

THE ‘CIVIL DEATH’ OF PERSONS DEPRIVED OF LEGAL CAPACITY IN THE REPUBLIC OF NORTH MACEDONIA¹

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-Abstract-

The author tackles the topic on legal capacity in the intersection between civil law and human rights that is very important, yet neglected in the Macedonian legal theory and jurisprudence. Namely, Republic of North Macedonia has ratified the Convention on Rights of Persons with Disabilities and has an obligation to align its legal system (primarily its Family Law and Law on Non-contentious Procedure, but also other laws) with its spirit. It seems as if the concept of legal capacity does not include variations of the mental capacity in the Court’s decision when deciding to limit/deprive a person of his/her legal capacity. Instead, it is binary in terms that the legal capacity can either be limited/deprived or not, without further specification of the scope of rights and obligations encompassed therein. As a result, persons deprived of legal capacity (and sometimes persons with limited legal capacity) are limited to enjoying and acting upon most of their fundamental rights. The author concludes that persons deprived of legal capacity in the Macedonian legal system are in a state of ‘civil death’ because they are restricted from enjoying and acting upon many fundamental human rights. These include equality rights (not to be discriminated against), private and family life rights (a right to make decisions about their own body, medical treatments, reproductive choices, conclusion of marriage, recognition of parenthood etc.), procedural rights (a right to access to court and administrative institutions, a right to express legally valid opinions in such proceedings), political rights (a right to vote) etc. This should be changed as a matter of priority in the future.

Key words: legal capacity, deprivation, restoration, civil law, human rights.

I. INTRODUCTION – THE LEGAL BACKGROUND SURROUNDING THE CONCEPT OF LEGAL CAPACITY IN NORTH MACEDONIA

In the Republic of North Macedonia, there is a difference between legal capacity in a narrow and in a wider sense. In a wider sense, it means the capacity to have rights (правна способност) and is acquired at birth (Art. 45 a Law on Obligations). It means the ability of a person to have rights

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¹ This research has been developed from the Report on North Macedonia based on the *Questionnaire: Legal Protection and Empowerment of Vulnerable Adults* of the Family Law in Europe (FL-EUR) Academic network - <https://fl-eur.eu/>.

and liabilities, i.e. to be a subject before the law. In a narrow sense, legal capacity is the capacity to act or exercise these rights (деловна способност) or sometimes referred to as business capacity and it assumes the ability to make independent decisions about rights and obligations.² In this sense, the regulation on legal capacity is very similar to the Serbian regulation on the matter (both countries share the same legal tradition from former Yugoslavia).³ The legal (business) capacity is acquired upon reaching 18 years of age (the age of maturity). Only in the case of this capacity, full or partial deprivation is possible. This text uses the term legal capacity in a narrow sense. In the Macedonian legal system, there is full and partial deprivation of legal capacity, but for purposes of better clarity, the text uses person(s) with limited/restricted legal capacity and person(s) deprived of legal capacity instead.

Legal capacity in a narrow sense (business capacity) means a possibility for a person to be recognized as a subject – holder of rights and responsibilities and acting accordingly (to execute them). It is a precondition for enjoying both personal and property rights: consenting decisions about personal choices – where to live, medical treatments, concluding contracts, filing appeals and legal remedies, concluding marriage, acknowledging and rebutting parenthood etc., but also political rights, including voting.

Natural persons up to 14 years and adults (over 18 years) deprived of legal capacity are legally incapable. Natural persons from 14 to 18 years and adults (over 18) with limited legal capacity have limited legal capacity, unless it is otherwise stipulated by law (art. 45 b Law on Obligations). The Constitution of the country rests upon fundamental core values among which: appreciation of basic human rights recognized by ratified international treaties and the Constitution itself, as well as humanism, social justice and solidarity.⁴ The Constitution also guarantees equality in rights and freedoms (art. 9). However, it only foresees a general clause on equality that does not mention disability as ground for discrimination. Each citizen over 18 years (after reaching maturity) gains the right to vote that is equal, general and imminent. However, the right to vote is not granted to persons deprived of legal capacity (art. 22 of the Constitution). The Republic provides for special care and protection of family, but it provides only subsidiary care because primary care belongs to family members (parents have rights and responsibilities to take care of their children and the other way round - children have responsibilities to take care of their old, ill and exhausted parents) - art. 40 of the Constitution.

The main national sources of law in the current North Macedonian's legal framework regarding state ordered measures for protection of persons with deprived legal capacity are: the Law on Family (Law on Family),⁵ the General Administrative Procedure Act (the Law on General Administrative Procedure)⁶ and the Law on Non-contentious Procedure (Proceeding)⁷ and only subsidiary the Law on Civil Procedure (Proceeding).⁸

² Legal capacity is defined in art. 165, par. 2 of the Law on Family. The Law on Obligations (regarding contracts and torts) also follows the same definition (art.45-b). Закон за облигационите односи *Службен весник на РМ* основен текст бр. 18/2001 пречистен текст - <https://aso.mk/wp-content/uploads/2019/04/Zakon-za-obligacii.pdf>.

³ See more in Kovaček Stanić G., Samarđžić S., *The Empowerment and Protection of Vulnerable Adults Serbia*, (Serbia Report) FL-EUR website, pg. 4 - <https://assets.vu.nl/7099fcf9-715f-0061-5726-009a48410fee/d6c155a6-447d-4289-aaef-586e3f860b4c/Serbia.pdf>.

⁴ Art. 8 Constitution – Устав на Република Македонија, *Службен весник на Република Македонија* 52/2991 – пречистен текст до последни амандмани и објава во *Службен весник на Република Македонија* 36/2-19.

⁵ Закон за семејството, *Службен весник на Република Македонија* 80/1992 - консолидиран текст.

⁶ Закон за општата управна постапка, *Службен весник на Република Македонија* 124/2015.

⁷ Закон за вонпарнична постапка, *Службен весник на Република Македонија* 79/2005, (пречистен текст) 09/2008 - https://jpacademy.gov.mk/wp-content/uploads/2022/08/zakon_za_vonparicna_postapka.pdf.

⁸ Закон за парничната постапка, *Службен весник на Република Македонија* 79/2005, (пречистен текст) 07/2011.

The Law on Family stipulates, in many instances, when a person deprived of legal capacity is not capable of performing. In that sense, a marriage cannot be concluded if a person cannot understand the meaning, rights and responsibilities that come along with marriage and is unable to reason (art. 18). A man can acknowledge his fatherhood of a child born outside of marriage only if he has at least limited legal capacity and is able to understand the meaning of the acknowledgement (art. 55). Following such statement, the mother can consent only if she has full legal capacity. If that is not the case, the consent can be given by the child's guardian followed by an approval from the Centre for Social Services (art. 56, par. 3). The child can also consent him/herself if he/she has reached 16 years of age (art. 57). A proceeding for contestation of paternity could only be initiated by persons with legal capacity. If that is not the case, they could be represented by their guardian (art. 64, par. 3 and art. 74). The Law on Family stipulates that the parental right could be extended after the child reaches 18 years of age in case where the child is not capable of taking care of him/herself on his/her own (art.94). This article is not aligned with the Law on Non-contentious Procedure (art.34-57) and the provisions on guardianship in the Law on Family (165-172) that stipulate that a person over 18 years not capable of taking care of his/her own rights and interests should be limited/deprived of legal capacity followed by an official appointment of a guardian by the Centre for Social Services. A person can adopt a child only if he/she has full legal, intellectual and physical capacity (art. 100-a and 102-b, g and d), while a consent to adopt the child from biological parents will not be needed if they lack legal capacity (art. 103, par. 3).

