

THE SCOPE OF THE DEPRIVATION OF LEGAL CAPACITY AS A PRECONDITION FOR THE PROTECTION OF RIGHTS AND DIGNITY OF PERSONS WITH DISABILITIES

ABSTRACT

Guardianship as a family-law institute has been an important, yet unsolved issue for decades now. The latest family law reform of 2014 and 2015 brought certain changes, which have been explained and advocated for as a new contribution to the improvement of the legal position of adults with disabilities on one hand as well as the legal certainty and the rule of law on the other.

The Croatian Family Act proclaims that a person cannot be deprived of legal capacity completely, but only partially. One can only wonder - how can this provision be implemented in cases of a coma for instance? A wise legislator allows judges to be far more than the pure executors of a person with disabilities' intentions. However, it seems that a wise judge when deciding upon this issue would in certain cases be acting contra

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legem if attempting to coherently protect the person with disabilities, which cannot be acceptable.

Therefore, it is the aim of this paper to shed additional light on the newly adopted provisions of the Family Act as regards the deprivation of legal capacity, with the general premise that such a legislative intervention is neither proportional nor efficient.

INTRODUCTORY NOTES

The comprehensive reform of Croatian family law, commenced in 2014 and continued in 2015, was intended to be a universal answer for numerous questions arising from the legislation and from its practice. At this point, it is rather clear that the aim is not yet reached. It should be stated that only shortly after the entry into force of Family Act 2014 (Family act, 2014), the proceedings for the review of its constitutionality were commenced and by the Decree of the Constitutional court its implementation was suspended (Constitutional court of the Republic of Croatia, 2015a). Before the decision of the Constitutional court in *meritum*, the legislative procedure for the passing of the new Family Act began, resulting in the entry into force of the Family Act 2015 (Family act, 2015).

The main topics of this paper are certain provisions of the Family Act as regards guardianship for adults. As it is stated in the Explanation to the Final draft of the Family act, as accepted by the Government of the Republic of Croatia in September 2015, the institute of guardianship for adults deprived of legal capacity has been changed, having in mind that the Republic of Croatia is not obliged to deprive persons with disabilities of their legal capacity, but to undertake certain measures aimed at providing the necessary assistance for persons with disabilities in realisation of their legal capacity (Government of the Republic of Croatia, 2015).

The fundamental provision regarding protection through guardianship is Article 221 of the Family act, which stipulates that such protection has to be appropriate, individualised and in accordance with the welfare of the ward. This is a general provision that reflects contemporary views regarding protection of persons with disabilities and it cannot be disputed.

However though, at least two challenges lie ahead of its implementation in practice, especially as far it concerns the strengthening of the individualised approach. The first challenge is that the non-existence of the possibility of complete deprivation of legal capacity opens numerous doubts, both in theoretical as well as in practical considerations. The second challenge concerns the protection of a person in regards to whom the proceedings for the deprivation of legal capacity have been commenced. In accordance with Article 241 Paragraph 1 Subparagraph 1 such a person shall be appointed a special guardian, unless he/she has previously

named a person who is to represent him/her in this procedure, by means of an advanced directive.

Since this alternative is a novelty in the Croatian legal system, it is very rarely used, therefore, a special guardian is appointed by the social welfare centre for the protection of particular personal and property rights and interests of a person in regards to whom the procedure for the deprivation of legal capacity is under way. This special guardian, by means of Paragraph 2 of the same Article is a person employed in the Centre for special guardianship (*cf.*: Aras Kramar and Ljubić, 2017).

Pursuant to Article 544 of the Family act, this Centre is a public institution, established by the ministry in charge of social affairs for the territory of the Republic of Croatia and enrolled in the court registry. Since its establishment, this Centre's activities have suffered from numerous deficiencies, most of them deriving from the mere fact that it is not adequately equipped to perform its duties, due to the lack of financial resources resulting in an insufficient number of employees, however further analysis of this issue surpasses the scope of this paper.

It is our firm belief that the complete deprivation of legal capacity should be reconsidered, however though, only as an exception to the rule and applied only in extraordinary circumstances. In general, it should be considered only in cases in which it is impossible to establish any meaningful contact with the person whatsoever.

Such a conclusion follows also from the analysis of comparative legal systems, which are not prone to completely abolishing the possibility of full deprivation of legal capacity, such as Austria, Germany, Italy, France or Switzerland, all countries often seen by Croatian legislator as model systems.

