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# REFORM OF THE ADULT GUARDIANSHIP SYSTEM (LEGAL CAPACITY)

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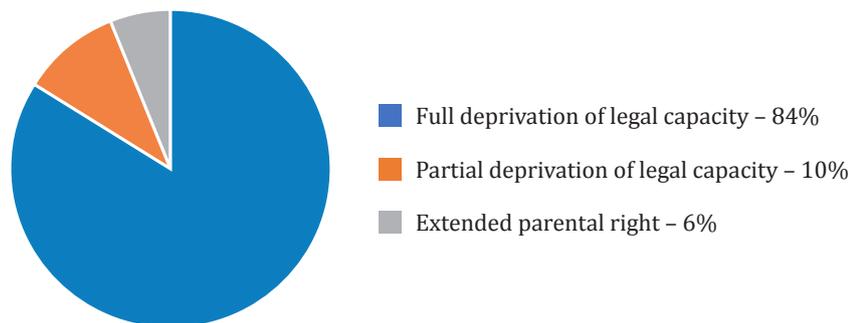


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Legal capacity is acquired at the age of majority and represents the person's ability to independently decide on his/her rights and obligations, which means that a person can assume rights, accept obligations and enter into legal relations on his/her own will.<sup>1</sup> Persons with disabilities, especially intellectual and psychosocial disabilities, are most at risk of losing this ability in the process of **deprivation of legal capacity**.<sup>2</sup> Persons deprived of legal capacity usually end up in residential institutions or psychiatric hospitals, far from their place of residence, which they cannot leave and very rarely make contact with the outside world.<sup>3</sup>

Deprivation of legal capacity is widespread in Serbia, **and the existence of disability (medical diagnosis) is one of the main reasons for deprivation of legal capacity**,<sup>4</sup> which is contrary to the Convention on the Rights of Persons with Disabilities.<sup>5</sup> Based on the data from 2019, 10,442 persons in Serbia were completely deprived of legal capacity, 928 partially, while parental rights were extended over 629 persons,<sup>6</sup> with this number being higher, taking into account that data were collected from 110 out of 174 municipalities in Serbia.



The Family Law of Serbia<sup>7</sup> regulates **full**<sup>8</sup> and **partial**<sup>9</sup> deprivation of legal capacity, as well as the **possibility of extending parental rights**.<sup>10</sup> Persons who are fully deprived of legal capacity are equated with younger minors (children under 14), and persons who are partially deprived of legal capacity with older minors (children aged 14 to 18). Procedures for deprivation of legal capacity and extension of parental rights are regulated by the Law on Extra-Judicial Proceedings.<sup>11</sup>

1 Kosana Beker, Tijana Milošević, *Poslovna sposobnost – Sudska praksa i zakoni u Republici Srbiji 2016. godine (Legal capacity – Judicial practice and laws in Serbia, 2016)*, Mental Disability Rights Initiative MDRI-S, Beograd, 2016, p. 12, available at: <http://www.mdri-s.org/wp-content/uploads/2017/01/Sudska-praksa-i-zakoni.pdf>

2 Kosana Beker, *Lišenje poslovne sposobnosti – Zakoni i praksa u Republici Srbiji*, Inicijativa za prava osoba sa mentalnim invaliditetom MDRI-S, Beograd, 2014, str 7, (Kosana Beker, *Deprivation of legal capacity – Laws and practice in the Republic of Serbia*, Mental Disability Rights Initiative MDRI-S, Belgrade 2014, p. 7, available at: <http://www.mdri-s.org/wp-content/uploads/2013/03/Lisenje-poslovne-sposobnosti.pdf>

3 Kosana Beker, Tijana Milošević, op. cit, p. 69

4 Report by Nils Muiznieks, Commissioner for Human Rights, after his visit to Serbia. 16-20 March 2015

5 „Sl. glasnik RS – Međunarodni ugovori”, br. 42/2009 (“Official Gazette of the Republic of Serbia – International Agreements”, no. 42/2009

6 Ljiljana Plazinić, *Istraživački nalazi o praksama centara za socijalni rad u vezi sa lišavanjem poslovne sposobnosti (Research findings on the practices of social work centers in relation to deprivation of legal capacity)*, Mental Disability Rights Initiative MDRI-S, Beograd, 2020, p. 18, available at: <https://www.mdri-s.org/wp-content/uploads/2020/10/Istrazivacki-nalazi.pdf>