The State has adopted the National Strategy for Rights of Persons with Disability 2023-2030 with an Action Plan 2023-2026 in 2023.⁹ In it, it is stated that for the purposes of improvement of services for persons with disability, interventions in the legal sphere have to follow in order to eliminate discrimination, improve independence and autonomy in realization of personal rights as well as better inclusion.¹⁰ The country has not signed and ratified the Hague Convention of International Protection of Adults but has signed and ratified the UN Convention on the Rights of Persons with Disabilities in 2011. Prior to that, there were some efforts to protect persons with disability in the framework of protection against discrimination.¹¹ Since then, several important efforts have been made to integrate persons with disabilities into society. Firstly, a National Coordinative Body for Implementation of the Convention was founded as well as a Monitoring Team for Implementation of the Convention in the Department for Protection of Rights of Children and Persons with Disabilities at the Public Defender's Office.

A new Law on Prevention and Protection from Discrimination was passed in 2020 that guarantees protection from discrimination of persons with disabilities.¹² The law defines persons with disabilities as those who have long lasting physical, intellectual, mental or sensory disability that if taken together with different societal barriers may disable their full and effective participation in the society on equal grounds as the others.¹³ Prior to the new Law, the mechanisms for discrimination were not efficient when it came to people with disabilities. In the period between 2011 – 2016, the Commission against discrimination received 44 complaints based on disability

⁹ Влада на РСМ, *Национална стратегија за правата на лицата со попреченост 2023-2030 со акциски план 2023-2026*, Скопје, март, 2023.

¹⁰ *Ibid.* pg. 32.

¹¹ See for instance Цералдин Скалион Консалтинг и Шила Роџерс, *Прирачник за заштита од дискриминација (примери на добра пракса за примена на принципот на еднаков третман и недискриминација во Европската Унија)*, 2010, pp. 53-64 - https://www.mtsp.gov.mk/WBStorage/Files/priracnik_antidiskriminacija.pdf.

¹² Закон за спречување и заштита од дискриминација, *Службен весник на РСМ*, 258/2020.

¹³ *Ibid.*, art. 4 and 5.

and established discrimination only in 3 cases. When it came to Court's protection, during the period between 2011 and 2016, only 1 procedure was initiated against discrimination on the grounds of disability, in which the Court made a positive decision.¹⁴ The Law on Social Protection¹⁵ stipulates new rights, including increased social compensation. Persons with high level of intellectual disability, which are 26 years or older are potential beneficiaries of special disability allowance. The Law was amended in July 2021 stipulating a new provision to decrease the age from 18 to 6 for using special social service (personal assistance) aiming at improving the support for the personal and educational development of persons with disabilities as well as their families. The amendments introduced a new category of children/persons with disabilities, which is a with combined disability. Additionally, the Law on Protection of Children¹⁶ was also amended for purposes of increasing the special allowance to 15%. The National Strategy 2018-2027 Timjanik¹⁷ aimed at special protection of children without parental care by placing them into families that provided for social services and care in a home instead of in an institution. The Law on Primary Education from 2019¹⁸ and the Inclusive Education Concept from 2020¹⁹ enabled inclusion of all children (including children with disabilities) in the same educational system. Children with disabilities can use educational assistance from specially trained educational assistants while attending regular school. Within the Law on Protection of Children there is a provision connected with the special allowance/fiscal benefits that are provided to one of the parents or to the guardian for "children with special needs who have impairment in physical and mental development" up to the age of 26 years. As a result, we can infer that persons with disability up to the age of 26 years are treated as children. This matrix by default is transferred to all spheres. According to the Summary Report of the Country with regards to the CRPD from 2018, Macedonia collects statistics and data in different manners for everything except for disability. The state's lack of data considering disability status is due to the non-consistent definition/interpretation on what disability is. The mentioned Register that was proposed in 2016 is completely based on the medical condition of people with disability. There is no data on women with disabilities - victims of violence. There is not enough research about issues of disability and even in the research made by CSOs for different matters (for example, how many ethnicities are employed in the Public Administration) the disability is missing.²⁰ Furthermore, the Report is very critical regarding inclusion of persons with disability in making the Report itself.²¹ According to the last census held in 2023, there are 94.412 persons with disabilities in the country, which is 5% of the total population, among which 2,5% are over 65 years of age.²² The National Statistic Institution reported that around 31,5% of the whole population has some sort of disability,

¹⁴ Informal coalition and group of authors, *Summary Report of the State Responses to the Questions related to the initial Report of the Republic of Macedonia in the implementation of the Convention on the Rights of Persons with Disability*, July 2018 pg. 6.

¹⁵ Закон за социјална заштита, *Службен весник на РСМ*, 104/2019.

¹⁶ Закон за заштита на децата, *Службен весник на РСМ*, 23/2013.

¹⁷ http://www.mtsp.gov.mk/content/pdf/strategii/Strategii%202018/Strategija_deinstitucionalizacija_Timjanik_2018-2027.pdf.

¹⁸ Закон за основно образование *Службен весник на РСМ*, бр. 08-4389/1, 30 јули 2019 година.

¹⁹ Концепција за инклузивно образование достапна на: [Konceptija za inkluzivno.pdf \(mon.gov.mk\)](http://konceptija.za.inkluzivno.pdf(mon.gov.mk)).

²⁰ *Op. cit. Summary Report*, pg. 21.

²¹ *Ibid.* pg. 23.

²² Државен завод за статистика 2022
http://makstat.stat.gov.mk/PXWeb/pxweb/mk/MakStat/MakStat_Popisi_Popis2021_NaselenieVkupno_Nasele nie_Poprecenost/T1053P21.px/table/tableViewLayout2/?rxid=a812e800-ecc2-45cf-b8ca-5cfe3d2208e5.

among which 34,2% are women.²³ The State has no official records on the number of persons deprived of legal capacity. Nevertheless, according to the State's Commission on Elections records from the last elections in 2021, around 900 citizens were erased from the election list based on the data gathered from Courts. The last national strategy for the elderly dates back from 2010 about the period 2010-2020.²⁴ There is no other, more recently available information regarding adult protection measures and elderly abuse in particular. Some scarce data could be gathered from Action Plans and Reports regarding implementation of the Istanbul Convention against Violence against Women and Domestic Violence that in general refers to the fact that not much has been done notwithstanding the declarations.²⁵ The National Strategy²⁶ for prevention and protection from family violence 2012 - 2015 recognized persons with disability (persons with invalidity) as victims. The Law on Prevention and Protection against Domestic Violence²⁷ does not explicitly prohibit the exploitation, violence and abuse toward persons with disabilities. The disability is not included in the research done for the family violence. The shelter centers for victims of family violence are not accessible and there are no accessible services for support. The providers for support have not been trained.²⁸

In general terms and relevant to the topic, North Macedonia is a party to the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the Universal Declaration on the Human Genome and Human Rights and the Universal Declaration on Bioethics and Human Rights. The regional mechanism for ensuring protection on human rights had already been established and implemented through the Council of Europe, the European Convention on Human Rights²⁹ being the most important.

CRPD has been signed (by North Macedonia) on 30 March 2007 and ratified on 29 November 2011. The Hague Convention on the International Protection of the Adults has neither been signed nor ratified by North Macedonia. As mentioned above, the country took serious measures to fully implement the CRPD. However, there are many complaints by associations/organizations, that protect rights of persons with disabilities, about its full implementation as well as Courts' decisions

²³ Државен завод за статистика, *Анкета за приходи и услови за живеење за 2017 г.*, Статистички преглед број 2.4.18.13/905, pp. 28-31: <http://www.stat.gov.mk/Publikacii/2.4.18.13.pdf>.

²⁴ Министерство за труд и социјална политика на Република Македонија, *Национална стратегија за стари лица 2010-2020*, јуни, 2010.

²⁵ *Акциски план за спроведување на Конвенцијата на Советот на Европа за спречување на борба со насилство спрема жените и семејното насилство 2018-2023* и Балшиќевска М., Аврамоска Нушкова А., *Извештај за напредокот на РСМ при спроведување на Националниот Акциски План за имплементација на Истамбулската конвенција октомври 2018 – октомври 2020*, Национална мрежа против насилство врз жени и семејно насилство, 2002.

