DRAFT

**DEPRIVATION OF LEGAL CAPACITY IN MONTENEGRO**

The analysis of the implementation of the Law on non-contentious procedure and other relevant legislation

Conclusions and reccomendations

Kosana Beker

**TABLE OF CONTENTS**

1. INTRODUCTION ………………………………………………………………………………………………........ 4

2. ABOUT LEGAL CAPACITY …………………………………………………………………………………...….5

3. INTERNATIONAL LEGAL FRAMEWORK ………………………………………………………………....6

 3.1. The Convention on the Rights of Persons with Disabilities …………...…………….8

3.2. General Comment No. 1 of the Committee on the Rights of Persons with Disabilities…………………………………………………………………………………………………….11

 3.3. European Court of Human Rights ………………………………………………………...….14

3.4. The Right to a Fair Trial …………………………………………………………………………..15

3.5. Case-law of the European Court of Human Rights……...………………………………16

3.6. Initial Report of the Government of Montenegro on the implementation of the Convention on the Rights of Persons with Disabilities…………………………………...…21

3.7. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment……………………………………………………………...23

4. NATIONAL LEGAL FRAMEWORK

4.1. Constitution of Montenegro

4.2. Conditions for deprivation of legal capacity and extension of parental rights…………………………………………………………………………………….…………..…………..28

4.3. Procedure for deprivation of legal capacity……...…………………………………..……30

4.4. Procedure for extension of parental rights…………….…………………...……………..32

4.5. Termination of extended parental rights and restoration of legal capacity….33

4.6. Guardianship…………………………………………………………………………………………...34

5. CASE LAW IN MONTENEGRO………………………………………………………………………………...35

5.1. Research of the case-law ……………………………………………………………………...….36

5.2. Quantitative analysis………………………………………………………………………………..37

5.3. Qualitative analysis………………………………………………………………………………….45

6. CONCLUSION AND RECOMMENDATIONS………………………………………………………………57

7. BEST PRACTICE

 7.1. Bulgaria

 7.2. Ireland

 7.3. France

 7.4. Sweden

 7.5. Other examples

8. LITERATURE………………………………………………………………………………………………………...

|  |
| --- |
| ***All terms used in masculine grammatical gender include both women and men to which they relate*** |

**6. CONCLUSIONS AND RECOMMENDATIONS**

Bearing in mind that the regulations of Montenegro are not in accordance with international instruments and standards on the issue of legal capacity, particularly with the Convention on the Rights of Persons with Disabilities (hereinafter: the Convention), it is essential to take steps towards harmonization of regulations with regard to the Convention ratified in 2009. In parallel, it is necessary to inform the public, raise awareness and actively work on suppression of prejudices and stereotypes in society against persons with disabilities.

|  |
| --- |
| **Deprivation of legal capacity is unacceptable in modern society and is contrary to the principles of respect for human rights and non-discrimination.** |

The Convention provides that all measures relating to the legal capacity of adults should include appropriate and effective safeguards to prevent abuse in accordance with the international human rights law. The guarantees should ensure respect for the rights, will and preferences of people, that there is no conflict of interest and undue influence, that all measures are proportional and tailored to the circumstances of an adult, that they are applied as short as possible and that a professional, independent and impartial authority or judicial body reviews them periodically and regularly.

The fundamental principle that a law should be based on is the principle of respect for human rights and fundamental freedoms, as it ensures respect for other important principles and takes into account the respect for dignity of every human being, regardless of any personal characteristic. On the issue of the rights of persons with disabilities and deprivation of legal capacity, we should point out that **the full deprivation of legal capacity is unacceptable in modern society and is contrary to the principles of respect for human rights and non-discrimination**, as stated in the Article 12 of the Convention and clarified additionally in the General Comment No. 1 of the Committee on the Rights of Persons with Disabilities (see chapter 3.2).

Legal systems should ensure the existence of a large number of different measures for different people and different situations in which they can find, in order to provide some flexibility and individualization. It should provide simple and inexpensive support measures , among other things, measures that do not limit legal capacity, which are limited to a specific legal action, without setting up a permanent guardian, measures that would enable a person to undertake certain tasks with the (legal) representative, measures to determine more (legal) representatives for different jobs and life situations, as well as measures that would enable a person to make certain decisions in advance (*advanced directives*), in case that a person would not be able to make independent decisions during the life.