Even the systems not so akin to the Croatian one share the same logic. For instance, the Australian law reform commission has recently published a report in which they remind us of the existence of „»hard cases« in which it is extremely difficult or even impossible to establish the will and preferences of a person, due to which fact it is necessary that someone else decides for them (Australian Government – Australian Law Reform Commission, 2014: 62). The same Commission holds that it is the consequence of the fact that *»some people will always need decisions made for them«* (Australian Government – Australian Law Reform Commission, 2014: 278). A similar position is supported also by Norway, which clearly stated that in extraordinary cases, the substitute decision making was the solution they agreed with, of course under the condition that adequate protection mechanisms were implemented in the legislation (Freeman et al., 2015: 848).

In order to further test our hypothesis, we have made an insight into the recent court practice of the Municipal civil court in Zagreb, in October 2016 and again in June 2017. We have analysed in total 30 court decrees passed in the procedures

for the deprivation of legal capacity as well as for its re-establishment, randomly selected by the appointed court clerk. Of course, it would be unrealistic to claim that such research can be considered as comprehensive and valid for all cases and in the whole country, but the patterns of procedure are more than obvious. It can be well presumed that the situation is similar in other Croatian courts as well.

Nevertheless, the aim of this paper is not to criticise the current state of legislation and practice. On the contrary, as a result of evidence-based research, we propose amendments *de lege ferenda*. We are convinced that only a coherent action in the area of protection of the rights of persons with disabilities can bring the desired results, *inter alia* the safeguarding of their human rights and dignity.

THE LEGAL FRAMEWORK: NON-EXISTENCE OF THE POSSIBILITY OF COMPLETE DEPRIVATION OF LEGAL CAPACITY

The deprivation of legal capacity has long been used as a means of protection of persons who, due to their health status, are unable to protect their own interests and rights. Of course, the notion of »health status« in this context refers primarily to the issues of mental health and welfare. The progress of a certain society has always been evaluated in regards to the approach to the most vulnerable groups, and persons with mental disabilities certainly belong to this category.

The legal framework remained in its core almost unchanged for centuries. Let us just remind ourselves of the Roman law institutes of *cura furiosi*, *cura debilium personarum* or *cura prodigi* (Horvat, 1980). However, the purpose changed significantly. Until recently, one could almost claim that the aim of deprivation of legal capacity, no matter how it was named at the time, was to protect the society from a person with disabilities. As Korać Graovac and Hrabar (2007) correctly warn, adults suffering from mental disorders have been isolated from the society for centuries.

Contemporary concept and approach are aimed to protect the person with disabilities from society, meaning that the legal system provides for protection primarily from persons who would be acting in bad faith towards such a person, but also under certain circumstances, the person with disabilities is in a way protected from himself/herself. Furthermore, the new concept advocates for ever more consistent integration into society and promotes the principle of non-discrimination and human dignity in general.

The possibility of deprivation of legal capacity was initially designed in a manner that partial deprivation was supposed to be a rule and complete deprivation an exception to this rule, as defined by contemporary family-law acts, e.g. by Article

182 of the Family Act 1998 (Family act, 1998) or Article 159 of the Family Act 2003 (Family act, 2003).

However, notwithstanding the legislator's intention, as regrettably often seems to be the case, the situation in practice was completely opposite – the complete deprivation of legal capacity became a rule, and partial deprivation an exception to the rule. This is also deplorably obvious from the statistical data for the last years. Namely, of the total number of persons deprived of legal capacity from 2007 until 2015, for which period there are comparable data available at the pages of the Ministry of demography, family, youth and social policy of the Republic of Croatia, a simple mathematical operation confirms that in this decade the number of persons partially deprived of legal capacity makes around 12%. In details since 2007 until 2015 the percentages are: 10.82%, 10.13%, 10.76%, 12.86%, 11.03%, 11.74%, 12.13%, 15.43% and 16.40% in 2015 respectively (Ministry of social policy, 2017).

The number of court decisions by means of which the legal capacity was re-established is interesting to note as well. From the same statistical data, it follows that since 2007, and it may be well assumed that the situation was similar before as well, namely out of the complete number of deprivations of legal capacity, court decisions on its re-establishment are passed in less than one-half of a percent of cases. In details since 2007 until 2015 the percentages are: 0.12%, 0.20%, 0.27%, 0.30%, 0.34%, 0.29%, 0.30%, 0.36% and 0.29% in 2015 respectively (Ministry of social policy, 9.7.2017). The stated data itself confirm that the reform of the institute of guardianship was necessary, as was advocated for in Croatian family law theory.

