adopted a plan entitled the “Action Plan to promote the promotion of rights and full participation people with disabilities in society – improving the quality of life of people with disabilities in Europe, 2006 to 2015”. Based on the Action plan, the Committee of Ministers adopted Recommendation Rec (2006)5³³ on 5th April 2006,, which recommends that the governments of member states having due regard to their specific national, regional or local structures and respective responsibilities:

- integrate as appropriate in their policy, legislation and practice the principles and implement the actions set out in the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015, as it appears in the appendix to this recommendation;
- promote the implementation and application of the Council of Europe Disability Action Plan 2006-2015 in areas which are not the direct responsibility of public authorities, but where they nonetheless have a certain power or may play a certain role;
- assure to this end the widest possible dissemination of this recommendation amongst all parties concerned, for example through awareness-raising campaigns and co-operation with the private sector and civil society, involving, in particular, non-governmental organizations of people with disabilities.

The Action plan consists of 15 key action lines and each represents one or more areas of life in which further measures are needed to ensure equal access and further improve the quality of life for persons with disabilities. The Action Plan states that persons with disabilities should be encouraged to participate in the life of their communities by enjoying the right to vote and participate in political and public life (key action line 1). In addition, persons with disabilities should be granted equal access to education in all stages of life, from pre-school to professional education (key action line 2). Further, employment is a key element of social inclusion and legislation and support services that promote the economic independence of persons with disabilities, (including services assisting persons with disabilities in obtaining and maintaining employment, professional rehabilitation and vocational training) must be supported (key action line 5). The Action Plan also emphasizes that persons with disabilities should be enabled to live as independently as possible, and be empowered to make choices on how and where to live. This requires strategic policies which support the move from institutional care to community-based settings ranging from independent living arrangements to small group homes. (key action line 8). In addition, people with disabilities have the right to recognition everywhere as persons before the law . Legal protection (key action line 12) consists of taking appropriate

³³ Council of Europe, Committee of Ministers, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=986865>, accessed on 27th September 2009;

measures with the aim of prohibiting discrimination against persons with disabilities. Adequate legal and administrative framework is necessary to prevent and fight against discrimination.

Legal capacity and the Convention on the Rights of Persons with Disabilities

At the beginning of this text we learned about the importance of legal capacity for every human being and especially for persons with disabilities, who are more likely to have their legal capacity limited or deprived.

The Convention on the Rights of Persons with Disabilities recognizes the importance of legal capacity and equal recognition before the law and emphasizes that legal capacity cannot be limited or deprived solely on the basis of a person's disability.

Article 12 of the Convention says:

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

The provisions of this Article are innovative and revolutionary in terms of improving the lives of persons with disabilities in society. National legislation on legal capacity is outdated and needs comprehensive reform in order to be harmonized with the provisions and obligations of the Convention.

Legal framework – Serbia

Conditions for persons with disabilities in Serbia remain very poor. Though persons with disabilities have become more “visible” in recent years and some positive changes have been made, their position in society is still far from satisfactory or equal to persons without disabilities. Serbia’s Poverty Reduction Strategy places persons with disabilities in the general population on the bottom level of poverty and social exclusion. The incomes of families with a disabled member are disproportionately below the poverty line. Data from 2001 says that there are approximately 760,000 persons with disabilities in the Republic of Serbia, and the estimates are that 70% of them live in households with incomes that are below the poverty line³⁴. The reasons for this situation are not explained by mere material poverty or a lack of financial resources. World Bank studies show that the poverty of persons with disabilities is multi-faceted and that the origins of such poverty are found in a lack of access to basic services, capital, employment, education and diminished overall participation in decision-making³⁵.

Positive improvements in Serbia include the adoption of the Law on preventing discrimination against persons with disabilities, ratification of the Convention on the Rights of Persons with Disabilities, adoption of the Strategy for improving the position of persons with disabilities in Serbia (2007-2015), adoption of the Law on prohibiting discrimination and the Law on professional rehabilitation and employment of persons with disabilities.

The Strategy for improving position of persons with disabilities in the Republic of Serbia

The goal of the Strategy is to elevate the position of persons with disabilities in Serbia to a position on par with other citizens so that they may enjoy all the same rights, as well as duties, as other citizens of Serbia.

In accordance with the set framework, the plan is to fulfill the following general objectives by 2015:

1. Incorporate the issue of persons with disabilities into mainstream development plans, by bringing an institutional framework and operationalising multi-sectoral and multi-departmental cooperation;
2. Develop an efficient legal system for the protection and promotion of the rights of persons with disabilities, develop and implement a plan for the

³⁴ Data taken from the Poverty Reduction Strategy of the Republic of Serbia

³⁵ Ibid.

prevention of discrimination and a plan for the sensitisation of society to disability issues;

3. Make social, health and other services accessible, rights- and needs- based in accordance with modern and internationally acceptable methods for the evaluation of disability and resulting needs;
4. Develop and implement policies, programmes and measures, particularly in the areas of education, employment, work and housing which provide equal opportunities for persons with disabilities and encourage independence, personal development and productive life in all areas;
5. Ensure the access of persons with disabilities to the built environment, accessible transportation, information, communication and services for the public through the development and implementation of a plan for removing barriers and constructing accessible buildings, spaces, services, information and communication;
6. Ensure adequate living standards and social security for persons with disabilities.

The issues of legal capacity and guardianship for adults with disabilities have great relevance to human rights and the position of the individual in society. Despite this, the issue has long been neglected in many countries and the legislation regulating guardianship and legal capacity of adults has generally remained unchanged. Laws allowing guardianship and legal capacity deprivation exist in almost every country. The basic premise underlying such laws was that persons with physical and/or mental disabilities could not take care of their interests independently, and that the legal system needed to intervene and protect their interests for them. In modern times, this notion has been abandoned. Persons with disabilities are capable of taking care of themselves, and if there are life situations in which they require additional support, the state has an obligation to provide it.

Although there have been some positive changes in Serbia and certain laws regulate the position and treatment of persons with disabilities, the issue of legal capacity and putting adults under guardianship is still regulated by decades-old, outdated legislation. Regulations and legislation effective in Serbia are not united in one place, but scattered throughout many laws. Basic provisions about legal capacity and guardianship are in the Family law and in the Non-Contentious Proceedings Act (adopted in 1982 and changed several times since, but without significant changes in this area). In addition, certain provisions can also be found in the Law on health protection, the Law on social protection, the Law ensuring social security of citizens, Criminal law, laws on elections, Law on obligation relations, and several more.

Extending parental rights and the deprivation of legal capacity

In addition to the Constitution of the Republic of Serbia, the Family law³⁶ regulates the legal capacity and maturity, which is gained at the age of 18. Full legal capacity is gained at the age of 18 or by getting married before the legal age with the court's permission. The court can allow full legal capacity to an underage person at the age of 16 if he/she has become a parent and has the mental maturity necessary for independent care of his/her own person, rights and interest.

The court decides on whether to grant this permission in an extrajudicial procedure. Parental rights stop when the child turns 18 or gains full legal capacity before the legal age³⁷.

Conditions for extending parental rights

Parental rights can be extended after the legal age if the child, as a result of illness or difficulties in psychological or physical development, is incapable of taking care of and protecting his/her rights, or if he/she threatens his/her rights and interests with his/her actions³⁸.

Conditions for the deprivation of legal capacity

Complete deprivation of legal capacity

An adult person who is, as a result of illness or difficulties in psychological or physical development, incapable of normal reasoning and therefore unable to care independently for his/her own rights and interests can be fully deprived of his/her legal capacity³⁹. Legal capacity of these persons is equal to the legal capacity of a younger minor (child below the age of 14)⁴⁰. Persons fully deprived of their legal capacity can take legal action to gain rights, legal actions that do not lead to obtaining any rights or obligations and legal actions of minor significance⁴¹.

Partial deprivation of legal capacity

³⁶ Article 11 of the Family law of the Republic of Serbia

³⁷ Article 84, paragraph 1, points 1 and 2 of the Family law of the Republic of Serbia

³⁸ Article 85 of the Family law

³⁹ Article 146, paragraph 1 of the Family law

⁴⁰ Article 146, paragraph 2 of the Family law

⁴¹ Article 64, paragraph 1 of the Family law

An adult person who, as a result of illness or difficulties in psychological or physical development, directly threatens his/her own rights and interests or the rights and interests of other persons can be partially deprived of his/her legal capacity⁴². Legal capacity of these persons is equal to that of an older minor (child between the age of 14 and 18)⁴³.

The precise legal actions that a person partially deprived of his/her legal capacity can or cannot take will be determined by court decision⁴⁴.

Extending parental rights

If there are legal reasons for extending parental rights after the legal age of maturity, it is possible to initiate a non-contentious proceeding. The procedure is expedited by the courts and can be initiated by parents, adoptive parents or the guardianship authority. In this final case, a child is represented by a special guardian who is determined by the court or the guardianship authority⁴⁵. In this procedure, the court, in its institutional capacity, determines the psychological and physical state of the child of significance to his/her capacity to independently take care of his/her person, rights and interests⁴⁶.

The decision on whether or not parental rights are extended is made on the basis of a discussion in court between the guardianship authority, child, guardian and parents, regardless of who initiated the procedure. It is mandatory to take an official statement from the parents, and the guardianship authority is obliged to provide an opinion about the suitability of extending parental rights⁴⁷. The child's mental state and capability are determined in the same way as in the procedure for the deprivation of legal capacity⁴⁸, and this issue will be elaborated on later in this publication.

The procedure for the deprivation of legal capacity

Initiating the procedure, authorized initiators

The procedure for the deprivation of legal capacity is initiated and carried out by the court in its official capacity or on the initiative of the guardianship authority, spouse, child or parent when there are legal conditions met for the deprivation or limitation of legal capacity⁴⁹. The procedure can also be initiated by grandparents or grandchildren if they live with that person in a family⁵⁰.

⁴² Article 147, paragraph 1 of the Family law

⁴³ Article 147, paragraph 2 of the Family law

⁴⁴ Article 147, paragraph 3 of the Family Law

⁴⁵ Article 72, paragraph 3 of the Law on Extrajudicial Procedure

⁴⁶ Article 73, paragraph 1 of the Law on Extrajudicial Procedure

⁴⁷ Article 73, paragraph 2 of the Law on Extrajudicial Procedure

⁴⁸ Article 73, paragraph 3 of the Law on Extrajudicial Procedure

⁴⁹ Article 32, paragraph 1 of the Law on Extrajudicial Procedure

⁵⁰ Article 32, paragraph 2 of the Law on Extrajudicial Procedure

The proceedings can also be initiated by the very person who stands to be deprived of his/her legal capacity if he/she can comprehend the purpose and legal consequences of such an action⁵¹. The proposal must contain and be based facts as well as evidence established with certainty or thought to be probable⁵². If a person who is in the process of having their legal capacity deprived has assets or owns property, the court will promptly invite bodies responsible for property or other public registry books to take note of the proceedings⁵³. In addition, the birth registry is also informed about the procedure⁵⁴.