7 „Sl. glasnik RS”, br. 18/2005, 72/2011 – dr.zakon i 6/2015 “Official Gazette of the Republic of Serbia”, no. 18/2005, 72/2011 – as amended and 6/2015)

8 Full deprivation is applied to an adult who, due to illness or psycho-physical development, is not capable of normal reasoning and is therefore unable to take care of herself or himself and protect her or his rights and interests and may be fully deprived of legal capacity. Article 146 of the Family Law

9 Partial deprivation of legal capacity occurs if an adult directly endangers his own rights and interests or the rights and interests of others due to illness or disorders in psycho-physical development. In this case, the court decision determines the legal affairs that the person may or may not undertake independently. Article 147 of the Family Law.

10 When the parental right is extended even after the child reaches the age of majority if the child is unable to take care of herself or himself and to protect her/his rights or interests due to illness or disorders in psycho-physical development or if she or he endangers her or his own rights and interests by her or his actions. Article 85 of the Family Law

11 „Sl. glasnik SRS”, br. 25/82 i 48/88 i „Sl. glasnik RS”, br.46/95 – dr.zakon, 18/2005 – dr. zakon, 85/2012, 45/2013 – dr.zakon, 55/2014, 6/2015, i 106/2015-dr.zakon ( “Official Gazette of the FRS”, no. 25/82 and 48/88 and “Official Gazette of the Republic of Serbia”, no. 46/95 – as amended, 18/2005 – as amended, 85/2012, 45/2013 – as amended, 55/2014, 6/2015 and 106/2015 – as amended)

**Deprivation of legal capacity has no alternative in Serbian law and practice**, which is not in line with the obligations undertaken by the ratification of the Convention on the Rights of Persons with Disabilities, which stipulates (Article 12) **that States parties to the Convention should recognize that persons with disabilities exercise their legal capacity on an equal basis with others in all aspects of life.**

**Restoration of legal capacity is possible, but it rarely happens** because it is prescribed that legal capacity can be restored when the reasons for which a person is deprived of legal capacity cease to exist. Given that often the only reason for deprivation is the existence of a disability, it is unlikely that the disability will cease/disappear, which means that the condition for the restoration of legal capacity will not be met.<sup>12</sup> During 2019, the reason for the termination of permanent guardianship of adults in 96.6% of cases was the death of the beneficiary, while legal capacity was restored in only 27 cases (3.4%).<sup>13</sup>

Serbia has one of the most restrictive models of guardianship that affects all aspects of the lives of persons deprived of legal capacity, and the position of mentally disabled women is particularly difficult.<sup>14</sup> The rights of women with disabilities to control their reproductive health, including the right to free and informed consent, the right to start a family, the right to choose where and with whom to live, the right to physical and mental integrity, the right to dispose of property, to control their financial affairs and to have equal access to bank loans, mortgages and other forms of financial lending are often violated.<sup>15</sup> **All of these issues are decided by their guardians,<sup>16</sup> and many women with mental disability who live in residential institutions do not even know who their guardian is or who they would turn to if they needed support,<sup>17</sup>** as they were previously excluded from the proceedings in which they were deprived of legal capacity.

Women with disabilities have many reproductive health rights violated, while women with mental disability who live in residential institutions, **are at risk of specific forms of gender-based violence, such as forced abortions and sterilization, contraceptives application without informed**

**The Committee on the Rights of Persons with Disabilities (CRPD Committee)** recommended that Serbia harmonize its regulations with the Convention, and replace the regime of substitute decision-making with a supported decision-making, respecting personal autonomy, will and preferences and establish a transparent protection mechanism. In addition, the Committee recommended that the state provide training, with consultation and involvement of persons with disabilities, organizations representing them and Ombudsman, at the national, regional and local levels, for all stakeholders, including civil servants, judges, social workers, regarding the recognition of the legal capacity of persons with disabilities and good practice in decision-making with the help of another person. (CRPD/C/SRB/CO/1, para. 22)