The influence of the Convention on the rights of persons with disabilities and the Committee on the rights of persons with disabilities

The idea of the urgent need to improve the legal position of persons with disabilities, in Croatia as well as in numerous legal systems, gained momentum by the entry into force of the United Nations Convention on the rights of persons with disabilities and its Optional protocol (UN, 2006). The purpose of this Convention, as stated in Article 1, is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

As emphasised in a widely cited Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol, *»the Convention is a complement to existing international human rights treaties. It does not recognise any new human rights of persons with disabilities, but rather clarifies*

the obligations and legal duties of States to respect and ensure the equal enjoyment of all human rights by all persons with disabilities. The Convention identifies areas where adaptations have to be made so that persons with disabilities can exercise their rights and areas where the protection of their rights must be reinforced because those rights have been routinely violated. It also establishes universal minimum standards that should apply to everyone and that provide the basis for a coherent framework for action.» (United Nations, 2007:5).

The new concept, of course, surpassed the boundaries of family law. For instance, the Law on the electoral register of 2012 in Article 64 included the persons completely deprived of legal capacity into the electoral registers Law on the electoral register, 2012). This brought about a significant change in comparison to the previous Act of 2007 in accordance to which the electoral register included Croatian citizens of full age, except for those completely deprived of legal capacity by virtue of a final court decree (Law on electoral roll, 2007).

It is therefore no wonder that the Croatian legislator in 2014 and 2015 respectively found the reform of the institute of guardianship for adults to be needed. Aware of the deficiencies and weaknesses of the system, present at that time but also now, the legislator decided to tackle only a few issues, hoping that they would provide for a more comprehensive protection of persons with disabilities. It is explained by the drafter of the new Act that the novelties in the family-law protection of persons with disabilities are primarily a result of international obligations of the Republic of Croatia and the influence of the European court of human rights reflected in the number of judgements by virtue of which the breaches of human rights of persons with disabilities have been established (Rešetar, 2017).

The provision on the principles of guardianship for adults is a very noble and acceptable one, namely, Article 233 of the Family Act stipulates (as translated by the authors):

»(1) The protection of a person with disabilities is, when possible, necessary to secure through other means and measures provided for in special regulations, before a decision on the deprivation of legal capacity and protection through guardianship is passed.

(2) In the implementation of the protection through guardianship, it is necessary to aspire to lesser constraints of the rights of the ward.

(3) In proceedings with the ward, present or previously declared views of the person, as well as the protection of the dignity and the welfare of the person have to be taken into consideration.

(4) It is necessary to encourage independent decision making by the ward and to provide decision-making in the decision making as well as in the participation in community life.

(5) The guardian is obliged to accept the wishes and personal views of the ward, unless it is contrary to the welfare of the ward.«.

However, the legislator did not put in any extra effort to make these principles implementable in practice (for example, in practice there is no system of supported decision-making being realised through new legal institutes as a way of preventing the appointment of a guardian to the ward). On the contrary, the fundamental change, as already mentioned, as regards guardianship for adults is the non-existence of the possibility of complete deprivation of legal capacity, as defined by Article 234 Paragraph 2 of the Family Act 2015 (Family Act, 2015).

To our mind, such a legislative intervention is a reflection of the quite dubious understanding of the Convention on the Rights of Persons with Disabilities (CRPD), especially paragraphs 1 and 2 of Article 12, entitled Equal recognition before the law, which reads:

»(1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

(2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.«.

In the sense of content, although one might believe that such a provision is only of a principal nature, its scope was indeed strongly advocated for by the Committee on the rights of persons with disabilities in its General comment no. 1 (2014) on this very article. The Committee is an independent monitoring body which consists of twelve experts. In para. 7 of this General Comment, the Committee reads: *»State parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others«* (Committee on the rights of persons with disabilities, 2014: 2).

In the sense of terminology, the Convention does not define the notion „legal capacity“ which obviously represented an open issue. It was not until the publication of General comment no. 1 (2014), which is not binding for the contractual parties, that the Committee on the rights of persons with disabilities declared its understanding that the notion »legal capacity« includes both the ability to hold rights and duties (legal standing), as well as the ability to exercise those rights and duties (legal agency) (Committee on the rights of persons with disabilities, 2014: 3).

The abolition of the institute of guardianship as a whole could be considered as a very progressive one. It would indeed be such if all the safeguards as defined by the same Article 12 Paragraph 4 of the CRPD were put in place, which reads:

»(4) States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.«.

The idea of abandoning the complete deprivation of legal capacity, as a pebble on this path, seemed interesting to the Croatian legislator. The question therefore is: what does the legal system do when it changes legal provisions by the stroke of a pen, without sufficient attention paid to the real situation, both of persons who the system is trying to protect and to the system itself? The answer we find to be the only realistic one is: the system makes wrong decisions in regards to a certain circle of persons with disabilities who, unfortunately, cannot protect their rights and interests whatsoever. The decision to only partially deprive of legal capacity a person who is in terminal phase of Alzheimer's disease or dementia, or who is in a coma, or whose severe intellectual disability prevents him/her from establishing any reasonable and meaningful contact with another person is simply wrong. Therefore, it is the issue of protection of persons with disabilities who are, due to their health status, objectively precluded from any participation in the society, so their protection should be based on different presumptions to the protection intended for those persons with disabilities whose participation in society, due to their health status, is only limited to a certain extent, but is not completely precluded.