²⁶ *National Strategy for Prevention and Protection from Family Violence 2012 – 2015*. Available at: http://mtsp.gov.mk/WBStorage/Files/nasilstvo_strategija_mkd.pdf

²⁷ The Law on Prevention, Prevention and Protection against Domestic Violence. Available at: <http://www.mtsp.gov.mk/content/pdf/zakoni/Zakon%20za%20prevencija%20semejno.pdf>

²⁸ See more in *Summary Report (Summary Report) of the State Responses to the Questions related to the initial Report of the Republic of Macedonia in the implementation of the Convention on the Rights of Persons with Disability*, July 2018 – See more at <https://www.ohchr.org/en/treaty-bodies/crpd>.

²⁹ Ratified by SFRY on 27th of February, 1997 as law on ratification – *Закон за ратификација на Конвенцијата за заштита на правата на човекот и основните слободи, и на Првиот протокол, Протоколот број 4, Протоколот број 6, Протоколот број 7 и Протоколот број 11 кон Конвенцијата*.

confirming discrimination.³⁰ The Oviedo Convention (Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine has been signed in 1997 (4.4.), ratified in 2009 (3.9.), while it entered in force in 2010 (1.1.).

The Hague Convention on the International Protection of Adults has not been signed yet, there are no ongoing discussions about it or public awareness of its meaning. The draft version of the Civil Code does not have significant changes in the field of guardianship or possible introduction of voluntary or *ex-lege* measures for protection of vulnerable adults.

The Macedonian legal system does not recognize voluntary measures. It does not recognize continuing powers of attorney nor advance directives. It is only possible to authorize a person to take (certain) actions/deeds on behalf of the person that gives the authorization while still having legal capacity (with a statement signed by the Notary Public). This is known as authorization – полномошно, while the authorized person (проху) – полномошник. The authorization could be limited (ограничено) or unlimited (неограничено), specific (посебно, специјално) and general (општо, генерално) but not preventive (to encompass cases if and when the person might be disabled to reason and bring sound decisions about oneself).³¹ Authorization in civil proceedings is regulated by the Law on Civil Procedure (art.80-92). Article 81 (1) stipulates that an authorized person could be ...among others... also a blood relative in straight line, brother, sister and a spouse if he/she has complete legal capacity. Especially important is art. 91 (1) stipulating that if during civil litigation with an authorized person as a representative, the represented party dies, his/her legal representative dies, or gets deprived of legal capacity (...) the representative is still capable of taking legal actions in the litigation, unless an heir or a new legal representative revokes the authorization. The Law on Family in article 28 stipulates that in certain justified circumstances, the Marriage Registry Office can allow conclusion of marriage with the sole presence of one of the future spouses and an authorized person of the other spouse. This is a specific authorization that applies only for the purposes of concluding the marriage with the specified other person.

II. THE CONCEPT OF LEGAL CAPACITY AND THE PROCEDURE FOR DEPRIVATION AND RESTORATION OF LEGAL CAPACITY – *DE LEGE LATA*

The Law on Non-contentious Procedure regulates the procedure for deprivation (full or partial) and restoration of legal capacity (art. 34-57). The Court decides to fully deprive the person of legal capacity or just partially (limitation of legal capacity) on the grounds explicitly enumerated: mental illness or deficiency, use of alcohol or other substances such as nerve poisons, narcotic drugs, psychotropic substances and precursors that disable an adult to care for himself/herself as well as for his/her rights and interests. If the reasons for deprivation cease to exist, the Court may decide to restore the legal capacity (fully or partially).

The procedure could be initiated by a proposal from the Court *ex officio*, the Centre, the spouse, the child, the grandchild, the parent, the grandparent, the sibling and anyone else who lives in the same household with the person concerned (art. 36). Interestingly enough, the concerned person is

³⁰ Хелсиншки комитет, *Потврдена е директна дискриминација врз лицата со попреченост при остварување на нивното право на глас од страна на Владата и Државната изборна комисија*, декември 20, 2023 - <https://mhc.org.mk/news/potvrdena-e-direktnata-diskriminacija-vrz-licata-so-poprechenost-pri-ostvaruvanje-na-nivnoto-pravo-na-glas-od-strana-na-vladata-i-drzhavnata-izborna-komisija/>.

³¹ For more see in Камбовски И., *Застапување во граѓанското и трговското право*, Стобитрејд, 2015.

not eligible to initiate a procedure for deprivation of legal capacity but is eligible to initiate a procedure for restoration of legal capacity (art. 52).

Following the initiation of a procedure for limitation or restoration of legal capacity, the Centre should be notified if the procedure is not initiated on its suggestion. The proposal for removal of legal capacity should state the facts from which it follows that there are conditions for removal of the person's legal capacity and the evidence that confirms those facts.

In urgent and justified cases, the Court may appoint a temporary representative during the procedure. Before appointing a temporary representative, the Court should hear the person if possible and if that does not affect his/her health. The Court will then immediately notify the Centre of the appointment of a temporary representative. This temporary representative will be dismissed from duty if the proposal for removal of legal capacity is legally rejected or the procedure is stopped, that is, when the reasons for which he was appointed cease to exist as well as when the Centre appoints a temporary guardian.

The Proposal for deprivation of legal capacity should contain the facts and proofs leading to the conclusion that there should be deprivation of legal capacity (full or partial) – art. 37 while the Court should conduct the procedure urgently (art. 38).

The scope of limitations is set out in the material law, primarily in the Law on Family (art. 165, par. 2), which governs various aspects of family relationships, including legal capacity issues related to individuals. Additionally, the Law on Obligations (art.45-b) also contains provisions related to legal capacity in the context of contractual relationships. However, the scope of the limitation of legal capacity in each particular case is determined by a Court's decision by which it is decided on partial or complete removal of legal capacity (art. 48 Law on Non-contentious Procedure).

The decision on limitation of legal capacity is binary as the Court can decide in each particular case on partial or complete removal based on the individual circumstances of the person regarding his/her ability to care for himself/herself and for the protection of his/her rights and interests, considering factors like mental health and substance use. The decision is not fully tailor-made to fit individual needs. On the contrary, the Court could either decide to limit/deprive the person of legal capacity or not, while this decision is mainly based on the expert opinions of consulted physicians. This is perceived as if there is dominance of the medical science and psychiatry over judicial disposition to assess the extent to which the legal capacity should be deprived.³² Nevertheless, the Law stipulates that the Court is not dependent on the proposal regarding the scope of deprivation of the legal capacity. On the contrary, the Court could make a subsequently different decision from the proposed one.³³ The critics also deliberate that the person concerned is usually being called on a hearing if that does not affect his/hers health (art.43), but in practice the Court rarely relies on these opinions. As a next step, the Centre in its decision determines the scope of rights and responsibilities the person can still have and his/her guardian accordingly. The Law does not explicitly ask from the Judge to set the scope of legal matters that the person could/could not take in the future in the Decision,³⁴ therefore the Centre responsible to appoint a guardian, further does it.

³² See more in Зороска - Камилловска, Т., *Одземање и враќање на деловната способност*, Универзитет „Св. Кирил и Методиј“ Правен факултет „Јустинијан Први“, Годишник на Правниот факултет „Јустинијан Први“ во Скопје во чест на проф.д-р Марјан Марјановски, pg. 100.

³³ *Ibid.* pg. 101.

³⁴ Even though, according to Zoroska-Kamilovska this should be presumed and the Court should state the scope of legal matters and acts the person could/could not take in the future. *Ibid.* pg. 101.

There are no other legal instruments that can lead to deprivation of legal capacity (if we exclude continuation of parental rights for children over 18 years with disability). The only adult protection measure in the Macedonian legal system is the measure of deprivation or limitation of legal capacity and subsequently appointment of a guardian. It is a presumed 'best interest' principle that prevails instead of 'will and preferences' of the person concerned principle. There are no advanced directives, supported decision-making etc. The only possibility to take into consideration opinions of the concerned person is in urgent and justified cases when the Court can appoint a temporary representative (art. 40). The Court can also hear the opinion of the concerned person if it considers it possible.