**The CRPD Committee** has pointed out that there is a key difference between legal capacity and mental decision-making ability. While legal capacity should be intact, as it ensures the exercise of rights and freedoms, the assessment of mental capacity should primarily serve as a basis for determining the support provided to a person in the enjoyment of legal capacity, as well as mental capacity must not be used as an excuse to deny legal capacity. (CRPD/C/GC/1, para. 13)

12 Kosana Beker, 2014, op. cit, p. 58

13 Izveštaj o radu centara za socijalni rad za 2019. godinu, *Republički zavod za socijalnu zaštitu, Beograd, 2020*, str. 15, (Report on the work of the centers for social work for 2019, *Republic Institute for Social Protection, Belgrade, 2020*, p.15) available at: <http://www.zavodsz.gov.rs/media/2078/izvestaj-o-radu-csr-2019-1.pdf>

14 Kosana Beker and Tijana Milošević, op. cit, p. 69

15 CRPD/ C/GC/3, para. 51

16 Kosana Beker, 2014, op. cit, p. 7.

17 Biljana Janjić and Dragana Ćirić Milovanović, Here the walls have ears too, Mental Disability Rights Initiative MDRI-S, Belgrade, 2017, p. 54.

**consent**,<sup>18</sup> which is particularly highlighted in the European Commission's October 2020 Progress Report on Serbia.<sup>19</sup> This action was assessed by the CRPD Committee as a violation of Article 12 of the Convention.<sup>20</sup>

**The CRPD Committee** has recommended that Serbia take all necessary measures to ensure the right to information and informed consent before any intervention that could affect a person with a disability, regardless of his or her legal capacity, and to ensure that women with disabilities are entitled to rights to have a home and found a family and provide them with the necessary support. (CRPD/C/SRB/CO/1, paras. 38, 46)

The Committee has recommended that States adopt effective measures to provide women with disabilities with access to the support they may need to exercise their legal capacity, in line with the General Comment on Article 12, to give their free and informed consent and to make decisions regarding their own lives. (CRPD/C/GC/3, paras. 62, a, ii).

**The Council of Europe's Group of Experts on Actions against Violence against Women and Domestic Violence (GREVIO Group)**, in its first report for Serbia in 2020, recommended that Serbia ensure that guardians and healthcare professionals, in all circumstances, respect and act in accordance with informed and free consent of women and ensure that that consent would be complied with in the performance of medical procedures, such as abortion and sterilization, especially in the case of women with disabilities living in institutions.<sup>21</sup>

Women with mental disability in residential institutions also **face barriers to accessing justice**, including sexual harassment and sexual violence. Internal protection mechanisms in institutions are not established or are not functional, women are often not trusted if they report violence, and they **cannot conduct court proceedings for protection against violence on their own because they are deprived of legal capacity**.<sup>22</sup>

**CEDAW committee** is concerned about the deprivation of legal capacity and the guardianship regime in Serbia, which limits the legal capacity of many women with disabilities, making it impossible for them to marry, start a family, access justice or vote. Serbia has been recommended to repeal provisions of the law that limit the legal capacity of women based on disability. (CEDAW/C/SRB/CO/4, para. 45-46)

The issue of enjoying the legal capacity of persons with disabilities is essential for the exercise of all rights and active participation in the life of the community,<sup>23</sup> and in order to ensure **this it is necessary that the guardianship system should be completely reformed and that the possibility of**

18 Ibid.

19 European Commission Progress Report on Serbia (October 2020)

20 CRPD/C/GC/3, para. 44-45

21 More details in: Biljana Janjić, Kosana Beker, Valentina Lepojević, *Protection of sexual and reproductive rights of women with mental disability and protection from violence*, FemPlatz&MDRI-S, available at MDRI-S web site

22 Kosana Beker, *Žene sa invaliditetom u ustanovama socijalne zaštite ili zašto je važna reforma Sistema starateljstva (Women with disabilities in social care institutions or why reform of the guardianship system is important)*, Danas, 29.04.2021, available at: [https://www.danas.rs/drustvo/zene-sa-invaliditetom-u-ustanovama-socijalne-zastite-ili-zasto-je-vazna-reforma-sistema-starateljstva/?fbclid=IwAR1nX\\_MO5YImXnqRq8l6PhslMi5X2YbuUjPqgxIIRosF7rw-1bBRhvD2KgE](https://www.danas.rs/drustvo/zene-sa-invaliditetom-u-ustanovama-socijalne-zastite-ili-zasto-je-vazna-reforma-sistema-starateljstva/?fbclid=IwAR1nX_MO5YImXnqRq8l6PhslMi5X2YbuUjPqgxIIRosF7rw-1bBRhvD2KgE) (accessed on 5.7.2021)

