



PERSON

Albania Country Report
on Legal Capacity
June 2016

COUNTRY REPORT
DEPRIVATION OF THE CAPACITY TO ACT IN ALBANIA

A publication of the Albanian Disability Rights Foundation

For more information, please contact:

Albanian Disability Rights Foundation (ADRF)

Rr. “Bogdani” (ish-A.Z.Çajupi) pall. 15 kat i III (3) Tirana, Albania.

Tel/Fax +3554269426

www.adrf.org.al

E-mail: adrf@albmail.com

This document has been produced with the financial assistance of the European Union. The contents of this document are the sole responsibility of PERSON (Partnership to Ensure Reforms of Supports in Other Nations) and can under no circumstances be regarded as reflecting the position of the European Union.

Table of Contents

Acronyms	3
LIST of figures.....	4
EXECUTIVE SUMMARY.....	5
Introduction.....	7
METHODOLOGY	12
CHAPTER I. INTERNATIONAL LAW FRAMEWORK.....	13
1.1 Convention on the Rights of Persons with Disabilities (CRPD).....	13
1.2 General Comment, Number 1 (2014).....	15
CHAPTER II. National Legislation	17
1.1 Codes and capacity to act	17
1.2 Law on Inclusion and Accessibility of Persons with Disabilities	19
1.3 Law on Mental Health.....	21
1.4 Criminal Code.....	22
1.5 Criminal Procedure Code	23
CHAPTER III. FINDINGS FROM MONITORING OF COURT PRACTICE.....	26
CONCLUSIONS AND RECOMMENDATIONS	37
ANNEX: I.....	40

Acronyms

CEDAW	Convention for the Elimination of all forms of Discrimination against Women
UDHR	Universal Declaration of Human rights
ECHR	European Court of Human Rights
CRPD	Convention on the rights of Persons with disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
LAC	Legal aid commission
KMCAP	Medical commission for establishing the ability to work
KML	medical and legal commission
ICCPR	International Convention on Civil and Political rights
NGO	not for profit organization

LIST of figures

Figure 1 the relationship of the applicant with the person for whom deprivation/restriction of the capacity to act is required

Figure 2 Age of Applicants

Figure 3 Legal representation

Figure 4 Legal representation

Figure 5 Gender of the person whose capacity to act is sought to be deprived/restricted

Figure 6 Age of the person whose capacity to act is sought to be deprived/restricted

Figure 7 The relationship of the person whose capacity to act is sought to be deprived/restricted with the applicant

Figure 8 Court fees

Figure 9 Number of held court sessions

Figure 10 Duration of court proceedings

EXECUTIVE SUMMARY

This report provides an overview of the concept of equal recognition before the law of persons with disabilities in Albania. In order to contextualize the issue, international and national legal documents related to human rights and rights of persons with disabilities are reviewed. Court monitoring of the key aspects and procedures for full deprivation or restriction of capacity to act of persons with disabilities (an essential part of equal recognition before the law) highlights the main issues and inconsistencies with the Convention on the Rights of Persons with Disabilities (CRPD). As a conclusion several generic recommendations for aligning national with international legislation are provided. The report was drafted focusing on persons with intellectual and psychosocial disabilities who represent the largest group experiencing the removal of their legal capacity to act.

Article 12 of CRPD recognizes that persons with disabilities enjoy legal capacity on equal basis with others in all aspects of life, and recognizes not just their capacity to enjoy rights, but also their capacity to exercise these rights. This right underpins enjoyment of all other rights in the CRPD and is derived from the most basic individual human right; a right to self-determination. Deprivation of the capacity to act of persons with disabilities and their placement under guardianship is deemed to be a violation of human rights. Sometimes the term “civil death” can be used as to describe the nature of such a violation. Placing a person under guardianship is unfair and unnecessary.¹ In lieu of deprivation of legal capacity there are different alternatives that may support persons with disabilities in their day to day decision-making and actions. However, assistance in decision making, when required by persons with disabilities, should never be a basis for imposing deprivation of legal capacity. The concept of deprivation of legal capacity based on disability must be abolished in order to ensure full enjoyment of individual human rights for people with disabilities.²

This report points to the fact that Albanian legislation is not consistent with the CRPD. In addition, Albanian legislation runs against the standards and decisions of the European Convention on Human Rights (ECHR). However, it should also be noted that even the European Court of Human Rights (ECtHR) does not follow the CRPD standards in recognizing the legal implications of Article 12. Although mentioning Article 12 CRPD as a relevant source of international law when it comes to legal capacity of persons with disabilities, the ECtHR has not yet fully applied the CRPD standards. Until the ECtHR adopts the higher standard demanded by the CRPD, there may be a period of confusion for Albania as a state party to both Conventions on how to address the conflicting issues between two equally relevant sources of international law.

In addition to discrepancies with international standards, problems were identified with the enforcement of the legislation per se. A person with disabilities, who is deprived of capacity to

¹ <https://openaccess.leidenuniv.nl/handle/1887/33834>

² <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

act is not adequately and fully involved in the process in Albania, although the legislation provides for the person's participation in court hearings. The process is led entirely by a medical approach which does not have effective instruments to determine the support required by a person in all areas of life, and consequently to decide about one's ability to exercise legal capacity with support.

The key actors in the process of deprivation of legal capacity include prosecutors, social service staff at the local government units, physicians, and other experts while the person concerned often times is excluded from the process. The processes for deprivation of legal capacity do not meet the international standards on the right to a fair trial in Albania. Not only are the key actors assigned by law passive in these proceedings, there also is no available legal assistance to persons concerned. The costs of proceedings often place these persons in the unfavourable position of being unable to provide an adequate defence against denials of capacity, in effect rendering judicial proceedings quite often arbitrary and in effect rubber stamping medical decisions. The professionals, especially the judiciary, who are part of the process are not informed about the recent international law developments, the CRPD or the rulings of the European Court of Human Rights (ECHR).³

Undoubtedly, based on the complexity of the principle of equal recognition before the law of persons with intellectual and psychosocial disabilities, it is necessary to have a multi-dimensional reform in Albania, starting with amendments to the main legislation in the country. It is important for society and the state to re-think relationships with the persons with intellectual and psychosocial disabilities, and their approach towards them, and provide access to communication and support for them. In any case, it should be taken into account that protection should not involve a restriction of rights. Personal freedom and right to self-determination, making one's own decisions and living independently in the community are the main requirements to fulfil international standards when it comes to equality before the law.

³ Source: interviews with professional lawyers.

Introduction

The main objectives of this report include:

- Provision of an overview about the concept of equal recognition before the law of persons with disabilities, in the spirit of the CPRD and other legal international standards when appropriate;
- Description of the situation of equal recognition before the law in Albania, aspects and procedures for full or partial deprivation of legal capacity to act of persons with disabilities and identification of lack of compliance with the CRPD standards;
- Identification of needs for intervention in formulating CRPD compliant legislation and leading future reforms.

The methodology used for achieving the objectives was both qualitative and quantitative. For the purpose of this report, documents that include concepts of equality before the law, legal capacity and the capacity to act were reviewed; as were key documents related to human rights and the rights of persons with disabilities, and the main legislation in Albania that includes the key provisions in these areas. In addition, the court practice for deprivation of the capacity to act was monitored. As a conclusion several general recommendations are provided to ensure alignment of the national framework with international obligations.

The concept of legal capacity to act and its deprivation on grounds of disability goes back to the times of Ancient Rome.⁴ Mental health status could be given as a cause for restriction of legal capacity to act. The main reasons behind this situation were related to tender age, lack of experience and potential carelessness, as well as to mental health problems as a result of a disease.

The Universal Declaration of Human Rights and the International Convention on Civil and Political Rights includes the term ‘legal personality’, mainly with reference to legal capacity, i.e. the right to have rights and obligations, while bypassing and failing to address legal capacity to act, i.e. exercise of universally acknowledged human rights and obligations. Now, the CRPD includes these two concepts within the concept of legal capacity, and not separately as in the two above mentioned documents.

A key principle of the liberal-democratic philosophy is that the state plays a primary role in the preservation of autonomy and rights of the individuals to make choices and decisions regarding their personal lives, such as where to live, what education to have, what health interventions to make or not, or decisions related to property or income. Despite this fact, persons with intellectual disabilities and psychosocial disabilities are faced with considerable restrictions in terms of decision-making. Often they are perceived as persons who are not capable of managing their lives, as persons that need to “be adjusted” or “protected”, in other words as

⁴ Analytical paper: Does the law on mental capacity recognize the legal capacity? Wayne Martin, Matt Burch, Essex Autonomy Project (EAP) 2014
<http://autonomy.essex.ac.uk/wp-content/uploads/2014/06/3.-Briefing-Paper-Three-FINAL.pdf>

persons that cannot make their own decisions. Many of them are even physically isolated, and excluded from social and economic life, and are consequently left with no choices to develop a vision, or to take charge of their lives⁵. Services for these people are often based on charity. Whereas models of social protection are based on the assumption that due to the fact that these people need support and care, other people should take decisions on their behalf. Often, service providers ask for guardianship, so that they can take decisions and manage decision-making, different activities and health care for these persons. This trend to restrict decision-making is obvious also among older persons. With growing age, and reduced functionality, family members and service providers restrict the area of decision-making for these persons, which is often connected with the desire of families to manage the property of older persons or persons with disabilities⁶. This restriction is often not official, as well as official, by placing someone in guardianship. Recently, there is growing criticism about this form of decision-making, i.e. decisions being taken by the legal guardian⁷. Deprivation and/or restriction of legal capacity has been subject to criticism by persons with disabilities, activists, organizations and most importantly the highest political body in the global arena – the United Nations. Not only do they raise doubts about the fact whether deprivation or restriction of legal capacity is the most appropriate approach to address situations which face persons with psychosocial or intellectual disabilities, whereby the persons appear as “incapable” of decision-making⁸, but also the UN CRPD Committee requires States Parties to replace substitute-decision making regimes with the supported decision making models, a very strong, unambiguous statement of the General Comment on Article 12.⁹ This is outlined in detail below.¹⁰ Recent developments, in particular those deriving from the CRPD¹¹ point to a wider acknowledgment of the ability to act of persons with intellectual and psychosocial disabilities.

⁵ Peter Blanck and Jonathan G. Martinis (2015) The right to chose. National resource center for supportive decision-making. Inclusion, March 2015, Vol. 3, Nr. 1, pgs. 24-33.
http://bbi.syr.edu/publications/2015/SDM_Overview.pdf

⁶ Ibid.

⁷ A new paradigm for protection of autonomy and the right to legal capacity to act, Michael Bach and Lana Kerzner, Law Commission of Ontario, 2010
<http://www.lco-cdo.org/disabilities/bach-kerzner.pdf>

⁸ Deliberations: Promoting and protecting the rights of persons with disabilities who are subject to guardianship, Law Commission Ontario. <http://www.lco-cdo.org/en/capacity-guardianship-commissioned-paper-arch-section1>

⁹ Committee on the Rights of Persons with Disabilities, General Comment No.1 – Article 12: Equal Recognition Before the Law (April 2014) UN Doc. No. CRPD/C/GC/1, adopted at the 11th Session.

¹⁰ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

¹¹ Article 12 Equal recognition before the law 1. State Parties reaffirm that persons with disabilities have the right to be recognized everywhere as persons before the law. 2. State Parties admit that persons with disabilities enjoy the capacity the same with the rest of the population in all walks of life. 3. State Parties will take all appropriate measures to ensure persons with disabilities access in terms of support that they may require for the exercise of their legal capacity. 4. State Parties, in line with international legislation about human rights will make sure that all measures related to the exercise of the legal capacity constitute appropriate and efficient standards to prevent abuse. These standards will make it possible for measures related to the exercise of legal capacity to respect the rights, will, and preferences of the person with no conflict of interest and unnecessary influence are proportionate to the circumstances of the person, apply for the briefest period possible and are subject to regular review by the competent, independent and impartial authorities or a panel of judges. The

From ancient times until the 19th century, due to limited medical knowledge, deprivation of the legal capacity to act was initially based on participation in the social life of a person, which meant that his/her behaviour would respect or be in line with religious and moral norms and traditions; that served as the basis for assessing one's ability to act.¹² Furthermore, in many instances individuals were deprived even of their passive capacity (recognition as a holder of rights)¹³. Developments in the 19th century in medicine (in particular in the fields of neurology and psychiatry) determined the upper hand of the medical approach regarding treatment of disability, in the beginning of the 20th century. According to this approach, every person with a neurological or psychiatric diagnosis fell under the category of a person with disabilities. Intellectual and psychosocial disabilities and legal capacity (including the capacity to act) were regarded as medical and legal issues. However, due to the fact that the medical approach cannot address all life circumstances, it has never been fully applied. Furthermore, the impact of particular medical conditions on the cognitive abilities of different persons was not the same. The civil law systems have provided for these circumstances in a general provision, thus leaving a "free hand" to the judges. In rulings, we often find the general formula of "there are no cognitive skills for other reasons" as a justification for denying people of legal capacity.¹⁴ As can be easily deduced from the above mentioned background, the current systems of legal guardianship continue to be based on some outdated definitions regarding equality before the law of persons with disabilities dating from ancient eras.