Limitation of legal capacity, i.e. partial deprivation of legal capacity usually encompasses rights and responsibilities as of a person who has reached the age of 15. However, the Centre should, on the one hand, specify the rights and responsibilities of the person concerned and on the other hand, of the guardian in its decision appointing one. A person with full legal capacity (acquired at 18 years of age) is a fully capable person to act in the legal market. A person deprived of legal capacity is considered by law as a person under 15 years of age and is represented by his/her legal representative (guardian).

The guardian is obliged to take care of the ward's personal rights and interests, accommodation and health, considering the reasons for deprivation/limitation of legal capacity. The final aim of the guardian is to enable the person to have an independent life as much as possible.

If the person against whom a procedure for removal of legal capacity has been initiated has real estate, an annotation is placed in the public books in which the rights to real estate are recorded. The Court should immediately notify the authority that keeps the public books of real estate records to make a note regarding the procedure for deprivation/limitation of legal capacity. If the ward has property, the Centre will make a decision for assessment of inventory by a Committee appointed by the Centre and only afterwards will hand over the property to the guardian for management. The guardian is obliged, within its powers, to conscientiously take care of the rights and interests of the ward and manage the property. The guardian cannot undertake measures that go beyond the scope of regular work or management of the property of the ward without compensation and cannot bind him/her a guarantor (without prior approval from the Centre). The guardian is obliged, with the help of the Centre to take necessary measures to secure funds necessary for the implementation of the measures determined by the Centre in the interest of the ward. The guardian, only with the approval of the Centre, could alienate or encumber real estate, movable objects of greater and special personal value or dispose of property rights of greater value, renounce an inheritance or refuse a gift and take other measures determined by law on behalf of the ward. The Center, in the procedure for granting approval for the guardian to dispose of and manage the property of the ward, determines the purpose of the acquired funds and supervises their use. The guardian is obliged to compensate the ward for the damage caused by improper, negligent or careless performance of the duty (art.140-150 Law on Family).

Regarding marriage, persons who, due to a manifest form of mental illness, with the presence of psychotic symptoms or residual signs of the illness, are unable to understand the meaning of marriage and the obligations arising from it, and who are simultaneously incapable of reasoning, cannot enter into marriage (art. 18, par. 1 Family). Persons who lack mental (psychic) development and belong to a group of persons with severe mental deficiency (IQ under 36) cannot enter into marriage (art.18 par. 2 Law on Family). On the other hand, persons with moderate or mild disabilities in their mental development as well as persons with severe hereditary diseases in the family, can enter into marriage after a previously obtained opinion on the genetic construction

issued by the Institute for Mental Health of Children and Youth Skopje or another appropriate institution that deals with genetic research (art.18, par. 3 Law on Family). It may be concluded that the right to marry and found a family, as a basic human right (art. 12) of the European Convention on Human Rights is restricted to persons with severe disabilities in the Republic of North Macedonia.

Regarding medical matters, persons deprived of legal capacity are excluded from the decision making process about their own body in at least several laws including: the Law on Protection of Patient Rights (art. 6, par. 1; art. 14, art. 15, art. 17, art. 20)³⁵; the Law on Mental Health (art. 16)³⁶; the Law on Termination of Pregnancy (art. 3)³⁷; and the Law on Bio-medically Assisted Reproduction (art. 9)³⁸

Regarding administrative procedures (such as issuing a passport), again, a person with restricted legal capacity cannot submit a request on his/her own. Instead, that can only be done by his/her parent/legal representative or guardian (art. 29 Law on Travel Documents for Citizens of North Macedonia).³⁹

A testament can be drawn up by any person capable of reasoning who has reached the age of 15. The will is void if the testator was under 15 years of age or was incapable of reasoning at the time of its creation (art. 62, par. 1 and 2 Law on Inheritance). A loss of judgment that would have occurred since the will was made does not affect its validity. Consequently to the above-mentioned, a person who has been partially deprived of his/her legal capacity can write his/her own testament, because he/she is equated to a minor who has reached the age of 15, but the person who has been completely deprived of his/her legal capacity cannot write his/her own testament. This is only if one follows the definition for limitation of legal capacity stipulated in the Law on Family (art.162 and 168), and not if one follows the definition of legal capacity stipulated in the Law on Obligations (art. 45).

The limitation of legal capacity cannot have a retroactive effect. It produces effect only for the future actions. If the person undertook legal deeds while not being capable of making reasonable judgments and prior to the limitation of their legal capacity, if proven, they could be annulled or considered void. For instance, the Law on Inheritance (art. 62, par. 3) stipulates that a loss of judgment that would have occurred after the will was made, does not affect its validity. However, if it is proven that the person was not capable of making judgments at the time of the legal deed (in particular, when making the will), the legal deed will be void.

The Court is obliged to determine that the person against whom the procedure for removal of legal capacity has been initiated, should be examined by at least two doctors, one of whom must be a specialist in nervous and mental diseases. The examination must be performed in the presence of the judge, except when the examination is performed in a stationary health facility. The review

³⁵ Закон за заштита на правата на пациентите, основен текст *Службен весник на РМ* 82/08. Пречистен текст - <https://zdravstvo.gov.mk/wp-content/uploads/2018/01/ZAKON-ZA-ZASHTITA-NA-PRAVATA-NA-PATSIENTITE-zakluchno-so-br.-150-od-2015.pdf>.

³⁶ Закон за ментално здравје, основен текст *Службен весник на РМ* 71/07, пречистен текст - <https://zdravstvo.gov.mk/wp-content/uploads/2018/01/ZAKON-ZA-MENTALNO-ZDRAVJE-zakluchno-so-br.-150-od-2015.pdf>.

³⁷ Закон за прекинување на бременоста, *Службен весник на Република Македонија* бр. 101/19.

³⁸ Закон за биомедицинско потпомогнато оплодување, основен текст *Службен весник на РМ* 37/08, пречистен текст - <https://zdravstvo.gov.mk/wp-content/uploads/2015/10/0-ZAKON-ZA-BIOMEDITITSINSKO-POTPOMOGNATO-OPLODUVAN-E.pdf>.

³⁹ Закон за патните исправи за државјани на Република Македонија, *Службен весник на РМ* бр. 73/04. Пречистен текст - <https://ldbis.pravda.gov.mk/PregledNaZakon.aspx?id=9084>.

performed without the presence of a judge represents a substantial violation of the provisions of the Law on Non-contentious Procedure. The Court may order the concerned person to be detained in a public health institution for mental illnesses, in a timely manner (no longer than three months), if this is necessary to determine his mental state, except in cases when due to such retention, there would be harmful consequences to his/her health. The proposer, the person against whom the procedure has been initiated and his temporary representative, i.e. the guardian, can file an appeal against that decision. The appeal does not postpone the execution of the decision. The Court is obliged to hear all persons who can provide information about the life and behaviour of the concerned person, and if necessary, it can also obtain data about those facts from other authorities and organizations. Finally, the Court will question the person against whom a procedure for removal of legal capacity has been conducted, for all the facts essential for reaching a decision, if this is possible and if it does not have a harmful effect on his/her health (art. 36-47 Law on Non-contentious procedure).

It seems that *mental capacity* is associated (or at least closely related) with *legal capacity*. If it is officially concluded that the mental capacity is lacking fully or partially, the Court will issue a decision for limitation or deprivation of legal capacity. Nevertheless, if there is lack of full mental capacity and a person is not officially restricted/deprived of legal capacity, it may affect legal actions because they may become null if challenged in the future.⁴⁰ A person deprived of legal capacity cannot conclude a contract, apart from daily routine contracts of a smaller value (ar. 47-a Law on Obligations). A minor with restricted legal capacity can conclude only those contracts that are allowed by law, while an adult with restricted legal capacity can only conclude contracts that are not explicitly forbidden in the Court's decision. Other contracts concluded by persons with restricted legal capacity without approval from the legal representative may become void unless the legal representative does not approve them additionally (art. 48 Law on Obligations).