In this procedure, the court makes its decision based on discussions at the hearing. Beside the guardianship authority, the referent individual, his/her guardian or temporary representative as well as the initiator of the proceedings are invited⁵⁵.

The court will listen to the person at the center of the legal capacity proceedings, and if he/she is in a health institution, the court will listen to him/her in accordance with the institution's rules and the institution will be the court's meeting place⁵⁶.

The court can withdraw a person from the hearing if it is determined that it could be detrimental to his/her health or if the hearing is impossible due to the mental or physical condition of the person⁵⁷. The court is then obliged to listen to the guardian, temporary representative, initiator of the proceedings or other persons who can give necessary information about the life, behavior and other circumstances of the person⁵⁸. If necessary, the court can obtain such information from other natural or legal bodies.

Giving expert opinion

During legal capacity proceedings, an individual must be examined by at least two medical specialists, who will give their opinions about the individual's mental state and capabilities⁵⁹. Expert opinion is given with the judge present unless it is given in a residential health institution⁶⁰. If the doctors' opinion is that further observation is required to determine an individual's mental state, the court can order that the person be placed in a suitable health institution either temporarily or for a set period of three months, except in cases when such a placement could be detrimental to the individual's health⁶¹. These decisions regarding temporary placement in an institution can be appealed within three days of the court's decision. The appeal can be made by the person whose legal capacity is in question (regardless of his/her

⁵¹ Article 32, paragraph 3 of the Law on Extrajudicial Procedure

⁵² Article 33, paragraph 1 of the Law on Extrajudicial Procedure

⁵³ Article 34, paragraph 1 of the Law on Extrajudicial procedure

⁵⁴ Article 34, paragraph 2 of the Law on Extrajudicial procedure

⁵⁵ Article 35, paragraphs 1 and 2 of the Law on extrajudicial procedure

⁵⁶ Article 36, paragraph 1 of the Non-contentious Proceedings Act (the NCPA)

⁵⁷ Article 36, paragraph 2 of the Non-contentious Proceedings Act (the NCPA)

⁵⁸ Article 37 of the Non-contentious Proceedings Act (the NCPA)

⁵⁹ Article 38, paragraph 1 of the Non-contentious Proceedings Act (the NCPA)

⁶⁰ Article 38, paragraph 2 of the Non-contentious Proceedings Act (the NCPA)

⁶¹ Article 38, paragraph 2 of the Non-contentious Proceedings Act (the NCPA)

mental state), his/her guardian or a temporary representative⁶². The appeal does not prevent the execution of the decision, unless the court has reasonable grounds to reach a different conclusion⁶³.

The court's decision

Court decisions on the extention and termination of parental rights are legally-binding and are decided in non-contentious proceedings. Once the case has been decided, the decision is recorded in the birth registry⁶⁴. If the child has assets or owns property, the court's decision is also recorded in the public registry of properties⁶⁵.

The decision on the deprivation or restoration of a person's legal capacity is made in non-contentious proceedings⁶⁶ if the necessary legal preconditions have been met⁶⁷. Decisions on the partial deprivation of legal capacity also include the court's decision on which actions an individual may be permitted to take independently. This decision is based on the opinion of medical experts.⁶⁸

A person deprived of his/her legal capacity can appeal the court's decision regardless of his/her mental state⁶⁹.

A legally-binding court decision on the deprivation or restoration of legal capacity must be submitted to the guardianship authority immediately⁷⁰. This decision is noted in the birth registry⁷¹ and if the person has assets or owns properties, the decision is also noted in the public registry of properties⁷².

Guardianship

It is interesting that the court's role is limited to ruling on the deprivation of legal capacity and that the guardianship authority assigns a person his/her actual guardian. Depriving a person of his/her legal capacity is a combination of court and administrative court procedure.

⁶² Article 39, paragraphs 1 and 2 of the Non-contentious Proceedings Act (the NCPA)

⁶³ Article 39, paragraph 3 of the Law on Non-contentious Proceedings Act (the NCPA)

⁶⁴ Article 87, paragraph 1 of the Family law

⁶⁵ Article 87, paragraph 2 of the Family law

⁶⁶ Article 149, paragraph 1 of the Family law

⁶⁸ Article 40, paragraph 2 of the Non-contentious Proceedings Act (the NCPA)

⁶⁸ Article 40, paragraph 2 of the Non-contentious Proceedings Act (the NCPA)

⁶⁹ Article 40, paragraph 3 of the Non-contentious Proceedings Act (the NCPA)

⁷⁰ Article 149, paragraph 2 of the Family law

⁷¹ Article 150, paragraphs 1 of the Family law

⁷² Article 150, paragraph 2 of the Family law

The Family law states that a child without parental care (minor ward of the court) or adult deprived of his/her legal capacity is placed under guardianship (adult ward of the court)⁷³. **This publication deals only with adult persons placed under guardianship or at risk of being deprived of their legal capacity**, so we will not present the provisions related to children. The term used in the legislation is “ward of the court” which is another example of the society’s attitude towards adults with disabilities. They are perceived as someone in need of protection, as it is assumed that they cannot take care of or protect themselves. We will try to avoid using the legislator’s outdated and incorrect terminology as much as possible.

The decision

The guardianship authority is obliged to make the decision to place someone under guardianship within 30 days of the court’s ruling on the deprivation of legal capacity. Which community guardianship authority has authority over the person under guardianship is determined based on his/her current address. If a person’s current address cannot be established, the authorized guardianship body is determined based on the place where that person was found.

The final decision contains a guardianship plan, the name of the guardian, and the placement of the person placed under guardianship.

The guardianship authority will first attempt to place the person with family. If the person has assets or owns property, the constant commission of the guardianship authority registers and completes an assessment of the property’s value.

Conditions for determining guardians

A person can be named as a guardian if he/she has the personal characteristics and capabilities necessary for performing the duties required of a guardian. The person must also agree to become a guardian⁷⁴. Guardians are typically a person’s spouse, relative or foster parent unless the particular interests of the person under guardianship require a different placement.⁷⁵

A person of the age of 10 who is capable of reasoning has a right to propose their own guardian⁷⁶.

A person who has been partially or fully deprived of their legal capacity or partially or fully deprived of their parental rights cannot be named as a guardian. In addition, a person cannot be named as a guardian if the court concludes that their interests are contrary to the interests of the person under guardianship. This includes potential guardians who, because of a relationship with either the ward of the court or his/her family, cannot be expected to carry out the duties of a guardian correctly⁷⁷.

⁷³ Article 124 of the Family law

⁷⁴ Article 126 of the Family law

⁷⁵ Article 125 of the Family law

⁷⁶ Article 127 of the Family law

⁷⁷ Article 128 of the Family law

*Types of guardianship*⁷⁸

- **Guardian to several wards of court** – the same person can be appointed the guardian for several wards of the court if he/she agrees to it and if it is in the best interests of the wards of court.
- **Collective guardian** – a manager or employee of a residential institution can be appointed a guardian of resident wards of court if he/she agrees to it and if it is in the best interests of the wards of court.
- **Direct guardian** – a direct guardian is appointed if the guardianship authority determines that it is in the best interests of a ward of the court if it administers guardianship itself. The decision specifies which expert will perform the guardianship in the name of the guardianship authority. A direct guardian requires legally-binding approval from the guardianship authority regarding the types of actions he/she can take. The expert can take legally-binding actions only if he/she is not the holder of administratively authorized guardianship and only if the action conforms to the same conditions required of a guardian. The guardianship authority can *close legal deals* with a ward of the court under direct guardianship only with permission from the Ministry authorized for family care.
- **Temporary guardian** – a temporary guardianship is assigned in the event that the guardianship authority deems it necessary for the temporary protection of the rights and interests of a person.

*Withdrawal of guardianship*⁷⁹

The guardianship authority can recall a guardian immediately if it is determined that he/she is neglecting certain duties, abusing his/her authority or if circumstances arise that disqualify him/her from being a guardian. The guardianship authority must withdraw the guardian within 30 days of a determination of negligence or the decision that it would be more beneficial to re-assign guardianship. If a guardian asks to terminate his/her guardianship, the guardianship authority is obliged to withdraw the guardian within 60 days. The guardianship authority is then obligated to perform the standard guardianship procedures and appoint a new guardian by the end of the 60 day period.

If a ward of the court has property the constant commission of the guardianship authority must register it and assess its value.

*The duties of a guardian*⁸⁰

⁷⁸ Articles 129 and 132 of the Family law

⁷⁹ Articles 129 to 132 of the Family law

⁸⁰ Article 135 to 142 of the Family law

The duty of the guardian is to conscientiously take steps necessary to ensure the care of the person under guardianship, including:

- **Providing care for the person**- Care must be provided with the aim of eliminating the reasons underlying the deprivation of legal capacity and making the individual capable of independent living again. The guardian must also visit the ward of court and report on his/her living conditions.
- **Representation** – Guardians represent persons under guardianship in much the same way as a parent would represent the needs of their child, save for certain decisions which require the permission of the guardianship authority (e.g., the authorization of medical procedures)
- **Acquiring funds for living** – Funds for living are derived from the person under guardianship, namely from the person's property, social benefits or the funds received by persons legally obligated to provide financial support to the person under guardianship.
- **Control of property** – The guardian has a duty to control the property, belonging to the person under guardianship (excluding property gained through work). The guardian is independently responsible for the control of regular property while he/she needs the prior permission of the guardianship authority for other actions.

Managing the property of the person under guardianship – With the prior permission of the guardianship authority, a guardian can manage the property belonging to the person under guardianship. The guardian can only apply the capital of the property to cover living costs or if there exists some other compelling interest. Pending the decision of the guardianship authority, income from any property can be used to pay for costs arising from the guardianship, namely the guardian's fees.

The guardian is also **accountable for the possible harm** caused to the person under guardianship unless the guardian proves that the harm was not his/her fault. When the harm is caused on purpose or because of grave negligence, both the guardian and guardianship authority are accountable.