Equality before the law is being now analysed from a different perspective, and has acquired a new dimension concerning human rights. In addition, the concept of disability has entirely changed in terms of its definition. Consequently, capacity to act, as part of the concept of the equality before the law related to disability (in practice, mainly intellectual disability and mental health) was bound to experience radical changes. Social changes are just as important as progress in the fields of medicine and technology. Advancing the agenda of human rights and fundamental freedoms represents a key element in the change of the approach towards persons with disabilities. The application of the human rights model is doing away with models based on paternalism and medical approaches. Undoubtedly, the Convention on the Rights of Persons with Disabilities is the legal instrument which enshrines the highest principles for the protection of rights of persons with disabilities, and as such is having a strong influence and

standards will be proportional to the measure that does not inflict the rights and interests of the person. (In Arabic, Chinese and Russian, the term "legal capacity" refers to "legal capacity for rights" and to the "legal capacity to act"). 5. In line with the provisions of this article, state parties will take all appropriate and effective measures to ensure equal rights of persons with disabilities to have access to properties, or to inherit properties, to control their financial status, and to have equal access to crediting, mortgage, and other forms of financial crediting and will make sure that persons with disabilities are not deprived of their assets in an arbitrary fashion.

¹² Istvan Hoffman, György Konczi, Legal regulations regarding active and passive legal capacity of persons with intellectual disabilities and persons with mental health problems, from the perspective of CPRD and the reform of the Hungarian Civil Code, 33 Loy. L.A. Int'l & Comp. L. Rev. 143 (2010).

¹³ Passive capacity refers to the legal capacity that is born and dies with the human being, as is clarified in the text. Whereas active legal capacity refers to the legal capacity to act, which could be subject to deprivation or restriction.

¹⁴Ibid.

guiding different reforms worldwide. Challenges regarding its efficient implementation are large and complex, not only due to social and economic conditions of different countries, but also due to different cultures and practices.

The adoption of this Convention requires the Government of Albania to re-think the legal capacity of persons with disabilities, in the light of the principle of non-discrimination and equality before the law and to establish new legislative and practical models to ensure rights of people with disabilities are respected.

Importance

Equal recognition before the law is a key issue, and a pre-requisite for the accomplishment of all rights. Failure to recognize persons with disabilities as persons who are able to exercise legal capacity has legal consequences, and this *inter alia* renders these individuals incapable of engaging in transactions or in a court process, which makes it impossible for them to file a suit and participate on equal footing with others; denies them the right to vote; to get married; to have a job; to perform different actions related to property; engage in contracts for different purposes etc. Depriving people with disabilities of the opportunity to take decisions renders an independent life impossible, since often persons deemed incapable of acting are placed in centres or hospitals at request of their guardians, and do not live in the community. Deprivation of the capacity to act, and placing them automatically under guardianship means removal of the rights in practice, i.e. the inability to exercise fundamental rights.

Placing persons with disabilities under guardianship is now considered a violation of human rights according to the CRPD. Placing these individuals under guardianship is an unfair and unnecessary action, as it presumes that the person is incapable in all areas of life.¹⁵ Instead of deprivation of legal capacity, there are mechanisms that can equally provide for support and protection without restricting fundamental human rights. Instead of assuming that people with disabilities are lacking legal capacity due to the nature of a medical problem, the CRPD paradigm shift recognizes that everyone has the right to exercise legal capacity by virtue of their identity as a human person. In that context, the existence of legal capacity is assumed. Placing a person under legal guardianship is an extreme measure that rather restricts rights, more than it prohibits or prevents the abuse of persons who are placed under the care of a guardian¹⁶.

Article 12 of the CRPD recognizes persons with disabilities as persons before the law, while acknowledging their legal capacity and the capacity to act. Concomitantly, it places the states under the obligation to ensure necessary support for these persons to exercise their legal capacity, and the means for protection in case of abuse. However, replacing regimes of substitute decision-making (full or partial guardianship) with support regimes does not allow for respondent states to continue with deprivations of legal capacity until support regimes are established. The Convention through this Article conveys the message that deprivation of legal

¹⁵For more clarifications, General Comment below.

¹⁶Legal capacity in international law, Lewis, Oliver, Leiden University, 2015
<https://openaccess.leidenuniv.nl/handle/1887/33834>

capacity is no longer an acceptable response for persons with disabilities who display problems in terms of understanding or decision-making. The solution is to offer the support that they need to receive in order to take such decisions, when people desire such support.¹⁷

It must be reiterated that when the CRPD refers in its articles to persons with disabilities, including in particular article 12, it refers to its conceptualisation of disability in Article 1.¹⁸ Article 12 even though not specifically referring to persons with psychosocial and intellectual disabilities includes them in the definition of persons with disabilities and in practice they fall “prey” to the deprivation of the legal capacity to act. Many argue¹⁹ that having psychosocial or intellectual disabilities does not automatically infer that an individual does not have legal capacity to act, since the disability should lead to inability to understand actions and the consequences of these actions before legal capacity is deprived. But, in practice its deprivation occurs mainly in these groups. If the legislation permits that the existence of a form of disability, directly or indirectly is grounds for deprivation of the legal capacity (to act), the legislation runs contrary to Article 12 of the CRPD.²⁰ So, in the meaning used in this Convention, and in particular in the meaning used in this Article, deprivation of legal capacity to act for persons with psychosocial and intellectual disabilities is discrimination in itself.

¹⁷ Ibid.

¹⁸ Persons with disabilities include individuals with physical, mental, intellectual and sensory long term damage which in correlation with different barriers may hamper their full and effective participation in society, like the rest of the society. http://www.qbz.gov.al/botime/fletore_zyrtare/2012/PDF-2012/157-2012.pdf

¹⁹ Legal capacity of persons with intellectual disabilities and mental health problems, FRA – European Union Agency for Fundamental Rights, 2013
<http://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf>

²⁰ Annual Report of UN High Commissioner for Human Rights and reports of the Office of the High Commissioner and Secretary General; Thematic study of the Office of the UN High Commissioner for Human Rights about awareness raising and understanding of CRPD, 2009
<http://www2.ohchr.org/english/issues/disability/docs/A.HRC.10-48.doc>

METHODOLOGY

The methodology used for the formulation of this report is mixed, containing both quantitative and qualitative approaches. Qualitative data is based on the review of the regulatory, legal and policy framework, studies and international research. There has been an assessment and analyses of international, national legislation and current literature. At the national level there was a review of the Civil Code, Family Code, Civil Procedure Code, Law on Inclusion and Accessibility, Mental Health Law, Criminal Code, Criminal Procedure Code, etc.

At the international level there was a review of the CPRD, General Comment of the Committee of the Convention of the Rights of Persons with Disabilities, Convention on Civil and Political Rights, Convention for the Elimination of all Forms of Discrimination against Women, Convention for Economic, Social and Cultural Rights, European Convention of Human Rights and rulings of the ECtHR regarding equal recognition before the law of persons with disabilities.

In the context of collection of qualitative data twelve interviews were organized with court representatives, representatives of the Ministry of Social Welfare and Youth, representatives of organizations of persons with mental disabilities (intellectual disabilities and mental health problems), organizations that provide legal aid, representatives of social services at the municipal units etc. The interviews focused on receiving information about the model of legal guardianship/deprivation of the capacity to act, the procedures and practice followed by the field professionals, and in general to get the perspective of persons involved in these processes, in order to determine their knowledge about supported decision-making and the CRPD.

Quantitative data was collected from monitoring rulings on cases related to deprivation/restriction of capacity to act in the Tirana judicial district court from 01.01.2013-30.04.2016 (court rulings online) and monitoring in the courtroom the court sessions during 01.10.2015-30.04.2016. During this timeframe 100 court rulings and 100 court sessions were monitored. 100 rulings were downloaded from the official website of the Tirana district court, where in 99 cases the plaintiffs requested the full deprivation of the capacity to act and only in one case asked for a partial restriction; there were analyses to identify the procedures, method for decision-making and in general to detect the characteristics of the procedures aimed at deprivation of capacity to act. 100 court sessions at the Tirana district court were directly monitored. Notes were taken about the sessions in order to determine the models of ruling related to cases of deprivation/restriction of capacity to act, the procedure as a whole, participation of parties, interaction with persons for whom deprivation/restriction is being sought, and difficulties encountered in such processes.

CHAPTER I. INTERNATIONAL LAW FRAMEWORK

Equal recognition before the law is part of the Universal Declaration of Human Rights (UDHR) and ICCPR. In the UDHR and ICCPR, “equal recognition before the law” includes legal capacity, but these treaties refer solely to rights and responsibilities, and not their exercise. It is also referred to in the CEDAW, but here we also notice the early beginnings of the use of the concept of “legal capacity” in civil cases, as a concept which encompasses legal capacity and the ability to act jointly. In the CRPD, the term legal capacity includes legal capacity and the capacity to act, as an integral part of this concept.

This Chapter refers to Article 12 of CRPD and the General Comment.

1.1 Convention on the Rights of Persons with Disabilities (CRPD)

The CRPD affirms that all persons enjoy the right of equal recognition before the law. Therefore Article 12 is a challenge for all systems that allow deprivation or restriction of the legal capacity to act.²¹ This article is binding on states to allow individual right to self-determination in decision making and, when necessary, ensure support for those persons so that they can exercise their legal capacity equally with others. This article was one of the most debated articles during the formulation of CRPD. Considering the above mentioned clarifications regarding the implementation of the concept of the legal capacity to act, there have been often doubts about the interpretation of this article. In particular, most of the doubt was related to whether the article is really trying to abolish the concept of legal guardianship. The drafters of the CRPD have at all times been mindful of the fact that legal guardianship in many countries entails and refers to taking decisions on behalf of the person under guardianship, by the guardian, without consulting the concerned person, and without taking into account his/her wishes. Furthermore, the guardian may also act against the will of the concerned person. Under such circumstances, it is almost impossible for the person under

²¹ Equal recognition before the law 1. State Parties reaffirm that persons with disabilities have the right to be recognized everywhere as persons before the law. 2. State Parties admit that persons with disabilities enjoy the capacity the same with the rest of the population in all walks of life. 3. State Parties will take all appropriate measures to ensure persons with disabilities access in terms of support that they may require for the exercise of their legal capacity. 4. State Parties, in line with international legislation about human rights will make sure that all measures related to the exercise of the legal capacity constitute appropriate and efficient standards to prevent abuse. These standards will make it possible for measures related to the exercise of legal capacity to respect the rights, will, and preferences of the person with no conflict of interest and unnecessary influence are proportionate to the circumstances of the person, apply for the briefest period possible and are subject to regular review by the competent, independent and impartial authorities or a panel of judges. The standards will be proportional to the measure that does not inflict the rights and interests of the person. (In Arabic, Chinese and Russian, the term “legal capacity” refers to “legal capacity for rights” and to the “legal capacity to act”). 5. In line with the provisions of this article, state parties will take all appropriate and effective measures to ensure equal rights of persons with disabilities to have access to properties, or to inherit properties, to control their financial status, and to have equal access to crediting, mortgage, and other forms of financial crediting and will make sure that persons with disabilities are not deprived of their assets in an arbitrary fashion.”

http://www.qbz.gov.al/botime/fletore_zyrtare/2012/PDF-2012/157-2012.pdf

guardianship to object to the decisions of his/her legal guardian.²² It should be noted that the deprivation or restriction of legal capacity is not always prohibited under international law where these methods are not discriminatorily used against persons with disabilities; when the non-discrimination criteria can be raised. For example, a respondent's state may have legislation in place that would restrict legal capacity regarding disposal of money or property for all persons that are excessive in spending and neglecting their basic needs through "bankruptcy laws." But in this case, it would have nothing to do with a medical condition or disability; the judicial decision would be based upon the circumstances that led to the mismanagement of the person's own property. In simple terms, CRPD prohibits deprivation or restriction of legal capacity in a discriminatory manner against people with disabilities, when the disability itself is a main or predominant reason for deprivation or restriction of such capacity.

The title of article 12 is "Equal recognition before the law". The first paragraph reiterates: "State Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. The next paragraph refers to legal capacity, in saying that: "State Parties shall recognize that persons with disabilities enjoy legal capacity²³ on an equal bases with others in all aspects of life." As discussed earlier, equal recognition before the law shall mean that a person has rights and obligations, in other words that he or she enjoys legal capacity. Equal recognition before the law leads to capacity to act, upon reaching the age of majority, which entails the possibility for exercising rights²⁴. Article 12 provides for equal recognition before the law, i.e. full enjoyment and exercise of legal capacity and introduces the concept of supported decision-making.

A study in the USA points to the fact that supported decision-making may take place through friends, professionals, networks of selected and trusted persons who help persons with disabilities in their decision-making.²⁵ These forms cannot be defined as an exhaustive list, since they may vary according to cases and the required level of support. Depriving individuals of the opportunity to make their own decisions, such as the case with persons with disabilities has an impact on lowering self-esteem and promotes feelings such as the inability to take

²²Arlen S. Kaner, Developments of disability rights in the international jurisprudence: The road from pity to human rights, November 2014 <https://books.google.al/books?id=ayecBQAAQBAJ&pg=PA236&lpg=PA236&dq=legal+capacity+international+la&source=bl&ots=iugNQSe5e&sig=x94rq2ze7UBoi40dyfovHyiVDSY&hl=en&sa=X&ved=0ahUKEwjt0MO1mrHKAhXD8A4KHZPgB-U4ChDoAQgwMAM#v=onepage&q=legal%20capacity%20international%20law&f=false>

²³Legal capacity is a term used in international law. As explained above, according to some Interpretation it only includes legal capacity, whereas in other the legal capacity to act. CRPD uses the term while including both these elements.