It is even more so when the fact is taken into consideration that other international documents, such as Recommendation No. 99 (4) of the Committee of ministers of the Council of Europe to Member States on principles concerning the legal protection of incapable adults does not demand the full abolition of substitute decision-making (Committee of ministers of the Council of Europe, 1999).

It may well be assumed that similar considerations led to the Canadian solution. Namely, Canada as a party to the Convention made a reservation as regards the circumstances that to the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards (The Government of Canada, 2010).

The Dutch system followed the same line of reasoning, interpreting Article 12 as restricting substitute decision-making arrangements to cases where such mea-

asures are necessary, as a last resort and subject to safeguards (The Government of the Kingdom of the Netherlands, 2016).

Dute (2015: 318) adds to this concept also the consideration that abolition of substitute decision-making arrangements is not only unrealistic, but it is also undesirable, since the main reason for the development of modalities of substitute decision-making is the need to protect the persons, both from the irresponsible decisions they can make on their own, but also from the possible abuse of their state by other persons, including family members, which, we agree, forms „the very essence of the *parens patriae* doctrine. Freeman et al. (2015: 844-847) go a step further and conclude that abolishing the forms of substitute decision-making in certain cases can lead to the jeopardy of other rights guaranteed to persons with disabilities by means of the Convention. Of course, there are authors who share a completely different opinion, based on the concept of the complete abolishing of the substitute decision-making agreements. Even in the cases of »severe impairment« of a person's health status, they find it appropriate to elect a personal representative, who shall assist in the decision-making process and support the exercise of legal capacity (Morrissey, 2012: 429). However, it is still an open issue as to how to achieve this goal when the health status of a person does not allow for the establishment of any meaningful contact with the elected representative, unless of course that the will and preferences of a person are not known via advance directives.

History teaches us that persons with disabilities have for centuries been, and in some situations, in general they still are, deprived of full exercise of their rights. This was wrong. However, to advocate for a mere fiction that persons in extraordinary situations, such as described above, are better protected if they are not completely, but rather, only partially deprived of legal capacity, is also wrong. The pendulum has gone too far. We are not protecting their human rights, we are merely designing emperor's new clothes, since nothing is changed as regards their possibility to interact with others, their possibility to express their will, their possibility to protect themselves.

It is fair to state that, on the other hand, the Committee on the rights of persons with disabilities has approved these latest Croatian legislative amendments, as is stated in the concluding observations on the initial report of Croatia by means of which the Committee »recommends that the State party take legislative measures to abolish substitute decision-making regimes, in accordance with the Committee's general comment no. 1 (2014) on equal recognition before the law« (Committee on the rights of persons with disabilities, 2015a: 4).

It is also fair to state that such a recommendation is also given to numerous other legal systems as well, including those whose solutions are quite often, in Croatia, seen as models, such as Austria, Germany, Italy, France or Switzerland. It

seems that none of these legislations is in complete congruence with the demands defined by the Committee on the rights of persons with disabilities.

In the concluding observations on the initial report of Austria adopted in 2013, the Committee notes that approximately 55 000 persons were under guardianship, half with respect to all aspects of life, *i.e.* completely deprived of legal capacity and therefore the Committee recommends that substitute decision-making be replaced with supported decision-making (Committee on the rights of persons with disabilities, 2013).

At the 2015 session, the Committee adopted concluding observations on the initial report of Germany, in which the same concern was raised: *»The Committee is concerned that the legal instrument of guardianship »rechtliche Betreuung«, as outlined in and governed by the German Civil Code is incompatible with the Convention» and therefore the Committee recommends that „the State party eliminate all forms of substitute decision-making and replace it with a system of supported decision-making, in line with the Committee’s general comment no. 1 (2014) on equal recognition before the law«* (Committee on the rights of persons with disabilities, 2015b: 5).

Similarly, in regards to the Italian initial report, the Committee raised its concern that substitute decision-making continues to be practised through the mechanisms of administrative support (*amministrazione di sostegno*) and hence recommended that the State party repeal all laws that permitted substitute decision-making by legal guardians (Committee on the rights of persons with disabilities, 2016).

The Committee has not yet issued concluding observations regarding the French and the Swiss system, but it is realistic in expecting the objections to be similar to the ones presented above. Dute (2018: 318) emphasises therefore that, currently, none of the parties to the Convention meets the demands of the Committee.