In addition, the guardian has an **obligation to submit reports** to the guardianship authority at the beginning of every year about his/her work during the previous year (regular report), when the guardianship body asks for it (specific report), and after the guardianship is cancelled (final report). The report contains information about the person under the guardianship, his/her living conditions, health, education, and other important information. The report should also contain facts about management of the person's property, final balances of any property and the previous period's income and expenses.

The guardian has a right to reimbursement of costs and a fee⁸¹. Such costs are primarily paid out of the income of the person under guardianship, unless such payment threatens the interests of the person⁸².

⁸¹ Articles 143 and 144 of the Family law

An appeal concerning the guardian's work can be made to the guardianship authority by the person under guardianship if he/she is capable of reasoning or by another person possessing legal interest. The guardianship authority has an obligation to respond to the appeal within 15 days of receiving it⁸³.

*Termination of the guardianship*⁸⁴

Guardianship of an adult is terminated by a court decision restoring legal capacity, the termination of extended parental rights or with the death of the individual under guardianship. Guardianship is not terminated by the withdrawal or death of the guardian.

Consequences of the extension of parental rights or the deprivation of legal capacity

This text has already described the serious consequences of the deprivation of legal capacity. A person needing additional social support in one or more areas of life is deprived of almost all rights (a process that is usually nonconsensual). Here you will find parts of current Serbian laws presented with the aim of understanding the consequences of the deprivation of legal capacity.

- A person incapable of reasoning cannot get married (Family law, article 18)
- One parent performs parental rights alone if the other parent is unknown, has died or is deprived of his/her parental rights or legal capacity (Family law, article 77, paragraph 1)
- A child whose parents are fully deprived of legal capacity can be adopted (Family law, article 91, paragraph 1, point 4)
- A person partially or fully deprived of legal capacity cannot adopt a child (Family law, article 100, paragraph 2, point 2)
- The Family law regards a child without parental care to be a child whose parents are not alive, are unknown or whose place of living is unknown, are fully deprived of their parental rights or legal capacity, have not gained legal

⁸² Conditions for the payment of the guardian's fees and reimbursements for costs are regulated by the Minister responsible for family care.

⁸³ Complaints concerning the work of the guardianship authority can be filed by the guardian or person under guardianship (if he/she is capable of reasoning) or another person possessing legal interest. The complaint is then submitted to the Ministry responsible for family care. The Ministry responsible for family care is obliged to respond to the complaint within 30 days.

⁸⁴ Article 145 of the Family law

capacity, have been deprived of the right to take care and bring up a child and/or do not take care of a child or do not take proper care of a child (Family law, article 113, paragraph 3)

- When a child is without parental care, no permission for foster care is needed (Family law, article 114, paragraph 2)
- A foster parent cannot be a person fully or partially deprived of legal capacity (Family law, article 117, paragraph 2, point 2)
- Parents of a child in foster care have the right and duty to represent a child, manage his/her property, provide funds for living, have personal contacts with the child and decide on issues important for the child's life together with the foster parent unless the parents are partially or fully deprived of parental rights or legal capacity or if they do not take care of a child in a proper way (Family law, article 120).
- A party that has full legal capacity can independently take legal actions – juridical capability (Law on Judicial Procedure, article 74, paragraph 1)
- An immigrant and his/her child can be granted citizenship of the Republic of Serbia if they are 18 year old, have not been deprived of legal capacity and if they give a written statement attesting that they consider the Republic of Serbia their own country (Law on Citizenship in the Republic of Serbia, article 18)
- Every citizen who is of legal age and has legal capacity can vote and be voted on (the Constitution of the Republic of Serbia, article 18)
- Every citizen of the Republic of Serbia who has legal age and legal capacity has the right to vote for and be voted for as President of the Republic of Serbia (Law on the Election of the President of the Republic, article 2)
- Persons who have received a legally-binding court decision on the deprivation of their legal capacity cannot be on the voting list. If such persons are listed, they will be removed from the list, and when the court offers a legally-binding decision on the restoration legal capacity they will be again put on the voting list (Law on Electing the Members of the Parliament, article 13, paragraph 6 and the Law on Changes and Additions to the Law on Electing the Members of the Parliament, article 1)
- Persons under the age of 16 or persons deprived of legal capacity need written permission of parents or a guardian to terminate a pregnancy (Law on the

Procedure of Pregnancy Termination in Health Institutions, article 2, paragraph 2)

- If a patient is underage or he/she is deprived of legal capacity, medical procedures can be undertaken if the legal representative- parents, foster carer or guardian- are informed and give permission. (Law on Health Protection, article 35, paragraph 1)
- A patient who has been deprived of his/her legal capacity should be involved in the decision-making about a proposed medical procedure in accordance with his/her maturity and capacity for reasoning (Law on Health Protection, article 35, paragraph 4)
- An organ transplant can only be performed if an adult organ recipient is in possession of his/her legal capacity and has given written permission before the transplant as an expression of his/her free will (Law on Organ Transplantation, article 21, paragraph 1)
- A minor or adult who has been deprived of his/her legal capacity can only have an organ transplant with the written permission of a legal representative or guardian and under conditions in which there are no direct objections (from a minor older than 15). A person who is partially deprived of legal capacity can have an organ transplant only if he/she gives written permission before the transplant is to occur in accordance with his/her capacity to make independent decisions, and with the presence and permission of the guardian who signs and confirms the person's expressed will. The guardianship authority also must approve the written permission of the guardian (Law on Organ Transplantation, article 22, paragraphs 1, 2 and 3).
- A person older than 18 can donate organs if he/she: has full legal capacity or capacity for reasoning and decision-making, is a relative of the donor recipient in lineal consanguinity regardless of the degree of blood relationship, or who is in collateral consanguinity at the third degree of blood-relationship (Law on Organ Transplantation, article 42, paragraph 1)
- Natural persons can found a shop company only if he/she is in possession of his/her legal capacity (Law on Private Entrepreneurial, article 8, paragraph 1, point 2)
- The shop ceases to work with legal force in the event of the death or permanent deprivation of legal of the owner (Law on Private Entrepreneurial, article 27, paragraph 1, point 2)

- Persons fully deprived of legal capacity are fully excluded from insurance, unless the law regulates it differently (Article 4 of the General Conditions for Insurance Against Accidents of the insurance association DELTA GENERALI OSIGURANJE, Belgrade; conditions from April 2007)
- Persons fully deprived of legal capacity are fully excluded from insurance, unless the law regulates it differently – mandatory insurance of travelers on public transport (Article 5 of the General Conditions for Insurance from the Consequences of Accidents by the Company Dunav Insurance a.d.o Belgrade)
- A child has a right to the family pension as long as: the child is incapable of independent life and employment, the child has attained the age of a child's right to the family pension prior to the death of the pension holder, and if the pension holder has supported the child until his/her death. A child with disabilities has a right to the family pension after the pension holder is employed or runs a private business in compliance with the regulations for the categorization of children with disabilities and article 4 of this law (Law on Pension and Disability Insurance, article 31, paragraphs 4 and 7).
- Fatherhood can be admitted by a man who has turned 16 and who is capable of reasoning (Family Law, article 46)
- A mother must agree with an admission of fatherhood but only if she has turned 16 and is capable of reasoning (Family Law, article 48, paragraph 1)
- A child must agree with an admission of fatherhood but only if he/she has turned 16 and is capable of reasoning (Family Law, article 49, paragraph 1)
- A child of legal (adult) age who is incapable of working and does not have enough resources for living has a right to family financial support by the parents until such child's condition lasts (Family law, article 155)
- A person must have legal capacity to enter into legal contract. A person with limited legal capacity can enter into contracts that are solely legally approved for him/her and in such cases, contracts are entered into without requiring the guardian's permission. If other contracts are entered into without the guardian's permission, they are unacceptable, but can be enforced later if a guardian subsequently grants permission.
- A criminal act committed in a state of incompetency cannot be considered a criminal act. Persons considered incompetent are those that were unable to comprehend the weight of their actions or were unable to control their actions as a result of mental illness, temporary mental state, delayed mental

development or other severe mental illness (Criminal Law, article 23, paragraphs 1 and 2)

- Only a person possessing full legal capacity can be bound by a contract on assurance (Law on Obligation Relations, article 999)
- A service user cannot be placed in another family if a family member is deprived of parental rights or legal capacity (Law on Social Protection, article 44, paragraph 1)
- Additional financial benefits for a child can also be available after they turn 19 if there is an act on categorization and while he/she is in the education system and an employment program, and the same benefits can be made available for a child upon which parental rights have been extended until age 26 (Law on Financial Support to the Family with Children, article 17, paragraph 8)
- A person partially or fully deprived of legal capacity cannot be a volunteer (Law on Volunteering, article 12, paragraph 2, point 3).

Termination of extended parental rights

Extended parental rights can be terminated when reasons for their extension no longer exist⁸⁵. The same provisions applied to the procedure for extending parental rights apply to the procedure for the termination of extended parental rights.

Restoration of legal capacity

A person of the age of majority who is deprived of his/her legal capacity can gain back his/her legal capacity when the reasons for deprivation are eliminated⁸⁶. This can be done by the court or by the authorized initiators⁸⁷. In addition, if following a decision to deprive a person of legal capacity the court determines that the mental state of the person has improved and that the partial deprivation of legal capacity would be sufficient, the court will replace the previous decision with a determination on the partial deprivation of legal capacity⁸⁸. The procedure for the restoration of legal capacity applies the same provisions as the procedure for the deprivation of legal capacity.

⁸⁵ Article 86 of the Family Law

⁸⁶ Article 148 of the Family Law

⁸⁷ Article 42, paragraph 1 of the Non-contentious Proceedings Act (the NCAP)

⁸⁸ Article 42, paragraph 2 of the Non-contentious Proceedings Act (the NCAP)

If we discuss the situations in which parental rights are extended or in which legal capacity is deprived solely on the basis of a person's disability, it is difficult to imagine how such an action can be eliminated. Nonetheless, it is necessary that we to change these provisions, eliminate the full deprivation of legal capacity and provide a completely different support system to persons with disabilities in order to avoid violations of basic human rights.

Practices of the European Court of Human Rights

Salontaji-Drobnjak v. Serbia (application no. 36500/05)⁸⁹

The European Court of Human Rights issued a chamber judgment regarding the applicant Slavko Salontaji-Drobnjak on 13th October 2009. Relying in particular on Article 6 § 1 and on Article 8, the applicant complained about the unfairness of the proceedings to determine his legal capacity and about his inability to institute proceedings for the restoration of his legal capacity.