23 Biljana Janjić, Kosana Beker, Milan M. Marković (ur), *Zbornik radova i preporuka – poslovna sposobnost i život u zajednici (Collection of papers and recommendations – legal capacity and community life)*, Mental Disability Rights Initiative MDRI-S, Belgrade 2014, p. 8), available at: <http://www.mdri-s.org/wp-content/uploads/2014/12/Zbirka-radova-SRB.pdf>

deprivation of legal capacity should be eliminated. This implies a complete transformation of the guardianship system, which includes amendments to the Family Law and the Law on Non-Contentious Proceedings, as well as the design, development and establishment of a support service system for persons with disabilities who need such support.<sup>24</sup> The Strategy for improving the position of persons with disabilities in the Republic of Serbia for the period from 2020 to 2024 plans this reform, in order to create conditions for equal participation of persons with disabilities in civic, political, economic and other spheres of life.<sup>25</sup>



It is necessary to carry out social processes in order to achieve real, instead of apparent equality.<sup>26</sup> Defining legal capacity as a universal right, the Convention establishes absolute respect for the autonomy of persons with disabilities, and the State has an obligation to take all necessary measures to provide support that persons with disabilities need in the exercise of legal capacity and make it accessible. This abandons the model of representative/guardianship decision-making, which is replaced by **assisted decision-making (supported decision-making)** – which is based on the full legal capacity of persons with disabilities.<sup>27</sup>

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24 Strategija za unapređenje položaja osoba sa invaliditetom u Republici Srbiji za period od 2020. do 2024. godine, „Sl.glasnik RS”, broj 44/2020, (Strategy for improving position of Persons with Disabilities in the Republic of Serbia for the period from 2020 to 2024, “Official Gazette of the Republic of Serbia”, number 44/2020.

25 Ibid.

26 Biljana Janjić, Kosana Beker, Milan M. Marković (ed), op. cit, p. 52.

27 Ibid, p. 56

This means that the court should recognize groups, networks or individual support providers, most often in the immediate vicinity of a person with a disability. **Assistants are assigned by choice and with the consent of the person, from the circle of people whom the person trusts. The emphasis is made on providing support, on personal decision-making instead of advocacy, on ability instead of incompetence.** The focus is on the individual and his/her individual needs, and whether and to what extent that person will need support is a matter for the court to assess in a particular case, but the rule is that a person with a (mental) disability is observed in the light of his/her social life and the greatest independence he/she can achieve, not social dependence, exclusion and passivity.<sup>28</sup>

***General Comment no. 1 of the CRPD Committee (Equality before the Law) provides guidance to states on how to harmonize legislation with the commitments made by ratifying the Convention on the Rights of Persons with Disabilities and to develop supported decision-making practices instead of the current guardianship regime.***<sup>29</sup>

For example, people with disabilities may choose one or more trusted people to help them with certain types of decisions/jobs or may request other forms of support, such as peer support, advocacy (including self-advocacy) or communication assistance – using understandable formats or providing interpretations in sign language etc., all in order to respect the will, dignity and autonomy of persons with disabilities. (CRPD/C/GC/1, para. 17, 4)

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28 Ibid, p. 57-58

29 Kosana Beker and Tijana Milošević, op. cit, p. 7.

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### **Mental Disability Rights Initiative MDRI-S**

It was founded in 2008 as a non-profit non-governmental organization with the support of the international organization Disability Rights International (DRI), which recognized the need for constant presence and strengthening of the movement for the rights of persons with disabilities in Serbia. MDRI-S is fully committed to the protection and promotion of the human rights of persons with intellectual and mental disabilities, and to the realization of their full inclusion and participation in society.

### **Women's Rights Organization FemPlatz**

It was established in 2017 with the aim of advocating for the promotion and exercise of the rights of women and girls, protection against discrimination and violence, economic empowerment and social inclusion, with a special focus on women and girls facing multiple discrimination.