²⁴Arlen S. Kaner, Development of disability rights in international law: The road from pity to human rights, November 2014 <https://books.google.al/books?id=ayecBQAAQBAJ&pg=PA236&lpg=PA236&dq=legal+capacity+international+law&source=bl&ots=iugNQSw5w&sig=x94rq2ze7UBoi40dyfovHyiVDSY&hl=en&sa=X&ved=0ahUKEwjt0MO1mrHKAhXD8A4KHZPgB-U4ChDoAQgwMAM#v=onepage&q=legal%20capacity%20international%20law&f=false>

²⁵ Peter Blanck and Jonathan G. Martinis (2015) The right to choose. National resource center for supportive decision-making. Inclusion, March 2015, Vol. 3, Nr. 1, pgs. 24-33. http://bbi.syr.edu/publications/2015/SDM_Overview.pdf

decisions or passivity. Based on different studies, there is proof of a positive relationship between decision-making by a person himself and positive outcomes for that person, due giving them more control over their lives.²⁶ Furthermore, supported decision making is only one alternative; the main point coming from Article 12 CRPD is that legal capacity belongs to people with disability so that when they do not wish to use supports they retain the right to be independent decision makers.

1.2 General Comment, Number 1²⁷ (2014)

Article 12: The right to equal recognition before the law. Committee for the rights of Persons with disabilities (Committee), Session 11, 31 March- April 11, 2014

“Legal capacity” is a common concept for UDHR, ICCPR and CEDAW. Recognition of equality before the law is a principle of international law and the implementation of this principle is indispensable in the exercise and enjoyment of all human rights. Meanwhile, the Committee explains that legal capacity includes legal personhood, and legal capacity to act, and legal capacity should be understood exactly in this spirit, with these two elements, even in the above mentioned international documents. The Committee further reiterates the universality of legal capacity and points out that it is only recognized to people due to the fact that they are humans, including persons with disabilities. In order for them to enjoy legal capacity they should possess two elements: legal capacity and the legal capacity to act. These elements cannot be separated.²⁸

Mental capacity (which is the main ground for withdrawing the legal capacity to act) is the ability to take decisions, which ability varies from one individual to the other, and from a number of environmental and social factors. This concept, according to the Committee is not objective or based on scientific facts, as it is often times presented, but rather it must be placed in a given social or political context. The reports that States have submitted to the Committee indicate that concepts of the legal capacity and mental capacity are either intertwined or combined with each other, so that when a person has reduced decision-making abilities or is a person with disabilities this is usually enough ground for deprivation of the capacity to act. The Committee considers this intolerable.²⁹

Regarding supported decision-making, the Committee has some important guidelines. It should be always based on the free will and preferences of the adult, and not according to the model of best interest (as in the case of children). “Support” can include a series of formal and informal forms of assistance, be that in terms of facilitation of communication or in other forms such as: provision of accessible information, general access to institutions such as: banks or

²⁶Ibid.

²⁷General comment no.1, 2014 <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>

²⁸General comment no. 1, Article 12: The right for equal recognition before the law, Committee for the rights of persons with disabilities, session 11, 31 March- 11 April 2014 <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>

²⁹ Ibid.

other private institutions. Individuals can choose one or several persons from their family members or not, as someone to support them in the exercise of legal capacity. They may plan well in advance who or how decisions will be taken under circumstances when they themselves cannot express their will or preferences, such as for e.g. delegation of power of attorney through a contract or an advance directive under specific circumstances. The Committee further clarifies that States in line with Article 12 are obliged to repeal any legislation that permits deprivation of the legal capacity to act, fully or partially, and replace these with the model of supported decision-making.³⁰

³⁰ Ibid.

CHAPTER II. National Legislation

This chapter provides a general analysis of main legislation in Albania that contains provisions and reference to the concept of equal recognition before the law, legal capacity and the legal capacity to act. The main purpose of this Chapter is to identify the main codes and legislation, and present what they envisage for persons with intellectual and psychosocial disabilities; what are the procedures to be followed, who are the main actors that participate in the process, and other criteria. In addition, the Chapter focuses on the discrepancy of national legislation with the international legal standards. These findings are further reiterated in the next chapter “Findings from monitoring court practices.”

1.1 Codes and capacity to act

In tandem with the majority of legislation, the Albanian legislation provides for a major distinction between the capacity to hold rights and legal capacity to act. According to Article 1 of the Civil Code, every physical person enjoys full and equal capacity to have civil rights and obligations, and this capacity begins with a person’s birth and ends upon his death. Albanian civil law includes as one of the conditions for engagement in legal and civil relationships the legal capacity to act. Furthermore, part of this is the civil procedural capacity to act as party in a court process. Article 9 of the Civil Code refers to treatment of “psychiatric diseases” vis-a-vis capacity to act. Thus, during a lifespan of a person from 14-18 years old, if he/she is suffering from “psychiatric disorders” or has “mental development problems”³¹, he/she may be restricted in or deprived of capacity to act by a court verdict/ruling. This also holds true for adults (over 18 years old) who due to a psychiatric disorder or due to intellectual disability are entirely or partially unable to take care of their affairs, whose capacity to engage in legal acts may be reduced or removed through court verdict. The Civil Code includes definitions of mental health status that entail mental disorders, as they are now referred to in the Law on Mental Health. The main procedure for deprivation or restriction of the legal capacity to act of adult persons with disabilities is provided for in the Family Code, Articles 307-313.

With reference to Article 10 of the Civil Code, deprivation or restriction of the capacity to act may be determined only through court verdict, and is always accompanied with placing a person under guardianship. The rules and procedures for commencing and processing cases related to deprivation or restriction of capacity to act are provided for as part of special deliberations. Article 382 of the Civil Procedure Code provides for certain persons who enjoy the legitimate right to address the court during guardianship proceedings. These include the spouse of the person who is the subject of proceedings, next of kin, prosecutor, or persons with a legitimate interest in the case. This also includes persons with a legal interest in the case.

The request for deprivation/restriction of the capacity to act is judged by a panel consisting of no less than three judges (Article 35 of the Civil Procedure Code). The case should indicate

³¹ This terminology is based on the existing legislation and refers directly to the applicable Codes.

facts and be based on evidence that supports the claims of the plaintiffs. The prosecutor is always notified about the case in point, and receives a copy of the suit and all evidence that has been deposited in the court.³² The participation of the prosecutor in the process, without being a direct party is considered *sui generis*, since it has no implications, such as is the case for parties. The prosecutor has more of a protective role in these proceedings, to ensure that the rule of law is upheld.³³

Furthermore, the court can hear from third parties, drawn from the section of assistance and social services in the respective communes or municipalities, in line with Article 267 of the Family Code. The Social Service submits an evaluation of the person, which includes the examination of the development of the personality of the person whose capacity to act is to be restricted or removed, in the family, education and social background/context, and makes an assessment of the conditions and suitability of the future guardian or care institution.

In ruling on these cases, the court should conduct a comprehensive and detailed investigation. The court has been assigned an active role in the judgment since person whose capacity to act is to be removed or restricted is often unable to defend himself as would be the case in normal court procedures. The court, after reviewing the suit and hearing the plaintiff, interviews the person whose capacity to act is sought to be deprived or restricted. The court calls or alternatively assigns a member of the jury to interview the person in his place of residence, in the event that it is impossible for the individual to participate in the court process.

If the severity of the disease of the person is such that it makes his interview in court difficult or impossible, then the court should visit this person at his place of residence, even if it is in the presence of a physician, in a hospital where the person has been admitted for treatment, at home, or in an institution where the person is isolated etc. The court cannot under any circumstances avoid this procedural act since it would constitute a serious violation of the law. In addition, the court should interview the person's next of kin, if any, as well as the doctor that has examined him. The court may also interview other persons that are familiar with the person when the medical file is taken in as evidence, i.e. if the person has been hospitalized.

In addition, the court must submit the person whose capacity to act is sought to be withdrawn or restricted to examination by a team of expert doctors, specialists in the field. The examination should produce scientific arguments concerning the type of disability, its severity, and its impact on the activity of the concerned person. There are no defined specific medical criteria to determine whether a person should be deprived of legal capacity to act in Albania. In forensic medicine they use intelligence tests such as Wechsler IQ Test, which is the only standardized test, and clinical interviews which are generally conducted by two psychiatrists.³⁴

³² Alban Abaz Brati, "Civil procedure", Dudaj publishing house, Tirana 2008

³³ Çlirim Gjata "Procedura Civile", Luarasi university, Tirana 2009

³⁴ In addition to the report of the physicians, a summary of the frequently asked questions to the courts include: - Does the citizen for whom deprivation/restriction is sought suffer from any mental health problems? –If he does, what is that in concrete terms, and is he able to understand the importance of the legal acts that he is performing? –Does the illness make it possible for him to take care of himself or does he need care from his family?

With the full deprivation of one's capacity to act, a person becomes equal to a minor under 14 years of age, whereas with a partial restriction of the capacity to act, a person is equal to a minor of 14-18 years of age. However, it is worth pointing out that in practice there is no difference between full and partial deprivation of legal capacity. The legal implications are the same for all legal procedures that take place on behalf of the person placed under legal guardianship. This is due to the lack of definition of partial restriction of legal capacity, and its scope. Interviews conducted for this report with judges demonstrate that they are not aware of how to act in the case of partial restriction, and neither they nor the doctors can define the areas in which the person should continue to operate with partial legal capacity to act. In addition, the codes are not explicit about the will and preferences of a person, but they simply refer to protection of the 'best interests' of a person that is placed under guardianship³⁵.

With regard to the legal guardian, the Family Code establishes several conditions or circumstances under which a person cannot be placed under guardianship. Article 270 of the Family Code provides for the disqualifications for serving as a guardian:

- the persons are under guardianship themselves;
- they have conflicts of interest with the person under guardianship;
- they are not free to manage their properties;
- they are disqualified due to a written declaration;
- their parental rights have been lost or terminated or they previously had the guardianship of another terminated;
- they have been sentenced to a term of imprisonment for a criminal action and are presently incarcerated, or they have been punished for crimes against minors;
- they have reached 65 years of age;
- they cannot exercise guardianship due to health conditions;
- they exercise parental responsibility for more than three children;
- they have more than two other guardianships;
- they do not consent to being a guardian.

1.2 Law on Inclusion and Accessibility of Persons with Disabilities

This law reflects some of the principles of the CRPD and it is more advanced than the rest of the existing legislation, in particular the basic Codes, since it is a recently adopted law in 2014. Articles 5 and 6 of the law address aspects of independent living in particular, providing for

³⁵ Civil Code, Family Code, Code of Civil Procedure.

concrete services that may be delivered by the government, in line with this law. These services include supportive decision-making. In line with this law, “supportive decision-making” is the exercise of the will of a person with disabilities through an added specific requirement that this service supports his “best goal and interest,” enabling the person to exercise rights and obligations. Thus, it still uses the best interest test on supported decision-making, which is contrary to the CRPD³⁶. As reiterated during the analysis of the international legislation, and more specifically with reference to General Comment 1 of the Committee on the Rights of Persons with Disabilities, all approaches and legislation that allow for decisions to be taken on behalf of adults with disabilities, based on “best interest” should be abolished. Support should be granted only based on the will and preferences of the concerned person. In absence of the expression of will, the supporters in decision-making engage in the best possible interpretation of will, based on all available information about the will and preferences of the person, with reference to knowledge, experience, background and relations with others etc. The Committee noted that the “best interests” test is used for children, and this is considered inappropriate for adult persons with disabilities.³⁷

The Albanian law further provides that every person with disabilities in need of assistance in decision-making may receive appropriate support from a trusted individual or group of individuals³⁸. Support may be generated in a number of forms, including support through interpretation and simple language, and support for the concerned person to express views to third parties that may not understand his/her method of communication. Hence, the methods in the Albanian law are the same as those described in the General Comment.

This law states that support should be gradual, giving sufficient time to persons who seek it, in order for them to learn how to use the support “in their best interests”.³⁹ Again the expression “best interests” is clearly in conflict with the requirements of the General Comment. The law defines that the rules, procedures and criteria for the delivery of these services are determined by a decision of the Council of Ministers, which are to be published 24 months after the entry into force of this law. The law was published in the Official Gazette in August 2014. This means that the decision containing rules and criteria for the delivery of support service is pending adoption in August 2016.

It is worth pointing out that this law does not fully and finally address the need to reform existing laws on deprivation and restriction of legal capacity. As explained above, the model of legal guardianship is set out in the main legislation such as: the Civil Code, Family Code, and the Civil Procedure Code. These pieces of legislation have legal precedence compared to the Law on Inclusion and Accessibility and as long as they do not change, the model of deprivation of the capacity to act will remain in force. However, the law on Inclusion and

³⁶ Para. 27 General Comment on Article 12.

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

³⁷ Para. 21, General Comment on Article 12.

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

³⁸ Articles 6, 7, Law on inclusion and accessibility.

³⁹ Article 6. 7.

Accessibility is a good opportunity to start the application of some models of supported decision-making that may progressively guide required legal changes.