Violation of Article 6 – Unfairness of Proceedings to Determine Legal Capacity

The purpose of the applicant's complaint to the European Court refer to the unfairness of the legal capacity proceedings which relies on the facts that he was not present at the court proceedings held on 22nd February 2005 when the court made its decision about the partial deprivation of his legal capacity, that he had not had a representative who would properly protect his interests, and that the national court's decision to deprive him of legal capacity was worded in vague terms.

The court did not accept the the Republic of Serbia's argument that the applicant had been heard several times before the court, that the court was enabled to make the decision without the applicant's presence, that if he were present in court he would n't be understood because of his mental state, that the hearing would affect his health, and that in any case, even if he had been heard, the court would not reach a different decision.

In addition, the Court did not accept the argument that the appointment of a temporary guardian who would represent the applicant's interests at the hearing held on 22nd February 2005 would be in the applicant's best interests, simply because it had been determined that a professional would best protect the applicant's interests.

Finally, the Court did not accept the argument that the Municipal court in Vrbas had carefully and comprehensively collected the necessary evidence and brought about a reasonable decision concerning the partial deprivation of legal capacity in full compliance with Article 36, paragraph 2 of the Non-Contentious Proceedings Act.

By allowing a certain margin of appreciation in this situation, the Court noted that:

- 1) the applicant had been excluded from the final hearing and had therefore been unable to personally challenge the experts' report recommending the partial deprivation of his legal capacity.

⁸⁹ The Serbian presentation of the Court's verdict – taken from the website of the Ministry for human and minority rights, Department for representation before the European Court for Human Rights; the complete verdict (in Serbian) -

http://www.zastupnik.gov.rs/index.php?optio=com_content&view=article&id=133:salontaji-drobnjak-protiv-srbije-3650005

- 2) Further, the domestic court's decision to this effect had not been reasoned enough and was worded in rather vague terms.
- 3) In addition, the Court did not accept the Government's submission that Mr Salontaji-Drobnjak's participation in the proceedings would have been useless.
- 4) Finally, Mr Salontaji-Drobnjak had had no opportunity to meet the lawyer appointed by the state neither to represent him nor to give her instructions.

The Court therefore concluded unanimously that the proceedings in question, taken as a whole, had not satisfied the requirements of a fair hearing and, consequently, there had been a violation of Article 6 § 1.

Proceedings for the full restoration of legal capacity

The Court did not accept the Republic of Serbia's argument that the domestic authorities had properly implemented the national legislation, nor its argument that the national legislation is in full harmony with the Convention.

The Court found discrepancies between the national legislation and its implementation with regard to limiting an applicant's rights to access to justice. In this regard, the Court first noted that despite numerous requests lodged by Mr Salontaji-Drobnjak and his guardian to have his legal capacity fully restored, the court had not yet pronounced its decision four years later. Second, during this time there had been no comprehensive psychiatric examination of the applicant. Lastly, **the domestic law did not provide for a periodical judicial re-assessment of the applicant's condition** but granted the decisive power in this regard to the Social Care Centre notwithstanding the principle of 14th Recommendation of the Committee of the Ministers of the Council of Europe from 23rd February 1999 that the legal capacity deprivation should be time-limited and with periodical re-assessment. Consequently, the Court held unanimously that the very essence of the applicant's right to a court had been impaired, in violation of Article 6 § 1.

Violation of the Article 8 – Right to private and family life

The Court noted that the margin of appreciation regarding Article 8 of the Convention depends on the quality of the decision-making process. If the decision-making process has serious flaws, conclusions made by the national authorities must be subjected to criticism.

Noting that ***the partial deprivation of legal capacity is without a doubt a violation of private life*** with regard to Article 8 of the Convention, the Court found that the limitation of the applicant's legal capacity had been very serious as he was unable to independently take part in legal actions, file for a disability pension, decide about his own medical treatment, or even get a loan. However, the domestic court's procedure for reaching such a decision had itself been fundamentally flawed and, some four years later, they had not yet re-examined their decision despite numerous requests to do so. The Court concluded unanimously that while a legal

system had to protect itself from vexatious litigants, the domestic authorities had to set up an effective judicial mechanism of dealing with such litigants' claims without having to necessarily limit their legal capacity. There had, accordingly, been a breach of the applicant's right to respect for his private life and a violation of Article 8.

Comment

With such violations of procedure in instances as important as the deprivation of legal capacity, it becomes clear that the Court could not have reached a different judgment, especially taking into account the Court's decision in a similar case (*Shtukaturv v. Russia*, judgment from 27th March 2008).

The national court could exclude the applicant from the hearing in compliance with Article 36, paragraph 2 of the Non-contentious Proceedings Act, but only if it would be harmful to the applicant's health or if it would not be impossible due to the applicant's mental or physical state. Authorized experts should have announced such an opinion at the hearing on 22nd February 2005, but it was not done. However, the court decided not to hear the applicant, who was in prison at the time, and also decided that including him in the hearing would be useless. In such circumstances and with the absence of a representative chosen by the applicant, possibilities for the Government's defense were diminished to useless.

If we disregard the issue of fair compensation and the costs of the procedure, which are not insignificant, the Serbian authorities have an obligation to undertake individual and general measures. Individual measures include the initiation of the procedure for restoring full legal capacity (taken in compliance with the Article 42, paragraph 1 of the Non-Contentious Proceedings Act) , in the same way that the procedure for the deprivation of legal capacity was initiated. General measures include the court's mandatory reassessment of the reasons for the deprivation of legal capacity in accordance with the recommendation given in this judgment and in accordance with the recommendation of the Committee of Ministers from 23rd February 1999. In addition, general measures could also refer, as it was stated in the verdict, to "the establishment of an efficient judicial mechanism to protect the court from vexatious litigants", but would not violate the right to a trial or deprive an individual of his or her legal capacity, especially not in the realm of health care, which was also in contradiction to the above mentioned recommendation of the Committee of Ministers.

Alajos Kiss v. Hungary (application no. 38832/06)

European Court of Human Rights delivered an important verdict on 20th May 2010 in *Alajos Kiss v. Hungary*, a case involving a person with mental illness and a violation of their right to vote. The applicant suffered from manic depression and had for that reason been placed under partial guardianship. Since the Hungarian Constitution contained an absolute voting ban for people put under guardianship, he could not vote in the 2006 parliamentary elections.

The European Court held unanimously that such an absolute ban violated the right to free elections of Article 3 of Protocol 1 ECHR.

The Court did accept the Government's contention that "only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs"⁹⁰, but did not accept the consequence Hungary attached to it, namely an automatic exclusion from the right to vote. The Court thus held that the ban was disproportionate. It is useful to quote the relevant parts of the Court's reasoning in full:

41. The Court accepts that this is an area in which, generally, a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on the right to vote can be justified in modern times and, if so, how a fair balance is to be struck. In particular, it should be for the legislature to decide as to what procedure should be tailored to assessing the fitness to vote of mentally disabled persons.

The Court observes that there is no evidence that the Hungarian legislature has ever sought to weigh the competing interests or to assess the proportionality of the restriction as it stands.

42. The Court cannot accept, however, that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation. Indeed, while the Court reiterates that this margin of appreciation is wide, it is not all-embracing⁹¹. In addition, if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question (cf. also the example of those suffering different treatment on the ground of their gender⁹², race⁹³, or sexual orientation⁹⁴). The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting

⁹⁰ Paragraph 38

⁹¹ *Hirst v. the United Kingdom (no. 2)* [GC], op. cit., § 82

⁹² *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94

⁹³ *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 182, ECHR 2007

⁹⁴ *E.B. v. France* [GC], no. 43546/02, § 94, ECHR 2008

consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualized evaluation of their capacities and needs⁹⁵.

43. The applicant in the present case lost his right to vote as the result of the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship. He may therefore claim to be a victim of the measure. The Court cannot speculate as to whether the applicant would still have been deprived of the right to vote even if a more limited restriction on the rights of the mentally disabled had been imposed in compliance with the requirements of Article 3 of Protocol No. 1 (see *mutatis mutandis* *Hirst v. the United Kingdom (no. 2)*, *op.cit.*, §§ 48 to 52).

44. The Court further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny. This approach is reflected in other instruments of international law, referred to above (paragraphs 14-17). The Court therefore concludes that an indiscriminate removal of voting rights, without an individualized judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote. There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.

Undoubtedly this has consequences for other European countries as well. There is a strong parallel between this case and the earlier case of *Hirst v. the United Kingdom (No. 2)* of 2005 in which the Court found that blanket bans on voting rights for prisoners violated the Convention (not yet implemented by the UK, by the way). The principle of individual judicial assessment is now broadened to people with mental disabilities. This underscores the importance of the right to vote and the extreme caution required when limiting that right.

Furthermore, it is notable that the Court refers for the very first time to the recent UN Convention on the Rights of Persons with Disabilities⁹⁶.

⁹⁵ cf. *Shtukurov v. Russia*, no. 44009/05, § 95, 27 March 2008

⁹⁶ This is the international law instrument mentioned in para. 14, to which the Court refers.

The legal capacity system in Serbia

Personal stories of parents who deprived their children of legal capacity or extended parental rights

Family M

Our son turned 18 in 2002 and at that point we deprived him of his legal capacity. We talked with the president of the Republic association for autism and she told us that legal capacity deprivation would be a way to represent our son if there should be some dispute. We did not understand the meaning of full legal capacity, but we knew that we should be his guardians and the pre-condition for guardianship was legal capacity deprivation. It was a precautious measure, but we also thought that it should be like that. We had to go to the court twice. Once, I was alone, and the other time, my son was with me. A lawyer from the Centre for social work was present at both hearings. They behaved appropriately towards us at the hearing. I remember that there was a blackout and everybody looked at our son with sympathy while he was trying to turn on the lights. I remember very well that I asked the judge at the moment the decision on legal capacity deprivation was delivered whether it was possible to change the decision if there would be conditions for our son to be employed sometime in the future. I knew that employment of persons with disabilities was possible in some developed countries, but still there had not been such opportunity in Serbia, and I told this to the judge. She looked and I had the impression that she thought that I was the one to be deprived of legal capacity and she told me "Yes, sure", but I believe it was only to get rid of us somehow. Along with the medical documentation that we submitted to the court, we were also asked to bring the latest opinion of a psychiatrist (no matter which one), and we were required to have a visit by experts appointed by the court. The experts who visited us were two elderly doctors who listened carefully to what we were talking about and took notes. We were telling the same story over and over again. They observed our son, concluded that he was well-nurtured and cared about. I responsibly claim that they did not know what autism was or how to behave with the person they were supposed to assess. I remember that they misunderstood some of his gestures and that they concluded that our son did not have the ability to communicate or produce emotional reactions. Although they knew our son did not talk, they asked him some questions to which he could not give answers.