In relation to contracts involving property or other agreements, it is permissible to initiate legal proceedings to demonstrate that an individual who, at the time of entering into the contract, did not have limited legal capacity, but was actually incapable of rational judgment. As a widely accepted legal principle, this argument can be employed in Court proceedings to render the contract void.

A case from 2018 in front of the Supreme Court⁴¹ tackled the deteriorated mental capacity when concluding a Donation Contract (Gift Agreement) without prior decision for deprivation of legal capacity. It was concluded that lower Courts decided rightfully when they annulled the Contract due to lack of/non-existence of mental (therefore, legal) capacity to fully comprehend the meaning, rights and responsibilities (art. 45 b, par 1, 47a, par 1 and 2 and art. 101 and 102 Law on Obligations).

Another case from 2019 in front of the Court of Appeal (Court of Second Instance)⁴² opens a discussion about the scope of legal deeds a person with limited legal capacity can undertake in comparison to a person with deprived legal capacity under the current legal framework. The case regarding a woman with serious medical conditions who concluded a Life-Care Contract/Agreement for life-long support/maintenance, while her legal capacity was never challenged in front of the Court. After her death, the validity of the Contract was questioned by her heirs who claimed that she was not capable of reasoning at the time of signing the Contract.

⁴⁰ See for instance the case elaborated below Апелационен Суд Скопје, ГЖ – 2216/18, Решение од 24.1.2019, as well as the case Врховен Суд на Република Северна Македонија, Пресуда, Рев.2.бр.206/2018.

⁴¹ Врховен Суд на Република Северна Македонија, Пресуда, Рев.2.бр.206/2018.

⁴² Апелационен Суд Скопје, ГЖ – 2216/18, Решение од 24.1.2019.

Accordingly, they asked for annulment of the Contract. The Basic Court (Court of First Instance) annulled the Contract following an expert (medical) opinion leading to the conclusion that she had restricted mental (accordingly, legal) capacity at the time when she signed the Contract. The Court of Appeal decided that the Basic Court should decide on the matter again, having more clear facts about her mental capacity to participate in the legal sphere and dispose of her property in a situation when her legal capacity was not officially challenged but was assessed as limited by an expert opinion. The Basic Court should explain the scope of legal deeds a person with restricted legal capacity can enter into and the difference between the same scope in case of complete loss of mental capacity (deprivation of legal capacity).

Regarding abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions, the country lost a case in front of the ECtHR that was about a mentally ill child from parents with mental disability.⁴³ The child was abandoned at birth and at his grandmother's request the child was placed in an orphanage while the Centre was appointed as a guardian. Soon after the child was diagnosed with both mental and physical disabilities and was accommodated in a Rehabilitation institute (State-run Institution) that was not suitable to his conditions. Following an Ombudsman visit, he was found tied to his bed, while the Ombudsman recorded inhumane and degrading treatment. The Helsinki Committee for Human Rights in Skopje took over the case after the Ombudsman's public presentation initiating criminal complaints on behalf of the applicant. Since the domestic proceedings were not efficiently protecting the rights of the child, the case was filed before the ECtHR. The admission was contested by the Government on reasons that the Helsinki Committee should not have had legitimation to act on behalf of the child and that all national remedies were not exhausted. However, the ECtHR considered the application admissible. In the Judgment, the Court recognized an infringement of article 3 on account of an inappropriate placement of the applicant in the Rehabilitation Institute and lack of requisite care provided that resulted with inhumane and degrading treatment. The Court also found violation of article 3 (procedural obligation - investigation) because the authorities failed to hold a proper inquiry into the case. The Court found it particularly striking that the guardian and the other authorities were aware that the institute could not cater for the child's needs, yet nothing was done. Instead, the placement continued for a considerable period. The Government had provided no explanation for the authorities' failure to react in a prompt, concrete and appropriate manner. The Special Reporter noted that domestic legislation allows forced interventions and further on stated that "Forced interventions, often wrongfully justified by theories of incapacity and therapeutic necessity inconsistent with the Convention on the Rights of Persons with Disabilities, are legitimized under national laws, and may enjoy wide public support as being in the alleged 'best interest' of the person concerned. Nevertheless, to the extent that they inflict severe pain and suffering, they violate the absolute prohibition of torture and cruel, inhumane and degrading treatment (A/63/175, paras. 38, 40, 41). Concerns about the autonomy and dignity of persons with disabilities lead the Special Rapporteur to urge revision of domestic legislation allowing for forced interventions".⁴⁴ Despite many critics that the country received because of this case, it seems like it has not done much to avoid further repetitions.

A case against Serbia in front of the ECtHR⁴⁵ initiated legal changes in the country including a provision that in maximum of three years the Court has to check if the reasons for removal of the legal capacity has ceased to exist. Especially important recent novelty in the Serbian legal system

⁴³ *L.R. v. North Macedonia*, ECtHR, Application No. 38067/15, Judgment of 23 January, 2020.

⁴⁴ *Ibid.* par. 46.

⁴⁵ *Salontaji-Drobnjak v. Serbia*, ECtHR, Application No. 36500/05.

is that now the Court has to define legal operations which this person can undertake by him/herself when deciding on partial removal of legal capacity. Similar changes must be introduced in the Macedonian legal system as a minimum starting point for further and more profound reforms in order for the legal system to recognize and upgrade the position of persons with disabilities.

Regarding case-law, Judge Lidija Dimova has given reflections on matters that have to be improved in the national legal system in order to align with at least international treaties that the country has ratified.⁴⁶ According to her, without legal capacity, a person cannot manage its own life, accordingly a person loses control over one's own life. The person's right to decide about his/her life is a basic human life. Deprivation of this right is against personal integrity and dignity. Therefore, she urges that the national legal system recognizes the need to uplift the position of persons with disabilities in order not only to be able to make decisions about themselves but also to have the support they need to accomplish these rights.

III. THE CONCEPT OF LEGAL CAPACITY AND THE PROCEDURE FOR DEPRIVATION AND RESTORATION OF LEGAL CAPACITY – MOVING TOWARDS *DE LEGE FERENDA*

The undertaken activities mentioned in the State Reply to the CRPD Committee are projects based.⁴⁷ There is no national targeted strategy to raise awareness about people with disability in all their diversity. A recent study found that the medical model of perceiving disability prevails in the country: 30% of citizens believe that the barriers should be removed, 44% state that citizens with disabilities need medical care and services, while 25% think that citizens with disabilities should be included in society as much as possible.⁴⁸ Citizens with disabilities have some basic knowledge on the rights set forth in the Convention. Only 45.6% of citizens with disability stated that they know about CRPD, and 54,4% do not know,⁴⁹ in comparison with the citizens without disabilities where 36 % of the general public said they have heard about CRPD, while 67% they have not.⁵⁰

The Summary Report of the State Responses to the Questions related to the initial Report of the Republic of Macedonia in the implementation of the Convention on the Rights of Persons with Disability locates many problems.⁵¹ The concept of disability itself is translated literally as "invalidity". There is variety and mixture of outdated terms in the legislation. The existing definitions reflect the medical paradigm of disability and do not correspond with the principles of dignity, non-discrimination, and equality. According to the Summary Report, the Law on Family is an obvious example of discrimination and human rights abuse against persons with intellectual disability concerning the right to marriage. Additionally, the same Law, considering the right to adoption is discriminatory against persons with disability. Namely, within the listed negative criteria that exclude a person to be eligible for adopting a child is physical disability of such a

⁴⁶ Димова Л., *Деловна способност, поим и значење, одземање и враќање*, Академија за судии и јавни обвинители „Павен Шатов“, 13.2.2020 - <https://old.jpacademy.gov.mk/wp56/wp-content/uploads/2020/02/odzemanje-na-delovna-sposobnost.pdf>.

⁴⁷ Replies to the list of issues in relation to the initial report of Republic of Macedonia after the CRPD. Available at: https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/MKD/INT_CRPD_RLI_MKD_31772_E.docx

⁴⁸ UNICEF, *Knowledge attitudes and practices toward children with disabilities*, Available at: <https://www.unicef.org/tfymacedonia/UnicefDisabilitiesInfographsMK.pdf>.