Having the aforestated in mind, it can well be concluded that the actions (or omissions) by the State parties to the Convention on the rights with disabilities are not similar by pure chance. It is even more questionable having in mind that the above mentioned countries can be depicted as *»well-intentioned and resourced countries«* and can be assumed that less resourced systems shall encounter even more intense challenges (Fallon-Kund and Bickenbach, 2017: 288).

It is therefore an open issue whether *»there is a general misunderstanding of the exact scope of the obligations of State parties under article 12 of the Convention«* or that *»there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision making«* (Committee on the rights of persons with disabilities, 2014: 1).

To our mind, it is not a misunderstanding, it is just the opposite. Namely, there are unfortunately extraordinary situations in life where both the complete

deprivation of legal capacity, as well as plenary guardianship are in line with the very concept of human rights, since extraordinary situations demand exceptional legislative, judicial and administrative responses. Therefore, we completely adhere to the view of Korać Graovac and Čulo (2011) who claim that this Convention is a document, which, in the velocity and the ardour of the new change did not completely take into consideration the particularity of the state and the needs of individuals with disabilities.

On the basis of the aforesaid, we support the doctrinal pleas directed to the Committee for the rights of persons with disabilities in order to provide a more realistic, that is less radical interpretation of the Convention and of Article 12 in particular. We adhere to Dawson's opinion that a new interpretation could secure better guidelines to the parties to the Convention in the reforms and implementation of national legislations (Dawson, 2015). Dute (2015: 318) is even more direct when claiming that the abolition of substitute decision-making arrangements is »a *step too far*« and that the Committee has lost sight of reality, since it is obvious that not everyone is able to exercise legal rights, even with the most comprehensive support.

Fallon-Kund and Bickenbach (2017: 308-309) therefore rightfully warn that »*demanding unrealistic goals leads not only to violations of those but also to the real possibility of States disregarding the entire instrument*«. They also state that »*some well-defined exceptions to the exercise of legal capacity, surrounded by appropriate safeguards, would more likely encourage the States to reform their legal capacity laws*« (Fallon-Kund and Bickenbach, 2017: 310). Namely, as Alston (2017:22) correctly reminds us »*the perfect should not be the enemy of the good*«.

THE INSIGHT INTO SELECTED DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA AND THE EUROPEAN COURT FOR HUMAN RIGHTS AS REGARDS THE DEPRIVATION OF LEGAL CAPACITY

The concept of complete deprivation of legal capacity as an exception to the rule, applied only in extraordinary situations, is clearly not unthinkable of from the constitutional point of view as well. Let us mention the decision of the Constitutional court of the Republic of Croatia, passed in May 2015. By virtue of this decision, the Constitutional court does not *a limine* eliminate the possibility of complete deprivation of legal capacity, it only warns that it is by all means a serious measure that is to be applied only in exceptional cases, always taking into consideration that such a measure has significant impact on the private life of a person and his/her human rights, also taking into consideration the principle of proportionality. Hence, it might

well be concluded that the Constitutional court is utterly aware of the impact of such a measure, but it nevertheless does not eliminate such an option in extraordinary cases (Constitutional court of the Republic of Croatia, 2015b). On that line of reasoning, the Constitutional court continues in paragraph 12. of this Decision as follows: *»Even when the State bodies establish, with the needed level of certainty, that the person is unable to take care of one's own needs, rights and interests and that the person is in need of assistance, care and supervision, the complete deprivation of legal capacity should be applied when it is established that no less restrictive measure would not serve its purpose or when other less restrictive measures have been unsuccessfully attempted«* ((Constitutional court of the Republic of Croatia, 2015 b: 11).

The previously stated opinion was once again approved by the Constitutional court in the decision passed in January 2016. In paragraph 8. of this Decision the Constitutional court came to the conclusion *»...that the deprivation of a person's legal capacity is a very serious measure that should be reserved only for exceptional circumstances«* (Constitutional court of the Republic of Croatia, 2016: 9, 2016: 9).

It is worth noting that the Constitutional court of the Republic of Croatia passed these decisions in 2015 and 2016, *i.e.* at the time when the Convention on the rights of persons with disabilities had been a part of internal legal order for years, in accordance with Article 134. of the Constitution of the Republic of Croatia (1990).

The same reasoning can be recognised in judgements of the European Court of Human Rights (ECHR) as well. Let us mention only two, however though, only in regard to the Court's general arguments regarding the deprivation of legal capacity. In the case *X. and Y. vs Croatia*, the Strasbourg court reiterates that *»divesting someone of legal capacity is a very serious measure which should be saved for exceptional circumstances«* (ECHR, 2011 a: 19). We completely adhere to this claim.

