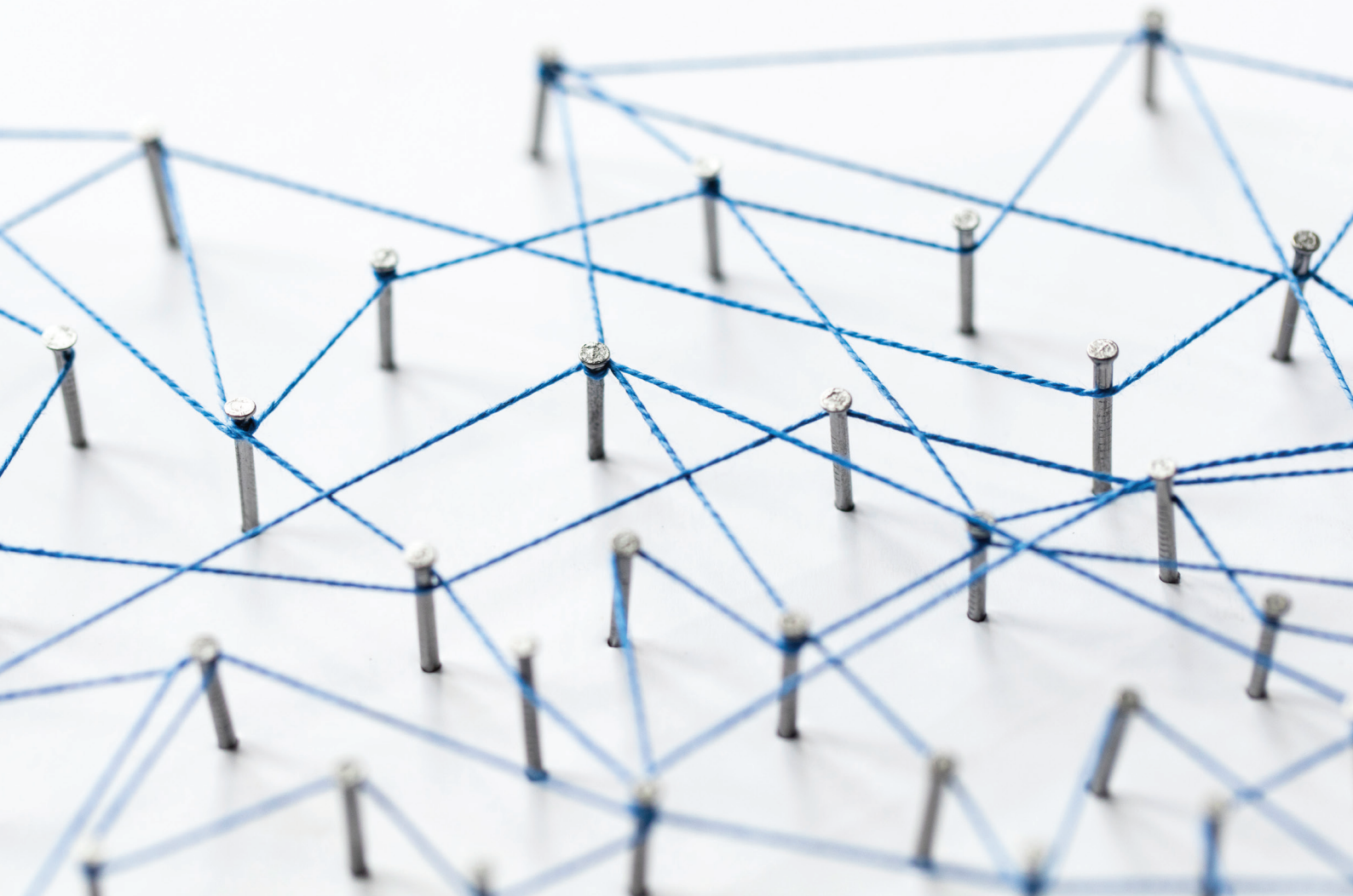
LEGAL CAPACITY IN MONTENEGRO

Analysis of the legal framework and the road map for alignment with the UN Convention on the Rights of Persons with Disabilities



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LEGAL CAPACITY IN MONTENEGRO

Analysis of the legal framework and the road map for alignment with the UN Convention on the Rights of Persons with Disabilities

Legal capacity goes beyond decision making; it is about what it means to be human. The life choices we make are part of who we are. Several human rights have been established to protect individuals against undue interference with these choices, e.g. freedom of religion, thought and conscience, the right to marry and to found a family and the right to respect for private and family life. Without legal capacity, many, if not all, of these rights become meaningless. What is the point of having the right to marry and found a family if someone else, your guardian, is the only one who can make legally effective decisions in that area?

Council of Europe Commissioner for Human Rights, 2012.[1]

1 Council of Europe Commissioner for Human Rights, Who Gets to Decide?, CommDH/IssuePaper(2012)2) [2012], https://rm.coe.int/16806da5c0

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Abbreviations:

ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FL	Family Law
NCPL	Non-Contentious Proceedings Law
UN	United Nations

INTRODUCTION

The purpose of this analysis is to assist the Montenegrin executive, legislative and judicial authorities to align the country's domestic legislation and practices on the realization of the rights of persons with disabilities with the international obligations that Montenegro has assumed through the ratification of both the United Nations Convention on the Rights of Persons with Disabilities (hereinafter: the Convention) and the Council of Europe Convention for the Protection of Fundamental Rights and Freedoms (European Convention on Human Rights) (hereinafter: the ECHR), as well as with the obligations assumed under the process of accession to the European Union.

In ratifying the United Nations Convention on the Rights of Persons with Disabilities in 2009, Montenegro pledged to abolish discriminatory regulations and establish a system of supported decision making. A 2017 analysis showed that the regulations governing the deprivation of legal capacity in Montenegro were not aligned with international legal standards in the field of anti-discrimination and human rights, and supported decision making was neither recognized nor guaranteed by law.[1] Some pieces of legislation have been amended in the meantime, including those governing the requirements and the process of deprivation of legal capacity. This study has found, though, that the practice of legal capacity deprivation has remained largely unchanged.

This interdisciplinary study primarily consists of an analysis of Montenegro's legal framework governing legal capacity and an analysis of case law on the deprivation of legal capacity from 2022 to 2024. The case law analysis included a sample of decisions in non-contentious proceedings for the deprivation of legal capacity during the mentioned period. The sample was sensitive to the geographical distribution of courts. This led to an analysis of the rulings made by all the competent courts in Montenegro whose decisions were available, including those with the fewest decisions. The study also includes a comparative review of the norms and practices in Montenegro from the perspective of regional and international law in this field. Consultative and informative meetings were held with judges who are currently presiding or have presided over cases of deprivation of legal capacity, representatives of guardianship authorities (social welfare centres – SWCs), persons with disabilities and representatives of organizations of persons with disabilities, representatives of the Ministry of Justice, the Ministry of Human and Minority Rights and the Ministry of Social Welfare. The meetings offered a detailed insight into the practices of different stakeholders, as well as the opportunities and barriers to improve the system. Following this analysis conducted by applying the participatory methodology, steps are proposed to amend the legislation and practices, and align them with the Convention.

1 Kosana Beker, Deprivation of Legal Capacity in Montenegro, *Analysis of the implementation of the Non-Contentious Proceedings Law and other relevant legislation,* (Action for Human Rights, 2017), p. 22.

Montenegrin legislation is extremely restrictive about deprivation of legal capacity.[2] Montenegro will, therefore, need to make comprehensive changes to align its legislation with international commitments, as well as with its own Constitution. Here, we examine the current situation and possibilities for a gradual improvement of current practices and regulations until the conditions are in place for changes that would lead to full alignment with the UN Convention on the Rights of Persons with Disabilities. We have found guidelines for these gradual changes in the case law of the European Court of Human Rights, as well as in examples from other countries that have accomplished progress in this field. Right now, Montenegro must take a crucial first step – improve the existing practice and ensure incorporation of supported decision making in the future Civil Code – and also gradually put other conditions in place to strengthen the rights of persons with disabilities who have been deprived or are at risk of being deprived of their legal capacity. Montenegro also needs to define a clear deadline and timeline for implementation of the comprehensive reforms.

What is legal capacity?

An individual acquires legal capacity upon reaching adulthood. It guarantees that the person is recognized and able to act within the law. Put differently, by acquiring legal capacity, a person becomes a subject of rights and can enter into legally binding relationships, and thereby acquire rights and obligations, as well as the right to have their decisions respected. A person with legal capacity can sign contracts, give consent for medical treatment, make decisions about where to live, manage their property, file lawsuits and appeals, get married, make decisions about the recognition of maternity or paternity, raise children, vote in parliamentary, presidential or local elections or in a referendum, take out loans and, in general, take all legal actions that an adult is allowed to take in their daily life. Legal capacity also allows a person to protect themselves from unsolicited actions, such as forced medical interventions or arbitrary detention.

All of us take legal capacity for granted and do not assume that anyone can question our decisions, no matter how favourable or unfavourable they may be for us. Also, none of us makes any decisions in a vacuum; we often seek advice from people we trust – family members, friends or experts in certain fields, such as: finances, property matters, business, education, medical treatment, place of residence, etc. Deprivation of legal capacity and guardianship, however, are a reality for many people. These are predominantly persons with intellectual or mental disabilities, whose skill of decision making is called into question and is a basis for restricting their legal capacity. By being deprived of their legal capacity, they lose the right to make decisions and are placed under guardianship, which is most often long-term and, for the majority of these persons, even lifelong.

2 Kosana Beker, Deprivation of Legal Capacity in Montenegro, *Analysis of the implementation of the Non-Contentious Proceedings Law and other relevant legislation*, (Action for Human Rights, 2017), p. 22.

Nothing intrudes on a person's private life like deprivation of legal capacity, which is often referred to today as "civil death", a term first used with this meaning in the 18th century, denoting also the restriction of legal capacity.[3] Although legal capacity has been challenged on various grounds throughout history, disability remains the only personal attribute, based on which a person can be deprived of the majority of their fundamental rights, including freedom, self-determination, and physical and mental integrity. Legal capacity of women has also been challenged based on their gender, which is why the UN Convention on the Elimination of All Forms of Discrimination against Women was the first human rights instrument to specifically address legal capacity.[4] The recognition of legal capacity is inseparably linked to the enjoyment of many other rights guaranteed by the Convention on the Rights of Persons with Disabilities (and all other international human rights conventions), such as: the right of access to justice, the right to freedom from involuntary placement in a mental healthcare facility and freedom to refuse treatment, the right to respect for physical and mental integrity, the right to freedom of movement, the right to freedom of expression, the right to marriage and family, the right to consent to medical treatment, the right to vote and be elected, and many other rights. Without full recognition of a person before the law, i.e. without legal capacity, the possibility to enjoy and protect these rights is compromised. Reform of the existing legal capacity mechanisms is one of the most significant human rights issues for persons with disabilities. Legal capacity goes beyond decision making; it is about what it means to be human.[5] The life choices we make, made independently or with support, whether good or bad, are part of who we are.

The concept of legal capacity is a fluid one, and the distinction between a person's acts that constitute an expression of their legal capacity and those that do not is not clear.[6] In reality, the deprivation of legal capacity goes "hand-in-hand" with denial of autonomy in daily life and decisions that do not have an obvious legal effect (e.g. wake-up time and bedtime, free time, etc.), especially in the context of placement in social and healthcare institutions. Furthermore, it is difficult to imagine a situation in which a person deprived of legal capacity – and thus of the ability to make decisions that produce a legal effect – enjoys a high degree of autonomy in making various, legally irrelevant decisions in their daily life. Even when persons with disabilities, as well as other persons, enjoy legal capacity formally, it can be limited precisely due to the surrounding factors, such as the way the family or the staff in the institution treat that person.

3 William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769 with an Introduction by Stanley N. Katz*, (Blackwells 1979) according to Lucy Series and Anna Nilsson, 'Article 12 Equal Recognition before the Law', in Bantekas, Stein and Anastasiou (ed.), *Convention on the Rights of Persons with Disabilities: A Commentary*, (OUP 2018), p. 350.

4 Article 15 para. 2 of the UN Convention on the Elimination of All Forms of Discrimination against Women.

5 Gerard Quinn, 'Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD', HPOD Conference, Harvard Law School, 20 February 2010, <www.fedvol.ie/_fileupload/Research/NDE%20Reading%20Lists/Harvard%20legal%20Capacity%20gq%20draft%202%20Gerard%20Quinn%20Feb%202010.pdf>

6 Lucy Series and Anna Nilsson, 'Article 12 Equal Recognition before the Law', in Bantekas, Stein and Anastasiou (ed.), *Convention on the Rights of Persons with Disabilities: A Commentary*, (OUP, 2018), p. 351.

Gender dimension of the deprivation of legal capacity

The deprivation of legal capacity means restriction of fundamental civil and political rights, which affects both men and women, although its consequences can be different depending on the gender that is interacting with external factors. In some countries, there have been cases of women who were subjected to various medical interventions to control their fertility, without their consent or on the grounds of a guardian's consent.[7] Such interventions included the insertion of contraceptives, abortions and sterilization. Also, in some cases, women placed in social welfare institutions and deprived of their legal capacity were raped by the staff, after which they underwent secret abortions.8 The deprivation of legal capacity poses a risk particularly for persons placed in social welfare institutions, as they have restricted access to justice due to complete dependence on their guardian and staff, who most often operate within a closed system, lacking adequate supervision.[9] Under such circumstances, the National Mechanism for the Prevention of Torture plays a vital role. However, its limitations are significant, which is why continuous respect for all the rights of persons living in social welfare institutions and in other places where persons with disabilities may be de facto deprived of liberty cannot be ensured. It is important to note that women deprived of legal capacity may be exposed to the same forms of violations of their rights outside institutional care. Therefore, prohibition of all forced interventions is necessary (including those based on a guardian's consent), especially those concerning fertility and family planning. Most European Union member states have already introduced such measures.[10]

Key terminology

Individuals acquire **full legal capacity** upon reaching the age of majority, meaning when they turn 18. Legal capacity may be acquired before reaching the age of majority in the case of marriage, with prior permission of the court.[11] Legal capacity is a legal concept and implies a person's ability to acquire rights and obligations through their own activity and by expressing their will. According to Montenegrin legislation, a court may deprive a person of or restrict legal capacity in accordance with the law.

7 Committee for the Rights of Persons with Disabilities, General Comment No. 1, Article 12 – Equality Recognition before the Law (CRPD/C/GC/1), [2014] para. 35; European Economic and Social Committee, 'Sexual and reproductive health rights of women with disabilities: Discrimination running high', 2024, <www.eesc.europa.eu/en/news-media/news/sexual-and-reproductive-health-rights-women-disabilities-discrimination-running-high>; European Disability Forum, 'Ending forced sterilisation of women and girls with disabilities' (EDF and CERMI, 2021).

8 *G.M. et al. vs. Moldova, complaint* No. 44394/15 [2023].

9 Biljana Janjić and Dragana Ćirić-Milovanović, 'Even the Walls Have Ears: Testimonies of Women with Mental Disabilities on Gender-Based Violence in Residential Institutions, (MDRI-S, 2017). Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Penguin, 1991).

10 European Disability Forum, 'Forced Sterilisation in the European Union', 2024, <www.edf-feph.org/end-forced-sterilisation-in-the-eu/>

11 Article 13 paragraph 2 of the Family Law (Official Gazette of Montenegro No. 1/2007 and Official Gazette of Montenegro Nos. 53/2016 and 76/2020).

Legal capacity should be distinguished from **legal personality**, which is acquired at birth and cannot be restricted or taken away. Legal personality means that a person is recognized as a holder of rights, but not as a subject of rights (someone who can decide on those rights). Legal personality and legal capacity are components of a person's legal subjectivity.

Full deprivation of legal capacity[12] is a legal procedure that a court may conduct to deprive a person of legal capacity fully, which means that the person cannot undertake any actions by themselves. Instead, all decisions are made on their behalf by their guardian. Guardianship is a mechanism of substitute decision making, as the guardian makes decisions in the name and on behalf of their ward.

The court may **partially deprive a person of their legal capacity**,[13] which means that the guardian makes decisions for that person only in some areas of their life, such as decisions about medical treatment, spending money and so on. In this case, the court has to list precisely the areas in which the person needs a guardian. Partial deprivation of legal capacity is not in line with the Convention on the Rights of Persons with Disabilities but, when implemented properly, it can be a more proportionate approach to restricting legal capacity, less intrusive on a person's privacy, than full deprivation of legal capacity.

The extension of parental rights[14] is a procedure that can be conducted before a person reaches the age of 18. It is most often applied for children with intellectual disabilities. It is important to note that it results in exactly the same consequences for the person as the deprivation of legal capacity. Under the law, such a person continues to be considered a minor even after reaching the age of 18, and therefore a person without legal capacity. Also, in this case, the parents do not have the obligations of a guardian appointed after the deprivation of legal capacity (for example, to report to the social welfare centre about their work and their ward). Instead, they retain their regular parental obligations, such as the obligation to support their child.

Guardianship[15] is a legal procedure that grants "protection of rights and interests" to persons deprived of legal capacity and assigns a guardian who makes all decisions on their behalf (substitute decision making), just as a parent does for a younger minor (a child up to the age of 14). For minors, their guardians are usually their parents. This

12 Article 235 paragraph 1 of the Family Law: "A person of full age who, due to mental illness, intellectual disability or due to any other cause, is not capable of taking care of his rights and interest shall be fully deprived of legal capacity."

13 Article 235 paragraph 2 of the Family Law: "A person of full age who by his actions jeopardizes his rights and interests or the rights and interests of other persons due to mental illness, intellectual disability, alcohol or drug abuse, senility or due to other similar reasons shall be partially deprived of his legal capacity."

14 Article 92 of the Family Law: "Parental rights may be extended beyond child's coming of age if due to developmental impairments and difficulties, disability or other reasons the child is incapable of taking care of himself, his rights and interests."

15 The Family Law prescribes that "through guardianship, the state shall provide protection to minor children who are not under parental care and to adults who are not able to or who may not take care of themselves, their rights and interests" (Art. 9 para. 1).

analysis does not address the guardianship of minors. As persons deprived of legal capacity are stripped of the right to make independent decisions about their rights and obligations, they are assigned guardians who make those decisions on their behalf. They can be family members, but also other persons. The decision to assign a guardian is made by a social welfare centre through a special procedure.[16]

Mental capacity refers to decision-making skills, which naturally differ from person to person. Depending on numerous circumstances, including the natural and social environment, those skills can vary for a given person.[17] According to the current legislation in Montenegro, as well as in many other countries, the requirements for the deprivation of legal capacity are still based on an evaluation of a person's mental capacity through a medical assessment procedure. Consequently, these two terms largely overlap and are often confused. The Convention on the Rights of Persons with Disabilities breaks this link and highlights that mental capacity cannot be used as a legal ground to restrict or deprive a person of their legal capacity. Such practice constitutes discrimination on the grounds of disability.