At the hearing, no one talked with our son, and I believe it was because he does not speak, so they thought that it was impossible to communicate with him. No one warned us about the consequences of the deprivation of legal capacity nor did they tell us that there was a possibility for a deprivation of legal capacity.

For our son and our family, there have been no benefits from the deprivation of legal capacity. On the contrary, we were faced with the negative consequences of this procedur three years ago. At that time, there was a daycare centre project for persons with autism spectrum disorders and our son was one of six boys included in

the project. We found them a job at one printing house. The manager of the printing house told us that it was a socially responsible company working in compliance with the regulations of an international company. He told us that the salary for the boys would be paid to their bank account, because the company did not want to be accused of abuse. Since all of the boys were deprived of their legal capacity or they had extended parental rights, they could not have bank accounts.

When we deprived our son of legal capacity, we did not know that once the Centre for Social Work takes over the guardianship, a person can be placed in an institution and that his property is managed by the Centre. One of the negative consequences of this is that we have to write report every year to the Centre for Social Work, and they never respond. Only after we submitted a complaint to the Ministry of Labor and Social Policy did the representatives of the Centre for Social Work come to visit us and see where and how our son lives.

In addition, we learned that there exists the theoretical possibility of the restoration of his legal capacity. I have never heard of such an example in practice and I do not know the procedure and rules, but I am certain that we will do that.

Family Dj

We extended our parental rights over our son. We had heard from parents of children much older than our son that extended parental rights are the best way to protect your child legally. We did not know what legal capacity was, and all we wanted was to give him protection and legal security.

We initiated the procedure in 2003 when he was 18. His father represented the opposite side in court. The assessment was done by experts from the Military Medical Academy⁹⁷ based on medical documentation we had provided. We were present at the hearing along with our son and the court listened to him. He was declared a person under the age of 14. I do not know exactly what it means in terms of his legal capacity. The court did not explain anything about it; it did not warn us about any negative consequences or inform us about the possibility of the partial deprivation of legal capacity. The benefits for our son are that he still has a right to the material financial benefits for children, which would not be possible if we had not extended our parental rights. I did not know about the possibility of legal capacity restoration or terminating parental rights. We would definitely do that if it would be in the interest of our child.

Family V

The court decision says: "The parental rights of Dj and B. V. are extended over their son D. and he is legally regarded as equal to a minor below the age of 14".

The initiator of the procedure was the Centre for Social Work. It appointed a guardian for special cases and she worked in the Centre. She talked to our son during that time, but I believe she no longer works in the Centre.

⁹⁷ NB by the translator: health institution in Serbia

We took him to the Clinic for Neurology and Psychiatry for Children and Youth and were given an opinion about his level of development. This was all done in 2001 when our son turned 18. We heard about the extension of parental rights from some parents, and some of them were lawyers. They told us it was a possibility for our son to receive a family pension. We did not know anything about legal capacity or extended parental rights in the material or legal sense, and we do not know much more even now.

When we think about our property and inheritance, we think about our daughter. Parents of other children advised us to sign a contract about lifelong care with our daughter because that is the way to ensure that everything will belong to her one day.

The procedure before the court was very disturbing and painful. The judge acted as if our son was not present in the room. Our son constantly asked questions about what the judge was saying (while she was dictating the minutes). He asked why we had brought him there and he wanted to leave. No one warned us about the negative consequences of such a decision. We were only told that it was for his protection and safety. We believe that we were not in a situation in which we could learn more about the positive or negative consequences of such an action. We think that the positive side is that if he were to have hospital treatment, we could go with him and he would not have to be alone. I do not know whether or not he can be employed. I believe not, and that is definitely negative if he finds a job one day. We would like to learn more about the negative consequences and might consider the restoration of legal capacity.

Family M

The Centre for Social Work told me that I needed to deprive my daughter of her legal capacity. They told me it was my legal obligation. Before that, there were no extended parental rights. We fully deprived her of legal capacity in 2008 when she was 24. I was in court only once and my daughter was not in court at all. Unknown doctors appointed by the court assessed her in the daycare centre. We had to pay for the opinion of these experts appointed by the court. It cost about 20.000 RSD. No one in the Centre for Social Work or the court told me about the negative consequences of the deprivation of legal capacity or the possibility of the partial deprivation of legal capacity. At the moment, we do not have any benefits from legal capacity deprivation, but I was told it was the only possibility for her to receive the family pension. Until now, I did not know about and did not think about the possibility for the restoration of legal capacity.

Experiences from the region

Reforms of the guardianship system in Hungary

There is no universal solution for reforming the legal capacity system but one positive example of reform can be seen in the recently adjusted Civil Code of Hungary. This is especially important if we keep in mind that the previous Hungarian legislative procedure was identical to that currently in place in Serbia. Working in partnership with other Hungarian non-governmental organizations, the Mental Disability Advocacy Center (MDAC) has successfully reformed the guardianship system in Hungary.

In 2007, the Hungarian Parliament adopted a new Civil Code making Hungary the first country in the world to reform its legal capacity system in compliance with the obligations of the Convention on the Rights of Persons with Disabilities.

Hungary's old Civil Code was the piece of legislation that regulated a range of civil law issues. In the area of disability it allowed for the total deprivation or partial restriction of a person's legal capacity and their placement under guardianship. There were no alternatives to guardianship for people who required assistance to make legally-binding decisions in their lives. Approximately 80,000 adults in Hungary are under guardianship, two thirds of whom are legally prohibited from making important decisions. Under full guardianship, people were denied a range of civil and political rights including the right to decide where to live. This meant that the majority of people in long-term residential institutions were placed there by a guardian, irrespective of their wishes. Also compromised were the right to marry and start a family, the right to manage one's own property, the right to work and the right to vote.

The new Civil Code brings many changes, including the following highlights:

- A legislative ban on plenary guardianship.
- The provision of a new form of partial guardianship: partial in terms of specific areas of decision-making, and partial in terms of decisions needing to be made jointly between the adult and the guardian.
- Supported decision-making, which is an alternative to guardianship. Supported decision-making means that the adult's legal capacity remains intact. It enables a network of supporters to assist the adult in making their own decisions, thereby enhancing their self-determination.
- Advance directives, whereby adults can plan for their future when cognitive difficulties may prevent them from making decisions without assistance.
- All of the above measures are available to persons who need assistance because of their mental condition, intellectual capabilities or addiction.

This legislative reform marks significant progress towards Hungary's compliance with international human rights law, notably the CRPD, to which Hungary is legally bound. Towards this end, MDAC has been working since 2005 in a coalition with other non-governmental organizations. The coalition has advocated tirelessly for guardianship reform and the introduction of alternatives, reminding the government of its obligations under the CRPD to include persons with disabilities in legislative and policy reform. The coalition applauds the legislative process that led to the adoption of the Civil Code, and its realization of the principle "Nothing about us without us".

As mentioned previously, the Hungarian Parliament adopted a new Civil Code in 2007 and in 2009 introduced some minor changes. Civil society organizations worked on reform of Book 2 of the Civil Code which concerns the rights of persons with disabilities, namely the reformation of the guardianship system. On 2 March 2010 the President signed the Act which specified that books 1 and 2 of the Civil Code would enter into force on 1 May 2010. On 5 March 2010, during the general election campaign period, a Member of Parliament from the political party Fidesz named Robert Répássy petitioned the Constitutional Court to declare the entry into force of the Act as unconstitutional. Fidesz is the political party which was formerly in opposition and whose Members of Parliament voted against the Civil Code in November 2009. The Fidesz party won a landslide victory in the general election, the second round of which was held on 25 April 2010.

In his petition to the Constitutional Court, Mr. Répássy argued that the five months between the law's adoption and its entry into force on 1 May 2010 was too short a period to allow those responsible for the law's implementation to be properly trained. He also argued that different books entering into force on different dates would cause confusion. MDAC believes Mr Répássy's petition was a political attempt to delay the entry into force of the Civil Code to allow the incoming government to demolish the reforms and substitute them with their own version.

By an eight to one majority, the Hungarian Constitutional Court destroyed reforms which would have introduced human rights-compliant legislative reform for people with disabilities. The Constitutional Court achieved this by declaring a parliamentary Act confirming 1 May 2010 as the date on which Book 1 and 2 of the Civil Code would enter into force as unconstitutional. Book 2 contained a wealth of reforms relevant to persons with disabilities, including the abolition of plenary guardianship and the introduction of supported decision-making and advance directives. These are cornerstone obligations under Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which Hungary ratified in July 2007. Now, these provisions will not enter into force.

Four days after Mr. Répássy submitted his petition, the Hungarian Association of Persons with Intellectual Disabilities together with the Mental Disability Advocacy Center and supported by eight other nongovernmental organizations that together

represent the nearly one million Hungarians with disabilities, submitted a counter-petition to the Constitutional Court. The NGOs' petition pointed out that (1) five months is plenty of time for judges to read and prepare the implementation of a new law which contains 115 articles; (2) the new Civil Code has been debated and drafted over a much longer period of time; (3) no new apparatus needs to be put in place in 2010 as a gradual implementation is envisioned; and (4) no more resources are needed to implement the law, as they have already been budgeted.

Civil society organizations in Hungary will continue advocacy activities in the area of guardianship reform and the implementation of the provisions from the Civil Code.

Guardianship reform in the Czech Republic

Below, we give a short overview of advocacy actions for the improving the protection of persons with disabilities in the Czech Republic which were implemented from January 2008 to January 2010 by Czech and international civil society organizations.

In April 2008, the NGOs Mental Disability Advocacy Center (MDAC) and the League of Human Rights (LIGA) organized meetings with NGOs and providers of social services to initiate a discussion about legal reformation of the guardianship system in the Czech Republic. It followed up on the activities of other organizations such as QUIP, Portus and Duha that had debated about problems with the existing law and practice. The main flaws of the current guardianship system were identified and ideas for alternative measures existing in other countries, such as advanced directives and supported decision-making were introduced to the participants. The NGOs then formed a coalition for guardianship reform.⁹⁸ The participants discussed and suggested basic guiding principles by which the reform should be conducted in light of the government's reform of the Civil Code.

A 15-page commentary was signed by 13 NGOs, social services providers and academic institutions and submitted to the Minister of Justice in August 2008.