It should be emphasised that, as we have already advocated for, the complete deprivation of legal capacity should be reconsidered only under extraordinary exceptional circumstances. Such a conclusion could also be made from another judgement of the Strasbourg court. Namely, in the case *Ivinović vs Croatia*, the Court stated: *»Even when the national authorities establish with the required degree of certainty that a person has been experiencing difficulties in paying his or her bills, deprivation, even partial (accentuated by the authors) of legal capacity should be a measure of last resort, applied only where the national authorities, after carrying out a careful consideration of possible alternatives, have concluded that no other, less restrictive, measure would serve the purpose or where other, less restrictive measures, have been unsuccessfully attempted«* (ECHR, 2011 b: 14).

In order to rethink this issue from a practical aspect in the sense of the functioning of Croatian national first instance courts, we have made insight into the court practice of the Municipal civil court in Zagreb. The first analysis was made in

October 2016 and the second in June 2017. It should be stated that the situation as regards the understanding of the abolition of the complete deprivation of legal capacity remained the same. Therefore, once again, we have changed the legislation, we have changed the court decrees as regards the scope of the deprivation, but we have not changed the true meaning and impact of the court decisions. The analysis conducted is briefly presented in the following lines.

AN INSIGHT INTO RECENT COURT PRACTICE OF THE MUNICIPAL CIVIL COURT IN ZAGREB AS REGARDS DEPRIVATION OF LEGAL CAPACITY

The previously elaborated insight into recent court practice revealed several circumstances. Firstly, the judges are prone to pass the decrees, which are in a form persistent with the Family Act in force, but in content they are not. Indeed, court decrees show that the main part of the decree really »hides« the purpose of the court decision itself. One could argue that by doing so, judges act *contra legem*, against the legal provision and its meaning. However though, we believe that they are obeying the law, respecting the old Roman proverb – *dura lex, sed lex*. The law is harsh, but it is the law, therefore it should be respected.

Hence, the question is: what can a judge aware of the terminal phase of a person suffering from Alzheimer's disease do in accordance with the Family Act 2015? The judge can only partially deprive the person of legal capacity. A wise judge would also know that such a protection is not sufficient and would therefore find a new way of protection: declarative partial, but really a complete deprivation of legal capacity. Are the judges who follow this line of reasoning wrong? To our mind, they not only are not wrong, but they follow the basic legal principles governing the legal profession. The role of the judges cannot be limited only to be the »*mouth that pronounces the words of the law*« (Montesquieu, 2011: 181).

As there is quite a strong indication that judges do as described above, let us briefly present several court files, in which the persons, to our minds, have to be completely deprived of legal capacity by nature of their health status. Of course, at this point, such a decision cannot be passed, but the aim for protection remains the same.

In the case R₁-Ob-928/2016, the person suffered from severe intellectual disability, epilepsy and paranoid psychosis. At the courtroom, the person stated his name, that his mother took care of him at home, that he watched television, and that »*he was in business with the shirts*«. The person also, pointing at his own father, stated that he was »*the priest or God himself*«. By virtue of the court decree, the par-

ty was partially deprived of legal capacity: *»for the purposes of regular ambulatory treatment, and also in accordance with the clinical status of the hospital treatment, for the purposes of accommodation in an appropriate institution, for the decisions in the segment of status issues, for the disposition and administration of complete property, including regular financial receipts, for undertaking all legal actions including concluding any legal acts, as well as for representation in court procedures before public bodies«.*

In another case, R₁-Ob-904/2016, the person suffered from encephalopathy, microcephaly, severe intellectual disability, epilepsy and autism. The person did not speak, did not maintain eye contact and did not move independently. In the out-of-court proceedings, the judge established that it was not possible to establish contact with the person. By virtue of the court decree, the person was partially deprived of legal capacity as regards regular ambulatory and hospital treatment, possible need of accommodation, administration of regular financial receipts, as well as for undertaking all legal actions and acts.

In the case R₁-Ob-586/2016, an elderly person suffered from dementia, which the medical doctor found to be of a permanent nature with the tendency of further deterioration. The court decree pronounced that the person be partially deprived of legal capacity in regards to actions and acts relating to the change of personal name, entering into and termination of a marriage, decisions on health issues, decisions on domicile or habitual residence, as well as acts and actions relating to the disposition and administration of any property, salary or other permanent financial receipts.

In case R₁-Ob-410/2016, the person suffered from Alzheimer's disease in a terminal phase. According to the medical report, it was impossible to establish either verbal or non-verbal communication; such circumstance was noted in the court file as well. The person was to be partially deprived of legal capacity but completely *in meritum*, then he died and hence the procedure was suspended.