Contrary to substitute decision making, **supported decision making** is a process that helps a person express their own will when making legally binding decisions, as well as daily life decisions that produce no legal effect. This support can be formal – when provided by third parties through an instrument provided by the law – or informal – when provided by family members, friends or other close individuals – and it can vary in intensity.[18] Either way, the person gets to decide who will provide support to them, and these can be different people for different areas of life. The Committee on the Rights of Persons with Disabilities draws the attention of states to refrain from overly detailed regulation of the supported decision-making system, because this can lead to the loss of flexibility required for smooth functioning in daily life.[19] Supported decision making aims to help a person receive and understand information, assess possible alternatives and the consequences of making a decision, and communicate and implement the decision properly.[20] Support needs to be available to all persons who request it, it must be based on the person's will (and not on their best interest) and it must be recognized in the legal system, with mandatory protective measures to prevent abuse.[21]

16 Article 180 of the Family Law.

17 The Committee on the Rights of Persons with Disabilities, General comment No. 1 Article 12 – Equal Recognition before the Law (CRPD/C/GC/1), [2014], para. 13.

18 The Committee on the Rights of Persons with Disabilities, General comment No. 1 Article 12 – Equal Recognition before the Law (CRPD/C/GC/1), [2014], paras. 16–19.

19 Ibid., para. 29.

20 Ibid.

21 Ibid., para. 21.

INTERNATIONAL LEGAL FRAMEWORK

In addition to the Convention on the Rights of Persons with Disabilities, equal recognition before the law is also guaranteed by other international treaties such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Therefore, experts often claim (though not without counterarguments) that the Convention on the Rights of Persons with Disabilities does not introduce new rights but rather confirms that they apply equally to persons with disabilities, and specifies obligations and provides guidelines for state parties on how to eliminate barriers to the equal enjoyment of these rights.

The Convention, however, stresses additionally the importance of the right to equal recognition before the law through one of its fundamental principles – the principle of personal autonomy[22] – which is why equal recognition before the law is interpreted as a prerequisite for the enjoyment of all other rights. It is reinforced additionally by Article 12 (Equal Recognition before the Law) and Article 13 (Access to Justice) of the Convention. Montenegro is a member of the Council of Europe, which is why we will also focus on the recommendations of the Committee of Ministers of the Council of Europe, the Commissioner for Human Rights and the case law of the European Court of Human Rights. Unlike the UN Convention on the Rights of Persons with Disabilities, the European Convention on Human Rights (ECHR) does not address the rights of persons with disabilities directly. However, many rights protected by the ECHR are particularly important in the context of legal capacity, including the right to a fair trial (Article 6 of the ECHR) and the right to respect for private and family life (Article 8 of the ECHR).

UN Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities was adopted in 2006, and 190 countries have become party to it so far.[23] **The Convention is also the only international human rights treaty that the EU has acceded to**. The Convention has thus become part of EU internal law and, in the hierarchy of legal sources, it comes only below the constitutive treaties of the EU. This means that the implementation of EU law must always be in line with the Convention. The EU also participated in the process of drafting the Convention and significantly influenced its content.

The Convention on the Rights of Persons with Disabilities is the first comprehensive and legally binding international treaty protecting the rights of all persons with disabilities. All previous UN human rights conventions also applied to persons with disabilities, and all of them included anti-discrimination provisions. However, the absence of state-specific

22 Article 3 of the Convention on the Rights of the Persons with Disabilities.
23 Number of ratifications in April 2025.

obligations regarding the respect and exercise of the rights of persons with disabilities resulted in those conventions having very limited effect on persons with disabilities. Therefore, the need for this Convention arose from the failure of other international instruments to contribute significantly to the human rights of persons with disabilities.[24] The purpose of this Convention 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."[25] State 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 achieve this, state parties undertake: to take all appropriate measures, including legislative ones, to amend, revoke or annul all laws, regulations, customs and practices that constitute discrimination against persons with disabilities**.[26] It clearly prescribes that persons with disabilities are equal, that they are subjects of rights, not "objects of protection", and that their rights must be respected on equal grounds with others and without discrimination on the basis of disability.

Article 12 – Equal recognition before the law

Article 12 of the Convention, "Equal Recognition before the Law", is considered to be the core of the Convention.[27] It is closely linked to the social inclusion, autonomy and equality of persons with disabilities. Accordingly, the assumption that all adult citizens should enjoy legal capacity must apply equally to persons with disabilities. The attention has thus shifted from a person's mental capacity toward provision of a system of support to enable persons with disabilities to make decisions about their own lives and improve their capacity for decision making. Despite the fact that the Convention quickly became the international treaty with the second-highest number of parties,[28] somewhat fewer states have fully harmonized their legislation and practice with Article 12 of the Convention. Just like other rights, this right has also been protected by previous conventions, as previously noted, but this has not contributed to a decrease in the number of persons with disabilities being placed under guardianship.[29]

24 Preamble of the Convention on the Rights of Persons with Disabilities.

25 Article 1 paragraph 1 of the Convention on the Rights of Persons with Disabilities.

26 Article 4 paragraph 1 of the Convention on the Rights of Persons with Disabilities.

27 Thomas Hammarberg, Commissioner for Human Rights, *Who Gets To Decide – Right to legal capacity for persons with intellectual and psychosocial disabilities,* (CommDH/IssuePaper(2012)2) [2012], <https://wcd.coe.int/ViewDoc.jsp?id=1908555>

28 The Convention on the Rights of the Child is the most ratified convention.

29 Lucy Series and Anna Nilsson, 'Article 12 Equal Recognition before the Law', in Bantekas, Stein and Anastasiou (ed.), *Convention on the Rights of Persons with Disabilities: A Commentary,* (OUP 2018), p. 342.

Article 12 – Equal Recognition before the Law[30]

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.*

Recognition of legal capacity and abolition of guardianship

States are required to recognize the legal capacity of all persons with disabilities, as well as to recognize the right to legal capacity on an equal basis with others (Article 12 paragraphs 1 and 2 of the Convention). The legal capacity of persons with disabilities is undeniable in Montenegrin legislation. **The Convention prescribes that legal capacity cannot be denied or restricted on the basis of disability or mental capacity**.[31] Given that disability is among the main reasons for the deprivation of legal capacity in most jurisdictions where it is possible to deprive a person of legal capacity or restrict their legal capacity, it is obvious that many jurisdictions, including Montenegro's, will have to change their frameworks to align as much as possible with the Convention.

30 Law Ratifying the United Nations Convention on the Rights of Persons with Disabilities with the Optional Protocol (Official Gazette of Montenegro – International Treaties No. 002/09 of 27 July 2009).

31 Lucy Series and Anna Nilsson, 'Article 12 Equal Recognition before the Law', in Bantekas, Stein and Anastasiou (ed.), *Convention on the Rights of Persons with Disabilities: A Commentary*, (OUP 2018), p. 340.

The authoritative interpretation offered by the Committee on the Rights of Persons with Disabilities points out that states cannot deny persons with disabilities the right to exercise their legal capacity and that they should repeal discriminatory laws, including substitute decision making or guardianship.[32] One should not forget that the right to equal recognition before the law is recognized as a civil and political right. Civil and political rights become applicable from the moment they are ratified. States are, therefore, invited to take measures that will enable immediate realization of these rights. The provisions of Article 12 of the Convention apply from the moment of its ratification and are not subject to gradual application. State parties are thus required to ensure access to support in exercising legal capacity on an equal basis with others.[33]

The recognition of the right to equality before the law as a civil and political right has raised some concerns in the academic community regarding the implementation of the Convention.[34] Dilemmas in understanding Article 12 of the Convention and the term "legal capacity" are the consequences of strong prejudices against persons with disabilities and decades of discriminatory practice, as well as failure to understand the changes in the approach toward persons with disabilities. Consequently, the Committee on the Rights of Persons with Disabilities realized there was a need for additional clarifications of the provisions of Article 12,[35] which was accomplished with adoption of General Comment No. 1.[36]

Supported decision making

Paragraph 3 of Article 12 prescribes that persons who have difficulties in understanding their options, communicating and/or making their own choices must primarily receive assistance to make decisions and exercise their legal capacity. This differs significantly from the prior practice of declaring a person mentally or psychologically incompetent and depriving them of legal capacity. This aspect of Article 12 is also referred to as the supported decision-making paradigm. It deviates from the traditional approach to legal capacity, which was deemed individual and independently applied, toward an understanding of legal capacity as a relational phenomenon, where individuals, connected with other individuals and communities, exercise their legal capacity.[37]

32 Committee on the Rights of Persons with Disabilities, General Comment No. 1 Article 12 – Equal recognition before the law (CRPD/C/GC/1), [2014], para. 25.

33 Kosana Beker, Deprivation of Legal Capacity in Montenegro, *Analysis of the implementation of the Non-Contentious Proceedings Law and other relevant legislation,* (Action for Human Rights, 2017), p. 14.

34 Lucy Series and Anna Nilsson, 'Article 12 Equal Recognition before the Law', in Bantekas, Stein and Anastasiou (ed.), *Convention on the Rights of Persons with Disabilities: A Commentary,* (OUP 2018), p. 341.

35 Kosana Beker, *Deprivation of Legal Capacity – Laws and Practice in the Republic of Serbia*, (MDRI-S 2014).

36 Committee on the Rights of Persons with Disabilities, General Comment No. 1 Article 12 – Equal recognition before the law (CRPD/C/GC/1), [2014].

37 Lucy Series and Anna Nilsson, 'Article 12 Equal Recognition before the Law', in Bantekas, Stein and Anastasiou (ed.), *Convention on the Rights of Persons with Disabilities: A Commentary,* (OUP 2018), p. 363.

This principle is based on the fact that each one of us sometimes needs the assistance of other people when we make decisions. For example, when we choose which university to go to or when and how to buy an apartment, or even when we try to solve some minor dilemmas, we often consult with family members, close friends and experts. The more complex and important the decisions are, the more time we will allocate for them and rely on the information and advice from a broader circle of people. This applies to both professional and financial decisions as well as to decisions of a personal nature. Hence, all of us use a supported decision-making model in our lives – we all seek and obtain support when we need to make a decision on something. We also occasionally make mistakes, i.e. we make unfavourable decisions. As all things that apply to every human being also apply to persons with disabilities, the philosophy of decision making includes the principle of receiving necessary support and the principle of freedom to take risks. **This perception of the decision-making process shows that none of us makes decisions in a vacuum and calls into question the paternalistic and overly protective attitude of our societies toward persons with disabilities, especially toward persons with intellectual or psychosocial difficulties.**

It is particularly important to acknowledge that even persons in need of the highest level of supported decision making have an equal right to such support. This is clearly stated in the preamble to the Convention, which highlights "the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support".[38] Many people use forms of communication that are unique to them and, in doing so, rely heavily on people who know and understand them well. It is very important to recognize and record the unique communication style that a person uses, to allow other people to understand the desires and preferences of that person and, accordingly, plan forms of support which will in time improve our understanding of persons whose statements and intentions we cannot understand now.

To properly govern legal capacity, it helps to understand the difference between support in making everyday decisions that do not produce a legal effect and support in making decisions that have legal effects. Most often, these terms are not distinguished in everyday use or even in literature, and generally the term "supported decision making" is used to describe both types of decisions. Nonetheless, it is good to keep this difference in mind when designing formal models of support and accordingly create instruments to support decisions that produce a legal effect. Supported decision making on legally irrelevant matters can be less formal. The Convention and the Committee do not presuppose the models and intensity of the support that should be established. Instead, they emphasize that the will and preferences of the person must be respected both in establishing the support and in decision making.[39] Models of support can be formal and informal, legally recognized or not. This support can be provided by a close, trusted person or other individual, or by two or more persons, but always chosen by the person who needs the support.

38 Preamble to the Convention on the Rights of the Persons with Disabilities, paragraph (j).

39 General Comment No. 1 to the Convention on the Rights of the Persons with Disabilities, paras. 16–19.

Safeguards

Paragraph 4 of Article 12 provides for safeguards that must be present in the system of support to exercise legal capacity. Their primary purpose is to ensure respect for the person's rights, will and preferences, which also includes "appropriate and effective safeguards to prevent abuse in accordance with international human rights law".[40] Such safeguards should include protection from undue influence, always respecting the person's rights, will and preferences. Guardianship, as a form of a safeguard, is thus practically contrary to the protection that should be established in accordance with the Convention. In cases when, despite significant efforts, it is not possible to determine the person's will and preferences, the principle of the "best interpretation of will and preferences" must replace decisions based on "best interests", because the "best interest" principle is not a proper safeguard for adults.[41] This interpretation relies on knowledge of the person's previously expressed will and patterns of established behaviour in the past. The interpretation should be made in consultation with close persons and, where appropriate, by using communication tools and assistive technology.

It is clear from the above that the paternalistic approach to safeguarding a person's rights and interests, which is based on restricting the person's right to make legally binding decisions, is replaced by an approach that introduces **control over the actions of third parties who provide support or enter into legally binding relationships with the person in question**. Such control includes safeguards from abuse as well as from excessive interference in the person's life, and can be introduced by establishing multiple oversight bodies and mechanisms. Otherwise, without multilevel external control, having a single independent control mechanism (or a single person providing support) can easily lead to a practice of de facto substitute decision making.

Council of Europe

The Council of Europe (CoE) commissioners for human rights have had a number of interventions in the field of the rights of persons with disabilities, including matters related to legal capacity. This analysis began with a quotation from a 2012 publication by the CoE Commissioner Thomas Hammarberg on the importance of legal capacity for the human rights of persons with disabilities. Nils Muižnieks, CoE Commissioner for Human Rights (2012–2018), also called for the recognition of legal capacity of all persons with disabilities, the abolition of full deprivation of legal capacity and the establishment of supported decision-making mechanisms.[42]

40 Article 12 paragraph 4 of the Law Ratifying the United Nations Convention on the Rights of Persons with Disabilities with the Optional Protocol (Official Gazette of Montenegro – International Treaties No. 002/09 of 27 July 2009).

41 General Comment No. 1 to the Convention on the Rights of the Persons with Disabilities, paras. 20–22.

42 E.g. Commissioner for Human Rights, Recognize Legal Capacity of All People with Disabilities, 2015, <www.coe.int/en/web/commissioner/-/recognise-legal-capacity-of-all-people-with-disabilities>

CoE Commissioner Dunja Mijatović (2018–2023) called on member states to carry out reforms in this field and make it possible for persons with disabilities to enjoy their legal capacity.[43]

The CoE Committee of Ministers has also addressed this topic; however, the last such document is from 1999 and is already outdated, especially considering the rich case law of the European Court of Human Rights (ECtHR) that followed in the 21st century, as well as the adoption of the Convention on the Rights of Persons with Disabilities by the UN General Assembly in 2006. Recommendation No. R(99) 4[44] of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults, although outdated in terms of both terminology and the general attitude toward persons with disabilities,[45] represents a step forward from the previous standards and highlights significant procedural measures of protection. The basic principle is "respect for the dignity of each person as a human being". Also, attention is drawn to the proportionality and flexibility of measures of protection. Furthermore, it is important that the range of protection measures, where appropriate, does not restrict the person's legal capacity. Also, the measure of protection should not lead to the full deprivation of legal capacity as an outcome automatically. However, this document says that restricting legal capacity is possible when it is "necessary for the protection of the person concerned", which is contrary to the UN Convention. It is also significant that the protective measure must be established with the free and informed consent of the person and that less formal alternatives with family members or other persons providing support are needed. Member states should also consider the establishment or support of associations or other bodies whose task would be to offer training to support providers.

Even though it uses outdated terminology and is based on the principles of best interest and the assumption of incapability based on disability, this document is still significant, as it points to the importance of recognizing legal capacity and proportionality in measures of protection, and it highlights the need to provide supported decision making instead of substitute decision making.

43 E.g. Commissioner for Human Rights, Report Following the Visit to the Czech Republic from 20 to 24 February 2023, CommHR(2023)26 [2023], <www.coe.int/en/web/commissioner/-/czech-republic-systemic-change-needed-to-address-long-standing-human-rights-issues-for-roma-and-persons-with-disabilities>; Commissioner for Human Rights, A paradigm shift is needed towards a human-rights approach to mental health care, 2023, <www.coe.int/en/web/commissioner/-/a-paradigm-shift-is-needed-towards-a-human-rights-approach-to-mental-health-care>

44 Council of Europe Recommendation CM/Rec(99)41 of the Committee of Ministers to Member States on Principles Concerning the Legal Protection of Incapable Adults (Adopted by the Committee of Ministers on 23 February 1999 at the 660th meeting of the Ministers' Deputies).

45 The use of the term "incapable adults" and their definition as "adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs" is not in line with modern international standards, primarily the Convention on the Rights of Persons with Disabilities.

Case law of the European Court of Human Rights

The European Court of Human Rights (hereinafter: the ECtHR) has conducted a number of proceedings in which it ruled on the issue of the deprivation of legal capacity. While the Convention on the Rights of Persons with Disabilities primarily focuses on the prohibition of discrimination on the basis of disability and the substantive importance of legal capacity, the ECtHR primarily deals with procedural issues – the right to a fair trial predominantly, but not exclusively.[46] Although its approach to legal capacity is not fully aligned with the Convention, the ECtHR's judgments that mandate procedural guarantees aimed at improving protection from possible abuse and that narrow the scope of consequences for persons whose legal capacity is restricted or fully denied are of particular relevance for us. The fair treatment standards must be met in proceedings concerning deprivation of legal capacity and extension of parental rights, as well as in any other proceedings.

As for the ECtHR's case law relevant for the issue of legal capacity, we will make reference to several judgments that have guided the ECtHR's case law concerning the right to a fair trial under Article 6 of the ECHR and the right to respect for private and family life under Article 8 of the ECHR, as well as judgments on other associated rights that are automatically denied to persons deprived of legal capacity on the basis of their disability. Some of the most significant judgments include the cases of *Shtukaturov vs. Russia*[47] and *Stanev vs. Bulgaria*,[48] which set important standards in protecting the rights of persons with disabilities related to the deprivation of legal capacity and the guardianship system. The mentioned judgments are not the only ECtHR judgments on legal capacity issues.

Shtukaturov vs. Russia: automatic deprivation of legal capacity and restriction of freedom

In **the judgment *Shtukaturov vs. Russia*** of 27 March 2008, the ECtHR considered the case of a young man who had been declared completely legally incapacitated due to his mental illness and placed under the guardianship of his mother, without being informed and without having the opportunity to participate in the proceedings or to appeal the decision. Consequently, he was deprived of the opportunity to independently decide on his personal and property ownership rights. At one point, he was even involuntarily placed in a psychiatric institution, which he could not leave without the guardian's permission.

In this case, the ECtHR found several violations of the rights guaranteed under the ECHR. There was a violation of the right to a fair trial under Article 6, given that the applicant had not had the opportunity to participate in the proceedings for the deprivation of legal

46 The right to a fair trial includes, among other things: access to justice; an impartial and independent trial; proceedings of an appropriate quality (a hearing in court proceedings, the right to representation and equality in using legal remedies); the right to public proceedings, with the possibility of excluding the public; and the right to proceedings within a reasonable time.

47 *Shtukaturov vs. Russia*, application No. 44009/05 [2008].

48 *Stanev vs. Bulgaria*, application No. 36760/06 [2012].

capacity. The Court also found that there had been a violation of the right to respect for private and family life under Article 8, because the systemic approach to the deprivation of legal capacity had been automated and non-individualized, which had led to an excessive intrusion into the applicant's personal dignity and autonomy. Furthermore, the Court noted a violation of the right to liberty and security under Article 5 paragraph 1, because the applicant had been involuntarily hospitalized with no proper procedural safeguards in place.