⁹⁸ Most of the organizations in the coalition were providers of social services. Two were patient (self-help) organizations, one was an academic institution (Center of Addictology – Department of Medical Faculty) and another was an organization representing parents of people with disabilities. Their representatives were mostly social workers; there were also 3 lawyers and one psychiatrist (at one meeting). The following organizations (besides MDAC and Liga) participated in the coalition: QUIP – Společnost pro změnu; Česká asociace pro psychické zdraví; občanské sdružení Kolumbus; občanské sdružení SELF HELP Ústí nad Labem; o.p.s. SYMPATHEA; občanské sdružení Fokus Praha; společnost DUHA – integrace osob s mentálním postižením; občanské sdružení Poradna pro občanství, občanská a lidská práva; Asociace průvodců v problematice rizikového chování; občanské sdružení Proutek; Centrum adiktologie; Dolmen, o.p.s, Agentura pro chráněné bydlení. We consulted individual members about specific issues and regularly informed all members about the progress in negotiations and new developments via emails and our guardianship webpage (www.reformaopatrovnictvi.cz).

Content of the NGO Commentary to the draft Civil Code

Original Civil Code proposal

The original draft Civil Code included several provisions that represented a positive change. First, it explicitly stated the obligation of the court to respect the principles of necessity and subsidiarity when deciding about plenary or partial guardianship. Second, it required that a guardianship measure be applied only for a specified period of time (currently a person can be placed under guardianship for their entire life). Third, it obliged the court to take into consideration the adult's wishes concerning the appointment of a guardian (including advanced directives which appoint a future guardian). Fourth, it incorporated the obligation of the guardian to take into account the opinions and wishes of the person under guardianship. Fifth, the draft law introduced the guardianship council as a body exercising supervision over the guardian's act. The guardianship council would be composed of at least three members elected from the relatives and friends of the person under guardianship. It would approve certain important decisions of the guardian defined by law.

However, the original proposal also had its weaknesses. It provided no alternatives to guardianship that would enable persons with disabilities to exercise their legal capacity on an equal basis as others, as required by Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD). The only exception was a brief provision about the appointment of a guardian without limitation of legal capacity, but in the NGOs' view, this was insufficiently developed. Moreover, the draft law preserved the possibility of plenary guardianship with automatic legal consequences such as the loss of the right to vote, parental rights and the right to get married. Further, the NGO coalition pointed out that the rights and obligations of guardians were not sufficiently regulated in the draft Civil Code and the person under guardianship would not have the right to be involved in the suggested control mechanism (the guardianship council). The NGO coalition also requested to the Ministry that together with the Civil Code it should propose an amendment of the Code of Civil Procedure that regulates the relevant proceedings, including the procedural rights of persons whose legal capacity is under consideration.

Amended draft Civil Code

After negotiations with representatives of MDAC/LIGA and other stakeholders, the Ministry of Justice introduced a revised proposal that incorporated most of the NGO coalition's proposals. The Ministry of Justice then submitted it to the Government in January 2009. Several alternatives to guardianship were added or elaborated: general advanced directives (not only directives regarding the identity of the future guardian), supported (assisted) decision-making, representation by next-of-kin in common affairs of daily life and guardianship without limitation of legal capacity. Guardianship without limitation of legal capacity signifies that the individual themselves would propose to the court the appointment of their guardian for certain

affairs. In these affairs, the adult and the guardian could act jointly, or the guardian could act alone but only in compliance with the will of the adult under guardianship. The person under guardianship could also act alone even in the areas for which the guardian was appointed. This measure would be useful in situations where there is a danger of harm as a result of the person's inactivity (e.g. application for social benefits). The issue of plenary guardianship became the most discussed one. Eventually, due to the advocacy of the NGO coalition, the relevant provisions allowing for plenary guardianship were deleted from the draft law.

The provisions of the draft Civil Code regulating the conduct of guardians were broadened to include, for example, the obligation of the guardian to keep in touch with the person under guardianship, to explain to the adult in an appropriate manner the nature and consequences of decisions taken by the guardian, and to take into account their opinions (including any advanced directives which were previously made) and manage their affairs accordingly. The draft Civil Code envisions that provisions regarding public guardians be regulated by a separate law. The NGOs suggested that it should be a separate law because it would deal with questions of qualification and education and would be quite detailed whereas the Civil Code is generally not as expansive.

As for the control mechanism, the draft Civil Code provides for the right of the adult under guardianship to participate in the meetings of the guardianship council, to appeal its decisions and to receive (together with the court and the guardianship council) annual and *ad hoc* financial accounts of their property prepared by the guardian. Under certain circumstances, organizations providing services to persons with disabilities also have the right to participate in the meetings of the guardianship council, to become a member, and to appeal its decisions.

Remaining problems

Several objections were not accepted by the Ministry of Justice. One of them is the term used by the draft law for persons possessing legal capacity and especially the term used for persons whose legal capacity is restricted or deprived (“nesvéprávný”), which was originally a legal term (before 1964), but which now has negative connotations in Czech. Nowadays it is even used as an insult and is therefore inappropriate to use with respect to persons with disabilities. Another anachronism in the draft law is the automatic loss of the right to marry as a consequence of limitation of legal capacity, although the court can specify an exception.

The NGO coalition also tried to strengthen the control mechanism over the guardian by broadening the scope of the guardianship council beyond that defined by the law, if the person under guardianship so wishes. Under the new provisions, the guardianship council would have competence only in areas or affairs specified by law (for example, changing the place of residence of the person under guardianship, or disposing of their property exceeding certain value or defined otherwise). The

guardianship council could agree on an extension of its competence. In addition, the NGOs wanted a provision which would allow the person under guardianship or the guardian to ask the guardianship council to make a decision in the following two situations: first, when the person under guardianship disagrees with the guardian and the decision regards an affair different from those included in the competence of the guardianship council defined by law. Second, when the person under guardianship wants the guardian to act but the guardian disagrees and refuses to act (in any area). In these situations, the decision of the guardianship council would substitute the decision of the guardian, and it would also mean that the decision of the guardianship council could be appealed and decided upon eventually by a court.

In spite of these limitations, the proposal fulfilled all the main requirements of the NGO coalition and represented a significant step forward in the process of CRPD implementation. The draft Civil Code was submitted to the Government at the beginning of 2009 and was discussed in the Legislative Council of the Government.

In March 2009, the Czech government lost a vote of no confidence. In spite of this, the Ministry of Justice submitted the draft Civil Code to the Lower Chamber of the Parliament. In June 2009, during the last Lower Chamber session before the elections scheduled in autumn 2009, the Parliament removed the Civil Code proposal from parliamentary debate leaving the future of the draft Civil Code unclear.

Continued advocacy following Czech ratification of the CRPD

On 2 October 2009, the Czech Republic ratified CRPD. On 9 October 2009, MDAC met with an official from the Ministry of Justice to discuss prospective amendments to the civil code concerning guardianship. The Ministry of Justice invited MDAC to be a member of the expert group on reform of the procedural rules.

Activities of MDAC, LIGA and other civil society organizations on guardianship reforms in Czech Republic are ongoing.

Shortcomings of the existing Serbian legislation and recommendations towards harmonization with the Convention on the Rights of Persons with Disabilities

The first step towards creating an adequate guardianship system and solving the problem of the deprivation of legal capacity is recognition of the problem. Through public debate and attention, it must be recognized that there is currently a widespread violation of the human rights of an entire group of people. It will not be easy to remedy, because it will first mean alleviating prejudices towards persons with disabilities, overcoming stereotypes and understanding new trends in the improvement of human rights protections around the world. Then, a complete analysis of current laws should be done in order to identify legislative shortcomings. Next, legislation must be harmonized with international standards and recommendations, as well as with constitutional guarantees in the area of human rights.

Recommendation of the Committee of Ministers of the Council of Europe no R(99)4⁹⁹ about principles of legal protection of incapable adults¹⁰⁰ outlines basic principles against which current legislation and practice in Serbia will be analyzed. **The principles were adopted in order to ensure that the measures regarding legal capacity “respect rights of persons with disabilities, their will and wishes, exclude any kind of conflict of interest and illicit interfering, are proportional to the circumstances of living conditions of each person, have the shortest possible period and are subject to regular revision by the authorized, independent and unbiased body or court authority”.** The recommendation refers to adults who, as a result of disability or insufficient personal development, are not capable of independent decision-making in regard to their personal or economic actions, or who are not capable of understanding, expressing or acting in accordance with decisions made, and therefore cannot protect their interests. “Incapability” can be consequence of mental disability, illness or other reasons. The principles should be applied to protection measures and other legal arrangements that provide “incapable adults” with the benefits of representation or assistance related to the above-mentioned actions.

It is important to highlight the fact that the full deprivation of legal capacity is unacceptable and that the regulations must be changed in compliance with the modern provisions described in international documents. The overview of these basic principles should be observed as a set of guidelines to provide support to persons with disabilities should they need it.

⁹⁹ Adopted by the Committee of Ministers on 23rd February 1999

¹⁰⁰ The recommendation uses the terminology which was probably correct at the time of adoption (1999) but today is outdated and no longer in use.

- *Respect for human rights and fundamental freedoms* – this is the fundamental principle underlying all other principles. It means the respect for the dignity of each person as a human being. The laws, procedures and practices relating to the protection of incapable adults shall be based on respect for their human rights and fundamental freedoms, taking into account any qualifications on those rights contained in the relevant international legal instruments.
- *Flexibility in legal response* - measures of legal protection and other arrangements intended to protect the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable a suitable legal response with respect to different degrees of incapacity and various situations. It includes measures that:
 - do not limit the legal capacity of a person
 - are limited only to specific actions without the need to appoint a representative/guardian with continuing powers
 - enable a person to take certain actions together with their representative
 - provide for more than one representative for certain actions and aspects of life
 - gives persons under guardianship the opportunity to undertake certain routine actions of minor significance based on the rights granted by the law and not by way of court or administrative decision
- give a person the opportunity to make certain decisions in advance which can be “activated” at some later date if incapability or disability occurs

Maximum preservation of capacity - the legislative framework should, as much as possible, recognize that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not automatically result in a complete deprivation of legal capacity. However, a restriction of legal capacity should be made possible where it is shown to be necessary for the protection of the person concerned. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make any other decision of a personal nature at any time when his/her capacity permits him/her to do so. Consideration should be given to legal arrangements whereby, even when representation in a particular area is necessary, the adult may be permitted, with the representative's consent, to undertake specific actions or act in a specific area.