In the case R₁-Ob-1410/2016, the person suffered from moderate intellectual disability and epilepsy. As noted in the medical report, the person *»did not have sufficient capacities and possibilities of making a decision, extremely susceptible, unable to independently and in whole take care of himself or his treatment and/or accommodation; he was unable to understand legal actions. Status with the tendency of further deterioration«.* By virtue of a court decree, the party was partially deprived of legal capacity as regards regular actions and acts regarding health issues, decisions on domicile or habitual residence, as well as acts and actions relating to concluding all types of legal actions.

Then, there are cases in which, in accordance with the previous acts, the parents would have continued to exercise their parental care after the child came of age, which is another possibility now unforeseen by the Family Act in force. For instance, in the case R₁-Ob-1670/2016, the person suffered from moderate intellectual

disability and epilepsy and was, in accordance with the previous acts, completely deprived of legal capacity. The competent social welfare centre proposed that the person is to be partially deprived of legal capacity in part referring to the following: health and treatment, accommodation, status issues, disposition and administration of material means as well as undertaking legal actions and acts. The psychiatric findings accentuated that there was no possibility of establishing a meaningful communication with the person. Although one may question the competence of a psychiatrist in this, as well as in any other case, it is our belief that especially psychiatrists are to be trusted as a valuable evaluator of a person's state of mind. The psychiatrist also stated that *»since in accordance with the Family act, there is neither the possibility of deciding upon parental care after the coming of age of the child, nor the complete deprivation of legal capacity, it is necessary to review the legal capacity, with the aim of partial deprivation...«*. The party died, so there was no need to adjudicate, but it is realistic to assume that the proposal would have been accepted.

Furthermore, there are cases where one can only wonder what the chain of events was, having in mind the fact that the deprivation of legal capacity influences not only regarding the person for whom the procedure has been initiated, but their family members and close persons as well. Only as an illustration, let us mention that in the case R₁-Ob-1908/2016, the person suffered from schizoaffective psychosis and misuse of psychoactive substances. The procedure was initiated by the social welfare centre upon request of the parents. The hand-written proposal of the father is worth particular noting: *»please appoint a guardian to our son to help us, our son, my wife and me, since the only wish my wife and I have in this situation is to die«*. Both parents subsequently underwent a psychiatric treatment, for anxiety and depression.

However, the social welfare centre decided to withhold the proposal, with the following explanation: *»the institution that the son is in does not have any problems with him, he takes his medicines regularly, if he feels bad he announces it in advance and then he is assisted by virtue of medications or hospitalisation... and he himself declared that he felt fine«*. The social welfare centre further continued: *»especially having in mind the fundamental principle of the Family act, namely that it is necessary to protect the person with disabilities by other means and measures before a decision on the deprivation of legal capacity is passed«*.

We cannot but state, once again, that the pendulum of protection of persons with disabilities has gone too far. How can the withdrawal of the proposal be justified by the subjective approach of a person with significant mental health issues, and even worse, upon justification by the principle of the most lenient intervention? The aim of State intervention is not only to protect the person (in this case from his/herself), but his/her family members as well, as emphasised by other authors too (Freeman et al., 2015: 844). In this case, it seems that the aim was not reached. The

question therefore arises: are such interventions into person's family life justifiable from the point of constitutional rules as well as the Strasbourg *acquis*?

CONCLUSION

The Croatian legislator in 2014 and 2015, respectively, abolished the possibility of a person being completely deprived of legal capacity. The key argument for such a change was that this option, which existed in previous legal provisions, was contrary to the obligations undertaken by the Republic of Croatia through ratification of international treaties, above all the Convention on the rights of persons with disabilities. It seems, however, that there is no unanimous consideration as to the content of such obligations. Therefore, family law doctrine, comparative analysis as well as the insight into court practice, warn that this question should be reconsidered.

It is the underlying idea of this paper, that the deprivation of legal capacity in general, and in particular the complete deprivation of legal capacity should always be used as an *ultima ratio*, undertaken with the aim of protection of persons with disabilities and which shall be limited to rare and exceptionally justified cases (Alinčić, 2002). This by no means prevents the establishment and the strengthening of the support decision mechanism, it is just the contrary.

However, as we have accentuated before, the system makes wrong decisions in regards to a certain circle of persons with disabilities who cannot protect their rights and interests whatsoever, due to, e.g. Alzheimer's disease or dementia or a coma, preventing them from establishing any reasonable and meaningful contact to another person. Therefore, the complete deprivation of legal capacity is unfortunately in certain cases the only meaningful means of their protection.