1.3 Law on Mental Health

Another piece of legislation that continues to permit deprivation of the legal capacity to act is the Law on Mental Health.⁴⁰ This law in its definitions allows treatment of a person without his consent⁴¹. This is referred to as "involuntary treatment" and is authorized through a court decision. It results in the person's placement in a psychiatric facility and allows for other medical procedures to be conducted while placed in the facility. Article 9 of the law describes the circumstances under which deprivation of the capacity to act may occur for the purpose of involuntary treatment, with direct reference to the procedures of the Civil Procedure Code.

The law also provides for voluntary treatment, for persons with partial capacity to act, when the decision for the treatment is approved by the legal guardian. It is obvious that this provision is contrary to the CRPD, giving total power to the legal guardian to determine the medical treatment. There is no provision regarding the will and preferences of the concerned person. On the other hand, even though the law encompasses the concept of informed consent, there are no provisions about the provision of information in accessible formats for the individual. The situation becomes more complicated in the instances of involuntary treatment. The law provides that involuntary treatment takes place only under special circumstances, and must be undertaken only by a specialized doctor, where three concomitant conditions are met: a) where there is a severe mental disorder that impairs the person's ability to understand or control his/her behaviour; and b) without receiving involuntary treatment a person's life or security and those of others is at stake; and c) all existing possibilities have been exhausted for treatment in the community, and the necessary medication can only be provided through hospitalization, in keeping with the principles of the less restrictive alternative.⁴²

This procedure does not formally require deprivation/restriction of the capacity to act (even though in practice, the procedure entails exactly the same restriction of the rights of a person), but is solely focused on involuntary treatment. The law refers to the "best interests" of a person. In addition, the law provides that consent of the legal guardian, where one exists, bypasses the need for the person with "mental health disorders" to provide personal consent or refusal of treatment.

⁴⁰Law on Mental Health, no. 44/2012

http://www.shendetesia.gov.al/files/userfiles/shendeti_mendor/Ligji_Nr.44,_2012_per_shendetin_mendor.pdf

⁴¹ Article 20 Law on Mental Health

⁴² Article 20 Law on Mental Health

1.4 Criminal Code

For the purpose of this report the consolidated version of the Criminal Code of Republic of Albania as of 2003 was used (Law no. 7895 from 1995 and as amended in 2003). The focus of this section on the criminal responsibility of either people (a) lacking legal capacity or those people (b) deemed to be “insane” tempore criminis. Also, the attention was paid to those offences that involved psychiatric distress or any other issue that may involve mental capacity of the person in the material criminal law. The Criminal Code of Republic of Albania is hereinafter referred to as: “ACC”.

The basis of the definition of guilt in ACC can be found only in intentional or negligent crimes.⁴³ However, there is an exclusion from criminal responsibility if a person tempore criminis “suffered from psychiatric and neuropsychiatric disorders ruining his mental balance entirely and, consequently, was unable either to control his actions or omissions, or to understand that he is committing a criminal act.” Partial culpability is imposed if the person had only a partial “mental imbalance” when commencing the criminal act.⁴⁴ In its basic form, the exclusion from criminal liability is concerned with establishing a diagnosis of a certain disorder under which the application of test of mental capacity is performed. Although the legislature did not directly mention that person declared to be “insane” shall not be deemed as guilty, the law itself does not allow for guilt to be established if the action was non-intended.

Non-exclusion criteria are also applied even if the person has a mental imbalance due to inebriation. If the person was inebriated accidentally then the occasion would be used for mitigating the sentence. When the person is intentionally inebriated in order to commit a criminal act, the court considers this circumstance for aggravating the sentence. These rules are also applied when the criminal act is committed under the effect of narcotics or other stimulants.⁴⁵ The mitigating circumstances may also occur when the act is committed under the effect of psychiatric distress caused by provocation.⁴⁶

However, beyond the general provisions of criminal law, the ACC also contains specific sections referring to a psychiatric condition connected to a specific criminal offence that may differ from the general provisions. In that case, the principle of *lex specialis derogat legi generali* is applied. These examples will be shown in further analysis below.

For example, while murder in aggravated conditions may be punished by imposing a sentence of at least 20 years imprisonment, “homicide committed in a state of profound psychiatric distress” that is caused by violence or serious insult by the victim is only sentenced up to eight years imprisonment.⁴⁷ However, this is significantly different from the situation of exclusion from criminal responsibility based on “mental imbalance”. Namely, for the exclusion from criminal liability due to mental imbalance the exact diagnosis of psychiatric or neuropsychiatric

⁴³ Article 14(2) ACC.

⁴⁴ Article 17 ACC.

⁴⁵ Article 18 ACC.

⁴⁶ Article 48 ACC.

⁴⁷ Article 82 ACC.

disorder is required, while within this form of homicide the mental state is not connected to the perpetrator's status as a person with a psychosocial disability (such as these diagnoses are) but rather to the victim's behaviour *tempore criminis*. The same can be applied to the criminal offence of "serious wounding under the conditions of strong psychiatric distress". These two specific offences can apply to anyone who may be provoked by 'violence or serious insult' of the victim. These offenders are deemed to be guilty, regardless of their mental state at the time of commencing the criminal act, while those offenders who committed criminal act(s) while being "mentally unbalanced" due to their psychiatric or neuropsychiatric diagnoses may be placed in completely different position; not to be deemed criminally liable. Nevertheless, individuals excluded from criminal responsibility due to diagnosis can still fall, as will be described in following section, under a different set of rules that are aimed at protection of public safety.

1.5 Criminal Procedure Code

The criminal procedure code provides for a basis for a fair trial when it comes to criminal prosecution. Criminal procedure is regulated by the Criminal Procedure Code of the Republic of Albania (hereinafter referred to as: "ACPC"). It remains unclear why the ACC omits a definition of "insanity" as an excluding circumstance for guilt, although the legal consequence is to quash the criminal liability of the person deemed to be in such a condition. One of the reasons may be in the fact that ACPC provides for "compulsory medical sanction" for persons who are deemed not criminally responsible due to insanity. The problem arises from the word "sanction" because under the general law nobody can be sanctioned if not proven to be guilty. But, while they are excluded from criminal liability, persons who committed criminal offences under requirements of Article 17 ACC can be sanctioned by the ACPC.

As it is transposed directly, the relevant provision reads as follows: "In any case, when the mental condition of the defendant shows that he must be treated, the court decides *ex officio*, [on] the hospitalization of the defendant in a psychiatric institution."⁴⁸ This situation in a criminal court in everyday life requires evidence of the individual's mental condition, which is assessed by a medical expert, and then either upon the proposal of the prosecution or even by the court *ex officio*, the person can be deprived of liberty and placed in a psychiatric institution. Although deprivation of liberty is dealt with by Article 14 CRPD, we note that deprivation of liberty is a consequence of not recognizing mental capability for committing a criminal act, which is connected to Article 12 CRPD.

The compulsory medical sanction the ACPC provides for can be only performed in a psychiatric institution and is connected to the individual's mental condition. Comparatively, if any other medical condition would show that defendant must be treated (e.g. due to infectious disease) there is no basis in criminal procedure that medical treatment may be imposed. Therefore, criminal procedural legislation, finds a social danger in persons diagnosed which

⁴⁸ Article 46(1) ACPC.

applies to psychiatric diagnoses only. The compulsory placement in psychiatric institution may be only temporary, when delay poses danger (although the extent of the danger which warrants this placement is undefined) until the court takes a decision.⁴⁹

Coercive orders may be issued also; such is a “temporary hospitalization in a psychiatric hospital.”⁵⁰ The law on this issue states: “1. When a person that must be arrested is suffering from mental disorder and, because of this, his capacity to understand or volition is lost or diminished, the court instead of pre-detention, may order his temporary hospitalization in a psychiatric institution imposing the necessary measures to prevent his absconding. 2. Hospitalization may not continue when it is proved that the defendant no longer suffers from mental disorder.”⁵¹

There is a gap existing between laws, when combined with Mental Health Law and it remains unclear whether the involuntary hospitalization may continue after the court takes a decision. When connected to Mental Health Law, this is not impossible in practice since person can be involuntarily treated if posing a required type and degree of danger, but it seems that after criminal proceedings finish, only the civil courts would deal with the person(s) concerned. What raises a significant problem in that sense is that there is no an expiration date; person may be indefinitely placed in a psychiatric hospital under the Albanian law if posing a danger to others due to mental disorder which, when taken within the light of a criminal sanction, results in life-long sentences.

Participation in criminal proceedings is also at stake when it comes to mental state of the party in the proceeding. For example, “the content of the procedural document may not be witnessed for a purpose of certifying by: a) ... persons who suffer from patent mental disorder...”⁵² Furthermore, “persons who, due to physical disabilities or psychological disorders, are not able to give proper testimony” may not be questioned as a witnesses.⁵³

It should be noted that issues of both civil and criminal legislation has not been raised by the Albanian Government in their “Advanced Unedited Version” of the Country Report submitted to the CRPD Committee in May 2015 on Article 12 but the this report will shed some light in the shadow report that will be prepared by a group of organizations in Albania.⁵⁴

1.6 Albanian Electoral Code

People deprived of capacity to act by the court are excluded from register of voters by the Albanian Electoral Code (hereinafter referred to as: (“AEC”).⁵⁵ The AEC is unclear as to whether this exclusion applies only to those persons who have been fully deprived of legal capacity or also those who are partially deprived of legal capacity. By virtue of not being

⁴⁹ Article 46(3) ACPC.

⁵⁰ Article Article 232(1)(e) ACPC.

⁵¹ Article 239 ACPC.

⁵² Article 108 ACPC.

⁵³ Article 156(1)(a) ACPC.

⁵⁴ CRPD_C_ALB_1_6926_E

⁵⁵ Article 44(c) AEC.

registered as voters, people deprived of capacity to act cannot vote in any kind of national or local elections, which is not compliant with Article 12. This provision also contradicts Article 29 CRPD that guarantees participation in political and public life to people with disabilities. This is also contrary to other instructive international documents, like the Code of Good Electoral Practice provided by the Venice Commission and it also contravenes the ECHR.⁵⁶

The Albanian Government denies any problem with this issue. In its report to the CRPD Committee⁵⁷ the Government focuses on the general anti-discrimination provisions, omitting the fact that restrictions on the right to vote is a form of discrimination. Although not known in exact terms, there are more than three cases of discrimination noted against persons with disabilities in electoral processes⁵⁸: in fact, there may be thousands of people prevented from voting due to being deprived of their capacity to act which represents violations of Article 5, 12 and 29 CRPD respectively.

⁵⁶ [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e)

⁵⁷ Ibid, p. 52.

⁵⁸ <http://www.kmd.al/?fg=brenda&emri=Botime&gj=gj1&kid=222&kidd=80>

CHAPTER III. FINDINGS FROM MONITORING OF COURT PRACTICE

This Chapter presents the key findings during the review of court rulings and direct monitoring of court sessions in the first instance court of Tirana of cases on ‘deprivation/restriction of the capacity to act’. Monitoring has taken place focusing on a comparative perspective with international standards presented in this report, which also monitors respect for the legal procedures, in line with the current provisions. In this chapter as well as in the above mentioned chapter, the main goal is to identify discrepancies and existing problems with the current law and practice.

The data highlights that in practice courts have very high tendencies to grant deprivation of the capacity to act, opting for this extreme measure. In very few (almost no) cases, the option of partial deprivation is exercised, although provided for in the Civil Code. But, as we will see below, partial deprivation of the capacity to act in Albania, does not have the same meaning it does in a number of other countries, or indeed the meaning intended in the Civil Code, which provides opportunities to perform certain limited actions in certain given fields. The court practice observed indicated that restriction is placed for a limited period of time and it is not placed in certain fields, with the assumption that the person does not comprehend any legal actions. Another problem is that there are no provisions regarding the restoration of legal capacity to act after this period. Is it automatically restored, following partial restriction/limitation? Is there need for a re-evaluation after the termination of said period? In practice, there is no restoration or re-evaluation, since there are no legal provisions in place about the re-evaluation or restoration of the capacity to act. As mentioned above, there are very few cases of partial deprivation and in practice partial deprivation is not really distinct from full deprivation. In one interview, we learned about a court ruling that authorised deprivation of the capacity to act for a three-year period, in other words limited in time, and the panel did not rule and the judges did not indicate what could or would happen following the termination of this period.

Figure 1 below presents data about the profile of the person who is requesting deprivation or restriction of the capacity to act. In all instances, the person that requests the hearing is a family member or next of kin, or brother/sister. In the majority of instances, 33% (n=33) the applicant is either the brother or the sister, followed by parents in 18% of the cases (n=18); children in 14% of the cases (n=14) and in 12% (n=12) the spouses. However, in 22% of the cases the relationship between the applicant and the person concerned is not mentioned (due to the case being dropped). The applicant in 99% (n=99) of the instances has asked to be appointed as legal guardian of the person whose capacity to act will be withdrawn or restricted.