⁴⁹ “Knowing my rights”, Polio Plus.

⁵⁰ *Ibid.*

⁵¹ *Op. cit. Summary Report*, 2018.

degree that it can reasonably be doubted that they are able to care for a child.⁵² Another located problem in the Summary Report is in the field of labour rights. Article 6 of the Law on Labour Relations explicitly prohibits discrimination in general but does not provide instruction on discrimination and does not prohibit any discriminatory advertisements or statements on the grounds of disability (art. 24, par. 2).⁵³ These provisions are being derogated with the provisions of the Law on Civil Servants, whereby general health capability is stated as prerequisite for employment. The same provisions can also be found in the Law on Courts (art. 45 par. 1 point 3), the Law on the Police (art. 95) and other laws.⁵⁴ This law is abounding with numerous terminologies for disability. The Law on Employment of Invalid persons needs to reflect the social model of understanding disability⁵⁵ and implement new affirmative measures that could lead from closed “sheltered” employment to employment in the open labour market and supported employment. The State needs to repeal the “school example” of systematic discrimination in the form of harassment, based on the law. The provision in article 4 paragraph 5 foresees that “[a]n invalid person may be an employer or carry out the duties of a responsible person at the employer, if the person receives a positive opinion from the Commission at the Ministry of Labour and Social Policies ...”. Such defined provision that requires obtaining an opinion on the ability of the persons with disabilities performing managerial functions is discriminatory.⁵⁶ There is no data related to disability or statistics for active, employed and unemployed persons with disability.⁵⁷ The Concluding observations of the Committee on the Rights of Persons with Disabilities⁵⁸ acknowledged and further criticized several recognized drawbacks in the Summary Report itself: (a)The lack of harmonization of national legislation, policy and programmes with the Convention, and the persistence of the medical model of disability; (b)The use of different disability assessments and definitions in the legal framework of the State party that are not in line with the human rights-based model of disability; (c)The absence of clear plans, timelines or budgets to ensure the progressive implementation of the rights of persons with disabilities in consultation with the organizations of persons with disabilities. On a general level, the Committee recommended that the State party should: (a)Review and ensure harmonization of its legislation and policies with the Convention; (b) Remove from its legislation programmes, plans and policies derogatory terms relating to disability and ensure respect for the dignity of all persons with disabilities; (c)Ensure that the disability assessment method fully incorporates the human rights-based approach to disability and takes the human rights approach. The most urgent and fundamental issues that have to be resolved in order to harmonize the national legal system with fundamental values regard several fields related to several articles of the CRPD, as elaborated below.

⁵² *Ibid.* pg. 14.

⁵³ Kochoska E. and others, *Analysis of the situation of people with physical disabilities in the Republic of Macedonia*, Helsinki Committee of Human Rights in North Macedonia, 2017.

⁵⁴ Poposka Z, Kadriu B. Kocevaska L, Kochoska E, *Analysis of the discriminatory practices in the field of work and employment*.

⁵⁵ Poposka Z, “Analysis of harmonization of domestic legislation”, OSCE and CPAD. Available at: http://www.kzd.mk/sites/default/files/dokumenti/publikacii/2015_analiza_za_harmonizacija_dom_zakon.pdf

⁵⁶ Poposka Z, Kadriu B. Kocevaska L, Kochoska E, “Analysis of the discriminatory practices in the field of work and employment”.

⁵⁷ *Op. cit. Summary Report* pg. 19.

⁵⁸ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of the Former Yugoslav Republic of Macedonia*, 29. Oct. 2018.

Regarding women with disabilities (art. 6), the Committee recognizes that national gender policies and programmes do not include a disability perspective, that disability is not mainstreamed in gender policies and that there is lack of specific measures to protect women and girls with disabilities, especially those with psychosocial or intellectual disabilities from gender-based violence.⁵⁹

Regarding equal recognition before the law (art. 12), the Committee is concerned that the laws in the State party, especially the existing guardianship system, negate or restrict the legal capacity of persons with disabilities, limiting their right to decision-making and the right to choice. Therefore, the Committee recommends that the country should: (a) Repeal all discriminatory provisions that permit deprivation of legal capacity based on impairment and replace them with supported decision-making mechanisms that respect the autonomy, will and preferences of the person concerned and (b) Conduct capacity-building activities for public officials on the right to equal recognition before the law of persons with disabilities and supported decision-making arrangements.⁶⁰

Regarding protecting the integrity of the person (art. 17), the Committee has concerns that a legal guardian can authorize medical interventions, including abortion and sterilization, without free and informed consent of the person with disabilities. It therefore urges the country to adopt effective measures to ensure respect for the right to persons with disabilities to provide their free and informed consent prior to medical treatment, including sterilization and abortion, and to provide efficient support mechanisms for decision-making in the State party.

Regarding living independently and being included in the community (art. 19), the Committee has concerns because there is a weakness in the deinstitutionalization process and the emphasis placed on the resettlement of persons with disabilities in small group homes instead of independent living arrangements and absence of services and provision of personal assistance to promote independent living of persons with disabilities. The Committee also has concerns because the personal assistance pilot programme is discriminatory on the basis of age.⁶¹

Regarding respect for home and family (art. 23), the Committee has concerns about the legal provisions in the Law on Family that discriminate against persons with psychosocial or intellectual disabilities with regards to the right to marry and form a family. The Committee is further concerned about the provision in that Law that requires persons with psychosocial or intellectual disabilities to be certified as “knowledgeable and understanding”. In this sense, the Committee recommends that the State party should: (a) Review the Law on Family to ensure that persons with disabilities can exercise their rights relating to marriage, family, parenthood and relationships on an equal basis with others and on the basis of their free and informed consent and (b) Adopt measures to promote adequate training of judicial and social workers and legal protection to ensure that persons with disabilities are not discriminated against during legal and administrative proceedings concerning their sexual and reproductive rights, the right to create a family and legal custody of their children.⁶²

Regarding health (art. 25) the Committee recommends that the State party should: (a) Include disability as a ground for discrimination in the Law on Protection of Patient Rights; (b) Remove age constraints to accessing free health care and treatment as well as any exemptions in the Law on Health Insurance that discriminate against persons with disabilities; (f) Ensure the dissemination

⁵⁹ *Ibid.* pg. 3.

⁶⁰ *Ibid.* pg. 5.

⁶¹ *Ibid.* pg. 7.

⁶² *Ibid.* pg. 8.

of information on sexual and reproductive rights in appropriate formats for all persons with disabilities, the availability of gender and age-sensitive services, and the availability of specialized services for persons with disabilities in all parts of the country.

The provisions for enabling participation of persons with speaking and hearing impairments in Court proceedings are not the same in all laws that refer to Court proceedings, which is an inconsistent approach to this issue. There are no obligations concerning the equalization of the access of persons with disabilities to justice and the institutions of justice. Therefore, the Summary Report for North Macedonia recommends that consideration should be given to the adoption of separate Law on the Rights of Persons with Disabilities that should complement the provisions regarding discrimination and should be *lex specialis* in relation to that law.⁶³ Further Strategy has also to improve the conditions for exercising the right to access to justice and a fair trial of persons with disabilities on an equal basis with other citizens by ensuring accessibility of buildings of judicial authorities. The Strategy also has to recognize the necessity to improve the conditions for concluding marriage/non-marital cohabitation, for making decisions about giving birth as well as for support for parenting of persons with disabilities.