Such an approach does not mean breaching their human rights or dignity, it is the opposite, it is the only efficient means of protecting people who need such protection in extraordinary situations. In other words, in certain cases, »*personal autonomy should be balanced against the need for protection*« (Dute, 2015: 318). It should be emphasised once more that the institute of deprivation of legal capacity is not intended for »*punishing*« persons for their (mental) health status. On the contrary, the purpose is to protect them in the part in which their personality cannot function independently. It is only such protection that allows for such a concept, and is proportionate to the state of their health; it is only then efficient and not remaining at the level of declaration.

Let us reiterate that despite the efforts of the Committee on the rights of persons with disabilities, numerous legal systems, including the ones often seen as models to the Croatian system, guardianship solutions remain in place, which

are when necessarily founded on the substitute decision-making rather than on the supported decision-making arrangements. We believe that it is the reflection of understanding that only such a concept represents a consistent implementation of the principle of proportionality, advocated for by the Convention itself. This theoretical standpoint was approved not only by the case law of the Constitutional court of the Republic of Croatia but also by the case law of the European court for human rights that was presented in this paper. The same conclusion follows from the analysis of the recent practice of the Municipal civil court in Zagreb. Today, this analysis confirms, judges, while respecting the principle of legality, only partially deprive persons who cannot establish any meaningful contact to another of their legal capacity. In other words, we strongly support the reconsideration of the current concept in the light of the objections to the newly adopted solutions, coming from the legal doctrine, from the comparative overview, as well as from the practice of supranational and national courts.

Knol Radoja (2015) foresaw that the changes of family law legislation should have contributed to the positive change as regards the persons with disabilities. However though, we believe it was only wishful thinking. The reform has also been appraised in other recent works, e.g. Arstein-Kerlake (2017: 174) called for the abolition of full deprivation of legal capacity by virtue of Croatian Family Act 2014, »a small victory«.

To our mind, it is exactly the opposite. We believe that only the complementary change of legislation and practice could be called victorious. On the one hand, it would demand for legislative change, which would allow for complete deprivation of legal capacity to be an exception to the rule, used only in extraordinary cases and on the other, the change of judicial practice, which would fully implement this principle, hence changing the administrative practice regarding guardianship.

Only in such a scenario could one, hopefully, confirm three major changes in the system. Firstly, statistical data would show that the deprivation of legal capacity is used rarely, always only after the exhaustion of all possibilities at the disposal of the system with the aim of strengthening a person and the introduction of various supported-decision arrangements. Secondly, the court practice would confirm that the complete deprivation of legal capacity is indeed a measure used exclusively in extraordinary situations, namely those in which a person is incapable of establishing any reasonable contact. In addition, thirdly, the analysis of the functioning of the social care system would confirm that practical guardianship protection is consistent with the court decree on the deprivation of legal capacity and is, therefore, individualised and appropriate. Then and only then could we evaluate that better times have come in the area of protection of persons with disabilities as far as it concerns their legal capacity.

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OPSEG LIŠENJA POSLOVNE SPOSOBNOSTI KAO PRETPOSTAVKA ZAŠTITE PRAVA I DOSTOJANSTVA OSOBA S INVALIDITETOM

SAŽETAK

Skrbnništvo kao institut obiteljskog prava je desetljećima bilo važno, ali ipak neriješeno pitanje. Posljednja reforma obiteljskog prava iz 2014. i 2015. godine donijela je određene promjene koje su objašnjene i zagovarane kao novi doprinos poboljšanju pravnog položaja odraslih osoba s invaliditetom s jedne, te doprinos pravnoj sigurnosti te vladavini prava s druge strane.

Obiteljski zakon propisuje da se osoba ne može potpuno lišiti poslovne sposobnosti, već samo djelomice. Možemo se samo zapitati kako se ova odredba može primijeniti, primjerice, u slučajevima kad je ta osoba u komi? Mudar zakonodavac dopušta da suci budu daleko više od samih izvršitelja njegovih namjera. Međutim, čini se da bi mudar sudac pri donošenju odluke o tom pitanju u određenim slučajevima djelovao *contra legem*, ako bi pokušao dosljedno i sveobuhvatno zaštititi osobu s invaliditetom, što ne može biti prihvatljivo.

Stoga je cilj ovog rada dodatno osvijetliti novousvojene odredbe Obiteljskog zakona u odnosu na lišenje poslovne sposobnosti, s općom pretpostavkom da se takva zakonodavna intervencija ne može smatrati ni razmjernom niti učinkovitom.

Ključne riječi: Konvencija o pravima osoba s invaliditetom, Obiteljski zakon, lišenje poslovne sposobnosti.



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