The significance of this judgment is manifold. The Court sharply criticized the Russian system of that time which allowed legal capacity to be denied without any insight into the individual's actual capabilities and without guaranteed procedural rights. The Court emphasized that the ability to make decisions was an integral part of the right to private life and that the deprivation of legal capacity must be an exceptional measure, with the full participation of the person themselves in the proceedings, the right to appeal and regular review of their status. The judgment promotes the position that legal protection must not be used as means of exclusion, but focus on supporting and preserving human dignity instead.

Stanev vs. Bulgaria: institutionalization, deprivation of liberty and dignity

The judgment in *Stanev vs. Bulgaria*, delivered on 17 January 2012, marks a turning point in the protection of the rights of persons with psychosocial disabilities in the European legal framework. Georgi Stanev, the applicant, had been partially deprived of his legal capacity due to a diagnosis of paranoid schizophrenia and placed in an institution for persons with mental disorders without his consent. The initial decision on the deprivation of legal capacity had been rendered by the Bulgarian courts and his guardian later moved him without his consent to a distant and isolated social care facility, where he spent several years in inhumane conditions.

The Court found that there had been a violation of Article 5 paragraph 1 of the ECHR, which guarantees the right to liberty and security. Although the Bulgarian authorities claimed that the case was not about deprivation of liberty but social care, the Court clearly highlighted that the conditions of Mr. Stanev's placement, then its involuntary nature, the restriction of movement and the inability to leave the institution, were all elements that indicated an actual deprivation of liberty. The Court particularly emphasized the fact that the applicant had had no power to influence his situation: as a person partially deprived of legal capacity, he had had no legal mechanism to challenge his placement in the institution.

The Court also found that there had been a violation of Article 3 of the ECHR, which prohibits inhumane and degrading treatment. The Court noted that the conditions in which the applicant had lived – including no heating, poor hygiene, isolation and the absence of any activities – were degrading and unworthy of a human being and, as such,

constituted a violation of his physical and psychological integrity. Moreover, the Court found that there had been a violation of Article 6 paragraph 1, because the applicant had not been granted access to a court to challenge his partial legal incapacity or his placement in the institution. He was denied the right to a fair trial and the right to seek a review of his legal status.

This judgment has had enormous significance in the development of European standards on the rights of persons with disabilities. For the first time, the European Court unequivocally recognized that the institutionalization of persons with psychosocial disabilities, when not based on free will and with respect for procedural safeguards, constitutes a form of deprivation of liberty. This created a basis for the application of Article 5 of the ECHR in the context of social care and psychiatric institutions, which was not common previously.

The Stanev judgment builds strongly on the principles of the Convention on the Rights of Persons with Disabilities, especially with regard to the right to liberty (Article 14), the right to access to justice (Article 13) and the right to live in the community (Article 19). The Court sent a clear message that states must ensure that persons with disabilities have effective access to justice and the opportunity to challenge decisions that affect their dignity, freedom and way of life.

Nikolyan vs. Armenia[49] from 2019 is in many ways similar to the cases of *Shtukaturov vs. Russia* and *Stanev vs. Bulgaria*. We have highlighted only some elements of the Court decision here that are particularly useful for this analysis. Among other things, the Court expressed doubt about the validity of the expert witness's findings concerning its thoroughness and individualization of the assessment, and underlined that the document consisted of only two pages of text. The Court did not question the expert witness's expertise, but it deemed that such an assessment was not detailed enough to serve as the basis for full deprivation of legal capacity. The Court particularly pointed out that the expert witness's findings did not contain an assessment of the "nature and degree" of the impairments, nor did the document explain which specific actions the applicant had not been able to understand or control. The Court emphasized the need for an individual needs assessment (which must also be timely and reflect the person's condition at the time the court proceedings are conducted) and identification of proper safeguards with different levels of intensity for persons with mental impairments (paras. 122–125). The Armenian law did not provide for partial deprivation and, if it had, a properly determined and reasoned partial deprivation could have met the proportionality requirement for restricting legal capacity. The Court found that the full deprivation was disproportionate and therefore violated the applicant's right to privacy under Article 8 of the ECHR (paras. 125, 127). Based on the Court's case law, we can conclude that the full deprivation of legal capacity can hardly ever be justified and that any restriction must be supported by a detailed expert assessment.

49 *Nikolyan vs. Armenia*, application No. 74438/14 [2019].

Among other things, the Court found that there had been a violation of the right to a fair trial (Article 6 paragraph 1 of the ECHR) due to the failure to allow direct access to the court for the applicant deprived of legal capacity in connection with the ongoing divorce procedure and removal of his wife from the applicant's apartment (paras. 94–97). The Court also found that there had been a violation of the right to a fair trial due to the applicant's inability to have direct access to the court for restoration of his legal capacity, as well as the lack of a regular judicial review of the need to continue with the deprivation of legal capacity (paras. 98–103).

In ***N. vs. Romania (No. 2)***,[50] the Court considered the circumstances under which the applicant, a person diagnosed with paranoid schizophrenia, had been deprived of legal capacity and placed under full guardianship, as well as the subsequent change of his guardian. Both decisions of the domestic courts had been based almost exclusively on medical assessment reports, without taking into account the specific needs, desires and abilities of the person involved. The Court found that, in both cases, there had been a violation of Article 8 of the ECHR, which guarantees the right to respect for private and family life. The Court declared that the deprivation of legal capacity had been enforced based on legal solutions that did not provide for an individualized approach and did not take into account the will and preferences of the individual. The measure imposed was too general, too broad and disproportionate, which made the intrusion into the applicant's rights greater than what is necessary in a democratic society.

The second violation of Article 8 was in relation to the change of guardian. The applicant had been completely excluded from the court proceedings and this was solely because he had been under guardianship. The Court pointed out that the domestic courts had not considered at all whether he had been able to understand the proceedings and express his own will, nor had they offered valid reasons for the change of guardian. The domestic courts had not based their decisions on the specific circumstances, nor did their decision meet the standard of proportionality.

In accordance with Article 46 of the ECHR, which makes member states legally bound to execute the Court's judgments, the Court emphasized that the systemic problems identified in this case could lead to numerous similar violations in the future. Therefore, it called on the Romanian state to take appropriate legislative and practical measures to align its system with international standards, including the case law of the Court itself. The Court underlined that the field of free assessment in such proceedings was significantly narrowed for persons who historically suffered systemic discrimination, such as persons with mental disabilities, and that states had to have particularly strong reasons for such denials of their rights (*N.* para. 55; *Alajos Kiss* para. 42).

50 *N. vs. Romania*, application No. 38048/18 [2022].

Deprivation of legal capacity and restriction of the right to vote

In ***Anatoliy Marinov vs. Bulgaria***,[51] the applicant could not exercise his right to vote in the 2017 parliamentary elections in Bulgaria. In accordance with the Constitution, his right to vote had been automatically denied after he had been placed under partial guardianship in 2000 due to psychiatric problems. The applicant claimed that his automatic disenfranchisement, resulting from the fact that he had been placed under partial guardianship and without an individual judicial assessment, was disproportionate. In his opinion, the exclusion of persons with disabilities, including those with "mental disorders", from the possibility to vote in elections was contrary to international standards.

The Court held that there was a violation of Article 3 of Protocol No. 1 to the ECHR and found that the indiscriminate denial of the applicant's right to vote – without an individual judicial review and solely because he had been placed under partial guardianship – was not proportionate to the legitimate aim of restricting the right to vote. The Court reiterated that such a comprehensive treatment of all persons with intellectual or mental disabilities was questionable and that the restriction of their rights had to be subject of strict control.

On 20 May 2010, in ***Alajos Kiss vs. Hungary***,[52] the European Court of Human Rights considered the case of an applicant who had lost the right to vote because he had been placed under guardianship for psychiatric reasons. The Hungarian constitution at that time provided for an automatic and comprehensive restriction of the right to vote for all persons under guardianship, without an individual assessment of their abilities.

In this case, the Court found that there had been a violation of Article 3 of Protocol No. 1 to the European Convention, which guarantees the right to free elections. Although the Court accepted that the restriction of the right to vote may have a legitimate aim – for example, to ensure that persons who are actually able to understand the consequences of their decisions participate in political life – it clearly pointed out that it could not accept a blanket ban that is automatically applied to all persons under guardianship, regardless of their actual mental abilities.

The Court stressed that such a general and indiscriminate restriction constitutes a discriminatory practice and a violation of basic democratic principles. Instead of a universal ban, states are required to undertake an individual and proportionate assessment, while respecting the right of persons with disabilities to participate in public and political life on an equal basis.

51 *Anatoliy Marinov vs. Bulgaria*, application No. 26081/17 [2022].

52 *Alajos Kiss vs. Hungary*, application No. 38832/06 [2010].

Deprivation of legal capacity and restriction of the right to marry and acknowledge paternity

In ***Lashin vs. Russia***,[53] the ECHR considered the situation of the applicant who had been completely deprived of legal capacity since 2000 due to a diagnosis of schizophrenia. In 2002, he and his fiancée had tried to register their marriage, but they were prevented from doing so because of a provision in the Russian Family Code, according to which persons who have been declared legally incapable due to their mental impairments, do not have the right to marry.

The Court had already found previously, in the same case, that there had been a violation of Article 8 of the European Convention on Human Rights, which protects the right to respect for private and family life, because the applicant had not had the possibility to review his legal status in the period 2002/2003. With this in mind, the Court did not deem it necessary to specifically consider Article 12 of the ECHR, which guarantees the right to marry, because the inability to marry was a direct consequence of the deprivation of legal incapacity.

This judgment clearly shows how the deprivation of legal capacity can have far-reaching and discriminatory consequences for fundamental human rights, including the right to found a family. The Court did not rule out the possibility that such a restriction would also have been contentious under Article 12, but it pointed out that the very absence of a mechanism to review the status constituted a serious violation of the ECHR. The judgment highlights that persons with disabilities must have the opportunity to participate in key life decisions and not be automatically excluded from them based on their legal status.

This case enhances the standards set by the Convention on the Rights of Persons with Disabilities, especially with regard to Articles 12 (Equal recognition before the law) and 23 (Respect for home and the family). It also confirms the need for systemic reforms in the field of legal capacity and personal rights.

In ***Krušković vs. Croatia***,[54] the applicant had not been allowed to acknowledge paternity, as he had been fully deprived of legal capacity. The child's mother had registered the applicant as the child's father in the civil registry and the applicant had given a statement confirming his paternity before the civil registry and subsequently before the guardianship authority. However, the guardianship authority had informed the civil registry that the applicant had been deprived of legal capacity. Consequently, the competent administrative authority had annulled the registration of paternity. This decision had not been delivered to the applicant but to his mother, who was his guardian. Accepting the applicant's situation – the deprivation of legal capacity – the Court stressed that it was in his essential interest to have such a fundamental fact from his private and family life

53 *Lashin vs. Russia*, application No. 3317/02 [2013].
54 *Krušković vs. Croatia*, application No. 46185/08 [2011].

established and recognized before the law (para. 34). The Court also underlined that the guardianship authority had not reacted to protect the obvious personal interest of the person deprived of legal capacity by providing support to register his paternity (para. 37). Furthermore, such actions had not been necessary to protect the public interest, nor had they been in the best interest of the father or the child, as the state representative had wanted to portray it (para. 41). The guardianship authority procedure had been the only way to establish the applicant's paternity and in this procedure the applicant had been the defendant but he could not have initiated this procedure himself. Instead, it had been entirely at the discretion of the guardianship authority (para. 40). This procedure had been initiated only two and a half years after the applicant's (unofficial) request, so the Court concluded that the state, i.e. the competent authorities, had failed to fulfil its positive obligation to protect the applicant's private and family life, thereby violating the right under Article 8 of the ECHR.

Such a problem could also arise in Montenegro because, according to Article 104 of the Family Law, paternity can be acknowledged by "[...] a man capable of judgment who has reached the age of 16".

Summary of the European Court for Human Rights case law

Procedure-wise, the ECtHR insisted that the procedure for the deprivation of legal capacity must include direct participation of the person themselves, clear and timely information about the procedure, the mandatory right to an effective appeal and the possibility of a regular judicial review of the need to proceed with the application of this measure, also upon the request of the person themselves (*Shtukaturov vs. Russia*, *Stanev vs. Bulgaria*, *Nikolyan vs. Armenia*, *N. vs. Romania (No. 2)*). In terms of substance, the Court emphasized the necessity of a detailed, individualized assessment of a person's abilities, which should not be exclusively medically based or general. Instead, it must carefully consider the specific situation, needs and will of the individual. The measure of restricting legal capacity must be proportionate to the legitimate aim for which it is introduced, by implementing the mildest possible intervention and avoiding completely automated and general approaches (*Nikolyan vs. Armenia*, *N. vs. Romania (No. 2)*). The Court paid special attention to the deprivation of legal capacity of persons who were historically discriminated against and emphasized that states had to be particularly careful in those cases and have very strong reasons for any restriction of their rights (*Alajos Kiss* para. 42). When it considered the content of expert findings and opinions, the Court particularly criticized the generality and lack of detail, and noted in one case that the document had been written on only two pages (*Nikolyan* paras. 10, 122).

At the same time, the Court found that the disproportionate deprivation of legal capacity led to the violations of various other rights such as: the right to liberty and security under Article 5 of the ECHR due to forced placement in institutions, the right to marry under

Article 12 of the ECHR due to the automatic prohibition to marry, as well as a violation of the right to vote guaranteed by Article 3 of Protocol No. 1 to the ECHR due to the automatic and non-individualized restriction of voting rights (*Stanev, Lashin, Anatoliy Marinov, Alajos Kiss*). Also, the right to private life can be violated by the fact that a person is deprived of legal capacity and placed under guardianship, but also when they are not allowed to effectively acknowledge paternity, for example. Thus, the Court clearly indicates that inadequate implementation or excessive restrictiveness of the measure of limiting legal capacity can have very serious and broad consequences for the realization of human rights, which are not in accordance with the ECHR as they are mostly disproportionate. Generally speaking, the least restrictive, highly individualized limitations that are applied as a last resort, with respect for the person's will and due care for their actual interests, with facilitated and supported exercise of rights in particularly sensitive areas of civil and political life, represent a lower risk to the rights and interests of a person with intellectual and psychosocial disabilities. The ECtHR's case law is constantly evolving and one should expect that the implicit standards that could be extracted from the current case law will improve to further minimize the restriction of rights with greater involvement of the person in decision making. This is particularly relevant when we take into account the fact that all CoE member states have ratified the Convention on the Rights of Persons with Disabilities and the general direction in which the ECtHR's case law in this field is developing.

European Union accession process

In line with the EU Stabilization and Association Agreement, Montenegro has committed itself to gradually harmonize its legislation with the EU *acquis*. Montenegro has opened all 35 chapters, including Chapter 23 (Judicial Reform and Fundamental Rights) which, among other things, covers non-discrimination and the protection of marginalized groups from discrimination, and Chapter 24 (Justice, Freedom and Security). The negotiations within these chapters will last until the end of the negotiation process, which is a new approach that the European Commission applied for the first time in the case of Montenegro.

The EU is also a state party to the Convention on the Rights of Persons with Disabilities and has an obligation to align its own legislation with that international treaty. This means that both the EU and Montenegro have to implement Article 12 of the Convention, which prescribes the equal recognition of persons with disabilities before the law, the provision of support and safeguards that respect the person's will. Furthermore, the implementation of the Convention is important for Montenegro's progress in the EU accession process, given that the Convention is part of the EU internal *acquis*, as previously explained.

The European Commission's most recent 2024 Montenegro Report on the country's progress in the accession process states that Montenegro has not fulfilled the recommendations of the Committee on the Rights of Persons with Disabilities from 2017, particularly regarding

the necessary reform of guardianship and decision making by persons with disabilities.[55] In the meantime, Montenegro has adopted the Deinstitutionalization Strategy 2025–2028 and is in the process of adopting other significant policies.[56] The Action Plan for Chapter 23 also includes a number of measures relevant for the rights of persons with disabilities, including the development and improvement of support services for community living.[57]

In the context of EU accession, the reform of legal capacity in Montenegro is a legal and institutional necessity but, above all, it is a moral and social obligation that strengthens the foundations of a democratic society founded on equality and respect for human rights. This reform also contributes to the development of civil rights of persons with disabilities in their entirety, which is necessary for Montenegro to become a fully-fledged member of the EU.

55 Commission, Montenegro Report by the European Commission (SWD(2024) 694 final), 2024, <https://enlargement.ec.europa.eu/montenegro-report-2024_en>, p. 41.

56 The Government of Montenegro, Deinstitutionalization Strategy 2025–2028 with the 2025 Action Plan, <www.gov.me/dokumenta/ae125913-ef38-4dd2-bc90-3e8d38a18a62>

57 Ministry of European Affairs, Action Plan for Closing Benchmarks under Negotiating Chapter 23 – Judiciary and Fundamental Rights, 2025, <www.gov.me/clanak/usvajanje-akcionih-planova-za-zavrsna-mjerila-u-pregovarackim-poglavljima-23-i-24-kljucni-korak-ka-evropskoj-buducnosti-crne-gore>, p. 36.

NATIONAL LEGAL FRAMEWORK

The matter of legal capacity and guardianship of adults in Montenegro is governed in a very restrictive manner and is not in line with international standards in this field. On the other hand, the Constitution of Montenegro guarantees many rights without prescribing that full legal capacity is a requirement for their realization (e.g. the right to marry, the right to vote). This should be taken into account when preparing a reform plan to align regulations and practices in this filed.

Article 9 of the Constitution prescribes that the ratified and published **international agreements and generally accepted rules of international law** constitute an integral part of the internal legal order, that they **have the supremacy over the national legislation and are directly applicable** when they govern relations differently from the internal legislation. This also means that the provisions of the Convention concerning legal capacity must be applied regardless of national legislation that has not yet been aligned with the Convention. Declaratory monistic legal systems, however, are often dualistic in practice or are combined (some international norms are applied directly, while others require incorporation). This seems to be the case with Montenegro, as it is obvious that the norms under Article 12 of the Convention are not implemented directly, regardless of the differing provisions of domestic law that govern this matter. Also, we should not forget that the direct applicability of an international norm depends on its features, primarily its specificity, clarity and prescriptiveness. A norm that is not specific enough or a norm that is more programmatic than prescriptive will require further elaboration and incorporation through domestic laws and secondary regulations, despite the monistic legal system.

The Constitution further prescribes that "**all shall be deemed equal before the law, regardless of any particularity or personal feature**" (Article 17) and "everyone shall have the right to equal protection of the rights and liberties thereof" (Article 19). It also prescribes that everyone has the right to a legal remedy as well as to legal aid (Article 20). Furthermore, human rights and freedoms may be restricted only by the law, within the scope permitted by the Constitution and to such an extent which is necessary to meet the purpose for which the restriction is allowed in an open and democratic society (Article 24).