- *Publicity* – decisions and measures related to the deprivation of legal capacity are public (noted in the birth registry, public registers and books etc.), which is problematic. Such a policy should be balanced with and proportional to the level of protection and/or type of measure taken.

- *Necessity and subsidiarity* - no protective measures should be established unless the measure is necessary, taking into account the individual circumstances and the needs of the person concerned. A protective measure may be taken, however, with the full and free consent of the person concerned. In deciding whether a protective measure is necessary, an account should be taken of any less formal arrangements that may be possible and of any assistance that may be provided by family members or others.
- *Proportionality* - where a protective measure is necessary, it should be proportional to the degree of capacity of the person concerned and tailored to their individual circumstances and needs. The protective measure should only interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent possible, consistent with achieving the purpose of the intervention.
- *Procedural fairness and efficiency* - there should be fair and efficient procedures for taking protective measures. There should be adequate procedural safeguards in place to protect the human rights of the persons concerned and to prevent potential abuses.
- *Primacy of protecting the interests and welfare of the person concerned* - in establishing or implementing a protective measure for an incapable adult, the interests and welfare of that person should be the paramount consideration. This principle implies, in particular, that the choice of any person to represent or assist an incapable adult should be governed primarily by the suitability of that person to safeguard and promote the adult's interests and welfare. This principle also implies that the property of the incapable adult should be managed and used for the benefit of the person concerned and to secure his or her welfare.
- *Respect for the wishes and feelings of the person concerned* - in establishing or implementing a protective measure for a person, the feelings as well as past and present wishes of the adult should be ascertained as far as possible, and should be taken into account and given due respect. This principle implies, in particular, that the wishes of the adult as to the choice of any person to represent or assist him/her should be taken into account and, as far as possible, given due respect. It also implies that a person representing or assisting an incapable adult should give him/her adequate information, whenever this is possible and appropriate, particularly concerning any major decision affecting him or her, so that he or she may express a view.
- *Consultation* - in the establishment and implementation of a measure of protection there should be consultation, so far as reasonable and practicable, with those having an interest in the welfare of the adult concerned, whether as representative, close family member or otherwise. It is for national law to determine which persons should be consulted and the effects of consultation or its absence.

The procedure for establishing protective measures and placing persons under guardianship should respect the following recommended principles:

- *Institution of proceedings* - the list of those entitled to institute proceedings for taking protective measures to safeguard incapable adults should be sufficiently long to ensure that protective measures can be considered in all cases where they are necessary. It may, in particular, be necessary to provide for the possibility that proceedings be initiated by a public official or body, or by the court or other competent authority on its own motion. The person concerned should be informed promptly in a language (or by other means) which he/she understands of the initiation of proceedings which could affect his or her legal capacity and the exercise of his or her rights or his or her interests, unless such information would be manifestly without meaning to the person concerned or would present a severe danger to the health of the person concerned.
- *Investigation and assessment* - there should be adequate procedures for the investigation and assessment of the adult's personal faculties. No measure of protection which restricts the legal capacity of an incapable adult should be taken unless the person taking the measure has seen the adult or is personally satisfied as to the adult's condition and an up-to-date report from at least one suitably qualified expert has been submitted. The report should be in writing or recorded in writing.
- *Right to be heard in person* - the person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.
- *Duration, review and appeal* - protective measures should, whenever possible and appropriate, be of a limited duration. Consideration should be given to the institution of periodical reviews. Protective measures should be reviewed upon a change of circumstances and, in particular, on a change in the adult's condition. They should be terminated if the conditions for imposition are no longer fulfilled. There should be adequate rights of appeal.
- *Adequate control* - there should be adequate control of the operation of measures of protection and of the acts and decisions of representatives.
- *Qualified persons* - steps should be taken with a view to providing an adequate number of suitably qualified persons for the representation and assistance of incapable adults. Consideration should be given, in particular, to the establishment or support of associations or other bodies with the function of providing and training such people.

Shortcomings

Here, we will highlight the most important shortcomings in national legislation with regard to the principles described in the Convention on the Rights of Persons with Disabilities.

Due to the size of this publication, we were unable to present more personal stories from families who deprived their adult children of legal capacity. However, from the handful of stories presented, we can conclude that the main reason parents deprived their child of legal capacity or extended their parental rights was for the protection of their children and to ensure the receipt of inheritance, family pension and/or other social financial benefits. In this way, the state ensures minimal social security, but the person is deprived of other very important rights. Currently, there are no adequate mechanisms of social support in Serbia that would allow persons with disabilities to retain both their rights and their legal capacity.

Alternatives to the deprivation of legal capacity

Legal provisions regulating the conditions and procedures for the deprivation of legal capacity are outdated and unclear. Such a situation leads to the grave violation of rights of persons with disabilities that are invisible to the public. One of the most important shortcomings is the lack of an alternative to the deprivation of legal capacity. There is no assistance in the decision-making process, even when such assistance is needed for persons with disabilities. The deprivation of legal capacity is has no alternative in our legislation or practice despite the fact that it is the most restrictive measure possible. Such a solution fully denies the individuality and diversity of a person with disabilities, and it does not take into account the different capabilities, characteristics and potentials of a person.

For example, there are persons who do not fully comprehend the value of money or property. Such person needs assistance in actions such as selling or buying a house or other item of greater value. However, it does not automatically mean that the person cannot decide where he/she should live, who to vote for, or whether or not to have children.

Within the framework of the current legislation, the partial deprivation of legal capacity represents a less restrictive measure and is a better (though still not the best) solution as it provides for a certain degree of legal capacity. In practice, however, the court routinely decides to deprive an individual of his/her full legal capacity to such an extent that the partial deprivation of legal capacity is an exception to the rule.

The law does not indicate that the family (parents, adoptive parents, siblings etc.) should grant permission to another person to take care of the person with disabilities and ensure their rights and interests are respected in the event of the parents' death.

In addition, the law does not allow a person to determine the type of care for himself/herself in the event that he/she should lose capacity at some point in the future. This is an important issue for persons suffering from some progressive illnesses who are aware that they will lose some capabilities in the future but do not have the opportunity (under the existing law) to organize their future life and care. In some cases, though an individual is still capable of taking care of their rights and interests, they may choose, with full awareness, to initiate the procedure for the

deprivation of legal capacity in order to regulate their future care. In doing so, they are deprived of their civil rights because the laws do not offer any alternative.

The cycle of poverty

Children with disabilities are usually excluded from both the mainstream and special education systems. A lack of education leads to a lack of employment opportunities and an inability to earn money for basic needs. Parents then decide to deprive their adult children of legal capacity in order to ensure they receive the family pension and/or other social benefits. This provides minimal social security but terminates the right to employment, earnings and management of property, reducing persons with disabilities to the status of “social welfare cases”, passive recipients of family pensions or other social categories living solely on the “state’s budget”. The vicious cycle of poverty thus ends.

The best interests of persons with disabilities

There are no legal provisions mandating that the court or other actors in the procedure deciding on the deprivation of a person’s legal capacity take that person’s best interests into account. Therefore, there are no provisions guaranteeing that only measures in the best interest of the person in question will be taken.

Reasons for initiating the procedure for the deprivation of legal capacity

Given the seriousness of the consequences of the deprivation of legal capacity, it is important to clearly define the reasons for the initiation of the procedure. This emphasizes the state’s duty to ensure the respect for human rights, maximum development and preservation of the capacity of each of its citizens. The state has an obligation to respect the diversity of its citizens and to try to adjust its mechanisms of protection to the various circumstances of the individual.

With the current legislation, the procedure is initiated easily as there are no defined justifications required for the deprivation of legal capacity. Throughout the process, persons with disabilities are exposed to degrading treatment in which their disability alone serves to justify and legitimate the procedure. The law states that in order to initiate the procedure, relevant facts and proof must be provided. Since this the law does not provide a clear interpretation of the types and quality of required proof, nor a stated obligation to act in the best interests of the individual in question, an apparent inability to communicate (e.g. a person has a hearing or speech impairment) commonly serves as sufficient proof.

Appointment of a temporary guardian

A temporary guardian is appointed without consulting with the person whose rights are being decided on. He/she does not have an opportunity to express wishes about the person being appointed as guardian. The guardianship body does not submit its decision on appointing a temporary guardian to the individual being placed under guardianship but only to the guardian and the court. Since the decision is not sent to the person whose rights are being decided on, he/she does not have a chance to use his/her right to appeal. The law provides that a person with legal interest can appeal, meaning the person under guardianship can use this right, but the right to appeal is made significantly difficult by the fact that an individual learns at their hearing who has been made his/her temporary guardian.

A person in the process of having their legal capacity deprived is usually appointed a relative as a temporary guardian. If there is no appropriate individual in the family, the guardianship authority appoints an employee of the guardianship authority as a temporary guardian, and in that respect undertakes the guardianship directly.

Although the temporary guardian should protect the rights of person in question, this role is usually a mere formality. In practice, a guardian appointed in this way usually does not know anything about the person he/she is supposed to represent, nor does he/she represent the interests of that person. Therefore, such an appointment only formally fulfills these duties.

Guardianship authority

During the procedure for the deprivation of legal capacity, the guardianship authority has multiple roles. As previously outlined, the guardianship authority is invited to the hearing, as along with the person in question, his/her temporary guardian or representative and the initiator of the procedure. Since the guardianship authority is frequently the initiator of the proceedings, the guardianship authority is sometimes in the role of initiator and temporary guardian and/or representative at the same time.

This is a fairly confusing situation, as the different roles of the guardianship authority are mixed and inconsistent. Therefore, the situation in practice (which is not unusual) is that the guardianship authority initiates the procedure for depriving a person of legal capacity and then appoints a temporary guardian – an employee of the guardianship authority, who usually doesn't know the person whose rights are being decided on – and can be the representative of the person with a disability during the same procedure. This leads to an inadequate protection of the rights and interests of the person in question. Finally, though the decision on the deprivation or restoration of legal capacity is made by the court, the decision on the appointment and withdrawal of the guardian is made by the guardianship authority.

Presenting proof

The law states that the court must hear the opinion of the person in question and can only sustain from hearing said person if it is harmful to the person's health or if such

a hearing is impossible due to the persons's mental or physical state. This leads to a situation in which a person in the process of having their legal capacity deprived of them cannot be heard in court, because the disability itself is regarded as sufficient reason for the "inability to organize a hearing".

The court can organize to hear the opinions of the relatives of the person in question, as well as the initiator of the procedure, but in majority of cases, the court makes its decision solely on the basis of the opinions of the appointed experts.