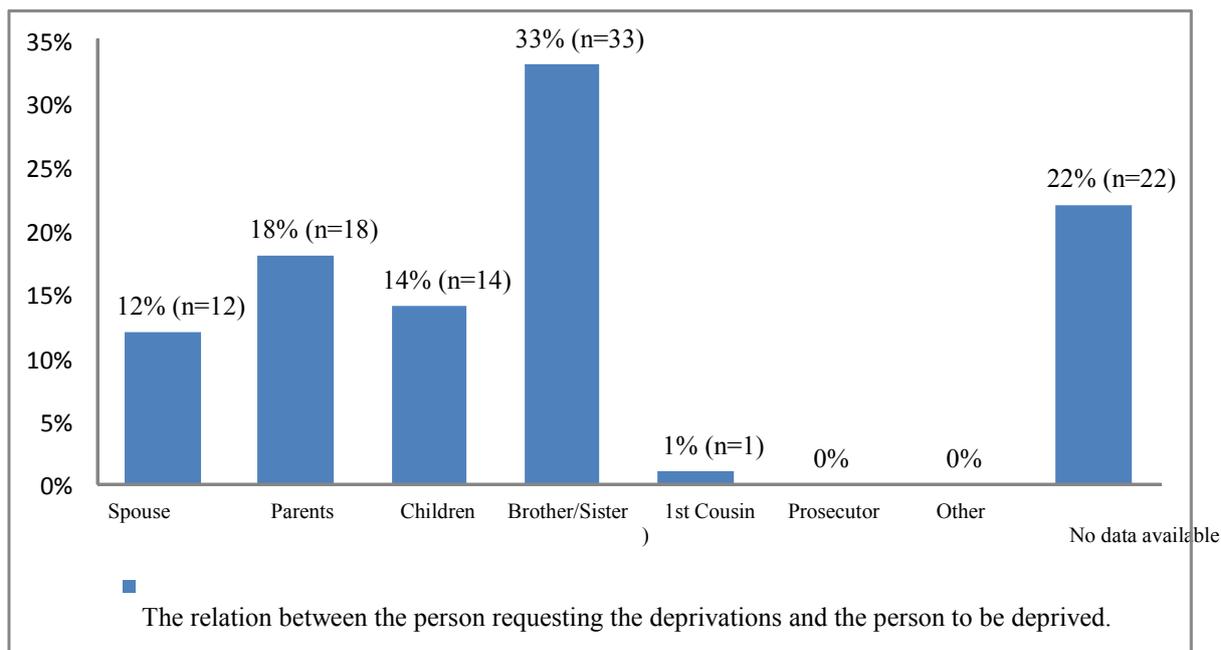


Figure 1 Relationship of the person who is requesting the deprivation/restriction with the person for whom deprivation/restriction of the capacity to act is sought

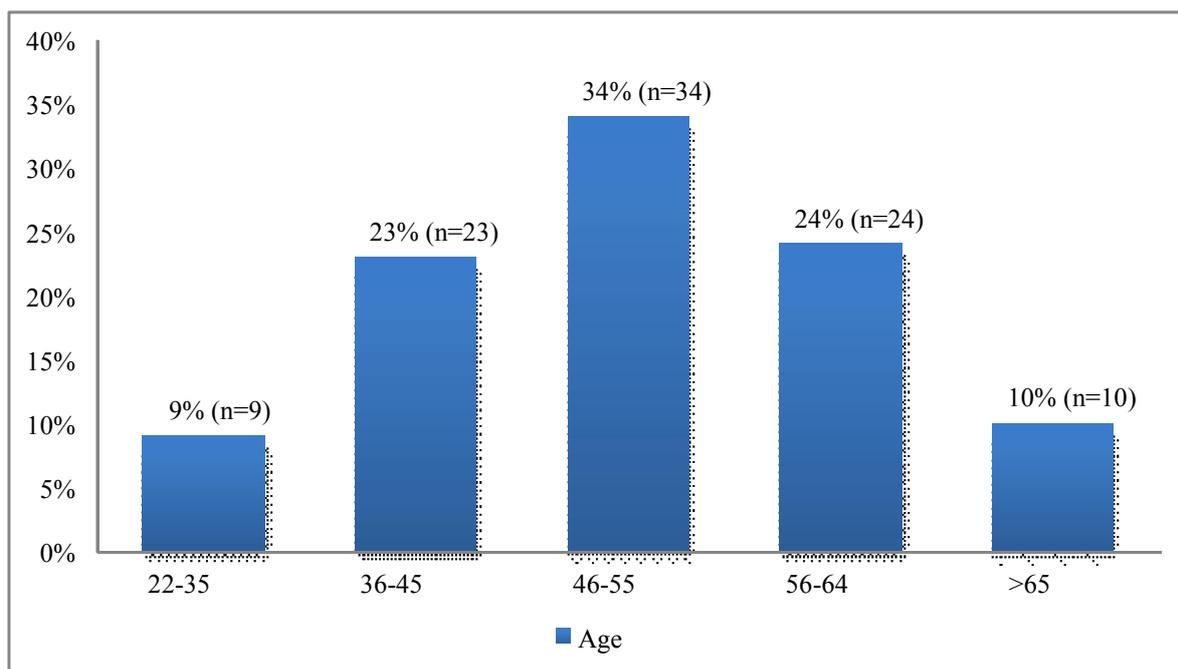


Figure 2 Age of applicants

As can be seen from Figure 2, the applicant/the legal guardian in most cases is within the age group 46-55 years of age (34%, n=34), which coincides with the fact in most cases, the applicant is the brother/sister, because parents often exceed the age criteria to be appointed as legal guardians. In fewer instances, the applicants belong to the age group of 22-35 years of age (9%, n=9). In 10% of the cases (n=10), the applicant was over 65 years of age, and in these instances had relinquished the suit or the court had decided to drop the case, due to a failure to

meet the age criteria. There are no legal provisions for the cases when the sole next of kin who has continuously taken care of the person with disabilities cannot be assigned as legal guardian since he/she does not meet the age criteria, or when the appointed guardian reaches the age of 65 years.

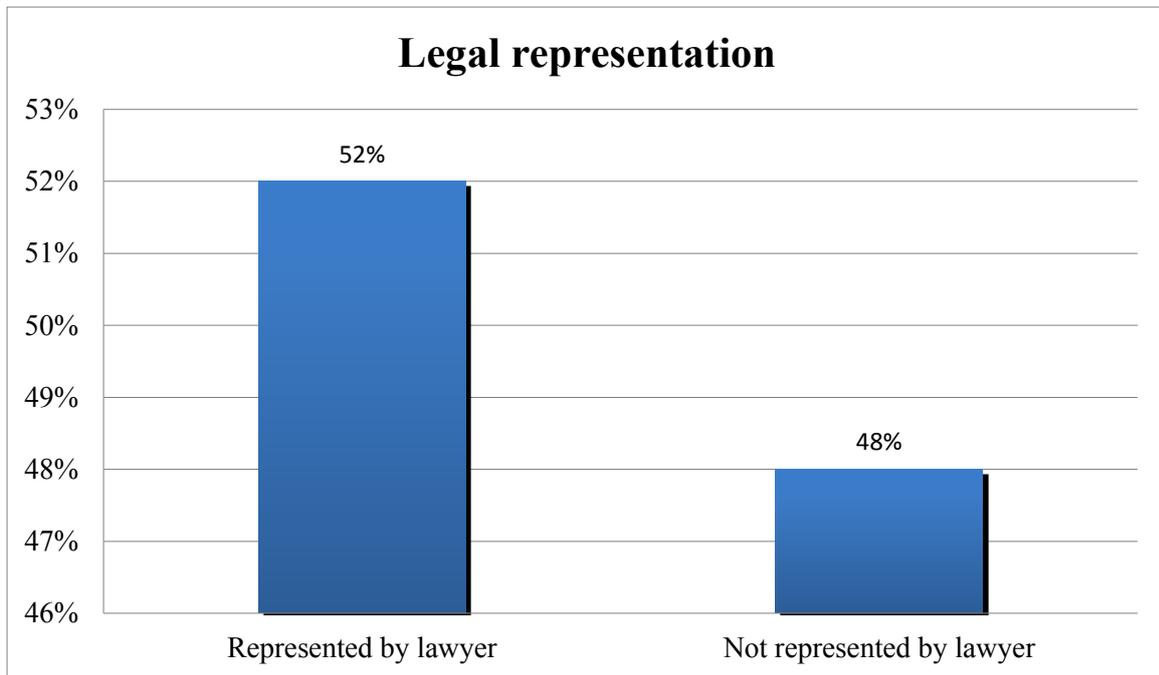


Figure 3 Legal representation

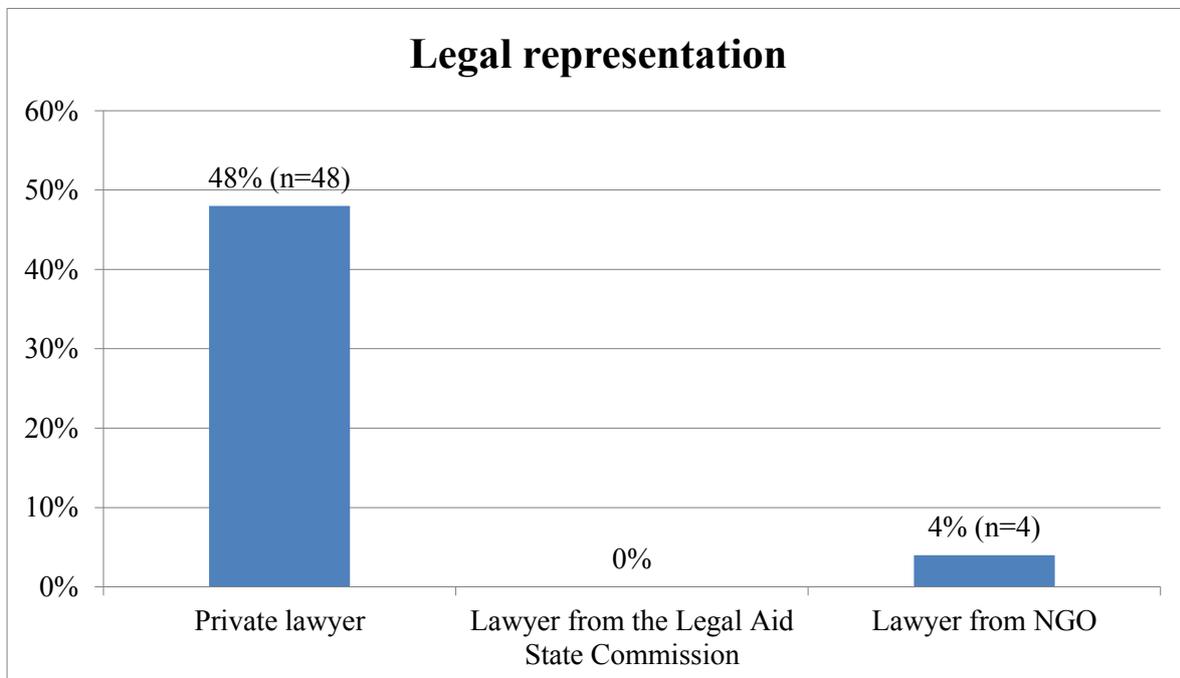


Figure 4 legal representation

As can be seen from Figures 3 and 4, even though these types of legal procedure do not call for legal representation, it has been noted that in most cases, the applicant asked for legal

representation. This happens due to the complexity of these cases. In 52% (n=52) of cases, the applicant asked for legal representation. In 48% (n=48) cases this was privately obtained, in 4% (n=4) of the cases, legal aid was provided by lawyers working for NGOs. In the cases of self-representation, in 30% of the cases, the case has been dropped. In none of the verdicts that we monitored did the person obtain legal aid from the Legal Aid Commission. We need to reiterate that persons with disabilities are, in theory, potential beneficiaries of the Law on State Legal Aid, adopted in 2008, although from this monitoring exercise this provision does not seem to be applied in practice.

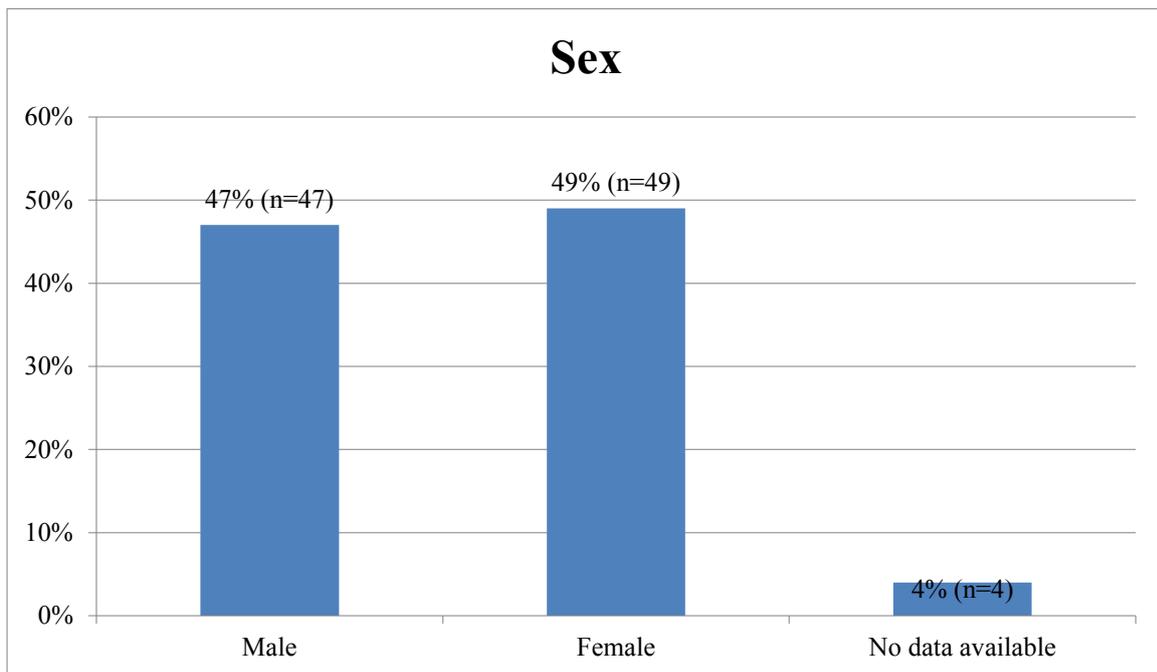


Figure 5 Gender of the person whose capacity to act is sought to be deprived/restricted

Figure 5 provides information about the gender of the person whose capacity to act is sought to be deprived or restricted. There is no big difference gender-wise, but the number of women and girls placed under guardianship is slightly higher. Whereas 4% (n=4) are cases when the court has decided to adjourn since the suits were incomplete or when parties withdrew from the case. In these cases, the gender of the person for whom the capacity to act is sought to be deprived/restricted is not given.