Based on the above, one could argue that the regulations governing the deprivation of legal capacity on the basis of disability are not only contrary to the Convention but potentially also to the Constitution of Montenegro as well. In the event of different interpretations of the mentioned provisions of the Constitution, primarily Article 17, the Convention as a document that has supremacy over domestic legislation must at the very least serve as a guideline to interpret the provisions of the Constitution (and laws).

The legal framework governing deprivation of legal capacity and the legal concept of guardianship

Within its Concluding Observations when considering the initial report on the implementation of the Convention in 2017, the Committee recommended that Montenegro, in accordance with General Comment No. 1 on Article 12 of the Convention, should "fully harmonize its legislation with the Convention, to replace the current guardianship and substitute decision-making regime with a system of supported decision making that fully respects the autonomy, integrity, dignity, will and preferences of the person, and to establish transparent and effective remedies for persons with disabilities whose legal capacity has been removed."[58]

The matter of deprivation of legal capacity and placement of an adult under guardianship is governed by regulations that are decades old and thus outdated even in terms of minimum human rights standards.[59] The basic provisions governing guardianship and deprivation of legal capacity are part of the Family Law (hereinafter: the FL), which defines the requirements for deprivation of legal capacity and extension of parental rights, as well as of the Non-Contentious Proceedings Law (hereinafter: NCPL), which prescribes the procedure for deprivation of legal capacity and extension of parental rights. Despite minor amendments aimed at alignment with certain ECHR practices, it appears that the practice has not changed significantly, as evidenced by the analysis of the case law.

Requirements for deprivation of legal capacity and extension of parental rights

The requirements for deprivation of legal capacity and extension of parental rights are governed by the Family Law, which prescribes that the age of majority is reached at the age of 18 (Article 13 paragraph 1). Parental rights end when a child turns 18 or acquires full legal capacity before the age of majority. The law identifies three types of restrictions on legal capacity: full deprivation of legal capacity, partial deprivation of legal capacity and extension of parental rights.

The Family Law prescribes that "a person of legal age who, due to mental illness, intellectual disability or due to any other cause, is not capable of taking care of their rights and interest shall be **fully deprived of legal capacity**" (Article 235 paragraph 1 of the FL). The legal capacity of these persons is equal to the legal capacity of younger minors (a child under the age of 14). Therefore, the duties of the guardian of a person fully deprived of legal capacity are equal to the duties of a guardian of a child under the age of 14 (Article 239 paragraph 1 of the FL).

58 Committee for the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Montenegro* (CRPD/C/MON/1), 2017,

59 Kosana Beker, Deprivation of Legal Capacity in Montenegro, *Analysis of the application of the Non-Contentious Proceedings Law and other relevant regulations*, (Human Rights Action, 2017), p. 22.

The law also prescribes that "a person of legal age who by their actions jeopardizes their rights and interests or the rights and interests of other persons due to mental illness, intellectual disability, alcohol or drug abuse, senility or due to other similar reasons shall be **partially deprived of legal capacity**" (Article 235 paragraph 2 of the FL). The legal capacity of these persons is equal to the legal capacity of older minors (children aged 14 to 17).

Parental rights may be extended before a child becomes an adult if the child "[...] due to developmental impairments and difficulties, disability or other reasons, is incapable of taking care of themselves, their rights and interests" (Article 92 of the FL). The law does not explicitly equate the status of persons over whom parental rights have been extended with the status of persons who have been fully or partially deprived of legal capacity. However, since a person over whom parental rights have been extended has the legal status of a minor, i.e. they have not acquired legal capacity, one can conclude that the status of persons over whom parental rights have been extended is in all aspects equal to the status of persons fully deprived of legal capacity. The law also allows extension of parental rights over an adult person when the reasons for the extension existed even before they reached the age of 18 (Article 93 paragraph 2 of the FL).

The aforementioned provisions reflect an obvious deviation from the Convention on the Rights of Persons with Disabilities, as they allow the deprivation of legal capacity on the basis of mental capacity, i.e. the ability to make decisions. Also, the deprivation leads to the appointment of a guardian who makes decisions on behalf of the person and does not provide supported decision making. However, a doctrine-based analysis of the concepts of the two types of deprivation, as defined in the Family Law, offers an insight into their differences that contribute to the almost complete absence of partial deprivation from the case law.

First of all, full and partial deprivation are not two levels of deprivation of legal capacity in the typical sense, where the less restrictive form is considered before the more restrictive form is imposed. Put differently, there is no gradation between them with the aim of ensuring the least possible intrusion into a person's civil rights, where the less restrictive solution would always be considered first and, only if that solution is not possible, then more restrictive one would be applied. This conclusion is drawn from different requirements for full and partial deprivation of legal capacity, as well as from the absence of a provision that would explicitly provide for gradation. The law provides for two requirements for the deprivation of legal capacity that have to be cumulatively met and are related to:

1. health status;
2. the relation to one's own (and other persons') rights and interests.

Although worded slightly differently, the first requirement for both partial and full deprivation is essential and broad. Mental illness and intellectual disability are explicitly mentioned under both types of deprivation. The law also mentions "other causes" for full deprivation, while specific illnesses and conditions such as alcohol or drug "abuse", senility, and other "similar reasons" are also mentioned for partial deprivation. Therefore, the first requirement does not differ essentially for the two forms of deprivation. In other words, if the second requirement is met, a person with mental difficulties, regardless of the cause and type of difficulty (congenital or developed during their life, intellectual disability, mental health disorders, dementia, addiction diseases, etc.), may be partially or fully deprived of legal capacity.

The second requirement is different for two types of deprivation. For full deprivation, the person must be "incapable of taking care of their own rights and interests" (due to mental illness/disability and other causes), while for partial deprivation, they must be, "[...] by their actions, jeopardizing their own rights and interests or the rights and interests of other persons [...]" (due to mental illness/disability and other reasons). A linguistic interpretation of these provisions indicates that actions by which a person puts themselves and others in jeopardy must occur for partial deprivation of legal capacity. Unlike full deprivation, when only the absence of ability matters, the presence of threat against one's own and other persons' rights and interests is thus required for partial deprivation. The lack of a person's ability to take care of their interests and rights is not mentioned in the context of partial deprivation. Instead, only the threat to them is mentioned. Therefore, the central element of the second requirement for partial deprivation involves threat to rights and interests.

The conceptual difference might be clearer when we introduce the concepts of "status", "functional" and "outcome" approaches, described by the Committee on the Rights of Persons with Disabilities.[60] The full and partial deprivation of legal capacity in the Montenegrin legislation reflects two approaches to the deprivation of legal capacity – "status-functional" in the case of full deprivation, and "status-outcome" in the case of partial deprivation. In this nomenclature, "status" represents a diagnosis of the health status (the first requirement). "Functionality" refers to the ability of a person to take care of their own rights and interests, and "outcome" refers to the consequences of making decisions (jeopardize one's own and others' rights and interests). For this reason, we can conclude that there is no gradation between the two types of deprivation, i.e. that partial deprivation was probably not defined with the intention of being an alternative to the full deprivation of legal capacity for every person, but rather to be applied in factually different situations and in a different way.

Nevertheless, the overlaps of requirements for full and partial deprivation are large, and

60 The Committee for the Rights of Persons with Disabilities, *General Comment No. 1: Article 12 – Equal Recognition before the Law* (CRPD/C/GC/1) [2014], para. 15.

their difference might be irrelevant in the judicial practice. For example, a person with an intellectual disability who is fully deprived of legal capacity due to a perceived inability to take care of their rights and interests can be partially deprived of legal capacity, because if they cannot take care of their rights and interests, it implies that the person jeopardizes their rights and interests when not under guardianship.

The case law, in this analysis and the analysis carried out by the Human Rights Action in 2017, shows that the courts very rarely partially deprive persons of legal capacity and almost always do that fully. This is confirmed additionally by the data from the Deinstitutionalization Strategy 2025–2028. In 2024, there were 948 persons fully deprived of legal capacity (455 women) and 38 persons partially deprived of legal capacity (14 women) in Montenegro. Partial deprivations of legal capacity, therefore, account for only 3.85% of all deprivations.[61]

The reasons for this extremely small share of partial deprivation of legal capacity not only can be found in the legal definition of the requirements for the deprivation of legal capacity, but they may also include the established practice and attitudes of various stakeholders in the system – the courts, expert witnesses, guardianship authorities, family members – due to prejudice, as well as other reasons. Nonetheless, the existing legal framework allows limited enhancement of practices to improve the status of persons with disabilities, while key stakeholders are simultaneously preparing a comprehensive reform of legal capacity and alignment with the Convention on the Rights of Persons with Disabilities. The Deinstitutionalization Strategy 2025–2028 and the accompanying Action Plan have set the reduction in the number of persons deprived of legal capacity and the increase in the number of persons with partially or fully restored legal capacity as strategy implementation performance indicators.[62]

Procedure for the deprivation of legal capacity

The NCPL governs the procedure for the deprivation of legal capacity.[63] In this procedure, the court decides on the full or partial deprivation of legal capacity, while the relevant social welfare centre appoints a guardian through the administrative procedure. The court conducts the procedure for the deprivation of legal capacity to examine whether an adult person, based on their level of capacity for normal judgment, is able to take care of their own rights and interests, and then it decides on the full or partial deprivation of legal capacity (Article 29 paragraph 1 of the NCPL). The procedure is urgent and has to be completed no later than 30 days from the date of receiving the petition (Article 29 of the NCPL). The court responsible for conducting the proceedings is the court within

61 The Government of Montenegro, Deinstitutionalization Strategy 2025–2028 with the Action Plan for 2025, <www.gov.me/dokumenta/ae125913-ef38-4dd2-bc90-3e8d38a18a62>, p. 64.

62 The Government of Montenegro, Deinstitutionalization Strategy 2025–2028 with the Action Plan for 2025, <www.gov.me/dokumenta/ae125913-ef38-4dd2-bc90-3e8d38a18a62>, p. 64.

63 The Non-Contentious Proceedings Law (Official Gazette of the Republic of Montenegro No. 27/2006 and Official Gazette of Montenegro Nos. 20/2015 and 75/2018 – other law Nos. 67/2019 and 123/24).

whose territory the person being deprived of legal capacity has permanent or temporary residence (Article 31 of the NCPL).

The court initiates and conducts the proceedings for the deprivation of legal capacity upon the initiative of a guardianship authority, spouse, common-law partner, child or parent of the person who meets the legal requirements for deprivation or restriction of legal capacity (Article 30 of the NCPL). The proceedings may also be initiated upon the petition of their grandmother, grandfather, brother, sister, as well as grandchildren, if they live with that person in a family unit. The petition to initiate the procedure can also be filed by a person who meets the legal requirements for deprivation of legal capacity, if they can understand the meaning and legal consequences of their petition. The petition must include the facts on which it is based, as well as the evidence that confirms or renders such facts likely. When the proceedings are not initiated by the guardianship authority, the petition must also include the information indicating the authorization to institute proceedings (Article 32 of the NCPL). Expert witnesses must provide their assessment in the presence of a judge, except when the expert assessment is carried out in a health institution (Article 37 of the NCPL). The decision on the deprivation of legal capacity is based on the opinion of a medical expert witness of proper specialty, who gives their judgment and opinion on the person's "mental" state and ability to reason. The central role of the expert witness's findings and opinion is visible in the fact that judges practically never decide differently from the recommendation that the expert witness gives in their findings and opinion. Also, the analysis of the case law shows that the court refers to the crucial parts of the expert's findings in its decisions and, as a rule, agrees with the recommendation to deprive the person of legal capacity, based on the expert witness's findings, without critically examining the content of their findings and opinion. **Neither the FL nor the NCPL prescribes that the expert witness declare whether the person should be deprived of legal capacity or not, which shows that the established practice to have expert witnesses recommend the deprivation of legal capacity has no legal basis**.

The law is also clear on the person's participation in the proceedings. It prescribes that the court should directly hear the person in relation to whom the proceedings for the deprivation of legal capacity are being conducted. If they are in a health institution, as a rule, they are heard in that institution, where the hearing is also held (Article 35 of the NCPL). The court may abandon the hearing of the person in relation to whom the proceedings are conducted only "if this may be harmful to their health or if the interview is not possible at all, considering the mental or physical state of such person" (Article 35 of the NCPL). The analysis of the case law **shows that the courts do not oppose the expert witness's claim that the person cannot be heard. Although it may abandon the interview, the court must see the person being deprived of legal capacity; however, this often does not happen in practice** (Chart 5). The court is also required to hear the guardian or temporary representative, the petitioner and other persons who may

provide the needed information about the life and behaviour of the person in relation to whom the procedure is being conducted and other important circumstances (Article 36). The person deprived of legal capacity may file an appeal against the decision on the deprivation of legal capacity, regardless of their mental state (Article 40 paragraph 2 of the NCPL). The decision on the deprivation is entered into the birth registry and into the real estate cadastre, if the person concerned owns immovable property (Article 43 of the NCPL). The decision is also delivered to the guardianship authority, which is required to appoint a guardian for the person.

Restoration of the legal capacity

The provisions of the NCPL that prescribe the procedure for the deprivation of legal capacity and the extension of parental rights shall be applied accordingly in the procedures for the restoration of legal capacity and the termination of extended parental rights.

The most recent amendments to the NCPL introduced the obligation of periodic review of the decision on the deprivation of legal capacity. In its decision on the deprivation of legal capacity, the court sets a period that may not be longer than three years in the case of partial deprivation of legal capacity, or five years in the case of full deprivation of legal capacity. Once the period expires, the court determines whether the reasons for deprivation of legal capacity still exist (Article 40 paragraph 2 of the NCPL).

The law prescribes that the court may, ex officio or upon the initiative of the guardianship authority or other authorized petitioners, including the person deprived of legal capacity, decide on the restoration of legal capacity "[b]efore the period from Article 40 paragraph 2 of this law expires, if it establishes that the reasons due to which the person was deprived of legal capacity no longer exist" (Article 42b paragraph 1 of the NCPL). **By adopting these amendments, Montenegro aligned its legislation with the case law of the ECtHR as regards regular review of the reasons for the deprivation of legal capacity and review at the request of the person deprived of legal capacity, provided that the reviews are conducted regularly**. The stakeholders interviewed for the purpose of this study point to problems with notifying the courts about the expiration of legal deadlines for review. One of the recommendations at the end of this analysis is to improve the information system in this field.

There are certain practical limitations in governing the restoration of legal capacity. While the law allows the person who has been deprived of legal capacity to initiate the process of restoring legal capacity, it does not require the court or national authorities to inform the persons concerned about the existence of this possibility. Moreover, the law prescribes that the restoration of legal capacity is possible when the reasons for which the person has been deprived of legal capacity no longer exist. However, if the disability itself is the reason for deprivation of legal capacity, such an approach will not help the person restore their legal capacity because, by definition, disability is long-term and

cannot simply disappear. In such cases, the criteria for the restoration of legal capacity will not be met and, despite the more favourable legal solution, this does not change the position of persons with, primarily, intellectual disabilities, as well as persons with psychosocial disabilities, because these disabilities are mostly unchangeable by nature.

An amendment to the NCPL introduced the option of reversing the full deprivation of legal capacity to partial, i.e. of changing the range of activities that the person is able to perform under the partial deprivation (Article 42b paras. 2 and 3 of the NCPL). This legal solution is more flexible than the previous one; however, it is used extremely rarely in the case law. Data for the period 2022–2023 shows that legal capacity was partially restored only three times as a result of a legal capacity review, and fully restored not even once.[64]

From the aspect of the extent of intrusion into a person's privacy, the court's obligation to prescribe activities that the person is able to perform in the case of partial deprivation is a special issue. **A significantly more pragmatic and less intrusive solution would be to prescribe activities that the person is not able to perform independently**. Such an approach would also represent **an opportunity to adapt to the future legal capacity reform**, given that the reform should provide for modalities of supported decision making, where the support will be limited to a specific decision or area (e.g. decisions related to property).

Guardianship

After the court proceedings for deprivation of legal capacity, the guardianship authority appoints a guardian for the person within 30 days of the court's decision on the deprivation of legal capacity. The guardian's duty is to conscientiously take care of the person who is placed under guardianship (Article 194 of the FL). The guardian of a person who has been fully deprived of legal capacity or whose legal capacity is restricted is required to take special care of the person's personality, accommodation, health and the causes due to which they have been deprived of legal capacity and to try to eliminate those causes (Article 237 of the FL). The guardian is required to take all necessary steps to prepare the person to live an independent life as soon as possible (Article 185 of the FL). This also means that the guardian should initiate the procedure for the restoration of legal capacity when the person with a disability is able to live independently again. Although the FL prescribes that the guardianship authority should be required to monitor continuously and examine the conditions under which the ward[65] lives, it does not provide for the obligation to visit such a person placed in an institution.

64 The Government of Montenegro, The Deinstitutionalization Strategy 2025–2028 with the Action Plan for 2025, <www.gov.me/dokumenta/ae125913-ef38-4dd2-bc90-3e8d38a18a62>, p. 64.

65 Article 185 of the Family Law: "The guardianship authority shall continually monitor and examine the conditions of life of protégées, particularly minors, and it shall control their accommodation, upbringing, health status, the process of assuming self-reliance, social environment in which they live, the social relationships that they have and how their property is managed, as well as how their rights and interests are protected."

Furthermore, other important obligations of the guardian are to represent the person in legal matters, provide livelihood, and manage and dispose of the person's property. The guardian may dispose of the property owned by the person under guardianship with the prior consent of the guardianship authority (Article 196 of the FL). Likewise, with the approval of the guardianship authority, the income from the property owned by the person under guardianship may be used to pay for the costs of guardianship (Article 212 of the FL). If the guardian establishes that circumstances have arisen for the person deprived of legal capacity that indicate the need to restore their legal capacity, i.e. to change the previous decision, they are required to inform the guardianship authority without delay about it (Article 238 of the FL). As regards persons partially deprived of legal capacity, a particularly significant power of the guardianship authority (i.e. the SWC) is to expand or to narrow the extent of activities those persons are able to perform (Article 239 paragraph 2). With this, the SWC can effectively, more or less, intrude on the private life and fundamental rights of the person. This legal solution is unexpected and does not provide proper guarantees for protection from excessive and disproportionate influence. Given that the practice of partial deprivation of legal capacity is extremely rare, it is most likely that guardianship authorities rarely or never use this option.

One could say that proper mechanisms to control the work of a guardian are non-existent. The fact that the guardianship authority that appoints a guardian is at the same time responsible for monitoring and evaluating the work of the guardian is problematic, especially when this guardian is also an employee of that guardianship authority. When a person does not have any relatives or when relatives do not want to be guardians, the guardianship authority appoints one of its employees to perform the duties of a guardian. Appointing employees from the guardianship authority to perform the duties of a guardian may yield inadequate results, especially if these duties are not defined clearly enough and taking into account the limited number of professionals employed at social welfare centres. The safeguards are mostly not clearly elaborated by the law and there are no sanctions for guardians who do not fulfil their obligations, for example, if they fail to visit the person who is under their protection. It should also be noted that **there are no provisions that would force guardians to respect the person's will or even to consult them about any aspect of their life and decisions that are made in their name**. This role of the guardian completely deprives the person of their autonomy and dignity, and the meaningfulness of the protective role that the guardian – especially a person employed in a social welfare centre (SWC) – can exercise is also brought into question.