The concept of legal capacity has to change in terms of reconsidering full deprivation of legal capacity so that persons with disability are able to exercise their rights and actively participate in their daily private as well as public life. The situation in North Macedonia resembles the situation in Serbia, to the extent that Serbia at least made a declaration that they will improve the regime of deprivation of legal capacity.⁶⁴ The latest Serbian Strategy includes measures that could guide Macedonian future Strategies. The most important aspect for the further Strategy is to reconsider the concept of full deprivation of legal capacity of persons with disabilities and to initiate a gradual transition to a system of providing support in decision-making. This will create conditions for persons with disabilities to enjoy legal capacity on an equal basis with others in all aspects of life.⁶⁵ Even though the CRPD Committee points out that there is a key difference between legal capacity and mental capacity to make decisions, North Macedonia, even less than Serbia, made efforts to change this. And while legal capacity should be intact because it ensures the realization of rights and freedoms, the assessment of mental capacity should primarily serve as a basis for determining the support that is provided to a person in the enjoyment of legal capacity, as well as that mental capacity must not be used as a justification for denying legal capacity.⁶⁶

IV. CONCLUSION

The best sentence that describes how persons deprived of legal capacity feel in North Macedonia nowadays is written elsewhere at a different time (more than 10 years ago): *Without legal capacity we are non-persons in the eyes of the law and our decisions have no legal force. Third parties make decisions for us. This merger of our personhood into that of someone else's has been described as „civil death“.*⁶⁷ This is how one of the very few studies about the topic in North Macedonia starts.⁶⁸ Ever since, many countries in Europe reformed their systems in a way that the

⁶³ *Ibid.* pg. 10.

⁶⁴ *Op. cit.* Report Serbia for FL-EUR website pg. 10.

⁶⁵ *Ibid.* pg. 13.

⁶⁶ *Ibid.* (CRPD/C/GC/1, para. 13).

⁶⁷ Commissioner for Human Rights, *Who Gets to Decide? Rights to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, Strasbourg, 20 February 2012.

⁶⁸ *Op.cit.* Зороска Камиловска Т., (Zoroska - Kamilovska T.), 2017, pg. 93.

whole system of guardianship became obsolete because the concept of deprivation of legal capacity was considered a threat towards human rights of the concerned person. Accordingly, the concept of substitute decision making for the vulnerable person for purposes of his/her own protection and protection of the public interest switched into concept of supported decision-making. During this transition, the proportion between protection and empowerment of vulnerable adults was questioned. Professor Masha Antokolskaia considers this topic as the most important in the junction between Family Law and Law on Persons, especially if we have in mind that demographically Europe has an aging population and has more adults than children.⁶⁹ In contrast, this topic is underestimated in North Macedonia, while the system of guardianship is still a threat towards human rights, especially political rights, such as the right to vote, labour rights, private and family life rights, especially the right to conclude marriage, make reproductive choices, the right to access to Court etc. Unfortunately, in North Macedonia there are no/very rare debates and discussions on this topic, even though Professor Zoroska- Kamilovska triggered them in the above mentioned study in 2017. According to her, the country has to do better to implement article 12 of the CRPD regarding deprivation of legal capacity of persons with mental disabilities. However, she remains of the opinion that the most rational choice could be found in a combined system: to keep the deprivation of legal capacity and use it only rarely in exceptional cases⁷⁰ and to introduce an alternative support decision-making system for persons with mental disabilities.⁷¹ The arguments are found in that the current system for deprivation and restoration of legal capacity is flexible and in line with the modern standards (in line with Principle 3 – maximum reservation of capacity and Principle 6 – proportionality of the Recommendation (99)4) and the fact that there are still persons with severe mental disabilities which need a guardian.⁷² The parallel system of support should enable possibilities for persons with mental disabilities to make decisions about themselves. Some activities are already taking place in this direction by non-profit organizations in the country.⁷³ Regarding changes in the Law on Non-contentious Procedure in light of the European Court of Human Rights case law,⁷⁴ Zoroska - Kamilovska recommends that: 1. In a procedure for deprivation of legal capacity, the concerned person has to be heard and enabled to express his/her own opinion (even though such possibility is also given nowadays, but largely left upon judges' interpretation if and when a person is capable) and 2. In the Court's decision for partially depriving a person of legal capacity (limitation of legal capacity), a mandatory content has to be the scope of matters that the person cannot undertake alone anymore (nowadays, the Centre does this when appointing a guardian).⁷⁵ These recommendations suggest co-existence of

⁶⁹ See more in the prof. Antokolskaia M.'s speech at the First FL-EUR Conference, *Autonomy and Protection of Adults. Striking the Right Balance*, 11 October, 2021 - https://fl-eur.eu/fl_eur_conferences/first-fl-eur-conference-11-october-2021.

⁷⁰ The author supports this opinion (*ibid.* pg. 109) with the ECtHR's opinion in the case of *Lashin v. Russia*, Application No. 33117/02, Judgment of January 2013, para 80 stating: "*the Court accepts that depriving someone of his legal capacity and maintaining that status may pursue a number of legitimate aims, such as to protect the interests of the person affected by the measure*" while being aware that the Court made step backwards with this decision.

⁷¹ *Ibid.* pg. 105.

⁷² Recommendation (99)4 of the Committee of Ministers of the Council of Europe to Member States on Principles concerning the Legal Protection of Incapable Adults, 23 February, 1999) from 23 February 1999.

⁷³ For more see the web site of Message (IlopaKa): <https://poraka.org.mk/>.

⁷⁴ *Salontaji-Drobnjak v. Serbia*, Application No. 36500/05, Judgment of 13 October 2009; *Shtukaturov v. Russia*, Application No. 44009/05, Judgment of 27 March 2008; *Sykora v. Czech Republic*, Application No. 23419/07, Judgment of 22 November 2012, final 22.2.2013; *D.D. v. Lithuania*, Application No. 13469/06 Judgment of 14 February 2012; *Stanev v. Bulgaria*, Application No. 336769/06, Judgment of 17 January 2012.

⁷⁵ *Op.cit* Zoroska - Kamilovska, 2017 pg. 110 and 111.

both concepts: substituted and supported decision-making (substituted decision-making/representation – as a last resort and subsidiarity as an autonomous decision-making of adults with impairments as long as possible).

However, the author of this text holds an opinion that the general lack of awareness/research about the topic and the drawbacks of the national system, manifest a necessity for a more profound reform. Namely, the whole system has to change on this matter, starting with revisions (abolition) of provisions on full and partial deprivation of legal capacity and introduction of the term ‘limitation of legal capacity’. Maybe a similar solution as in Serbia – introducing the institute ‘limited business capacity’ instead would fit in the Macedonian context too.⁷⁶ From there on, many additional changes have to follow in multiple laws in order to protect human rights of vulnerable adults and to be consistent with the ratified international conventions such as the CRPD (which should nonetheless be a part of the internal legal system).⁷⁷

References:

1. Antokolskaia M.’s speech at the First FL-EUR Conference, *Autonomy and Protection of Adults. Striking the Right Balance*, 11 October, 2021 - https://fl-eur.eu/fl_eur_conferences/first-fl-eur-conference-11-october-2021.
2. Commissioner for Human Rights, *Who Gets to Decide? Rights to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, Strasbourg, 20 February 2012.
3. Kochoska E. and others, *Analysis of the situation of people with physical disabilities in the Republic of Macedonia*, Helsinki Committee of Human Rights in North Macedonia, 2017.
4. Kovaček Stanić G., Samardžić S., *The Empowerment and Protection of Vulnerable Adults Serbia*, (Serbia Report) FL-EUR website - <https://assets.vu.nl/7099fcf9-715f-0061-5726-009a48410fee/d6c155a6-447d-4289-aaef-586e3f860b4c/Serbia.pdf>.
5. Polio Plus, *Knowing my rights*.
6. Poposka Z, *Analysis of harmonization of domestic legislation*, OSCE and CPAD: http://www.kzd.mk/sites/default/files/dokumenti/publikacii/2015_analiza_za_harmonizacija_dom_zakon.pdf.
7. Poposka Z, Kadriu B. Kocevaska L, Kochoska E, *Analysis of the discriminatory practices in the field of work and employment*.
8. Димова Л., Деловна способност, поим и значење, одземање и враќање, Академија за судии и јавни обвинители „Павен Шатов“, 13.2.2020 - <https://old.jpacademy.gov.mk/wp56/wp-content/uploads/2020/02/odzemanje-na-delovna-sposobnost.pdf>.
9. Зороска - Камиловска, Т., *Одземање и враќање на деловната способност*, Универзитет „Св. Кирил и Методиј“ Правен факултет „Јустинијан Први“, Годишник на Правниот факултет „Јустинијан Први“ во Скопје во чест на проф.д-р Марјан Марјановски.
10. Камбовски И., *Застапување во граѓанското и трговското право*, Стобитрејд, 2015.
11. Хелсиншки комитет, *Потврдена е директна дискриминација врз лицата со попреченост при остварување на нивното право на глас од страна на Владата и Државната изборна комисија*, декември 20, 2023 - <https://mhc.org.mk/news/potvrdena-e-direktnata-diskriminacija-vrz-licata-so>

⁷⁶ *Op.cit.* FL-EUR Serbia, pg. 14.