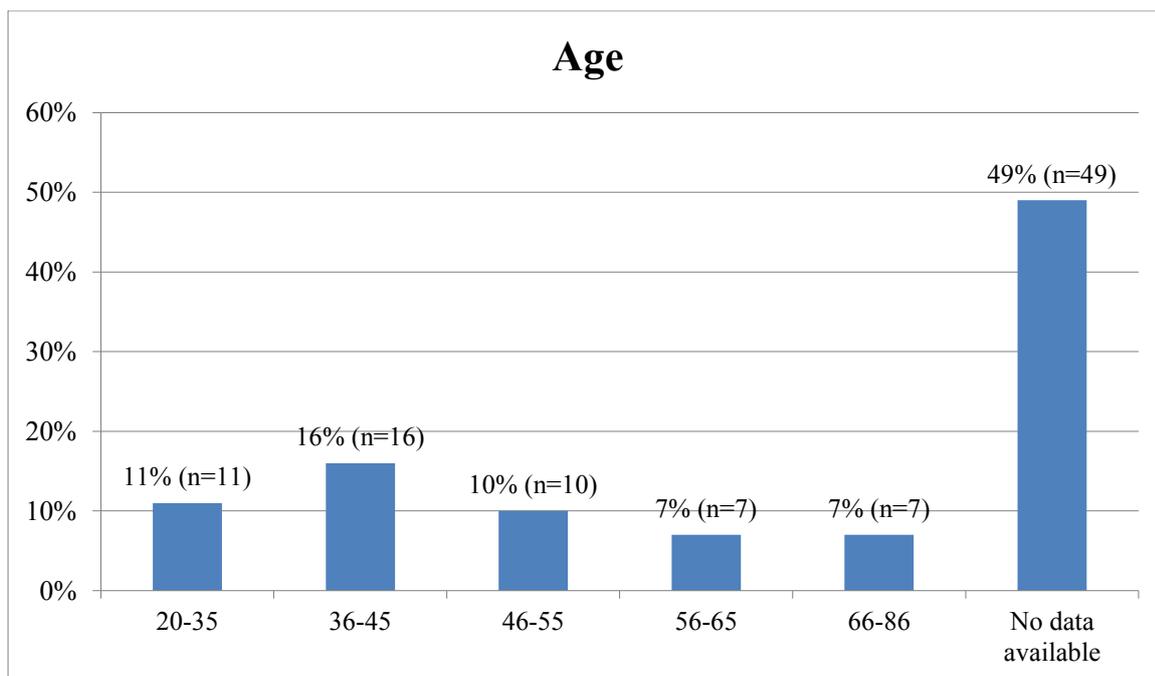


Figure 6 Age of the person whose capacity to act is sought to be deprived/restricted

Even though in the majority of the cases, the person concerned has been diagnosed with intellectual disabilities and/or psychosocial disabilities from a young age, in 76% (n=76) of the cases the applicant declares that his/her health status has remained stable, the age profiles indicate that the request has been sent to the court long after they turned 18. Here it is important to point out that until 18 years of age, even the persons with no capacity to act who are under parental guardianship continue to remain under such responsibility.

One of the “normal” questions would be what has been the situation regarding the legal actions of this person so far? Why does the plaintiff address the court at this precise moment? In 77% (n=77) of the cases, the person whose capacity is being deprived or restricted is entitled to disability benefit. In one of the instances the plaintiff has declared that: “Her mother is eligible for old age pension, but she can neither withdraw it, nor authorize somebody else to do it on her behalf, since her psychiatric problem is visible. In addition, she has not been eligible for disability benefit from K.M.C.A.P. [Medical Commission on Capacity for Work] since she could not complete the necessary procedures precisely due to her static circumstances.”

Relationship	%	Number
Spouse	8%	n=8
Parent	15%	n=15
Child	27%	n=27
Brother/sister	42%	n=42
No data	8%	n=8

Figure 7 Relationship of the person whose capacity to act is sought to be deprived/restricted with the applicant

Figure 7 reflects the relationship between the person's whose capacity is being sought to be deprived or restricted and the applicant.

One of the problems encountered during monitoring of the court sessions and court rulings is the absence of prosecution representatives. In 52% of the cases, the court proceeding (n=52) has taken place with no representation from the prosecution, despite continuous efforts of the court to notify them about the proceedings. In addition, even when there has been representation from the prosecution, its presence has been there only in some sessions, and not throughout the process. The same applies to the participation of the local Social Services. Social Services are not present in all proceedings, except to submit the evaluation report at the last session (there is a legal obligation to submit such a report).

Lack of participation of all stakeholders in the process of depriving someone of the capacity to act leads to prolongation of court proceedings and increases the cost of the process, where the applicants have to cover expenses for notification and other expenditure related to participation, such as transportation fees, legal representation, time etc. On the other hand, as mentioned, the participation of these actors gives sufficient gravitas to the court proceeding whereby a person is being deprived of his capacity to act, i.e. he/she is no longer recognized as a person who is capable of performing actions and exercising his/her rights. The prosecution needs to be present to "safeguard" the process, and ensure local social services participate and are aware of the circumstances of the family and person whose legal capacity is being denied. The absence of these actors, or their lack of active engagement, may have an impact in the process of granting a verdict. On the other hand, their absence is perceived by some stakeholders interviewed for this research to "minimize" the importance of the process of deprivation of capacity to act, which is determined in the Civil Code, Civil Procedure Code and Family Code.

Holding a court proceeding

At the start of a court process, the plaintiff should deposit the documents supporting his claim, such as: certificates; decisions of KMCAP; hospital clinical file; medical file of the health care centre; Verification from a medical commission for the ability (mental and physical) of the proposed guardian of the applicant; a statement about the applicant's income. However, in addition to the above mentioned documents, the court can seek any additional evidence that it deems necessary.⁵⁹ This can include calling the person's relatives to give evidence, requesting legal documents and reports from different support services.

While monitoring court sessions and proceedings of the Tirana first instance court it was noticed that some of the justifications for asking for deprivation/restriction of capacity to act are: (a) mental health problems; (b) the person is totally incapable of understanding the importance of actions and it is necessary for the person to have constant care; (c) entitlement to old age pension, but he/she cannot request the pension or have somebody else do it for her/him, due to his/her mental condition; (d) the person has not been eligible for disability payment from KMCAP, since he/she has not been able to perform the necessary procedures due to the fact that he/she cannot physically move; (e) he/she is easily manipulated and requires

⁵⁹ Civil Procedure Code, article 383

constant attention from relatives; (f) the person is taking impulsive actions detrimental to perceived personal or family economic interests, including signing away property and under these circumstances it is necessary for him/her to have a legal guardian.

During this monitoring several problems were observed regarding notification of the doctors from the Forensic Medicine Institute. Their absence (in addition to other stakeholders) from court sessions is one of the main reasons for overdue court procedures. In some cases, the court has addressed the Ministry of Justice to remedy the situation. As a result, in some cases private consultants were sought, although the financial cost of private consultants is very high, and for many individuals, unaffordable.

A new practice introduced recently is that of the appointment of the psychologist who is in charge of drafting a summary of psychological status for the applicant/proposed guardian and for the person whose capacity is being determined. This practice was introduced mainly during 2015, and was only used in 3 cases during 2014.⁶⁰ It is important to note that the applicant submits in advance an assessment report from the medical and legal assessment disability committee, to decide about legal guardianship. The person in question is examined by a group of psychiatrists. Under these circumstances, appointing a psychologist is an additional measure, with further costs to the process.

The person whose capacity is in question is interviewed in court by the panel of judges or if he/she cannot come to the court, a member of the panel interviews him/her in the institution he/she lives in or in his/her home. The minutes that are kept during these sessions often state: “The appearance of the person was not normal, and it was clear that the person is suffering from mental health problems.⁶¹” In some court rulings the reasoning is the following: “Under these circumstances, deprivation of the capacity to act of the sick person, when the scientific and legal criteria authorize such as a thing it is imperative to remove or restrict his capacity to act since performance of legal acts by the said person would lead to nullification and consequently stop the civil circulation.”

As noticed, these arguments are inappropriate, judgmental and discriminatory. The existence of illness should be insufficient to make any judgment about the capacity to act, together with a definition of the individual appearing “not normal”, a very generalist and inappropriate description. The evaluation is entirely based on a medical model, where the opinion of the experts needs to be translated into a court ruling, despite the fact that it is the court that gives the final verdict on the case. The interviewed judges stated that: “We cannot make a decision without support from medical and legal expertise. It is indispensable to take a decision for deprivation of legal capacity to act.”

On the other hand, the process is overburdened due to requests from the local Social Services that require a large number of documents to undertake the evaluation of the person’s capacity.⁶²

⁶⁰ Source: monitoring of the court cases.

⁶² Documents that prove the health status of the applicant, different tests; certificate from the KMCAP; Criminal records clearance certificate for all adults that live in the household of the person that will be taken under

Social Services set a deadline of 15 days for depositing these documents in their offices. The evaluation of social and economic factors of the individual is drafted based on the data acquired during this 15-day period by local social services. In other words, the document is valid only for the evaluation period. As noted, the court processes handling deprivation/restriction of the capacity to act are lengthy processes. An important aspect that is missing in the social and economic evaluation is related to re-evaluation of the person's situation, with the view of updating of the data regarding the social and economic circumstances of a household and of the guardian that may well change when a court process can take 1-3 years. In the Albanian legislation and in practice there are no mechanisms that guarantee supervision for the period during which deprivation/restriction of the capacity to act is being sought, or of the work of a legal guardian when one such is appointed. In line with the interviews conducted for this research in the social services at the local level, the local Social Service report is a verification of the social circumstances of applicant and of the person for whom deprivation of legal capacity is sought. This report, inter alia, includes a recommendation about the best alternative to assigning a legal guardian, in reference to evidence and legal terms.

During monitoring it was noticed that in 62% of the cases (n=) K.M.C.A.P. [the Medical Commission on Capacity for Work] has considered the individuals as persons in need of a guardian. In 6% of the cases (n=) the individual is in a psychiatric ward, and in one case, the applicant stated that he sends the person with disability to a day care centre while he is at work and cannot take care of him. Another interesting aspect which further reinforces the reliance of the court upon medical and legal expertise is that all the monitored court verdicts align with the conclusions of the psychiatrists, referring to the report of the latter as key evidence in the process. It goes without saying that this the court report does not try to make an assessment of the expertise, but as clarified in the previous chapters, it is the court's decision. However, no matter how accurate the medical diagnoses or health status these are never sufficient to make a full assessment of an individual's capacity to take legal action in all aspects of life. Psychiatrists on several occasions used the internationally discredited criteria of "mental age" or the IQ of the individual that is being examined as a methodology for their evaluation of the person's capacity.

guardianship; personal and household composition certificate of the applicant; (standing) picture of the person to be placed under guardianship; personal certificate with picture and household certificate of the person with disabilities; attestation from the Social assistance office of the local unit that is evidence of all or any of the applicant's entitlements; any other certificate (opinion of neighbours, elderly, cousins, in writing); Information from the centre where the applicant has been accommodated; death certificate of parents or other family members, if the person lives alone; a document that proves total income of the person that is seeking to become guardian.