Two doctors give their opinions on the mental health and capacity for reasoning of the person in question. This expert opinion should be given with the presence of the judge, except when it is done in a residential health institution. However, this is rarely implemented, and expert opinion is often made in either the doctor's office or in the place in which the person lives so the court does not have insight into the time and quality of the doctor's assessment. The observations are short (one to two hours average) and afterwards the experts give their opinion. This opinion has very significant consequences for the life of a person.

On the other hand, one problem with the law is the provision that states that the court can determine that a person should be placed in health institution for up to three months if it is required to determine his/her mental state (unless it could negatively affect the person's health). The criteria for making this decision is unclear and is usually made by the doctor and psychologist who are designated by the court to assess the capacity of the person and give their opinion. They decide whether more time is needed for an assessment of the mental and psychological state of the person. Three months is too long to be placed in a psychiatric institution simply to establish and present facts to the court. A more detailed provision describing exactly why a person should be kept in such an institution do not exist. A person can appeal such a decision, but the appeal does not halt the decision's implementation.

Decision on legal capacity

The court's decision on legal capacity is made for an indefinite period of time and there is no obligation to review the decision. Therefore, persons remain deprived of their legal capacity until death.

The restoration of legal capacity is possible, and the law provides that the court can, in its official capacity or on the initiative of the guardianship authority or other authorized persons, make a decision to restore legal capacity. It is difficult to imagine an instance in which the court would make such a decision, as there is no required periodical review of the decision to deprive an individual of his/her legal capacity. In practice, the court does not have an opportunity to receive information or reasons to initiate the process in its official capacity. Therefore, such a provision in the law is completely useless.

It has already been said that a person deprived of legal capacity can initiate the process to restore his/her legal capacity. The problem is that people are not informed about this possibility. On the other hand, the law provides that the restoration of legal capacity is possible if the reasons for its deprivation no longer exist. Since the disability itself is usually the only reason legal capacity is deprived in the first place, it is obvious that such a reason would not simply cease or disappear. Therefore, the conditions for the restoration of legal capacity will no be fulfilled.

Guardianship

As previously described, after the court's decision on the deprivation of legal capacity, the guardianship authority appoints a guardian. An appeal can be made to the Ministry of Labor and Social Policy, but the person deprived of legal capacity cannot make an appeal in practice since he/she loses procedural capacity through the deprivation of legal capacity. He/she is now represented by the guardian who can make an appeal for the person in question. This is another illogical solution in an instance in which a person deprived of legal capacity wants to appeal the choice of appointed guardian. An appeal can also be made by relatives. However, this possibility is usually withheld as there is no obligation to send the decision on guardian appointment to relatives.

In addition, a guardian is obligated to take care to make the person in question capable of independent life. This also means that the guardian initiates the procedure for the restoration of legal capacity when the person with disabilities is again capable of independent life, but this never happens in practice. Also, the guardian is obliged to visit a person and directly inform themselves about the living conditions of the individual deprived of legal capacity. However, this measure is not clearly elaborated on in the law and there are no sanctions or penalties if the guardian fails to fulfill this obligation. It is not unusual for a guardian to never visit the person under his/her guardianship or to have no direct contact with him/her.

There is no adequate control mechanism for the guardian's work. Although there is an obligation to report to the guardianship body, it is difficult to assess the behavior and obligations of the guardian, especially in cases in which the guardian is an employee of the guardianship authority. It is also problematic that the guardianship authority, which appoints the guardian, is solely responsible for controlling and assessing the guardian's work.

It is unbelievable that there is no provision obliging the guardian to consult a person deprived of legal capacity in any aspect of their person's life.

A person under guardianship can be placed in a residential institution against his/her will because he/she cannot make decisions on his/her place of living.

The law allows one person to be appointed as guardian for several persons deprived of legal capacity. In addition, managers and employees in residential institutions can be appointed guardians to the persons placed in such institutions.

Recommendation

We can conclude from this argument that Serbia needs radical reform of its legislation regarding guardianship and the deprivation of legal capacity. Doing so is necessary in order to fulfill its obligations under the relevant international treaties, implement internationally accepted standards, and to ensure respect for human rights and the equality of its citizens, which are also rights guaranteed by the Constitution of the Republic of Serbia.

The Convention on the Rights of Persons with Disabilities says that all measures related to the legal capacity of adults with disabilities should also include appropriate and efficient guarantees so that such measures are proportionate and adjusted to the circumstances of the adult in question, implemented for the shortest possible period and are periodically and regularly reviewed by experts, independent and unbiased by any body or court.

Current legislation does not promote protection and assistance of persons with disabilities, but is, by its very nature, based on depriving persons of rights and liberties. The choice given by the law – full or partial deprivation of legal capacity – does not respond to the needs of persons with disabilities. Legal regulations, procedures and actions that dictate the appointment of a guardian and that consider the legal capacity of a person incapable of taking care of his/her own interests should be based on the respect of the principles set by international standards in this area. For the harmonization of national legislation with such standards, it is necessary to change the current legislation. Some of the options are:

- Abolishing the full deprivation of legal capacity¹⁰¹ and provide alternative measures – full deprivation of legal capacity should be abolished. Instead of this measure, alternative measures should be introduced that can provide assistance to a person. One of the alternatives is the partial deprivation of legal capacity, namely partial/adjusted guardianship. It can be regulated to that the court in each individual case determines the areas requiring assistance and in other aspects of life, allows the person to retain his/her legal capacity. A person who requires assistance should be provided with the opportunity to express his/her needs and wishes, and the court should be obligated to adjust the procedure for each person so as to allow such a person to communicate and express his/her needs. A person who requires assistance must be given the option to choose or suggest someone as a guardian. It is important that the partial deprivation of legal capacity is the last and least restrictive measure. It

¹⁰¹ Since the full deprivation of legal capacity should be fully abolished, in the rest of the text we will only speak of the partial deprivation of legal capacity and adjusted guardianship.

should also be imposed only after all other measures have been attempted. Other measures can include granting authority for representation in certain actions, decisionmaking based on previously expressed wishes and permission and providing support to individuals with their independent decisionmaking – without putting a person under guardianship. The assistance should be provided when a person needs it, but it cannot limit any right and representatives must be subject to control and/or special permission – if the important decisions are connected to the personality or property of the person requiring support. The person in question should be at the center, and the measures imposed should be individualized in accordance with his/her needs.

- Respecting the human rights and best interests of a person with disabilities – respect for human rights and equality should be a fundamental principle. The court should be obliged to take care of the best interests of a person requiring assistance. It is necessary to provide a legal obligation, to impose the least restrictive and imposing measures on the private life of the person requiring assistance. A person cannot be deprived of rights, and the state should ensure that he/she has adequate support in order to fully enjoy his/her human and civil rights in every situation.
- The procedure for the deprivation of legal capacity – it is necessary to outline clear rules on the relevant proof required for initiating the procedure and thus preventing discrimination against the person with disabilities (taking into account that according to the current practice, disability is the sole precondition for justifying the deprivation of legal capacity). It should be clearly stated that the disability alone cannot and must not be the reason for initiating the procedure of the deprivation of legal capacity. The law should give clear criteria concerning an assessment for a need for additional support in each particular case. The type and quality of proof needed for the deprivation of legal capacity should be clearly stated, and it should be required that the expert assessment or opinion of the doctor and psychologist cannot be the only proof required for the deprivation of legal capacity. The court must hear and see a person, and form a personal opinion on a person's condition independent from the opinions acquired during the earlier procedure. It is very important to eliminate the possibility of holding a person against his/her will in a health institution for observation and for the purposes of obtaining a professional assessment, as is possible with the current legislation.
- Participation in the procedure and respecting the opinion of the person with disabilities – require that the adult be informed in due time and in a comprehensible manner about the legal actions involved in the procedure for the deprivation of legal capacity (determining for which actions the person needs support). It should be required that the person receive information about his/her rights, that the person is present at the hearings and is heard in whatever way he/she communicates. The law should determine the situations in which presence at the hearings would negatively affect a person's health. It is necessary to provide that the wishes and opinion of the person requiring

assistance are taken into account both in terms of needing support and choice of guardian. There should also be a possibility for appealing the decision and choice of the guardian. In addition, a person needing assistance should be provided with free legal aid in court and all proceedings related to appeals. It is important to ensure that a person is consulted about all decisions regarding his/her life.

- Guardianship - the guardianship system should be fully reformed and the authorities of the guardianship body should be reconsidered. The regulations must be harmonized with real needs and international standards. The guardianship body is given extensive authority in Serbia, and it seems that it does not have the necessary qualitative and quantitative resources in this area. In addition, the guardianship authority has multiple contradictory roles, which leads to unjust procedures and abuses. An independent body must be created that would have the duty to periodically monitor the work of the guardianship and assess the work of the guardians. It is important to ensure that the person under guardianship is included in the process of monitoring the work of the guardian with the support of the appropriate legal representative (an individual from a list of lawyers who have had special training and is aware of the sensitivities necessary in representing persons with disabilities). In addition, the selection criteria for a guardian should be more objective and regulated, and persons who have a conflict of interest or stand to benefit from the guardianship should not be able to be appointed as guardians. The scope of duties and obligations of the guardian with regard to the person under guardianship should be regulated, and the obligation of the guardian to provide housing that enables the highest degree of independence and free movement of the person under guardianship should be monitored for compliance. In addition, it is important to require the guardian to consult with persons needing assistance about all important issues and to respect their wishes.
- Decision with time limitations – the current practice in Serbia is such that the decision on the deprivation of legal capacity is made to be in effect for an indefinite (or unlimited) time. It is necessary to require a regular mandatory review of the decision.
- Cease the automatic deprivation of basic rights – there is no justification for a person deprived of legal capacity to be automatically deprived of some basic rights, especially rights to manage property, get married, have children, vote, have access to justice, choose a place to live, etc. The regulations should be harmonized with international standards so that these rights are not limited.
- Right to appeal – a person whose legal capacity or additional assistance is being decided on should have the right to appeal in court or through an administrative procedure. It is necessary to ensure free and fair legal representation in such situations. Representatives can be chosen from a list of lawyers that have received additional training on sensitivity in representing persons with disabilities.

- Necessary training for experts – it is necessary to plan and provide for further trainings of judges in non-contentious proceedings, as well as employees of the guardianship authority. They need to be more aware of and sensitive to the obstacles facing persons with disabilities and need to be more informed about the international documents and standards, as well as the positive practices that have been developed in the region.