When the procedure for deprivation of legal capacity is initiated against a person, the court notifies the guardianship authority (SWC), which then appoints a temporary guardian for the person (Article 241 of the FL). A much better solution would be to appoint an independent and legally qualified representative. Instead, a temporary guardian is appointed from among the ranks of SWC employees, who takes care of the person's

interests during the procedure. Thus, they are denied the opportunity for their rights to be defended in the same procedure by an independent and legally qualified person, such as a lawyer appointed ex officio.

A guardian for a specific case is different from a temporary guardian. To appoint a guardian for a specific case, a court request is not necessary. Instead, the social welfare centre (guardianship authority) can appoint such a guardian upon its own initiative (or at the court's request), as needed (Articles 244 and 245 of the FL). The law does not draw a connection between disability or the ability to make decisions and the reason for appointing a guardian for a specific case. Three reasons are listed, one of which is the need to protect the rights and interests of the person (Article 244 of the FL).[66] **Although established with the intention to protect the person, this very broadly defined requirement, along with the absence of a mandatory judicial review, represents a significant risk to privacy and fundamental civil rights**. Anecdotal sources attest to the use of this mechanism for the involuntary placement of a person in a social care institution or psychiatric hospital for treatment. The appointment of a guardian for a specific case allows the placement of a person to be formally voluntary, while basic checks provided for in cases of involuntary placement and/or treatment do not exist. In the case of involuntary placement, namely, there is an obligation to notify the court within 48 hours (Article 46 of the NCPL). The court is required to hold a hearing in the institution within three days and the person must have a lawyer during the proceedings (Article 48 of the NCPL). Such a check is not provided for when placing persons based on the consent given by a guardian for a specific case. The Family Law should be reviewed on this matter to ensure better protection of the rights of persons with disabilities.

Ulterior motives and systemic incentives for the deprivation of legal capacity

Consultations with representatives of organizations of persons with disabilities, parents of children with disabilities, as well as representatives of social welfare centres have pointed to various reasons that motivate parents or relatives to initiate the procedure for deprivation of legal capacity and extension of parental rights. The motive for initiating the procedure is often the intention to realize a certain right from the social protection system, to place the person in a social care institution or to facilitate completion of administrative tasks.

There is a direct, legally defined link between guardianship and the cash benefits stemming from social protection. The guardian (parent) of a person with extended parental rights or the guardian of a person deprived of legal capacity, if that person receives a personal disability allowance, is entitled to the allowance for the parent or guardian,[67] in line with

66 The other two reasons are not relevant for the matter of legal capacity.

67 The Family Law uses the term "guardian", while the Law on Social and Child Protection uses the term "caretaker".

the Law on Social and Child Protection.[68] The monthly allowance amounts to €276.34[69] which can be a significant bonus to the family budget for many families, compensating them for part of the additional costs of a person with a disability or lost earnings. As such, this allowance plays a major role in the social and economic status of many persons with disabilities. However, an unexpected consequence of this measure is the deprivation of legal capacity of or the extension of parental rights over adult persons with disabilities. **The social protection system should not encourage, either directly or indirectly, the deprivation of legal capacity**. **Therefore, the requirement to receive this allowance for adult persons with disabilities should be changed to avoid encouragement of the deprivation of legal capacity and the extension of parental rights. Changes in the requirements must not have a negative financial impact on the beneficiaries of this entitlement – persons with disabilities who receive a personal disability allowance**.

Finally, the deprivation of legal capacity for the purpose of placement in social care institutions is a particularly big issue. In the opinion of the consulted stakeholders – representatives of organizations of persons with disabilities and social welfare centres – this practice is common. According to them, it is mostly elderly people, especially those suffering from dementia, who are deprived of legal capacity so that the guardian can give consent for their placement in an institution. This practice not only intrudes on a person's privacy disproportionately in the case of full deprivation of legal capacity, but is also problematic from the aspect of possible arbitrary deprivation of liberty, as persons placed in institutions are de facto deprived of liberty. The guardianship for a specific case is also used in practice to place a person in an institution based upon the consent of the guardian for a specific case. Such placement is not subject to judicial review and involves a serious risk of abuse. **The relevant institutions and especially the ministry responsible for social protection must stop this practice and ensure that persons who need placement are not deprived of legal capacity for that reason, and that their rights in placement procedures are protected – including protection from arbitrary deprivation of liberty**.

Finally, institutions and other legal entities with which persons with disabilities and their family members come into contact in order to receive certain benefits – such as parking privileges, public transport or social protection entitlements – may in some cases incorrectly inform citizens that it is necessary for the person who is to be deprived of legal capacity to exercise those rights. Such practices are not based on the law and should be eliminated by raising awareness among these institutions and other entities, as well as by providing clear guidelines issued by the line ministries.

68 Article 39a of the Law on Social and Child Protection (Official Gazette of Montenegro No. 027/13, most recent amendment 3/23).

69 The decision harmonizing the amount of basis for entitlement to the subsistence benefit and the amount of cash benefits from the social and child protection (Official Gazette of Montenegro No. 9/2025).

CASE LAW

In total, 129 available court decisions on deprivation of legal capacity from 2022 to 2024 were used for this study. The analysis included 49 decisions, or 39.2% of the total number. This sample size is sufficient for an adequate qualitative analysis, while in the case of a quantitative analysis, issues of representativeness may arise. Moreover, one should bear in mind the possibility that the Courts of Montenegro web portal does not contain all the decisions that the courts have rendered in the proceedings for deprivation of legal capacity.[70] For this reason and due to the limited sample, the quantitative analysis should be considered as an indication of the actual situation. The most significant limitation of this analysis is the absence of decisions regarding the extension of parental rights. We have already explained that a person with extended parental rights is de facto deprived of legal capacity, in a procedure that is the same as the procedure for deprivation of legal capacity. The most important consequence of the absence of these decisions is the actual number of deprivations of legal capacity in the given period, which this analysis is not able to include. Therefore, the number of decisions cited here should not be taken as the total number of proceedings in the given period. Also, the absence of decisions on extending parental rights has a direct impact on the type of disability of the persons included in the sample. Since parental rights are extended for young people, these are often cases of intellectual disability, which is mostly a consequence of a congenital condition (e.g. Down syndrome, autism). The deprivation of the legal capacity of older people, on the other hand, is mostly in cases of dementia with various causes from the spectrum of mental health disorders (e.g. psychotic disorders). Thus, the share of deprivation of legal capacity by type of disability in the results of this analysis will be higher for disabilities that are typically acquired later in life, and lower for congenital intellectual disabilities.

The largest number of available decisions was from the Basic Court in Podgorica (48) and the smallest from the Basic Court in Berane (3). The sample was proportional to the number of available decisions from each court. At least one decision from each basic court, for which decisions were available, was analysed for each year. So, for example, a total of 17 decisions were analysed from the Basic Court in Podgorica and two decisions from the Basic Court in Berane.

Findings of the quantitative analysis

In all cases in which in the analysed period the courts rendered a decision on legal capacity, these were cases of **full deprivation of legal capacity and there was not a single case of partial deprivation or restoration of legal capacity** (Figure 1). In 4.1% of cases the court rejected the petition for the deprivation of legal capacity, while in all other cases the

70 Ministry of Justice, Courts of Montenegro portal, <https://sudovi.me/sdvi/odluke>

petition was upheld (95.9%) (Figure 2). **In 81.6% of cases, the petitioners were family members; in 16.3% it was the SWC**, and the courts initiated the procedure ex officio only in 2.1% of cases (Figure 3). **In half of the cases when the SWC was the petitioner, the person's temporary representative was a SWC employee**. In 75% of such cases, the temporary guardian was a SWC employee that had filed the petition to initiate the procedure, and in one case it was an employee of another SWC. We have already noted that there is an issue when a person with disabilities is represented by someone who is not qualified for legal defence in proceedings in which the person is deprived of fundamental rights, and this should be changed. In cases where the person's temporary guardian, i.e. their representative in the proceedings, is employed at the same SWC which is acting as the petitioner, not only is the quality of representation questionable, but the same is also true of the impartiality of such a representative. The 2017 analysis of the case law on the deprivation of legal capacity already points to this problem and highlights that such representation is inappropriate as regards the right to a fair trial.[71]

Figure 1. Court decisions on legal capacity

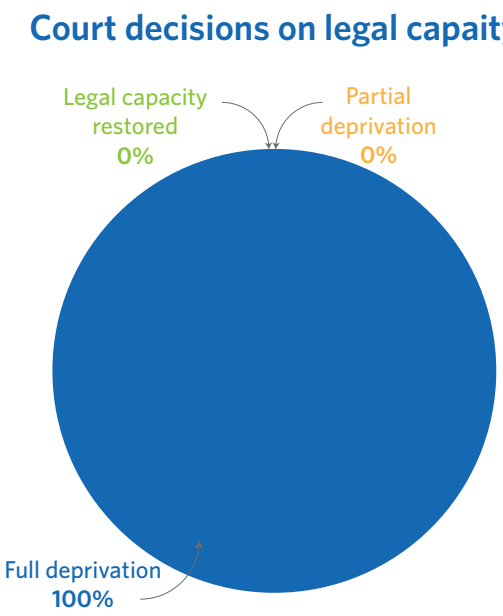


Figure 2. Upheld and rejected petitions for deprivation of legal capacity

71 Kosana Beker, Deprivation of Legal Capacity in Montenegro, *Analysis of the implementation of the Non-Contentious Proceedings Law and other relevant legislation*, (Action for Human Rights, 2017), p. 36.

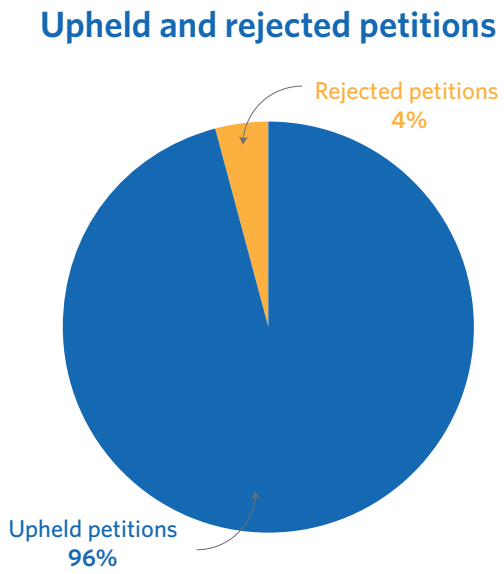
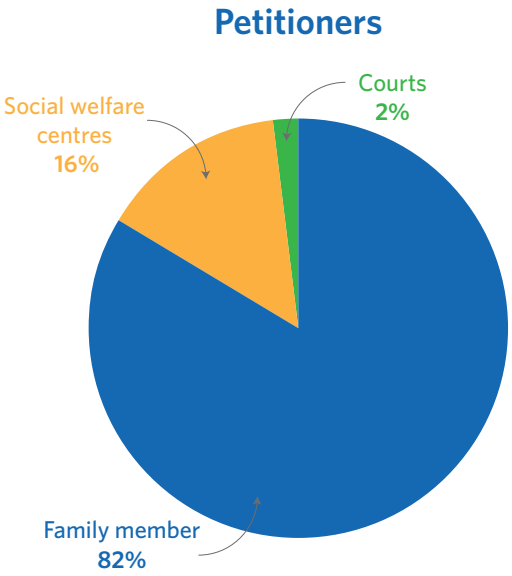


Figure 3. Who are the petitioners for the deprivation of legal capacity?



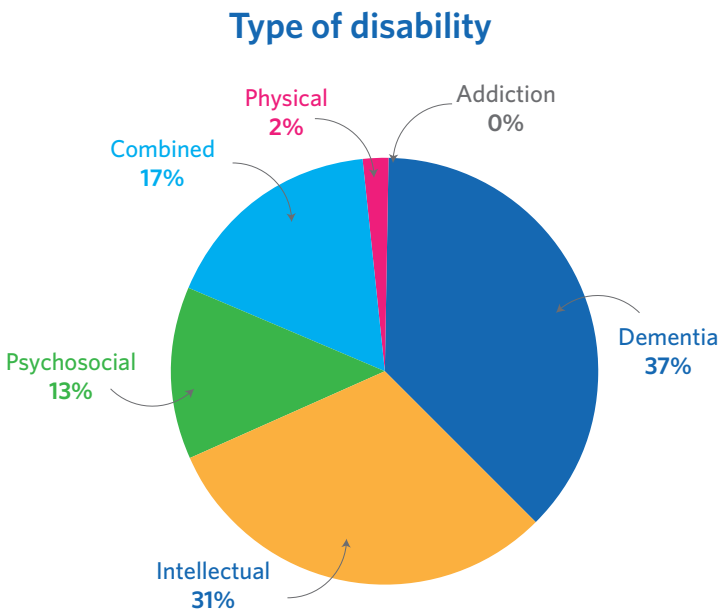
An unauthorized petitioner was identified (the respondent's daughter-in-law) in one case (2.1%). The court nonetheless upheld the petition. In a previous study from 2017, there were as many as 52 cases (15.4% of the 331 analysed cases) in which procedures were initiated by unauthorized petitioners or by petitioners whose relationship with the respondent could not be determined due to the anonymization of the decision.[72] Given that

72 Kosana Beker, Deprivation of Legal Capacity in Montenegro, *Analysis of the implementation of the Non-Contentious Proceedings Law and other relevant legislation,* (Action for Human Rights, 2017), p. 31.

the 2017 analysis included both unauthorized petitioners and those whose relationship with the respondent could not be clearly determined from the decision, comparison of the results of that and the current study in this segment is not possible. Nevertheless, **the fact that courts still uphold petitions from unauthorized petitioners is a cause for concern. Instead, such a practice should be completely eradicated**.

As regards the prevalence of the type of disability of the person deprived of legal capacity, dementia (37.5%) dominates,[73] followed by intellectual disability (31.2%),[74] combined disability (16.7%),[75] psychosocial disability (12.5%)[76] and physical disability (2.1%), while no deprivation was linked to diseases of addiction (Figure 4). One should not forget here that, due to the lack of decisions on the extension of parental rights from the sample, the share of disabilities that are typically acquired later in life is higher, while the share of congenital intellectual disabilities in the deprivation of legal capacity is lower than in reality.

Figure 4. Type of disability of persons deprived of legal capacity.

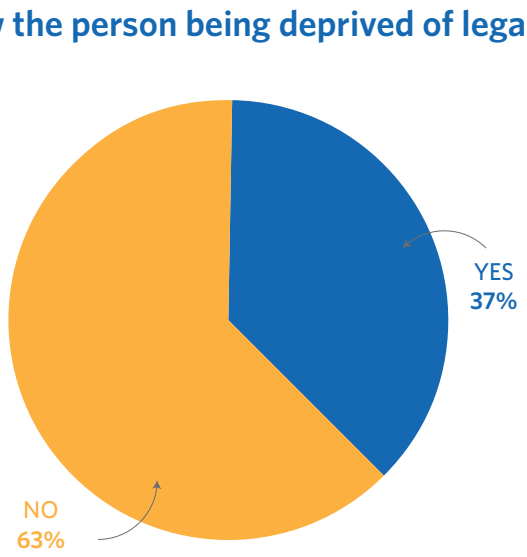


In only 36.7% of the cases did the judge actually see the person who was being deprived of legal capacity, whether in the courtroom or in a health institution (Figure 5). The presence of the person at the hearing does not guarantee that they will be heard. In fact, the person was heard in only 22.9% of the cases. This means that **in 63.3% of the cases, the judge did not see the person being deprived of legal capacity at all, which**

73 Mostly due to Alzheimer's. Most decisions do not specify the cause of dementia.
74 Mostly Down syndrome, as well as intellectual disability diagnosis. In fewer cases, autism is the type of disability.
75 Mostly combinations of intellectual and psychosocial disorders, as well as intellectual and physical/sensory disorders.
76 Mostly different forms of psychotic disorders.

is contrary to Article 35 paragraph 2 of the NCPL. According to the NCPL, it is possible for a judge not to hear the person who is being deprived of legal capacity, but only after being convinced in the presence of an expert witness that such a hearing is not possible. Instead, it is common practice for the expert witness to assert that the person is not in a state to be heard due to their mental condition or that the hearing would upset the person.[77] The judge usually notes such an expert's opinion in the decision, and does not hear the person based on it, nor does he summon them to the hearing (or omits to visit the person in a health institution). This finding is consistent with the finding from the 2017 study,[78] which indicates that there is a persistent problem that has become a deeply ingrained practice.

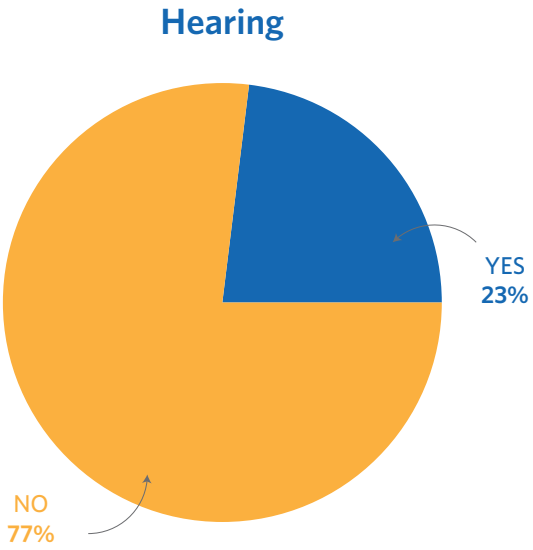
Figure 5. Share of cases in which the court actually saw the person whose legal capacity it had to decide about.



77 For example, Cd. No. 182/22, Basic Court in Kotor; Cd. No. 48/22 of 24 March 2023, Basic Court in Herceg Novi; Cd. No. 138/23, Basic Court in Podgorica.

78 Kosana Beker, Deprivation of Legal Capacity in Montenegro, *Analysis of the implementation of the Non-Contentious Proceedings Law and other relevant legislation,* (Action for Human Rights, 2017), p. 32.

Figure 6. Share of cases in which the judge heard the person being deprived of legal capacity.



Respondents objected to the deprivation of legal capacity at the hearing in only 4.1% of cases (two decisions) while they were being heard by the judge. In both cases, the representatives – temporary guardians – did not object to the procedure or voice reasons why the person should not be deprived of legal capacity. In one of those two cases, the court rejected the petition, while in the other, the person was fully deprived of their legal capacity. It is worth noting that the petition for deprivation was rejected in only 4.1% of all analysed cases.