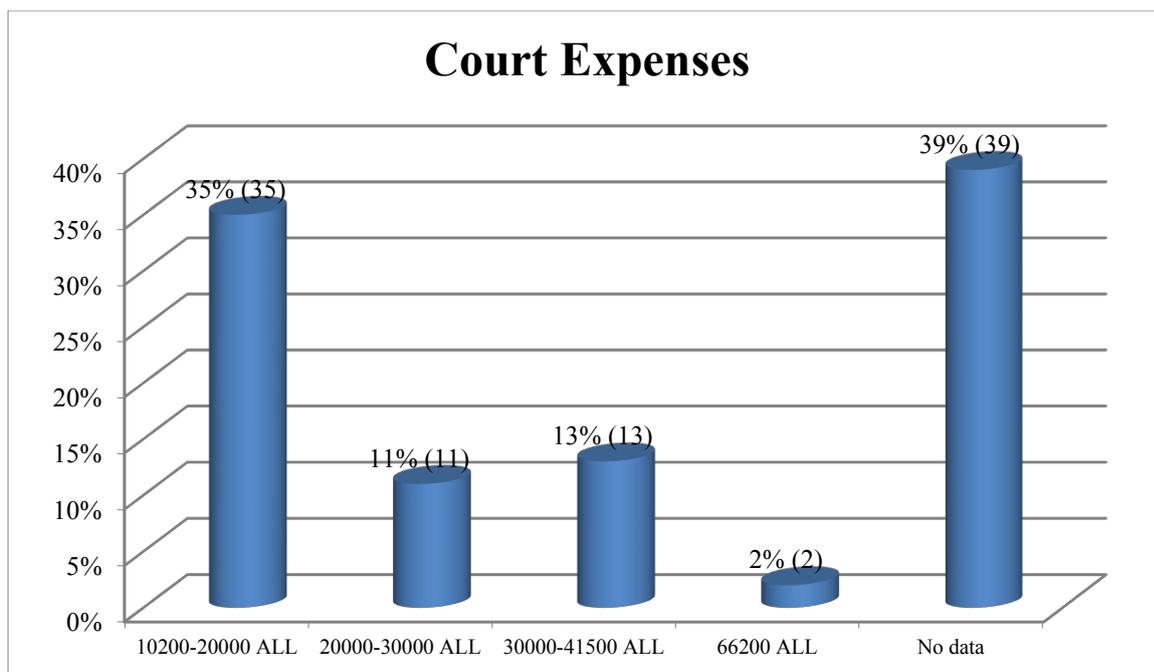


Figure 8 Court fees

Figure 8 demonstrates that the costs of the trial proceedings are high, given that the only source of income for these individuals is the disability benefit allowance and the guardian/caretaker allowance. In 35% of the cases (n=35) fees are 10 200-20 000, which is around 100-200 Euros and are borne by the individuals. In a large number of cases, 39% (n=39), no information is available about the court related expenses.

As pointed out above, one of the issues that came out during monitoring of court procedures is postponement and failure to hold court sessions. The main and most frequent reasons for postponement of a court session, or for it not taking place at all are: a) failure to constitute the panel of judges; b) the request for new evidence; c) lack of psychiatrists to undertake the evaluation of the individual for whom deprivation/restriction of the capacity to act is being sought, and relating of the evaluation act by local social services. This is also reflected in the court rulings, where the court has held on average 15 sessions before making the final verdict. In terms of timeframe the court proceedings on average take up to 13 months.

In no case does the court refer to international legislation, such as the UN Convention on the Rights of Persons with Disabilities (CRPD) which has been ratified by the Government, or to the ECHR.

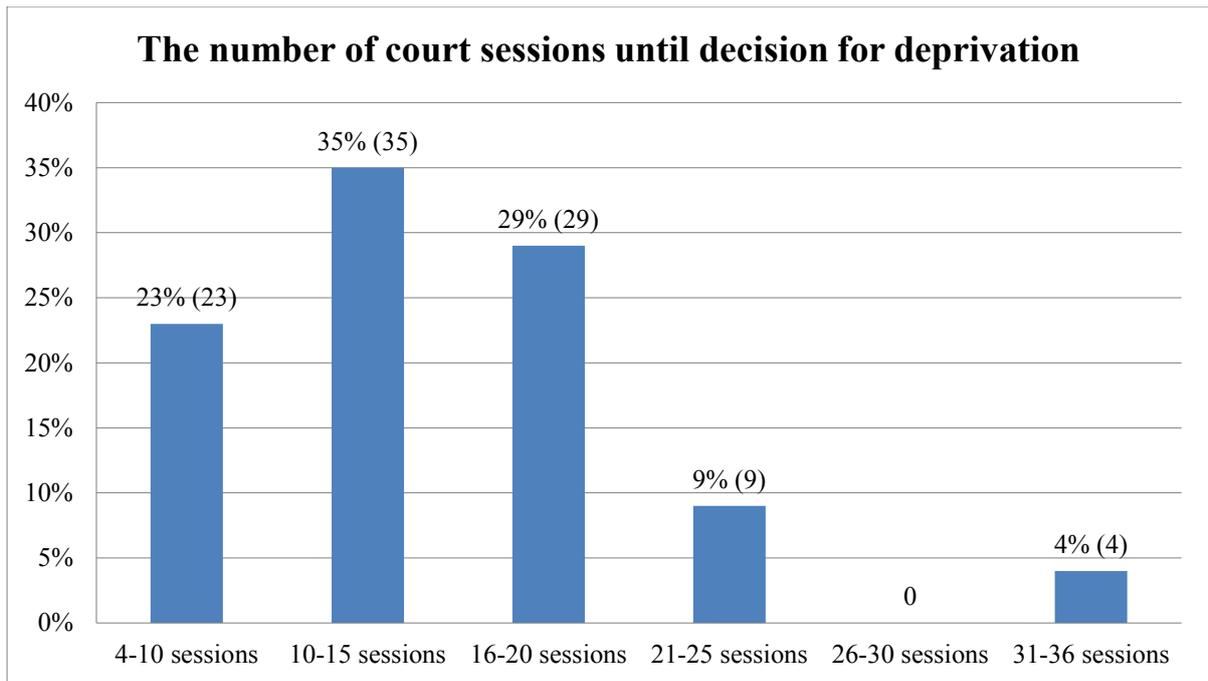


Figure 9 Number of court proceedings

As noticed in Figure 9, the number of court proceedings for each application is very high, and that entails very lengthy processes. In 30% (n=30) of cases there have been 16-20 court sessions; in 35% (n=35) of cases, 10-15 court sessions; while in 23% (n=23) of the cases 4-10 court sessions occurred.

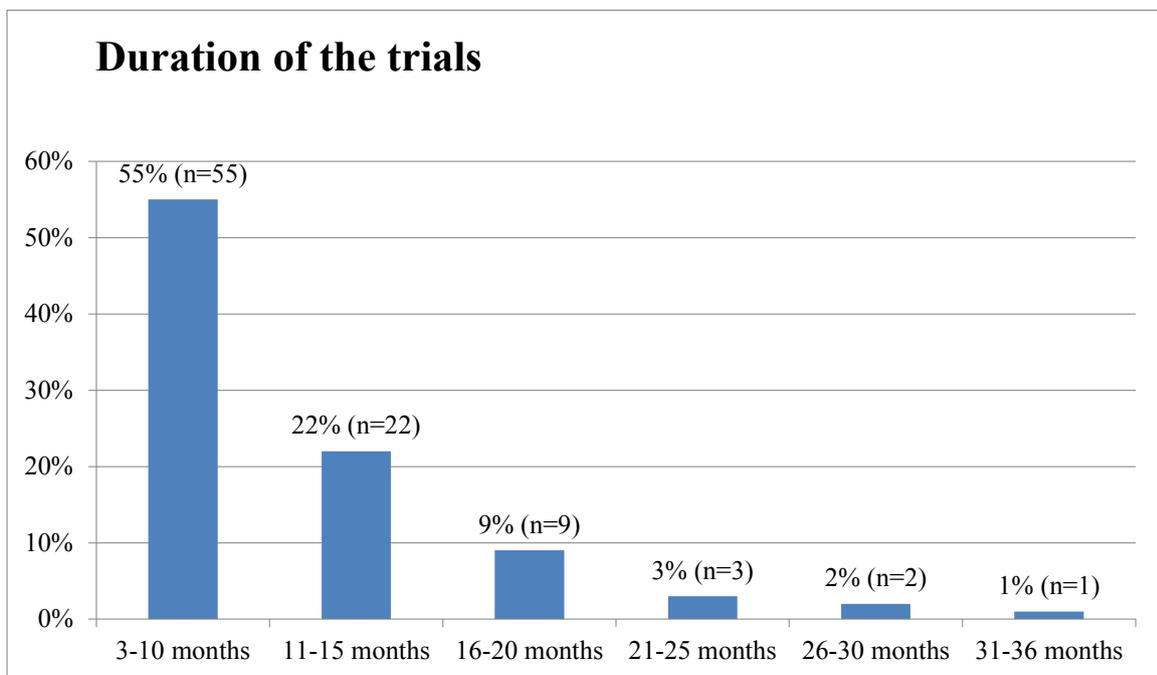


Figure 10 Length of trial

As noted from Figure 10, in 55% (n=55) of cases, the trial lasted between 3-10 months (this number includes cases where the trial was suspended due to various reasons). In 22% (n=22) cases the trial has taken between 11-15 months. In 1 case, the process took 36 months.

Some of the most striking cases include:

The case of the applicant A.S whose case ran for 2 years, with 25 court sessions, and was ultimately suspended because he was not present at one session. Several days later, he addressed the court again with the same suit. Upon renewal of the suit, the process is still ongoing, and since then 12 more sessions have taken place.

The court ruling for applicant D.B was: Since the team of medical and legal experts came to the conclusion that this citizen's capacity to act should be withdrawn for a certain time, to see if there is an improvement in the health status of the citizen. The court ruled on deprivation of capacity to act for a timeframe of 3 years, but it did not indicate when the re-assessment should take place.

The case of applicant J.Q who asked for restriction of legal capacity of his son, K.Q and appointment of A.F (the sister of K.Q) as legal guardian. He asked for the legal guardian to represent and be administrator of immovable properties of his son. The court ruled on restriction of legal capacity to act for alienation of immovable properties. The person who is the assigned legal guardian does not live in Albania. We need to bear in mind that in line with Articles 310 63 of the Family Code, the guardian should take care in particular about the person's medication, but in this case the legal guardian lives on a different continent.

In one case with 8 court sessions already having taken place (10 months), in the ninth session, the applicant has relinquished the case, with the claim that following consultations with the health care professionals of the Forensic Medical Institute and improvement of the individual's health status the case was supposed to be suspended.

⁶³Article 310 of the Family Code "The guardian of the person whose capacity to act has been withdrawn or restricted should take care of the said person, and in particular about his medical treatment."

CONCLUSIONS AND RECOMMENDATIONS

As noted in the Albanian legislation and from the monitoring of trial practice there are serious problems in two key aspects. First, the legislation is not consistent/in compliance with the Convention on the Rights of Persons with Disabilities (CRPD). The system of legal guardianship is still in use. Furthermore, no significant measures have been taken to replace this system with supported decision-making, except for some provisions that have been introduced in the Law on Inclusion and Accessibility that are as yet pending enforcement. In addition to the CRPD, the legislation runs contrary to the standards and rulings of ECHR. There are no legal and procedural mechanisms in place to monitor exercise of duties by the legal guardian. Even though in appearance, it is a process that ensures protection and high security measures for the person who is the object/subject of trial, through the participation of a large number of experts in the process, prosecution and the active role of the court it still remains a process where the person himself/herself for whom deprivation/restriction is sought is not sufficiently involved and there are no ways for involving him/her fully and which would ensure a realistic impact. The court does not dwell or go in detail on cases under review, but rather in most of instances depends on the reports of the forensic experts. The questions addressed to the experts are too generic. One single meeting is not enough to establish an opinion regarding all the social, economic and wider environmental dimensions of that person. Court sessions are too short to allow for that; the meetings too brief and there is no proper follow up or interaction with other persons on the side of the experts. The only tests used are the IQ tests that cannot sum up the person's experience, knowledge or support opportunities. The meetings with the individuals are rather formal and do not respect the obligation to provide reasonable accommodation.

A second problem is related to how the system or the procedures are implemented, with procedural setbacks as a result of failure of actors such as the prosecution, the local government social service officers, medical experts etc. to attend the court. The financial costs of such processes are high (with a tendency to escalate), due to delays in the process. Even though there have been some initial efforts to include the concept of supported decision-making, and to ensure its enforcement through the Law on Inclusion and Accessibility, the provisions have not yet been enforced. Of course, problems of in compliance of the legislation and failure of enforcement cannot be addressed only through the Law on Inclusion and Accessibility.

Current issues are systemic problems, and decisions about persons with disabilities are taken on this basis. The issues are not simply related to deep legal reforms required to align the national legislation with international standards, as outlined in Article 12 of CRPD. It goes without saying that reforms require first and foremost changes in the legislation, and that is the first step that needs to be taken. Such a reform requires "dismantling" the main principles that serve as foundations for the current legal system. One of the aspects that cannot be by-passed is the importance of the concept of equal recognition before the law, and its meaning in practice within different communities, e.g. the legal community, the community of persons with disabilities, their family members, social workers, healthcare professionals etc. The existing approaches towards persons with disabilities are entirely based on the medical model and on

the paternalistic concept of guardianship and substituted decision-making. Legal changes aiming for alignment of the legislation need to be preceded by detailed training, commencing with persons with disabilities, their parents, law professionals, and social science professionals. At the same time, based on a tendency of all stakeholders to accept medical expertise and definitions as non-negotiable and final, it is important to organize training sessions with psychiatrists offering legal expertise, and others working in hospitals or centres. There is a continuous perception by the professionals in this area that the standard required of the CRPD is very high, and cannot be met under the circumstances of overall lack of basic services and infrastructure.