It is important to bear in mind that the diversity of the people and the diversity in the level of their skills reflects and respects, as much as possible, even through legislation. This means that the measure taken in order to support people in the exercise of their rights and interests should not result in an automatic loss of other rights. Support measures should be determined only when it is absolutely necessary, and then measures must be proportionate to the degree of a person's ability and adapted to the individual circumstances and needs. Procedures which determine the measures must comply with the standards of a fair trial, as well as they need to have adequate procedural safeguards under which it is possible to prevent potential abuses. In determining the support measures, it should bear in mind that the interest and welfare of the person is priority and that person’s will, opinion and preferences must be taken into account in the proceedings, and that it is necessary that person concerned is informed in the language or in any other way to understand the initiation of proceedings, actions that will be taken and decisions consequences. In the process, hearing of the person should be ensured, while measures should be limited in duration, with the obligation of periodic review of justification of the measures and person must have the possibility of lodging an appeal.

Bearing in mind the Convention on the Rights of Persons with Disabilities (hereafter CRPD), General comment no. 1 of the Committee on the Rights of Persons with Disabilities, the European Convention on Human Rights and Fundamental Freedoms and practice of the European Court of Human Rights, we will point out the most important deficiencies in the regulations of Montenegro.

* **In the Montenegrin legislation still exists the possibility of full or partial deprivation of legal capacity of an adult person on the basis of disability.** As mentioned above several times, full and partial deprivation of legal capacity is unacceptable in modern societies and represents a violation of human rights. In addition, t**he reasons for deprivation of legal capacity are discriminatory in relation to people with disabilities**, because there is a possibility that to deprive a person of legal capacity only due to the fact that it has a disability, especially when it comes to intellectual or mental disabilities, regardless of its real capacity, which is contrary to the Convention;
* Montenegro, as well as most countries in the region, **does not stipulate an alternative to deprivation of legal capacity,** which is in principle contrary to the CRPD and the General Comment No. 1 of the Committee on the Rights of Persons with Disabilities. It is worrying that the most restrictive measure is the basic measure of protection in the Montenegrin legislation, and that is not provided any support for individuals which is necessary for making decisions and enjoying the right to legal capacity. This measure is obsolete and shows a discriminatory attitude of society and the state against persons with disabilities, denying their diversity and individuality and impairing their fundamental rights and freedoms.
* However, as the research shows, the **partial deprivation of legal capacity is rare, noted only in 2% of the cases,** in only 6proceedings.In addition, a serious deficiency is that the court does not determine the scope of partial deprivation of legal capacity and adult person is equalized with a minor aged 14-18 years. Center for social work has a possibility to determine the range of activities that a person can take without the consent of a guardian if deems it necessary. The Court is the one who should determine what a person cannot work or undertake, and in all other work areas a person should preserve full legal capacity, in accordance with the Art. 12 of the Convention, the General Comment No. 1 of the Committee on the Rights of Persons with Disabilities and the judgment of the European Court of Human Rights in the case *Alojos Kiss v. Hungary, app. no. 38832/06*. In addition, there is no possibility for family to entrust the care of a family member who needs support, to the person of their own choice, e.g. to take care of that person in the case when there are no living family members. Also, there is no possibility that any citizen designate the person to take care of his/her own rights and interests for the future, in case of any circumstances that will disable him/her to take care of himself/herself and of protecting its rights and interests;
* **There is no obligation for the court, guardianship authority or any other participants in the process, to respect the opinion, will and preferences of persons with disabilities**, as provided by Article 12 of the Convention, and also the principle of "the best interest of the person" has not been replaced with the principle of respect for the will and preferences of the person concerned, in accordance with the General Comment No. 1 of the Committee.
* **The court decision on deprivation of legal capacity is made for an indefinite period and there is no obligation to periodically review decisions.** This means that person can remain deprived of legal capacity until his/her death and that none from the state authority has no obligation to review the decision on deprivation of legal capacity, which is contrary to the provisions of Article 12 of the Convention, General Comment No. 1 Committee on the Rights of Persons with Disabilities, as well as the positions of the European Court of Human Rights in cases *Salontaji–Drobnjak v. Serbia*, *no. 36500/05, Štukaturovv. Russia, Application No. 44009/05 and Stanev v. Bulgaria, Application No. 36760/06;*
* Restitution of the legal capacity is possible, the law sets the conditions for the restitution of legal capacity. When the reasons for which the person is deprived of legal capacity cease to exist, the court shall, ex officio, or followed by the proposal of the person, as per the proposal of the guardianship and other authorized proposer, initiate procedure and dependent on the outcome of the proceedings decide on full or partial restitution of legal capacity. **Bearing in mind that there is no obligation of periodic review of the reasons for the deprivation of legal capacity, it is unlikely that the court will initiate the procedure for restitution of legal capacity, ex officio,** as the court has no knowledge of the person or of the possible need of restoration legal capacity.