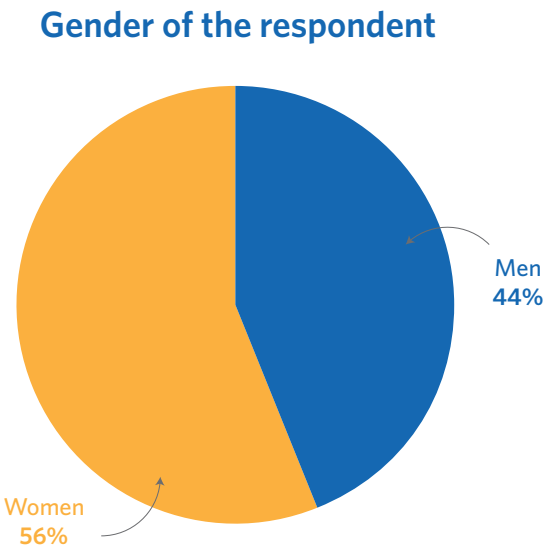
In most cases, expert witnesses explicitly recommend the deprivation of legal capacity, which is an intrusion of a medical expert into the field of law. Article 37 paragraph 2 of the NCPL prescribes that the expert witness presents their opinion on the "[...] mental state and abilities for reasoning", but not on whether the person should be deprived of legal capacity. **In 77.5% of the decisions an explicit recommendation by the expert witness on the deprivation of legal capacity is included**. The same could not be clearly concluded from the remaining decisions. This finding shows that **a practice has been established where expert witnesses present their opinion on a person's rights, which exceeds their legal role**. It is worth noting that the 2017 study showed that, in their order for expert witnesses, judges asked them to state whether the person should be deprived of legal capacity, which is why all expert witnesses, without exception, present their opinion on this matter.[79]

79 Kosana Beker, Deprivation of Legal Capacity in Montenegro, *Analysis of the implementation of the Non-Contentious Proceedings Law and other relevant legislation*, (Action for Human Rights, 2017), pp. 36–37.

Gender dimension in the proceedings for the deprivation of legal capacity

In 44% of the analysed cases, the proceedings for the deprivation of legal capacity were conducted against men, and in 56% of cases against women (Figure 7). In the 2017 analysis, it was the opposite – 57% of the proceedings involved men, and 43% women.[80] The 2024 data shows that 52.4% of the persons deprived of legal capacity were men, and 47.6% were women.[81] One of the possible reasons for the more frequent deprivation of legal capacity among men could be significant gender inequality in property ownership, especially real estate, in favour of men in Montenegro.82 In that case, relatives might have an interest in taking over the property from their relative who they believe could endanger his own ownership interests and the interests of his heirs. Other socio-economic, cultural and medical/biological factors might also influence the higher number of men being deprived of legal capacity; however, that issue is beyond the scope of this study.

Figure 7. Gender of persons subject to the proceedings for the deprivation of legal capacity.



Qualitative analysis

Observations primarily related to the compliance of the conducted proceedings with the law and the application of key procedural guarantees are provided below, having in mind that certain practices with no legal grounds have been identified, as well as practices

80 Kosana Beker, Deprivation of Legal Capacity in Montenegro, *Analysis of the implementation of the Non-Contentious Proceedings Law and other relevant legislation,* (Action for Human Rights, 2017), p. 31.

81 The Government of Montenegro, Deinstitutionalization Strategy 2025–2028 with the Action Plan for 2025, <www.gov.me/dokumenta/ae125913-ef38-4dd2-bc90-3e8d38a18a62>, p. 64.

82 Olivera Komar and Nemanja Batrićević, 'Gender and Property Ownership in Montenegro: mapping the property gap', (OSCE, 2023).

that are contrary to the relevant legislation. The analysis also puts additional focus on the general characteristics of court decisions that the ECtHR has pointed to in its case law, such as the detail and quality of the expert witnesses' findings and opinions. The analysis, however, does not explore the validity of the experts' assessments. Instead, it views them from the aspect of fulfilling their legal role. In this sense, we have singled out specific decisions that serve as examples to point to the identified omissions and other shortcomings. Furthermore, the analysis offers a specific review of the decisions in which the court rejected the proposal for the deprivation of legal capacity. Finally, given that a significant number of decisions include references to the Convention on the Rights of Persons with Disabilities and the case law of the ECtHR, the aim of the analysis is also to show how these international norms are interpreted and applied in the proceedings. **Furthermore, it should be noted that no procedure for the deprivation of legal capacity in Montenegro is in accordance with the Convention, even when carried out in accordance with the Family Law and the Non-Contentious Proceedings Law. Therefore, the reference to the Convention in the decisions is a particularly interesting practice of some judges**.

Findings of the qualitative analysis

Almost all the analysed decisions were written on one or two pages, and only exceptionally on three pages. The decisions **do not offer a detailed insight into the decision-making capacities for different spheres of life, nor do the courts** (or expert witnesses, although this is not their legal role) **consider the least possible extent of the deprivation of legal capacity**. For example, in one case,[83] a person with a congenital intellectual disability, who had been married for 25 years and had three children, and who was a caring father who loved his children, according to his wife's testimony, was deprived of legal capacity in his fifties. The decision itself does not indicate the reasons for the deprivation of legal capacity present at the moment of deprivation, that had not existed for the previous 35 years of the opponent's adult life, or why the deprivation of legal capacity was necessary then. It is also not evident from the decision that his mental state had deteriorated in any way. On the other hand, the decision mentions facts from his earliest life, the time when he started walking, and that due to a hearing impairment, he had attended a special school where he had not learned to read or write. Finally, it says that, due to aging, no improvement in his condition can be expected, but rather a decline in mental functions, and that the requirements for the deprivation of legal capacity were met.

Just like in the previously described case in which facts from the respondent's earliest life were cited which were not relevant for the issue of the person's legal capacity at the time the decision was rendered, **other court decisions often abound in information that is not linked to their capacity for decision making, but rather to the social and financial aspects of the person's life. There is often an unclear distinction between the need**

83 Cd. No. 5/22, Basic Court in Rožaje.

for different types of support (cash benefits, support services for personal hygiene, mobility, food preparation, etc.) and the issue of legal capacity. Sometimes, one gets the impression that these are procedures to determine the fulfilment of requirements for entitlements to social protection, given that unfavourable living conditions and other aspects of daily functioning are mentioned that indicate the need for health and other care and support.[84] In a case from 2022,[85] the court deprived a person of legal capacity, primarily due to a physical disability,[86] which was described in detail, while it did not mention her mental state and decision-making capacity. The petitioner first said that the respondent needed constant care and assistance, and only then that she was unable to take care of her interests. Based on the petitioner's reasoning quoted in the decision, one can conclude that the person was unable to take care of herself due to multiple physical disabilities, as she needed various forms of assistance. In this case, the petition was filed by the husband of the person whose legal capacity was brought into question, and her temporary representative was her daughter-in-law. Thus, apart from the brief reasoning or the lack of any reasoning of the assessment of decision-making capacity, the case is also problematic from the aspect of a potential conflict of interest between the petitioner and the respondent's representative, as well as the fact that the court did not see the respondent. The potential conflict of interest between the petitioner and the respondent's representative is especially problematic when the court does not hear and does not see the respondent.

A 2024 case[87] introduced a particularly unusual procedure for the deprivation of legal capacity, as it was carried out by deviating from legal procedures. In the mentioned case, **the expert witness did not see the person**, so he did not carry out a direct examination or psychiatric interview. Instead, he produced his findings and opinion based on his analysis of the medical documentation. **The court also did not hear the respondent, nor was she present at the hearing**. The court and the expert witness thus acted contrary to Article 37 of the NCPL. The expert witness also recommended the deprivation of legal capacity, for which there were no legal grounds, as already explained. The respondent, a person with Down syndrome, was fully deprived of legal capacity.

The mentioned example has been singled out as a practice that must not be repeated, primarily because it is not based on law. However, **the focus on medical documentation is a common feature of the procedures for deprivation of legal capacity**, i.e. of medical assessments. The psychiatric interview seems to be only a supplementary, albeit mandatory, element of the assessment, given that it is part of the expert witness's legal obligation. In one decision, a statement of the expert witness is also visible. He believed that a review of the medical documentation was of primary importance for assessing

84 For example, Cd. No. 36/22, Basic Court in Bijelo Polje; Cd. No. 8/22, Basic Court in Ulcinj.
85 Cd. No. 8/22, Basic Court in Ulcinj.
86 The person is tetraplegic.
87 Cd. No. 64/24, Basic Court in Podgorica.

legal capacity: "[...] the expert witness is of the opinion that medical documentation serves as the basic foothold for this type of assessment conducted for the purpose of potential deprivation of legal capacity [...]."[88]

In none of the analysed cases did the court critically review the expert witness's findings as regards their proposal for full deprivation of legal capacity. A conclusion can be drawn from this that judges maintain a passive and formalistic role in the procedure, focusing almost exclusively on procedural compliance. However, in one case, the judge did not agree with the expert witness that the person had a moderate form of intellectual disability, and noted the following in the decision: "In their findings, the expert witness pointed out that the documentation indicated that there was a moderate intellectual disability. There is nothing moderate in that syndrome. It is rather a serious and incurable developmental disability. From a forensic point of view, legal capacity might exist only in the case of mild intellectual disability. However, that is more a theoretical position. Practically, these persons are almost always legally incompetent. Moderate and severe intellectual disabilities are incompatible with legal capacity." Despite being uncommon, the judge's opinion voiced like this in the decision reflects an understanding of legal capacity that is in sharp contrast to the approach of the Convention on the Rights of Persons with Disabilities, but also to the approach that should ensure the least possible intrusion on a person's autonomy, privacy and integrity in the case of restriction of legal capacity. For this reason, as well as the fact that the deprivation of legal capacity has been a long-lasting and established practice, **it is clear that awareness-raising campaigns and capacity building for stakeholders are some of the crucial elements of the reform**. Otherwise, there is a risk that legal changes will not translate into improvements in the quality of life of persons with disabilities.

As mentioned above, unlike the previous analysis from 2017, a small proportion of cases initiated by an unauthorized person were identified in this analysis. In a case from 2023,[89] **the proceedings were initiated by the daughter-in-law**, i.e. the wife of the respondent's biological brother. Article 30 of the NCPL is specific about who has the possibility to file a petition for the deprivation of legal capacity, and a daughter-in-law is not among those persons. **In this specific case, the court upheld the petition and fully deprived the respondent of his legal capacity, even though the petition should have been rejected as inadmissible**.

A disturbing practice was identified in a case[90] in which **two persons were simultaneously deprived of legal capacity and the court rendered one decision for both persons**, as it fully deprived both respondents of legal capacity. Such a practice does not have any legal basis and represents a potential violation of the right to a fair trial as well as

88 Cd. No. 291/22, Basic Court in Podgorica.
89 Cd. No. 18/23, Basic Court in Cetinje.
90 Cd. No. 200/22, basic Court in Podgorica.

the right to privacy. The respondents were sisters and the petitioner for both of them was the SWC, while the temporary representative was an SWC employee. Also, the respondents were placed in a social care institution when the procedure was initiated, which indicates a situation of particularly deep social marginalization and vulnerability. In such circumstances, the court must take special care of the respondents' interests and avoid full deprivation of legal capacity as much as possible, as already found by the ECtHR for cases involving persons who have historically suffered significant marginalization and disenfranchisement.[91]

In another case from 2023,[92] the petitioner was a guardian for a specific case, while a temporary guardian – an SWC employee – was also assigned to the person. Thus, the person was simultaneously subject to guardianship for a specific case and to temporary guardianship. In such cases, the authority of the temporary guardian and the guardian for a specific case is questionable. The court upheld the petition and fully deprived the respondent of legal capacity.

The court rejected the petition for the deprivation of legal capacity in only 4.1% of cases. In a 2023 case,[93] the petitioner was the SWC and the person was represented by an employee of the same SWC. The respondent was heard at the hearing and objected to the procedure, while his representative did not object to the procedure. The expert witness found that the respondent did not exhibit any psychopathological changes or any disorder of mental functions, and that consequently there was no possibility for the deprivation of legal capacity. It is interesting that **the expert witness highlighted the need for the SWC to provide financial support to the respondent, given that he lived in difficult conditions**. The representative – an SWC employee – agreed with the decision proposed by the expert witness and said that the procedure had been initiated to find the most appropriate solution and ensure long-term care for the person. This demonstrates **deficient understanding of the purpose of the deprivation of legal capacity in the specific case, which is confused with the need for social and financial assistance and other support services for persons in a difficult financial situation, especially elderly people**. Also, the fact that the respondent's representative did not object to the procedure, which the respondent did object to, and the fact that the expert witness concluded that there were no grounds for the deprivation of legal capacity, indicates that such representation of interests by a temporary representative is inadequate. One should not ignore the fact that the representative was employed at the same SWC that initiated the procedure, which could call their impartiality into question. The lack of objection by these representatives in all other analysed cases, along with other alarming elements such as the aforementioned lack of representatives' legal qualifications, **casts serious doubt on the validity of such representation and calls for a review of the way in**

91 See above, case law of the ECtHR, *N. vs. Romania (No. 2), Alajos Kiss*.

92 Cd. No. 7/23, Basic Court in Rožaje.

93 Cd. No. 291/22, Basic Court in Podgorica.

which the interests of persons against whom a procedure for the deprivation of legal capacity is conducted are addressed.

In a 2024 case,[94] the court rejected the petition for the deprivation of legal capacity based on the findings of an expert witness, who concluded that the respondent did not have any visible psychopathology or disorder of mental functions. The person's representative – an SWC employee – did not object to the deprivation of legal capacity, but on the other hand agreed with the expert's findings. The respondent was heard at a hearing where, among other things, he had to answer questions from the field of law, such as the concepts of a sales contract and a gift contract. Questions like these can be found in other decisions, too; however, they cannot be an indicator of a person's ability to make decisions, but primarily of their education and awareness. Whether a person understands a specific piece of information can only be determined after the meaning of a concept is explained to them in an appropriate and clear manner. The representative – an SWC employee – stayed neutral in the proceedings in this case, too, and did not actively contribute to the decision to reject the petition, even though a rejection would have been in the interest of the opponent. In this, as in other cases, the representative – an SWC employee – did not take an active role in representing the person's interests. Instead, one gets the impression that their role was primarily formal and protocolary.

Application of the Convention on the Rights of Persons with Disabilities and the case law of the ECtHR

Referencing international human rights norms in court decisions can have various purposes.[95] Given that the Constitution of Montenegro prescribes the direct implementation of ratified international treaties, courts should render their decisions in accordance with international norms even when they are contrary to domestic norms. This, however, is not entirely possible, as there are no domestic mechanisms that would allow the implementation of the Convention on the Rights of Persons with Disabilities. In the practice described below, international norms, specifically the ECHR and the case law of the ECtHR, are referenced exclusively to support a decision made on the basis of domestic legislation.

Several decisions reference the ECtHR in a template-based manner, as identical wording can be found in several of them.[96] This primarily refers to the *Shtukaturov* case, to emphasize that: the deprivation of legal capacity is considered an interference in a person's private life and that this interference is in accordance with the law; has a legitimate aim

94 Cd. No. 25/24, Basic Court in Cetinje.

95 Anna Lawson, 'Uses of the Convention on the Rights of Persons with Disabilities in Domestic Courts', in Lisa Waddington and Anna Lawson (ed.), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts*, (OUP, 2018).

96 For example, Cd. No. 90/24, Basic Court in Bijelo Polje; Cd. No. 19/23, Basic Court in Podgorica; Cd. No. 163/22, Basic Court in Podgorica.

– the person's rights and interests; and is proportionate, especially given that it has a limited duration after which the need for the deprivation of legal capacity is reviewed. The proportionality of full deprivation of legal capacity is particularly problematic in this and all other similar cases, as no attempts were made to achieve the same goal with less restrictive measures; instead, an absolute, general and overly broad measure was applied. Several judgments of the ECtHR have been described previously, including *N. vs. Romania (No. 2)*, which are more recent than the 2008 *Shtukaturov* judgment and therefore better reflect the current interpretation of the ECHR by the ECtHR in the context of the deprivation of legal capacity, including the proportionality of the restriction of rights.

In another decision, the court made reference to the *Drobnjak-Salontaji* case only as confirmation that the deprivation of legal capacity constitutes a serious interference in a person's right to privacy.[97] In the same decision, the judge also refers to the Convention on the Rights of Persons with Disabilities, but only to point out the existence of Article 12, after which Article 12 remains unapplied, with the explanation that the appointment of a guardian is "in the best interest" of the person. However, such an explanation does not reflect the key reason for the failure to apply Article 12, which is the lack of a legal and institutional framework that would allow the implementation of supported decision-making measures (and safeguards), and not necessarily that guardianship is a better option.

In conclusion, the analysis indicates that Montenegrin courts are applying the ECHR and the case law of the ECtHR primarily to corroborate already made decisions based on domestic law, while they are less often used as a starting point for reviewing those decisions or for improving case law taking into consideration international standards. It is also evident that the Convention on the Rights of Persons with Disabilities is mentioned declaratively, without actual considerations of the obligations arising from its Article 12, while the lack of a proper legal and institutional framework to apply support measures remains a key barrier to its effective implementation in practice.

97 Cd. No. 260/22, Basic Court in Podgorica.

AN OVERVIEW OF REFORMS OF THE GUARDIANSHIP SYSTEMS IN OTHER COUNTRIES

The change in the approach to persons with disabilities and the recognition of the importance of personal autonomy and dignity date back to even before the adoption of the Convention on the Rights of Persons with Disabilities, primarily propelled by the efforts of the Council of Europe on this issue. Sweden was among first countries to abolish its guardianship law in 1989. Following the adoption of the Convention, a large number of countries in Europe launched their reforms of legal capacity, replacing the system of guardianship over adults with a supported decision-making system. According to a 2024 study on the state of affairs in the European Union regarding guardianship and deprivation of legal capacity, visible positive changes towards better protection of the rights of persons with disabilities have been recorded.[98] However, changes in the laws do not necessarily lead to changes in practice, and it is important to consider various elements of the process that would bring Montenegro closer to genuine fulfilment of its international obligations and an improvement of the status of persons with disabilities.

Six European Union countries have (almost) completely abandoned the deprivation of legal capacity of persons with disabilities – Austria, Czechia, Germany, Ireland, Portugal and Spain. This means that persons with disabilities cannot be deprived of legal capacity, but the court may make an exception for a specific decision, with this exception being time-limited, and appoint a person to be a substitute decision maker. **The countries in the region that have excluded the possibility of full deprivation include Slovenia and Romania, where legal capacity can be restricted in some spheres of life**, for example, to make financial decisions and/or sign contracts. Bulgaria, Croatia, Hungary and Italy have made some progress but still allow full deprivation of legal capacity, thereby stripping a person of all their rights.

There are formal and informal systems for providing supported decision making among European countries – ranging from a declarative reference to the supported decision-making system that runs parallel to the guardianship or substitute decision-making system, to the development of comprehensive legal solutions that guarantee supported decision making and that define different types and levels of support (e.g. in Ireland and Spain). Currently, **supported decision making is guaranteed by law in 13 European Union states, including Austria, Hungary and Italy**. In other countries, the

98 For more information, see the following report: *European Human Rights Report, Issue 8 – 2024, Legal capacity: Personal choice and control* (European Disability Forum, 2024), <www.edf-feph.org/publications/human-rights-report-2024-legal-capacity>

practice of providing supported decision making exists even when it is not guaranteed by law. Some positive examples regarding different forms of support include: "personal representatives" (Sweden), "open dialogue" (Finland), "informal support networks" (the United Kingdom) and a personal budget for choosing support (Ireland, Italy, Spain, Austria), as well as practices to understand and obtain free and informed consent and to guarantee autonomy in the field of mental health.

In addition to amending the general laws that govern legal capacity, some countries have proceeded to amend individual laws, such as laws prohibiting discrimination on the basis of disability or those governing free and informed consent in healthcare, laws concerning special civil rights, such as voting rights, as well as laws concerning property inheritance and management. Although such amendments may lead to certain positive changes, they are very limited in practice due to conflicts with other regulations.