It is important for society and the government to re-think their relationship with persons with mental disabilities in order to ensure communication and support. As noted in this report, the issue of “capacity to act”, equal recognition before the law, presents challenging issues. Even though the Committee on the Rights of Persons with Disabilities establishes it as a civil right, subject to immediate enforcement⁶⁴, society, public institutions, and the community of persons with disabilities are faced with an entirely new situation, and they do not yet have a good insight into the implications of these changes. There is very little awareness of the changes proposed in Article 12 of the CRPD and many are concerned about the new forms of regulation on this issue, some aspects of which sound like a setback and a return to the concept of legal guardianship⁶⁵. Based on the interviews, it is clear that persons with intellectual and psychosocial disabilities are unprotected, subject to abuse and exploitation, and are not facilitated to manage their own lives, or take their own decisions. Prejudice against the abilities of people with disabilities to be decision makers in their own right is deeply rooted in society, and without fighting these stereotypes and mind-sets, the legal changes will not yield the desired impact.

Based on the findings and international standards above mentioned, we present a set of recommendations that serve to align the national legislation with international standards.

- Repeal of the existing legislation, starting with the Family Code, Civil Code, and Civil Procedure Code, regarding deprivation of legal capacity to act;
- Adoption and implementation of by-laws in line with Law on Inclusion and Accessibility that enable supported decision-making services;
- Introduction and implementation of pilot projects related to supported decision-making;
- Raising awareness among professionals of the area, in particular focusing on the Judiciary, following with the central and local social services.

These steps towards reform will be advocated for by ADRF and its allies in Albania, through building broad coalitions with the representative organisations of persons with disabilities and their families, legal, social and healthcare professionals, human rights advocates and other interested parties. The current development of an Alternative Report for Albania to the UN Committee on the Rights of Persons with Disabilities is an important mechanism to advocate

⁶⁴ Para. 1 General Comment on article 12 CRPD.

⁶⁵ Interviews with the judges performed during the data collection period.

for these reforms, and the concluding observations issued by the Committee will also be a vital opportunity to push for the implementation of further reform on legal capacity law in Albania.

ANNEX: I

These are translations of the relevant extracts from the existing law – and not a proposal for reform.

Attachment I. National Legislation

Legal framework

Civil Code

Family Code

Civil Procedure Code

SUIT

Article 33

No suit can be raised against a person with no legal capacity.

COMPOSITION OF COURT SITTING (JURY)

Article 35

The first instance court is composed of a panel with one up to three judges. A sitting with three judges is formed in the following cases:

ç) suits for the deprivation or restriction of capacity to act.

Article 91

Capacity to act

The persons who have legal capacity to act enjoy all their rights and exercise and must be respected by others. Persons without legal capacity to act can be part only through legal representatives in a civil proceeding.

Article 93

Persons with capacity to act may perform themselves all procedural actions, except when the law provides for otherwise.

HEADING XII

Suspense of the court proceedings

a) Suspension of the ruling

Article 297

The court decided on the suspension:

ç) one of the parties does not have or has later on lost legal capacity to act as a party, and it is deemed necessary to appoint a legal representative;

During suspension period no procedural actions may take place.

Article 298

In the cases provided for in letters “c” and “ç” of the above mentioned article, the suspension continues till the person shows up or a contrary party is called, the person who is the legal representative of the person without legal capacity to act.

HEADING VII

Deprivation or restriction of the capacity to act

Article 382

Who submits the application

Deprivation or restriction of the capacity to act takes place upon the request of a spouse, next of kin, prosecution, and other persons who have a legitimate interest. The application is submitted to the court of the residence of the person for whom is request to deprive or restrict the capacity to act.

Article 383

Trial procedure

The application for the deprivation or restriction of the capacity to act is submitted to the prosecution. The application should contain the fact on which it is based and the necessary evidence. The court decided about the application, after interviewing the person for whom deprivation or restriction of the capacity to act is requested, his next to kin, his doctor, or the opinion of other experts, and other evidence that the court may deem necessary.

Interviewing of the person whose capacity to act is being withdrawn or restricted takes place in the institution the person is hospitalized for treatment or in his residence from a delegated judge, when the physical presence of the said person is not possible.

Article 384

Temporary guardian

(Cancelled by law no.9062, 8.5.2003)

Article 385

Appeal

The decision about deprivation or restriction of the capacity to act may be appealed by the said person, his temporary guardian, the person that has submitted the application, and all other persons who in line with article 382 of this Code have the right to ask for deprivation or restriction of their capacity to act, despite their participation or not in the court proceeding. In this case, the court allows them to become familiar with the file.

Article 386

Reference provision

The provisions of this Heading apply as well to the restitution of the capacity to act.

Article 387

Informing interested parties about the verdict of the court

Following a decision that settles deprivation, restriction or reinstatement of the capacity to act, a briefing is forwarded to all courts, so that all interested stakeholders may have access to it. The court forwards this briefing to the National Chamber of Notary Public that forwards it to the district notary public.

Civil Code

Capacity to act

Article 6

A person upon reaching eighteen years of age earns full rights so that by his acts he gains rights and holds civil obligations.

The full capacity to act is gained through marriage by the wife who has not reached the age of eighteen years. She does not lose the capacity even when the marriage is declared invalid or divorced before reaching eighteen.

Article 7

A minor who is not yet fourteen years old may perform legal actions only with the previous consent of his legal representative. However, he may participate in social organizations, to possess what he earns through his work, and to deposit his savings, and to dispose of these provisions.

Article 8

A minor of fourteen years old is not capable to act. He may perform legal actions proportionate to his age, and which are fulfilled at the point, as well as legal actions to his benefit without any compensation. Other legal actions are performed on his behalf by his legal representative.

Article 9

A minor of age from fourteen to eighteen years old who is incapable to tend to his work due to a psychic illness or mental health problems may be withdrawn legal capacity to act through a court decision. These actions may be performed only through his legal representative.

Article 10

An adult who due to a psychic illness or mental health problems is entirely or partially incapable to tend to his work may be withdrawn or restricted his capacity to perform legal acts through a court deliberation.

Article 11

A legal action that restricts the capacity to act is invalid.

Article 13

The person without legal capacity to act and the children in custody has the same address as their legal representative.

Article 64

A person with no full capacity to act cannot act as representative.

Legal actions that are declared invalid

Article 94

All legal actions that are valid until the court, upon the request of the applicant declares them invalid may be cancelled. Such are legal actions performed by:

b) persons who due to a psychic disease or problems of mental health have been withdrawn or restricted the capacity to act, when the legal action has been performed without the consent of the guardian;

c) persons who during the time of performance of the legal action were not aware about their importance, even though at that time they still had the capacity to act;

Cancellation of these actions may be required even after the death of the relevant person, but only when before death has been requested the deprivation of the capacity to act.

The deadline for prescription of the suit for the invalidity of legal actions

Article 104

The deadline for filing a suit begins: a) for legal actions performed by persons whose legal capacity to act has been withdrawn, from the day they have become adults or whose capacity to act has been reinstated;

Article 109

When a legal action is declared invalid because it has been performed by a person, whose capacity to act has been withdrawn or whose capacity to act has been restricted without the consent of his guardian or because it has been performed by a person who at the time of performance of the legal action has not been aware of the importance of his actions, each of the parties is obliged to return to the other everything it has taken, and when that is not possible, to pay for its value. In addition, the party with the capacity to act is obliged to compensate the other about the damage incurred due to the legal action that has been declared invalid, if he knew or was supposed to know that the other party did not have the capacity to act, or was not aware of the importance of his actions.

Statute of limitation and suspension

A. Suspension of the prescription period

Article 129

The prescription is suspended: d) for suits of minors and other persons with no capacity to act until they are assigned a representative, or until they earn this capacity, as well as for six months after appointment of the representatives or after gaining their capacity to act;

Capacity to dispose by will

Article 373

Any person that is 18 years old, and the wife under this age when she is married is entitled to draw a testament.

Minors from 14-18 years old may draw a testament only about assets earned through their work.

A person whose capacity to act has been withdrawn by court ruling, and the person who at the time of the drawing of the will is not able to understand the importance of this action cannot draw up a will.

The execution towards an unable creditor

Article 468

When the execution of the obligation is done to a creditor that is not able to act, the debtor is discharged in the same amount that has gone to the benefit of the creditor or of his representative.

Damages caused by minors and physically and mentally disabled persons

Article 613

A minor who is not yet fourteen years old and persons who are totally incapable to act are not responsible for the damage they have caused. Parents, guardians or persons to whom they have been entrusted or who supervise persons with no capacity to act are responsible for the damage caused by illegal actions of minors under fourteen years old, for persons under their guardianship and those that they supervise and with whom they live, but with no capacity to act, except when they can prove that they could not stop the cause of the damage.

The suit of restitution

Article 627

The person who has compensated the damage has the right to require from each of the other persons responsible for the damage his share of the damage, in direct proportion to the level of responsibility of each person and of the resulting consequences. When each party's proportionate share cannot be defined, the guilt is presumed to be equal.

Parents or guardians who have compensated the damaged caused by minors or persons who are unable to act have no right to require from them the restitution of the compensation for the damage they paid.

Termination of order

Article 927

Order ceases to exist upon death, incapacity to act or bankruptcy of the order maker or order taker, except when there is agreement otherwise or when the result is different due to the nature of the created circumstances. However, when termination of order may infringe the interests of order maker, order taker, the heirs or representatives are obliged to continue with the administration until when order maker, his heirs or representatives are in a position to handle the matter directly.

Deprivation from order and the legal implications

Article 928

Order maker may withdraw from a contract, but if the agreement provides for otherwise, he is liable for damages, except when resignation happens for a just cause.

The order given in the interest of the order makers or of the third parties does not cease to exist upon revocation by order makers except when it is stipulated otherwise in the contract or when it happens for a just cause, but does not cease to exist due to death or incapacity to act of order makers.

Civil Procedure Code

DEPRIVATION or RESTRICTION OF THE CAPACITY TO ACT

Article 382

Who can submit an application?

Deprivation or restriction of the capacity to act takes place upon the request of a spouse, next of kin, prosecutor, and other persons with legitimate interest in this fact.

The application is submitted to the court where the residence of the person whose capacity to act is sought to be withdrawn or restricted is.

Article 383

Trial procedure

The application for the deprivation or restriction of the capacity to act is forwarded to the prosecution. The application should include the facts and necessary evidence.

The court decided about the application, after interviewing the person for whom deprivation or restriction of the capacity to act is sought, his next to kin, his doctor, or after having received the opinion of other expert doctors, and administering other evidence that it deems necessary.

Interviewing the person whose capacity to act is sought to be withdrawn or restricted takes place in the institution where he is hospitalized or in his residence by a delegated judge, when it is not possible for him to present himself physically at the court.

Article 384

Temporary guardianship

(Cancelled by law no.9062, dated 8.5.2003)

Article 385

Appeal

The decision for deprivation or restriction of the capacity to act may be appealed against by the said person, his temporary guardian, the person who has submitted the application, and all other persons that according to article 382 of this Code have the right to ask for the deprivation or restriction of the capacity to act, despite their participation or not in the court proceedings. In this instance, the court permits them to get familiar with the case file.

Article 386

Reference provision

The provisions of this Heading apply as well to the restitution of the capacity to act.

Article 387

Informing the interested parties about the court ruling

Following the decision for the deprivation, restriction or restitution of the capacity to act, the deliberation is forwarded to all courts to register it in a special form, where anybody that is interested can look into it.

The court sends a briefing of this ruling to the National Chamber of Notary Public, which then forwards it to all notary public in the districts.

Family Code

Guardianship of incapacitated persons

Article 307

The court, in the decision for removing or limiting the capacity to act shall appoint a guardian for the person whose capacity to act is being withdrawn or restricted.

Article 308

Guardianship provisions for minors apply also for the guardianship of persons who have been declared incompetent, except for cases as otherwise stipulated in the Code.

Article 309

A guardian of the person who has been declared totally incompetent represents and manages their property in the same manner as a parent represents and manages the property of a minor who has not reached 14 years of age.

A guardian for a person with limited capacity gives consent and manages their property in the same manner as a parent gives consent and manages the property of a minor who has reached 14 years of age.

Article 310

The guardian of a person whose capacity is deprived or limited must take care of the person, and in particular of his medical treatment.

Article 311

For a minor who has reached the age of fourteen and is under parental tutelage, when his capacity is withdrawn does not get assigned a guardian, but continues to be under parental tutelage, the same way a minor does who has not reached fourteen years old.

Once a minor is turned into an adult and his capacity is not restored, the court assigns him a guardian that may be a parent or another person.

Article 312

For minors who have reached fourteen years of age, when under guardianship and his capacity is deprived, the court assigns a new guardian or decides that the guardian continues to exercise the same functions.

Article 313

A person is no longer under guardianship when his capacity to act has been restored by court verdict.

PERSON

PARTNERSHIP TO ENSURE
REFORM OF SUPPORTS IN
OTHER NATIONS

PERSON, Centre for Disability Law & Policy, National University of Ireland, Galway, Ireland
P: +353 (0)91 494272 / E: eu.person@nuigalway.ie / W: www.eu-person.com

Partner Organisations



This project is funded by the
European Union



This document has been produced with the financial assistance of the European Union. The contents of this document are the sole responsibility of PERSON (Partnership to Ensure Reforms of Supports in Other Nations) and can under no circumstances be regarded as reflecting the position of the European Union.