A person who is deprived of legal capacity has the right to submit a proposal for the restoration of legal capacity, but if we take into account that individuals are often completely excluded from the proceedings, that are not heard in the procedure of deprivation of legal capacity, and that they often do not receive decisions, it cannot be reasonably expected that these individuals will have the possibility to initiate the process for restoration of legal capacity. In addition**, the problem is the legal solution which prescribes that it is possible to restore the legal capacity when the reasons for which the person is deprived of legal capacity cease to exist.** Bearing in mind that the results of the research show that the existence of a disability is often the reason a person is deprived of legal capacity, it is clear that disability will not disappear, meaning that reasons will not cease to exist.

Information and data presented in this study clearly shows that **Montenegro needs reform of legislation concerning the deprivation of legal capacity and extension of parental rights,** because existing solutions - full or partial deprivation of legal capacity, are not measures of support, but are measures that lead to denial the entire spectrum of rights and freedoms. It is necessary to simultaneously reform and substantive and procedural law which regulates this field, in order to fulfill the obligations deriving from international treaties and to ensure respect for the human rights of persons with disabilities on an equal basis with others, in accordance with accepted international standards and agreements.

International human rights and non-discrimination, the Convention as well as the General Comment No. 1 of the Committee represent a good starting point for reforming the system of deprivation of legal capacity. Essential reform of legislation requires first full paradigm change towards people with disabilities, and then devise measures that will be transferred to the laws, customized to the legal system of Montenegro. Some of the recommendations that should take into account when reforming the system of deprivation of legal capacity:

* **Abolish full deprivation of legal capacity and provide alternative measures.** Instead of deprivation of legal capacity, it is necessary to create and prescribe adequate alternative measures for situations when a person needs support in any area of life. The best solution in terms of respect for human rights would be **creating and introducing into legal system supported decision making, without deprivation of legal capacity, without putting individuals under guardianship and without automatic deprivation of other rights.** In addition, there are other options - making decisions on the basis of previously expressed wishes and given authority, the introduction of a specific person for support or more people for support in different life situations etc. This means that it is necessary to amend **the Family Law and the Law on Non-Contentious Proceedings**, in the wayto abolish the possibility of deprivation of legal capacity and the extension of parental rights and instead prescribe a method of support for people with disabilities in exercising their right to legal capacity, when they need support;
* Considering that this is a big change, which requires a complete paradigm shift towards people with disabilities and the transition from medical to social model, it is necessary to implement **wider public campaign in order to change attitudes towards people with disabilities;**
* Also, **it is necessary to work with the decision-makers, representatives of judicial authorities and employees in the social welfare system** in order to change their attitudes towards people with disabilities and deprivation of legal capacity and to get familiar with developments in international law and practice with regard to human rights, the prohibition of discrimination and rights of persons with disabilities.
* In the public discussions regarding the deprivation of legal capacity and compliance with international obligations, in addition to representatives of public authorities and legal professionals it is necessary to engage persons with disabilities, their organizations and civil society, and to **jointly develop measures, types and methods of support for persons with disabilities in exercising their legal capacity**, which will be both applicable and acceptable in the Montenegrin society, and also be in line with international standards on the rights of persons with disabilities.
* **Amend regulations so as to avoid conflict of interest that arises due to the multiple roles of the guardianship authority**. In principle, it is necessary to **completely reform the system of guardianship for adults**, examine the powers of the guardianship and modify regulations in line with international standards;
* The principles of **respect for human rights and non-discrimination** of persons with disabilities must be integrated into all laws that regulate the rights of persons with disabilities. It is necessary to prescribe that in the context of existing measures, always apply a measure that least interferes in private life and which is the least restrictive for a person in need of support. A person should not be deprived of rights, but the state has to provide him/her with adequate support in exercising their rights.

Until legislation change or until Montenegro does not reform its legislation into line with the international obligations and abolish the possibility of deprivation of legal capacity, there are certain legal possibilities, laid down by national legislation and/or international agreements ratified by Montenegro, which should be used in order to reduce to a minimum violations of human rights and discrimination against persons with disabilities. This means that it should restrict legal capacityas little as possible, with parallel efforts to raise awareness of all actors involved in this process, as well as to work on developing an individual approach to every person, which is particularly applicable to judges.