However, provisions concerning the field of mental health can lead to more significant changes due to the unambiguous link in most systems between mental capacity and the ability to make legally binding decisions, as well as the fact that mental health issues are one of the most common causes of deprivation of legal capacity. The legislation can thus establish specific forms of support for decision making in the mental health context, which may include **the right to assistance and support by trusted persons when making decisions about accepting medical treatment and therapy**, the approval of **advance directives**, as well as **the appointment of persons to be consulted in crisis situations**.[99]

An overview of the practice of European countries, including Montenegro and other countries in the region, shows that three approaches dominate the improvement and reform of legal capacity matters for persons with disabilities:

a. **Maintaining the existing system while strengthening procedural safeguards**. An example can be found in the introduction of the obligation of a periodic review of decisions on the deprivation of legal capacity, which Montenegro has also done through amendments to the Family Law in 2020. However, by comparing case law from 2017 and 2025,[100] we can see that this approach does not lead to significant changes in the outcome of the proceedings, as decisions are still rendered without much deliberation, and courts automatically resort to the most restrictive forms of deprivation. The situation is similar in Serbia, where the ex officio obligation to review court decisions has not led to major changes either.

b. **Recognition of the concept of supported decision making while retaining the**

99 'Mental health, human rights and legislation: guidance and practice', (World Health Organization and United Nations, 2023), <www.who.int/publications/i/item/9789240080737>

100 Kosana Beker, Deprivation of Legal Capacity in Montenegro, *Analysis of the implementation of the Non-Contentious Proceedings Law and other relevant legislation,* (Action for Human Rights, 2017).

possibility of partial or full deprivation of legal capacity. This system still allows partial or full deprivation of legal capacity and is based on the discriminatory premise of incapacity, which, in practice, leads to disproportionate consequences affecting a large number of persons with intellectual and cognitive difficulties and mental health problems. The practice has shown that courts opt for more restrictive forms of substitute decision making even when less restrictive solutions exist, and the practice of depriving persons of legal capacity still represents more the rule than the exception, even when supported decision making is guaranteed by law. This is a consequence of a lack of information, prejudices and insufficient resources in the community to apply supported decision making in practice. Thus, Czechia formally introduced supported decision making into law back in 2014, but the Ombudsman's advisory body report in 2023 noted that courts "still prefer the restriction of legal capacity over other forms of support".[101]

c. **Gradual introduction of full recognition of legal capacity in decision making by introducing supported decision making through the adoption of laws and policies**. This option is the only one that meets the criteria addressing the existing shortcomings, reflected in the discrimination that affects the vast majority of persons with intellectual, developmental and cognitive difficulties and persons living with certain mental health challenges, preventing them from exercising their legal capacity. This comprehensive approach is the only one that can ensure consistency of laws and regulations regarding the recognition and exercise of legal capacity. The countries that have made major progress in this direction are Ireland and Spain (and Catalonia, which has autonomy in the field of substantive civil law), which we will present separately.

Ireland

The Assisted Decision Making (Capacity) Act 2015[102] brought a fundamental reform in the Irish legal system by abandoning the concept of deprivation of legal capacity and the guardianship system and introducing a multi-tiered support framework, in which substitute decision making is allowed exclusively as a last resort. The Act has been fully implemented only since 2023, following the adoption of the necessary secondary legislation and the establishment of the bodies provided for by the Act. The approach is based on a functional and time-specific definition of legal capacity, thereby rejecting status-based and diagnostic models. Capacity is assessed in relation to a specific decision and at a specific moment, and it is presumed until proven otherwise.

101 Ombudsman, Czech Ombudsman's Advisory Body: Thousands of people with disabilities lack full legal capacity in violation with the UN Convention on the Rights of Persons with Disabilities, 3 July 2023, <www.ochrance.cz/en/aktualne/czech_ombudsman_s_advisory_body_thousands_of_people_with_disabilities_lack_legal_capacity_despite_this_being_a_violation_of_the_un_convention_on_the_rights_of_persons_with_disabilities/>

102 Assisted Decision-Making (Capacity) Act, No. 64 of 2015.

The new law introduced the following novelties into the legal system:

- A legal definition of capacity based on a functional assessment;
- A regulated three-tiered decision-making framework;
- Detailed principles to guide decision making, to replace the "best interest" principle that existed in the case of guardianship;
- Improved instruments for advance planning through permanent powers of attorney and advance healthcare directives;
- Establishment of the Decision Support Service (DSS) with numerous functions.[103]

The Act prescribes three formal levels of intervention in decision making:

A **Decision-Making Assistance Agreement** allows a person to appoint an assistant to help them gather information, understand the available options, express their will and communicate the decision (Articles 10 and 14 of the Act). The assistant does not have the authority to make decisions on behalf of the person, and all decisions are considered entirely the person's own decisions.

A **Co-Decision-Making Agreement** provides for the appointment of a co-decision-maker, most often a close, trusted person, with whom relevant decisions are made jointly and equally, with mandatory registration of the agreement (Articles 17 and 22 of the Act). The co-decision-maker must accept the person's will and can refuse to sign a specific document only if it would probably lead to serious harm to the person or others (Article 19(5) of the Act). The Act emphasizes that the co-decision-maker must be guided by the person's will and preferences (Article 8(7)(b) of the Act). Any relevant decision made solely by the assisted person or the co-decision-maker is void (Article 23(2)).

Substitute decision making, through **appointment of a decision-making representative by the court**, is used as the last resort (Part 4). It can only be applied if prior forms of support are not suitable and must be in accordance with the principle of proportionality, with the least possible restriction of rights and with a time limit on the measure. The court can appoint one or more persons as representatives, with each person being responsible for decisions in a specific area (e.g. health care, property). The court can prescribe that some or all decisions be made jointly when there are multiple representatives. The representative is, primarily, a person that the represented person wishes to be their representative. If that is not possible, then the representative is from the immediate environment of the person in need of representation. Exceptionally, the court may directly make decisions on behalf of the person until a proper person is found to be the

103 Áine Flynn, 'Ireland: Assisted Decision Making (Capacity) Act 2015 and Article 12 Of the United Nations Convention on the Rights of Persons with Disabilities', 41 (2020) *Julgar*, p. 232.

representative. If a proper person still cannot be identified, at least two persons from a panel formed for the representation of persons within the **Decision Support Service** are appointed as representatives.[104] This service has multiple roles, including the registration of Decision-Making Assistance Agreements, Co-Decision-Making Agreements and appointed representatives. This authority provides information about supported decision making and the Act, manages a database of registered arrangements, supervises the work of support providers, organizes and maintains the aforementioned panel of decision-making representatives, and acts upon complaints. The database can be searched by all parties who have a reasonable interest, which the Service itself determines based on the request sent by a party. The Service acts upon complaints; when it receives one and finds it to be founded, the responsible person in the Service files a request to the relevant court to determine the appropriateness of the support provider's work. Moreover, the Service carries out regular checks of the support provider's work at regular intervals, first within one year, and then for periods not exceeding three years.

In practice, **the first two forms of support are of key importance** for persons with intellectual and psychosocial disabilities, as they **allow a large number of people to retain and enjoy legal capacity with a minimum of formal intervention**. Thus, they are able to exercise their right to make decisions without unnecessary and excessively broad deprivation of autonomy, typical for the deprivation of legal capacity.

The Act also provides for the possibility of advance decisions expressed through **enduring powers of attorney** (Part 7) and **advance healthcare directives** (Part 8). These **allow persons, while they still have the capacity**, to determine who will make decisions on their behalf, as well as which health interventions they want or refuse, including life-sustaining treatments (Articles 82–88 of the Act). For healthcare directives, the person may choose to appoint a representative for these matters, but does not have to. Doctors are required to check the database for a recorded directive when they have doubts about person's ability to make a decision. Healthcare institutions have a justifiable interest to access the previously mentioned database.

The principles applied before and during any intervention oblige all actors **to maximize the person's participation, respect their will and preferences** (as far as it is reasonably possible) and to minimize any measure restricting rights and freedoms (Article 8(6,7) of the Act). Interventions must be time-limited, taking into account the urgency and the possibility of the person's capacity recovering (Article 8(9) of the Act). The Act prohibits the collection and use of data that is not required for a specific decision and prescribes data protection obligations (Article 8(10) of the Act).

104 Decision Support Service, (Mental Health Committee, 2025), <www.decisionsupportservice.ie/about-us>

The implementation of the Act is not entirely without problems. A recent study shows that healthcare workers in some sectors are still not fully familiar with the new rights and procedures, which may lead to certain issues in practice.[105]

Spain

In 2021, Spain enacted a comprehensive piece of legislation that repealed the regulations that allowed the deprivation of legal capacity and recognized universal legal capacity for all adults.[106] The Spanish Law on Legal Capacity and Supported Decision Making for Persons with Disabilities introduced new measures that guarantee support when needed, thus aiming to fulfil Spain's obligations as a state party to the Convention on the Rights of Persons with Disabilities. Although it does not define the term "support", it notes that "support in exercising legal capacity must respect the rights, will and preferences of persons with disabilities and shall never decide on their behalf" (Articles 249(2) and 282(3) of the Law). Interestingly, support is available to anyone who requests it, regardless of whether they have a formally established disability.

The fundamental premise of any legal measure concerning legal capacity is not based on the person's inability to reason rationally, but on the need for "support in the correct exercise of legal capacity".[107] Support is offered to achieve the "full development of personality and legal action under conditions of equality" (Article 249(1) of the Law).

The 2021 reform links support with various legal tools. They are ranked according to the **principles of autonomy and subsidiarity**. First and foremost, the individual is free to appoint the person who will support them in exercising legal capacity and to determine the scope of this support (Article 250(2) of the Law). The provided legal instruments include the explicit consent of the granting party – the law refers to them as voluntary measures – and they must be formalized by a notarial deed. Voluntary measures have priority over any other type of support, including measures ordered by the court (Article 249(1) of the Law). The law provides for two types of voluntary measures: **a power of attorney**, by which a person (unilaterally) designates their representative on certain matters; and **a support agreement**, which is bilateral and by which the support provider is obliged to assist in making certain decisions. In both cases, notaries must guarantee that there is no conflict of interest and that the person is acting according to their will.

In addition to voluntary measures, Article 250 of the Law identifies two more levels of support: a) de facto protection (*guarda de hecho*), which refers to informal support primarily provided by relatives, family members or non-professional caregivers (Articles

105 Hannah Joanna Featherstone, et al., 'Palliative care healthcare professionals' perspective on the Assisted Decision Making (Capacity) Act 2015 in Ireland', (2024) *International Journal of Law and Psychiatry*, p. 90.

106 Law 8/2021 of 2 June reforming civil and procedural legislation to support persons with disabilities to exercise their legal capacity.

107 Jordi Ribot Igualada, 'The reforms of the Spanish Law on Legal Capacity and Supported Decision Making for Persons with Disabilities', 2 (2023), *Family & Law*, pp. 1–22.

263–267 of the Law); and b) measures ordered by the court, which include "curatorship" and "judicial protector" (Article 250 of the Law). As regards **de facto protection**, the court cannot appoint an individual to provide support or issue additional orders unless the assistance the person receives proves to be insufficient or inadequate. Article 255(5) of the Law specifies that **judicial measures** must be determined according to "the situation and circumstances of the person with disabilities and their need for support". Judicial measures also aim to "maximize the [adult person's] autonomy in exercising legal capacity" (Article 268). **Only in *exceptional cases*, when despite significant efforts it is not possible to determine the person's will, wishes and preferences, may support measures include representational functions** (Article 249(3)). Article 269(2,3) of the Law also emphasizes that the court order must list those legal actions in which the person concerned will be "assisted" by the curator and in which, only as a last resort, may the curator act on their behalf. In that case, the Law requires that "the life history of the person with disabilities, their beliefs and values, as well as the aspects they would have taken into account, must be considered in order to make the decision they would have chosen had they not been represented" (Article 249(3)).[108]

In addition to the general rule that all types of support must respect the person's will, wishes and preferences, the Law also prescribes that all measures concerning the exercise of legal capacity must be proportionate, strictly time-limited and subject to regular review by competent, independent and impartial authorities or courts. The law provides that all court-ordered measures shall be considered temporary and must be periodically reviewed in accordance with the schedule determined by the court, or within three or, in exceptional cases, six years (Articles 761 of the Civil Procedure Law and 268(2) of the Civil Code).

It is particularly important to emphasize that professional caregivers, who provide care at home or in residential placement, cannot assume the role of a support provider in decision making (Article 250(8) of the Law). Also, training of lawyers, civil servants and professionals involved in the supported decision-making process is mandatory.[109]

This reform is not without challenges, and it is believed that there is still a need to move away from the traditional "capacity assessment" scheme and to work in close cooperation with experts in the legal, health, and social protection fields to cover the individual's different competencies. There is also a need to create a new mechanism to assess the person's needs for support, taking into account their abilities and their capacity to understand the context of the decision they are making, as well as the specific consequences and implications of their decision.

108 Ibid., p. 14.

109 Models on Innovative Practices Focusing on Supported Decision-Making Mechanisms, (EASPD, 2021), p. 15.

The reform is a necessary first step towards alignment with the Convention. However, the system of public and private services needs to be built or the existing one redefined to adapt to the new standard of providing support.

Catalonia

In 2021, Catalonia adopted a transitional law, the Legislative Decree 19/2021,[110] to align its Civil Code with the Convention on the Rights of Persons with Disabilities, and took advantage of the comprehensive Spanish legal reform and avoided the legal vacuum that would have been created by the adoption of the Spanish law abolishing guardianship, due to different legislative competencies at the national and provincial levels.[111]

The Catalan law eliminates all traditional civil law institutions based on representation and substitution, such as "guardianship" or "curatorship", and regulates "**assistance**" as the only possible formal mechanism that can provide support to persons who may need it. The concept of assistance was introduced back in 2010 as an attempt to align with the Convention on the Rights of Persons with Disabilities. What is particularly interesting is that the support (assistance) may be provided by an **individual or an organization**.[112] The organization Support-Girona provides support to the majority of persons using this mechanism. The government funds the services, and support providers are subject to public control and are supervised by judicial bodies on an annual basis.[113]

Article 226(2) of the Law specifies that the selection of the individual providing support must be based on the **best interpretation of the will** and **preferences** of the person concerned, in accordance with their **life history and path**, previous expressions of their will in similar contexts, information held by trusted persons, and all other considerations relevant for the case. In this case, informing the judicial authority of all known circumstances regarding the wishes of the person receiving support is mandatory. Support is formalized by giving a notarial statement or through a **voluntary procedure** to request formal support before a court. Support formalization through a notary is a move aimed at lifting the burden from the judiciary and carry out the "**dejudicialization**" of the lives of persons with disabilities.[114]

This transitional law recognizes **an exception** in the provision of "assistance" which

110 Decret llei 19/2021, del 31 d'agost, pel qual s'adapta el Codi civil de Catalunya a la reforma del procediment de modificació judicial de la capacitat.

111 Catalonia Law Portal. Decret llei 19/2021, del 31 d'agost, pel qual s'adapta el Codi civil de Catalunya a la reforma del procediment de modificació judicial de la capacitat, <https://portaljuridic.gencat.cat/ca/document-del-pjur/?documentId=909512>

112 Implementing Supported Decision-Making: Developments across Europe and the role of NHRIs, (ENNHRI and MHE), <https://supportgirona.cat/en/serveis/suport-juridic-i-social>

113 Ibid.

114 Catalonia Law Portal. Decret llei 19/2021, del 31 d'agost, pel qual s'adapta el Codi civil de Catalunya a la reforma del procediment de modificació judicial de la capacitat, <https://portaljuridic.gencat.cat/ca/document-del-pjur/?documentId=909512>

allows and governs the representational action of the assistant (who provides support), only upon prior authorization of the court, which takes effect only when it is not possible to determine the will, wishes and preferences of the person, and when this is necessary given their circumstances.[115] This transitional law will be in force until a comprehensive reform of the Catalan Civil Code is carried out. The legislator has set the period of 12 months for this reform.

115 Models on Innovative Practices Focusing on Supported Decision-Making Mechanisms, (EASPD 2021), p. 17.

ROADMAP FOR REALIZATION OF THE RIGHT TO LEGAL CAPACITY AND SUPPORTED DECISION MAKING

> *The Committee is concerned about the current substituted decision making and guardianship regime, which restricts the exercise of various rights. It notes with concern that the number of persons with disabilities who are deprived of their full legal capacity continues to be high.*
>
> *Recalling its General Comment No. 1 (2014) on equal recognition before the law, the Committee urges the State Party to fully harmonize its legislation with the Convention, to replace the current guardianship and substituted decision-making regime with a system of supported decision making that fully respects the autonomy, integrity, dignity, will and preferences of the person, and to establish transparent and effective remedies for persons with disabilities whose legal capacity has been removed.*
>
> *(The Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Montenegro)*

This section includes **two sets of recommendations**: recommendations regarding implementation of the reform and alignment with the Convention on the Rights of Persons with Disabilities; and recommendations to improve practices within the existing legal framework. **The first group of recommendations** refers to the reforms needed for alignment with the Convention on the Rights of Persons with Disabilities (CRPD), which includes the implementation of supported decision making by respecting the person's will, the identification of instruments that allow persons to use their legal capacity even when their ability to make decisions independently is compromised, and flexible and effective safeguards against undue influence and abuse. The aim of **the second set of recommendations** is to improve the actions of key stakeholders, improve the position of persons during the proceedings and contribute to a lower number of deprivations of legal capacity, especially full deprivation of legal capacity. This group of recommendations refers to the transitional period and preparation of certain stakeholders for the shift to a legal framework and practice, that will focus on preserving the person's autonomy and minimizing the restriction of rights. **Reducing the number of persons deprived of legal capacity and increasing the number of persons whose legal capacity is partially or fully restored are performance indicators of the Action Plan for the Implementation of the Deinstitutionalization Strategy 2025–2028**. Therefore, the existing strategic framework already supports and puts the conditions in place for the gradual improvement of the status of persons deprived of legal capacity and those at risk

of being deprived.

Both groups of recommendations are extremely significant and neither should be neglected. These two phases are recommended to facilitate **the enhancement of observance of the rights of persons with disabilities in the short term, while the fundamental reforms in this area, which require certain time, are being prepared and implemented**. In comparative practice, we have seen that the period required to implement full reform in some countries – from obsolete systems to modern solutions almost fully aligned with the Convention – ranged from five to 10 years. The recommended gradual approach also recognizes the potential risks of sudden changes without a proper legal, institutional and social basis.

To align its legislation with the UN Convention on the Rights of Persons with Disabilities, **Montenegro will have to abolish the possibility of deprivation of legal capacity and guardianship over adults completely** and establish a system that allows equality of persons with disabilities before the law, with support when it is needed. However, such a comprehensive change is radical in a system that, at this moment, is completely at odds with the basic principles of the Convention. The fact that there is no country in Europe that has fully aligned its legislation with the Convention, although several countries have almost entirely done so (e.g. Ireland), indicates that a process of serious review and redefinition of the system for protecting the rights of persons who need support in decision making lies ahead.