⁷⁷ Art. 118 of the Constitution – “Ratified International Treaties are part of the internal legal system and cannot be changed by laws“.

[poprechenost-pri-ostvaruvanje-na-nivnoto-pravo-na-glas-od-strana-na-vladata-i-drzhavnata-izborna-komisija/](#).

12. Дјералдин Скалион Консалтинг и Шила Роџерс, *Прирачник за заштита од дискриминација (примери на добра пракса за примена на принципот на еднаков третман и недискриминација во Европската Унија)*, 2010 - https://www.mtsp.gov.mk/WBStorage/Files/priracnik_antidiskriminacija.pdf.

Reports and Strategies:

1. Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of the Former Yugoslav Republic of Macedonia*, 29. Oct. 2018.
2. Informal coalition and group of authors, *Summary Report of the State Responses to the Questions related to the initial Report of the Republic of Macedonia in the implementation of the Convention on the Rights of Persons with Disability*, July 2018.
3. *National Strategy for Prevention and Protection from Family Violence 2012 – 2015* - http://mtsp.gov.mk/WBStorage/Files/nasilstvo_strategija_mkd.pdf
4. *Replies to the list of issues in relation to the initial report of Republic of Macedonia after the* CRPD https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/MKD/INT_CRPD_RL_I_MKD_31772_E.docx.
5. *Summary Report (Summary Report) of the State Responses to the Questions related to the initial Report of the Republic of Macedonia in the implementation of the Convention on the Rights of Persons with Disability*, July 2018 - <https://www.ohchr.org/en/treaty-bodies/crpd>.
6. UNICEF, *Knowledge attitudes and practices toward children with disabilities*, UNICEF-<https://www.unicef.org/tfymacedonia/UnicefDisabilitiesInfographsMK.pdf>
7. Акциски план за спроведување на Конвенцијата на Советот на Европа за спречување на борба со насилство спрема жените и семејното насилство 2018-2023.
8. Балшиќевска М., Аврамоска Нушкова А., *Извештај за напредокот на РСМ при спроведување на Националниот Акциски План за имплементација на Истамбулската конвенција октомври 2018 – октомври 2020*, Национална мрежа против насилство врз жени и семејно насилство, 2002.
9. Влада на РСМ, *Национална стратегија за правата на лицата со попреченост 2023-2030 со акциски план 2023-2026*, Скопје, март, 2023.
10. Државен завод за статистика 2022 http://makstat.stat.gov.mk/PXWeb/pxweb/mk/MakStat/MakStat_Popisi_Popis2021_NaselenieVkupno_Naselenie_Poprecenost/T1053P21.px/table/tableViewLayout2/?rxid=a812e800-ecc2-45cf-b8ca-5cfe3d2208e5
11. Државен завод за статистика, *Анкета за приходи и услови за живеење за 2017 г.*, Статистички преглед број 2.4.18.13/905 - <http://www.stat.gov.mk/Publikacii/2.4.18.13.pdf>
12. *Концепција за инклузивно образование* достапна на: [Konceptija za inkluzivno.pdf \(mon.gov.mk\)](#)
13. Министерство за труд и социјална политика на Република Македонија, *Национална стратегија за стари лица 2010-2020*, јуни, 2010.

14. Стратегија за деинституционализација Тимјаник
http://www.mtsp.gov.mk/content/pdf/strategii/Strategii%202018/Strategija_deinstitutionalizacija_Timjanik_2018-2027.pdf.

National regulation:

1. Закон за биомедицинско потпомогнато оплодување, основен текст *Службен весник на РМ* 37/08, пречистен текст - <https://zdravstvo.gov.mk/wp-content/uploads/2015/10/0-ZAKON-ZA-BIOMEDITSINSKO-POTPOMOGNATO-OPLODUVAN-E.pdf>.
2. Закон за вонпарнична постапка, *Службен весник на Република Македонија* 79/2005, (пречистен текст) 09/2008 - https://jpacademy.gov.mk/wp-content/uploads/2022/08/zakon_za_vonparicna_postapka.pdf.
3. Закон за заштита на децата, *Службен весник на РСМ*, 23/2013.
4. Закон за заштита на правата на пациентите, основен текст *Службен весник на РМ* 82/08. Пречистен текст - <https://zdravstvo.gov.mk/wp-content/uploads/2018/01/ZAKON-ZA-ZASHTITA-NA-PRAVATA-NA-PATSIENTITE-zakluchno-so-br.-150-od-2015.pdf>.
5. Закон за ментално здравје, основен текст *Службен весник на РМ* 71/07, пречистен текст - <https://zdravstvo.gov.mk/wp-content/uploads/2018/01/ZAKON-ZA-MENTALNO-ZDRAVJE-zakluchno-so-br.-150-od-2015.pdf>.
6. Закон за облигационите односи *Службен весник на РМ* основен текст бр. 18/2001 пречистен текст - <https://aso.mk/wp-content/uploads/2019/04/Zakon-za-obligacii.pdf>.
7. Закон за општата управна постапка, *Службен весник на Република Македонија* 124/2015.
8. Закон за основно образование *Службен весник на РСМ* бр. 08-4389/1 од 30 јули 2019 година.
9. Закон за парничната постапка, *Службен весник на Република Македонија* 79/2005, (пречистен текст) 07/2011.
10. Закон за патните исправи за државјани на Република Македонија, *Службен весник на РМ* бр. 73/04. Пречистен текст - <https://ldbis.pravda.gov.mk/PregledNaZakon.aspx?id=9084>.
11. Закон за превенција, спречување и заштита од семејно насилство - <http://www.mtsp.gov.mk/content/pdf/zakoni/Zakon%20za%20prevencija%20semejno.pdf>
12. Закон за прекинување на бременоста, *Службен весник на Република Македонија* бр. 101/19.
13. Закон за семејството, *Службен весник на Република Македонија* 80/1992 - консолидиран текст.
14. Закон за социјална заштита, *Службен весник на РСМ*, 104/2019.
15. Закон за спречување и заштита од дискриминација *Службен весник на РСМ*, 258/2020.
16. Устав на Република Македонија, *Службен весник на Република Македонија* 52/2991 – пречистен текст до последни амандмани и објава во *Службен весник на Република Македонија* 36/2-19.

Одлуки пред домашните судови и пред ЕСЧП

1. *D.D. v. Lithuania*, Application No. 13469/06 Judgment of 14 February 2012.
2. *L.R. v. North Macedonia*, ECtHR, Application No. 38067/15, Judgment of 23 January, 2020.
3. *Salontaji-Drobnjak v. Serbia*, Application No. 36500/05, Judgment of 13 October 2009.
4. *Salontaji-Drobnjak v. Serbia*, ECtHR, Application No. 36500/05.
5. *Shtukurov v. Russia*, Application No. 44009/05, Judgment of 27 March 2008.
6. *Stanev v. Bulgaria*, Application No. 336769/06, Judgment of 17 January 2012.
7. *Sykora v. Czech Republic*, Application No. 23419/07, Judgment of 22 November 2012, final 22.2.2013.
8. Апелационен Суд Скопје, ГЖ – 2216/18, Решение од 24.1.2019.
9. Врховен Суд на Република Северна Македонија, Пресуда, Рев.2.бр.206/2018.