* **End the practice of full legal capacity deprivation**. Bearing in mind the current regulations, which stipulate that the deprivation of legal capacity may be fully or partially, it is clear that the partial deprivation of legal capacity is less restrictive measure, but almost not used in court practice. While the regulations do not change, judges should use the possibility of partial deprivation of legal capacity and only as a last resort. Judges could also make use of the principle of the supremacy of international law to deny deprivation of legal capacity directly on the basis of Article 12 of the UN CRPD.
* **The court, guardianship authority and all other participants in the process have an obligation to respect the opinions, will and preferences of the person with disability.** If the opinion, will or preference of person with disability are not respected for any reason when deciding, it is necessary that the decision contains a detailed explanation of the reasons why such opinion is no respected;
* **Change/abolish discriminatory practice that the existence of disability is sufficient to initiate the procedure of deprivation of legal capacity**, in accordance with the current regulations. The proposal for the initiation of proceedings must contain the facts on which it is based and evidence in respect thereto, or make it credible, but often only the medical documents is accepted as sufficient. In addition, **take into account** the circle of authorized nominators, respectively, on **the active legitimacy of the applicant**;
* **Consult with the person in relation with the placing of a temporary guardian and to take account of the conflict of interest**. Practice shows that the temporary guardian is appointed usually without any consultation with the person against whom the proceedings are conducted and often it is a person who is in conflict of interest. It is common that the temporary guardian is one of the relatives. However, the practice shows that very often the person who initiated the process is appointed as temporary guardian, i.e. a person who has the opposite interest in the procedure, which is contrary to the right to a fair trial laid down in the provisions of Article 6 of the European Convention on Human Rights and Fundamental Freedoms. A similar situation exists when the guardianship authority appoints one of its employees to a temporary guardian in the proceedings that Center for Social Work initiated.[[1]](#footnote-1) In addition to conflicts of interest, the temporary guardian who has worked at the Center for Social Work does not adequately protect the interests of the person to whom the proceedings are conducted, among other things, because there is not enough information about the person you should be represented;
* **The court should take into account the role of the guardianship authority in the procedure and to react, which means not to permit multiple roles in which the Centre appears in the procedure of deprivation of legal capacity, that is, to avoid conflicts of interest**. Research has shown that in 16% of cases of deprivation of legal capacity, the Center for Social Work was the proposer, that is, the Center has initiated the procedure for deprivation of legal capacity. Also, in proceedings in which the Center is the proposer, the Center appoints a temporary guardian to person and it is often a person that works in the Center. Such conflicts of interest must be avoided because in practice leads to inadequate protection of rights and interests of the person against whom the proceedings are conducted[[2]](#footnote-2);
* **Do not use the legal possibility for a person to be detained in a medical institution for expertise**, when doctor’s opinion is that it is necessary in order to determine its mental state. Three-month period is unduly long for person to be placed in a medical institution solely to provide psychiatric expertise of person’s mental state, specially having in mind that there is no provision that would more closely determined the reasons for detention;
* **The court should not proceed without the presence of the person against whom the proceedings are conducted, should not give up from hearing the person** against whom the proceedings are conducted and also **judge should present during psychiatric expertise**. The court must see and hear the person, to try to make contact in the way in which that person usually communicates. In few cases where a hearing is not possible, the judge must personally make sure in it by seeing the person and try hearing[[3]](#footnote-3). Specifically, there is an obligation of the court to personally hear the person against whom the proceedings are conducted, and it is prescribed that judge may withdraw from the hearing if it would be harmful to the health of the person or if the hearing is impossible due to a mental or physical condition of the person. Research has shown that this exceptions in fact become a common practice in Montenegro, that **court in most cases did not hear the person against whom the proceedings were conducted**. Often the fact that a person has a disability (e.g. not communicate in the usual way) is sufficient reason to withdraw from the court hearing. In almost all cases, the court decision was based on medical expert findings and opinion, and **although it is stipulated that the medical exam should be carried out in the presence of the judge, in practice, this rarely happens.**
* **It is necessary for court to explain in detail the decision on the deprivation of legal capacity**. The practice shows that the decisions on deprivation of legal capacity are very short and are on average two pages long, which is definitely unacceptable if one takes into account the degree of restriction of rights and the impact of this decision on a person's life.
* **Use power to ex officio initiate procedures for restoration of legal capacity**.
1. See the judgments of the European Court *of Human Rights: Salontaji - Drobnjak v. Serbia, no. 36500/05 and Ivinović v. Croatia, Application No. 13006/13.* [↑](#footnote-ref-1)
2. Stated in the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to the Government of Montenegro in 2008 and 2013, as well as the judgment of the European Court of Human Rights in the case *Ivinović v. Croatia, application number 13006/13.* [↑](#footnote-ref-2)
3. See Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Salontaji - Drobnjak v. Serbia, no. 36500/05*, Štukaturov v. Russia, *Application No. 44009/05, X and Y v. the Republic of Croatia, Application No. 5193/09;* [↑](#footnote-ref-3)