Recommendations for legal capacity reform

Below are possible steps leading to a comprehensive reform of the legal capacity system, from those that are immediately applicable to those that require time and gradual implementation. It is important to emphasize that the steps are interdependent and that they should be implemented in parallel, in consultation with all relevant stakeholders. This means that work on all steps needs to begin without delay, recognizing that their completion will require more or less time.

I. Adoption of the Civil Code

Montenegro is in the process of drafting a Civil Code, which represents a unique opportunity **to lay the foundations for comprehensive and stable changes**. The preparation of the Civil Code is a complex process and requires harmonization with other normative acts. However, it is important to point out that the Civil Code ensures the durability of the changes and stability through various political and social and economic circumstances.[116] It is important to identify challenges in understanding how the guardianship system,

116 Constantino Caycho, Renato Antonio, and Renata Anahí Bregaglio Lazarte, 'A Four-Speed Reform: A Typology for Legal Capacity Reforms in Latin American Countries', (2024) 12/45, *Laws* <https://doi.org/10.3390/laws12030045>.

rooted in the presumed "inability to reason", can be harmonized with the Convention. Moreover, abolition of the option to restrict legal capacity in a system that offers no alternative for the protection of rights and interests could be devastating for persons who urgently need supported decision making. Therefore, **the Civil Code not only should include the provisions addressing the recognition of legal capacity, but must also include provisions that make the provision of supported decision making a legal obligation** while guaranteeing adequate safeguards. Although the implementation of these provisions and the development of the support system will require time and gradual application, as well as changes in areas that are relevant and closely linked to the exercise of legal capacity (such as mental health), this is a definite way for Montenegro to show genuine progress towards harmonization of its legislation with international obligations in the process of joining the European Union. **The implementation of these provisions of the Civil Code can be postponed until the adoption of a special law on legal capacity and supported decision making for persons with disabilities, but it is important that the foundations are part of the new Civil Code.**[117]

Therefore, we recommend gradual changes that would improve the status of persons whose legal capacity is restricted or who are at risk of having it restricted. At the same time, the conditions for **a full reform of the guardianship system would be put in place, with the Civil Code as a legal basis**. The reform would involve the adoption of a comprehensive law that guarantees legal capacity to all persons with disabilities and prescribes the provision of supported decision making when needed, as well as safeguards.

II. Adoption of a planning document

A cross-cutting planning document should be adopted that sets out the goals, timeframe and pace of the reform implementation, performance indicators, responsible entities and cooperation with organizations of persons with disabilities, the sources and amount of funds needed to carry out the activities, and other elements. This can be part of the Action Plan for the implementation of the recommendations of the Committee on the Rights of Persons with Disabilities 2026–2030, which is in the process of preparation, to be finished by July 2025.

III. Coordination and involvement of relevant stakeholders in consultations and preparation of laws and regulations

An **inter-ministerial body** should be established, which could be managed by the Ministry of Justice, to coordinate the process of reforming the guardianship and legal capacity system. Its role would be to plan the timeline of amendments to the legal framework until full compliance with the Convention on the Rights of Persons with Disabilities is ensured.

117 For example, eight years passed from the adoption until the implementation of the Assisted Decision Making Act in the Republic of Ireland.

Furthermore, **active inclusion of persons with disabilities**[118] should be ensured, especially those most frequently affected by the procedure for deprivation of legal capacity, in all discussions, consultations and planning of amendments and development of new procedures, regulations and laws concerning the exercise of legal capacity. Article 4(3) of the Convention prescribes the obligation of member states to closely consult persons with disabilities and their organizations, as well as to ensure active involvement of persons with disabilities in the development and implementation of legislation and policies stemming from the Convention, and in other decision-making processes concerning issues relating to persons with disabilities. **Active participation of persons with disabilities in training and awareness campaigns on the importance of legal capacity is of particular importance**. This is the only approach that makes it possible to establish a system that adequately responds to the real needs of persons in need of supported decision making. One should bear in mind that parents of persons with disabilities may offer certain resistance to the reform. Their concerns should be acknowledged, and awareness raising and education of parents, relatives and other stakeholders should be strengthened. Nevertheless, the realization of the rights of persons with disabilities must not be neglected due to the prejudices of any of the stakeholders involved.

Preparations for the development of the Law on Supported Decision Making:

IV. **Identification of relevant systems' capacities and necessary resources**

The guardianship system reform calls for the establishment of proper "infrastructure", i.e. bodies, primarily for the implementation and supervision of mechanisms that make the enjoyment of legal capacity possible. Therefore, **the system's capacity and necessary resources must be identified**. The example of Ireland shows the key role played by the Decision Support Service, which operates within the Mental Health Commission. In a system aligned with the Convention, the Decision Support Service is the functional equivalent to the guardianship authority in the systems that allow full deprivation of legal capacity and guardianship over adults. In other words, the tasks of the guardianship authority – such as representation in proceedings, supervision of guardians and execution of guardianship duties – will become redundant and will be most likely replaced by an authority responsible for registration of supported decision making, maintenance of the database, protection of personal data and granting access to supported decision-making data for entities that have a justified interest, supervision of persons providing supported decision making for specific decisions and for ensuring that the will and preferences of persons are observed, etc.

Finding a way in which supported decision making, especially formal but also informal, will be organized is the task of an inter-departmental and interdisciplinary working

118 Article 4(3) of the UN Convention on the Rights of Persons with Disabilities.

group, in cooperation with persons with disabilities. Examples of comparative practice can be a significant source of information, but the solutions should be harmonized with the local context.

Supported decision making can also be offered as a social protection service. Persons who cannot make a decision independently should have the possibility to receive support to make decisions, which may or may not have legal effect. However, decisions that have legal effect and are the demonstration of the person's legal capacity should include mechanisms that prevent abuse and enable the person to undertake a legal action safely. We have seen in comparative practice that such mechanisms are registered or recorded by a notary or a special public service for supported decision-making matters. Therefore, they represent a formal form of support, but also make possible the legal validation of decisions made in that way.

Social protection services for independent living is another important topic and should also be considered in the context of legal capacity. The case law analysis showed that there was a large overlap between the need for practical support in daily functioning and the perceived ability of the person to make decisions independently and take care of their interests.

V. Mapping of existing informal support mechanisms

Informal mechanisms should be an integral part of the supported decision-making system, in addition to the formal ones. Consultations with persons in need for supported decision making, as well as with organizations that provide various community-based services may be used as a basis to design a support system that would be localized and applicable. This entails efforts to get an understanding of key causes of deprivation through a dialogue with the persons who are most often affected by it, as well as to map the support mechanisms that may exist in practice even if they are not formally recognized as such – such as **peer support and legal aid provided by civil society organizations**. In addition to mapping the support capacities that exist in the society, examples of good practice from other countries, which need to be adapted to local circumstances, are also useful.

VI. Mapping and analysis of regulations relevant for exercising legal capacity

Efforts should be made to identify laws that directly affect legal capacity in certain areas – such as health and social protection, property ownership, work and employment, etc. The areas that are most often related to the exercise of legal capacity, which require special attention, include mental health services, the right to free and informed consent, placement in social welfare institutions and reproductive health. Here, we draw special attention to the **Law on the Protection and Realization of the Rights of Mentally**

Ill Persons,[119] which prescribes the duty of police officers to take a person to a health institution based only on suspicion regarding the person's mental state and without their consent, where this person can be detained for up to five days until a court issues the decision on forced placement. The UN Committee on the Rights of Persons with Disabilities specifically requested the abolition of this possibility in the Montenegrin law.[120] In addition, **the introduction of an explicit prohibition of all interventions that affect the fertility and sexual health of women with disabilities without their informed consent should be considered, including the prohibition of interventions carried out solely on the basis of the guardian's consent**, as well as the prohibition of interference with family planning.

Some of these regulations will have to be amended and some provisions will be repealed by the new law on supported decision making.

VII. Development of a law that recognizes legal capacity and guarantees provision of supported decision making

Comparative practice shows that a reform of this significance is well served by the development of comprehensive legal solutions that guarantee supported decision making and define different types and levels of support, as well as safeguards. A comprehensive law would mean the elaboration of the basic principles on legal capacity and supported decision making established in the Civil Code.

The legislation reform should entail the following as a minimum:

a. Recognition of legal capacity

This is the basic principle that any reform must be based on. It implies the elimination of discriminatory provisions used to declare persons "incapable of reasoning" and to deprive them of their rights and freedoms based on a medical assessment. Instead, the law needs to introduce the concept of supported decision making based on respect for the rights, will and preferences of persons with disabilities. The need for support, if determined by the competent authorities, should under no circumstances lead to the abolition of rights.

b. Identification of different types and levels of support

While the recognition of legal capacity should be introduced at the level of key civil regulations, the support should be recognized at the same level, but also governed additionally by a special law that would identify clear circumstances in which support

119 Law on the Protection and Realization of the Rights of Mentally Ill Persons (Official Gazette of the Republic of Montenegro No. 032/05, Official Gazette of Montenegro Nos. 073/10, 040/11, 027/13) Section 2.

120 The Committee for the Rights of Persons with Disability, General Comment No. 1, Article 12 – Equal Recognition before the Law (CRPD/C/GC/1), [2014], para. 29.

is needed, as well as the ways in which it can be provided. **Types of support can be roughly divided into informal and formal, as well as voluntary and mandatory**. Even when the law provides for the formal appointment of a representative (assistant) to help the person in decision making, **it is important that the person retains the right to choose support, the possibility to accept or refuse support, and the right to choose who will provide that support**.

There are many examples of good practice regarding different types of formal and informal support, as well as possible types of agreements or contracts that a person can use to appoint representatives for certain areas or express preferences related to situations in which they may not be able to decide independently. The final decision about the type of arrangement must be based on the real needs of persons in need of supported decision making. That choice will combine the existing capacities and community-based services identified in the previous steps, as well as the development of new types of support based on identified needs.

Therefore, new (pilot) initiatives within various systems where supported decision making may be needed, such as the healthcare system, must be developed. Such initiatives would connect the existing local services, individuals with disabilities (or in need of support), their families and representative associations, and would help build the capacity of local communities for practical implementation of guardianship system reforms, which are appropriate for the given context and circumstances. The initiatives should use models that have proven to be effective in encouraging the creation of supported decision-making networks, should be designed to cover all decision-making points, such as medical decisions, financial disposal, as well as relations with other private and state organizations. The primary focus should be on persons with intellectual, developmental or cognitive difficulties or mental health challenges.

c. Beneficiaries of supported decision-making services

It has already been noted that the primary beneficiaries are persons with intellectual, developmental or cognitive difficulties or mental health challenges. However, it is important **to consider the possibility of providing supported decision-making services regardless of the presence of a disability**. Different life circumstances, including aging or a lack of education, may lead to problems in making decisions. Persons who do not have an established disability, but indicate a need for support, should be recognized as legitimate beneficiaries of such a service.

d. Prevention of abuse through regular supervision and access to dispute resolution mechanisms

The guardianship system reform entails a paradigm shift regarding both the definition of "safeguards" and the prevention of abuse. This means that the prevention of abuse must

focus on checking third parties who may have a conflict of interest or who may abuse or coerce persons with disabilities. It also entails establishment of a system that will check the support providers to ensure that they do not exert undue influence on those who receive support, and that they are guided in their work by the principle of observing the rights, will and preferences of the person they support.

Also, **supported persons must have unobstructed access to justice and appeal mechanisms** to challenge the appointment of a representative, challenge decisions made without their consent and protect their right to refuse support. This can be achieved in various ways: by establishing a separate supervisory body that could act upon complaints, periodically examine the validity of support provision and otherwise supervise and ensure respect for the person's will and protection from misuse. These tasks can also be performed by the Protector of Human Rights and Freedoms (Ombudsman), with the necessary expansion of the institution's capacity and the formation of a special organizational unit. In addition, civil society organizations can act as monitors, on the condition that the organization does not provide any form of supported decision making or other services. One of the basic measures can include the obligation for multiple trusted persons from the immediate environment of the person needing support to participate in the organization of that support.

e. Enhancement of capacities of relevant stakeholders and offices

Intensive efforts should be made to create conditions for the implementation of support system reforms by ensuring adequate resources and training on the right to freedom and equality in exercising legal capacity for all relevant social stakeholders and offices.[121] **Training should primarily be organized for employees in the health and social protection sector, but also for the police, the judicial system and financial institutions** – in brief, professionals from all sectors in which exercise of legal capacity is of essential importance. Training should be used, first and foremost, **to provide information about the right to equality in exercising legal capacity and the ways in which supported decision making functions, so that the mentioned entities can accept such decisions** (in health care, local administration, etc.). Numerous resources can be helpful to design the training, including the EASPD publication from 2021, "Models on Innovative Practices Focusing on Supported Decision-Making Mechanisms".[122]

121 Michael Bach and Lana Kerzner, Supported Decision Making – A Roadmap for Reform in Newfoundland and Labrador: Final Report, Toronto: Institute for Research and Development on Inclusion and Society (IRIS), <https://irisinstitute.ca/wp-content/uploads/sites/2/2021/01/Final-NL-Legal-Capacity-Report-Nov-2020.pdf>

122 Models on Innovative Practices Focusing on Supported Decision-Making Mechanisms (EASPD, 2021), <https://easpd.eu/fileadmin/user_upload/Conferences/Innovative_Frameworks_Report.pdf>, pp. 37–54.

Recommendation to improve the practice

Until the full reform of the legal capacity system is implemented, which will take several years, **the following recommendations should be implemented without delay, within the existing legal framework**. They will facilitate the improvement of the procedure for deprivation of legal capacity, the status of persons with disabilities participating in the procedure, and the situation of persons deprived of legal capacity in a relatively short period of time. Also, **acting on the recommendations will help various stakeholders in the system to bring their practices closer to the practices that will be in place after the implementation of the reform**, allowing a gradual transition to a system that differs significantly from the existing one.

First and foremost, based on the findings of the case law analysis, activities should be initiated to draft the guidelines aimed at improving judicial practice and/or implementation of training measures so that the deprivation of legal capacity is addressed with the aim of achieving the desired objective of the measure with the least possible intrusion on a person's privacy. In other words, full deprivation of legal capacity should be considered only as a **last resort**, **while partial deprivation of legal capacity in certain decision-making areas should always be considered as a primary option**, if there is any need for it. Furthermore, **application of the existing procedural safeguards** (the court's obligation to see the person, for example) **must be ensured** and **conflict of interest in representation must be avoided** (the petitioner and the representative should not be from the same social welfare centre and the petitioner and the representative should not be related) and **regular reviews of the deprivation of legal capacity must be ensured**, which should serve as **an opportunity to reverse full deprivation to partial deprivation or to restore legal capacity**. Changing judicial practice is very important both for improving respect for the rights of persons with disabilities and for the **gradual preparation of courts, expert witnesses and guardianship authorities for the reform of the system**. The assessment and modification of the practice and role of expert witnesses in the proceedings, as well as of the guardianship authority, should be addressed.

I – Less intrusive measures, i.e. partial deprivation with the least possible extent of rights restriction, should be considered first during the proceedings. The case law analysis shows that the approach of full deprivation of legal capacity is taken without seriously considering the possibility of fulfilling the protective role through partial deprivation. The goal should be the least possible intrusion on the person's privacy, while fulfilling the protective role of guardianship. Full deprivation is currently not considered the last resort in proceedings. Instead, the courts resort to it as the first choice. Moreover, **partial deprivation, with an accurate determination of the areas in which the person cannot act autonomously, can completely replace full deprivation of legal capacity in the system and make such a concept unnecessary**. Through a detailed

assessment of the person focusing on various areas of life, expert witnesses should facilitate this approach, in which the deprivation of legal capacity is the last resort and the least possible extent of restrictions are considered first.

II – The court should always see the person whose legal capacity it is deciding about, in line with the legal obligation. This is the absolute minimum for a person's participation in the proceedings, and if it is not possible to see the person, the court should discontinue the proceedings.

III – The expert witnesses' assessments should be detailed and focus on assessing the person's functionality to make specific decisions at a given time. The development of a methodology, guidelines and training for expert witnesses will improve their assessments even before adoption of the new law, which will be a good basis to assess the capacities and the need for support within the new system based on supported decision making.

IV – Expert witnesses should pay special attention to young persons and persons of working age, so that deprivation of legal capacity does not eliminate every possibility for economic activity and thus additionally hinder the person's social inclusion and quality of life. The lack of an individualized, detailed assessment leads to the person being completely deprived of legal capacity, despite the legal possibility of partial deprivation that would allow a more proportionate approach and less drastic consequences for the rights of the person whose legal capacity is being restricted.

V – Expert witnesses should refrain from addressing matters of the persons' rights. In the vast majority of cases, expert witnesses explicitly recommend the deprivation of legal capacity, which is confirmed by the case law analysis. The analysis of the laws has shown that this statement by expert witnesses on legal capacity has no legal grounds. Court decisions are always based on the expert's recommendation. While courts lack knowledge in the areas for which assessment is conducted, they do have knowledge of fundamental rights and should therefore take responsibility for determining the extent of the deprivation of legal capacity, guided by the principle of the least possible intrusion on the person's rights and autonomy.

VI – Establish a database with timely notifications to courts to review the need for deprivation of legal capacity, in accordance with the law. The interviews with judges and representatives of guardianship authorities have shown that there is a need for a reliable and effective system of notifying courts about the expiration of the three- or five-year period for which a person is deprived of legal capacity. The review should be an opportunity for judges to revise the reasoning for full deprivation of legal capacity and reduce the extent of restrictions in accordance with the principle of least interference with the person's rights and autonomy.

VII – Eliminate problematic practices of guardianship authorities through training and guidelines for employees in social welfare centres (SWCs), but also through judicial practice. The analysis of court decisions has shown that significant problems arise from inadequate practices of guardianship authorities in the proceedings, such as a potential conflict of interest when the petitioner is the SWC and the respondent's representative is employed at the same SWC. If the SWC fails to prevent such situations, **the court should prevent them and order the appointment of a representative from another SWC**.

VIII – Strengthen the role of the respondent's representative employed at the SWC to advocate for the person's interest during the proceedings so that they are not deprived of legal capacity or so as to actively contribute to a solution leading to the least possible extent of legal capacity restriction. The analysis of case law has shown that the role of a temporary representative employed at the SWC is of a procedural nature, meaning it has no real influence on the proceedings, the court's decision or the protection of the respondent's rights and interests.

IX – Eliminate the grounds for deprivation of legal capacity related to the realization of social protection rights and other benefits.

a. **Eliminate the link between the financial benefit stemming from the Law on Social and Child Protection and guardianship over adults with disabilities**, so that the end-beneficiaries are not financially harmed.

b. **Prevent the deprivation of legal capacity of persons with disabilities for the purpose of placement in social protection institutions** and other public and private residential-type institutions. During the placement procedure, ensure that their rights are sufficiently protected, including from arbitrary deprivation of liberty, given that persons placed in residential facilities are de facto deprived of liberty.

X – Analysis of the practice of guardianship authorities, development of guidelines and training are necessary due to the multiple duties and roles performed by SWCs, as well as entrenched practices, due to which both representation in proceedings and guardianship itself may be below a satisfactory level. Such an analysis can be used to inform the future creation of a central service that will deal with legal capacity matters.

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