

## **Research report on recognition before law of persons with disabilities 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 kati III (3) Tirana, Albania.

Tel/Fax +3554269426

E-mail: [adrf@albmail.com](mailto:adrf@albmail.com); [www.adrf.org.al](http://www.adrf.org.al)

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## ACRONYMS

|                                                       |                                                                             |
|-------------------------------------------------------|-----------------------------------------------------------------------------|
| ALBANIAN ELECTORAL CODE                               | AEC                                                                         |
| CEDAW                                                 | Convention for the Elimination of all forms of Discrimination against Women |
| COMMITTEE FOR THE RIGHTS OF PERSONS WITH DISABILITIES | Committee                                                                   |
| CRPD                                                  | Convention on the rights of Persons with disabilities                       |
| UDHR                                                  | Universal Declaration of Human rights                                       |
| ECofHR                                                | European Court of Human Rights                                              |
| ECHR                                                  | European Convention on Human Rights                                         |
| ECofHR                                                | European Court of Human Rights                                              |
| KMCAP                                                 | Medical Commission for Establishing the Ability to Work                     |
| KML                                                   | Medical and Legal Commission                                                |
| ICCPR                                                 | International Convention on Civil and Political rights                      |
| NGO                                                   | Nongovernmental Organization                                                |
| SOCIAL SERVICES                                       | SS                                                                          |

## EXECUTIVE SUMMARY

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This report provides an overview of the evolvement of the policy and legal framework on equal recognition before law of persons with disabilities in Albania in connection with the right to independent living and non-discrimination after the ratification of the Convention on the Rights of Persons with Disabilities (CRPD).

While the report identifies the progress made so far, it describes the national legal framework and provides a comparative analysis with the international standards, mainly the CRPD. It identifies practices and achievements, but also the challenges for the Albanian government to fulfill its obligation under the CRPD.

Article 12 of CRPD recognizes that persons with disabilities enjoy legal capacity on equal basis with others in all aspects of life, and it 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. Placing a person under guardianship is unfair and unnecessary.<sup>1</sup> 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.<sup>2</sup>

The results of the research speak of important steps made by the Albanian government to comply with its obligations under the CRPD. The legal and policy framework adopted after 2012 is a strong indicator of that, and in particular the Law on Accessibility and Inclusion of Persons with Disabilities and the National Action Plan for Persons with Disabilities 2016- 2020.

The findings highlight inconsistencies of national laws and policies with international standards, but they also show that there are serious difficulties in applying the laws and policies even as they are. The attempts undertaken by the government are insufficient and partial. They have been unsuccessful in properly addressing the issue of recognition before law in Albania. Moreover, the policies and laws have failed in addressing recognition before law and independent living and living in the community from a non-discrimination standpoint as provided in the CRPD and the General Comments of the Committee on the Rights of Persons with Disabilities.

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

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

More concretely, this research points to the fact that Albanian legislation is not consistent with the CRPD, but in addition, it runs against the standards and decisions of the European Convention on Human Rights (ECHR).

As mentioned earlier, in addition to discrepancies with international standards, problems are identified with the enforcement of the existing legislation per se. A person with disabilities, who is deprived of the capacity to act<sup>3</sup> 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 and there are no 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. Judges rely exclusively on the medical expertise provided by physicians.

The key actors in the process of deprivation of one's legal capacity to act 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. They have little or no knowledge on the novelties brought by the CRPD and concretely on recognition before law. Professionals, especially of the judiciary, who are part of the process are not well informed about the recent international law developments, the CRPD, or the rulings of the European Court of Human Rights (ECHR).<sup>4</sup> They generally admit that the process of denying legal capacity should improve, but no one questions whether this process should exist at all. The processes for deprivation of legal capacity do not meet also the international standards on the right to a fair trial in Albania. The above-mentioned actors are generally passive in these proceedings and there is no available legal assistance provided. The costs of proceedings often place these persons in the unfavorable position of being unable to provide an adequate defense against denials of legal capacity to act, in effect rendering judicial proceedings quite often arbitrary.

The methodology used for the report is qualitative.

International and national legal documents and policies disability- related were examined. Interviews with representatives from the judiciary, public and non-profit sector on the practical aspects and procedures for deprivation or restriction of the legal capacity to act of persons with disabilities (an essential part of equal recognition before the law) were conducted.

As a conclusion several general recommendations for aligning national with international legislation are provided. Undoubtedly, based on the complexity and the challenges that the right equal recognition before the law imposes for all countries, including Albania, it is essential to have an all- inclusive reform in Albania, starting with amendments in the 'heart' of civil legislation regarding recognition before law, and progressively work with other relevant pieces of legislation. This is especially important because of the fact that the negative consequences

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<sup>3</sup> 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 the legal capacity to act as one of the conditions for engagement in legal and civil relationships.

<sup>4</sup> Source: interviews with lawyers.

faced by persons with disabilities due to the present-day legislation are distributed in different pieces of legislation. This can be accomplished only through the establishment of a cross-sectorial working groups at central level and more importantly, must be a priority in the governmental and political agenda. It is equally important to provide trainings for all the actors involved because they have scarce knowledge on the CRPD and lack tools to implement it.

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## CONTEXT- RECOGNITION BEFORE LAW

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Albania has ratified the Convention on the Rights of Persons with Disabilities in 2012 by the Law 108/2012 dated 15.12.2012 "On the ratification of the UN Convention "On the Rights of Persons with Disabilities"<sup>5</sup>. Under Article 4, "General Obligations," of the CRPD), all states have the obligation to adopt all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention.<sup>6</sup> Based on the Republic of Albania's Constitution, international conventions are part of our legal system, having superiority over the national legislation.<sup>7</sup> One of the areas in which interventions are required is equal recognition of persons with disabilities before the law.

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 for example, which makes it impossible for them to file a suit and participate on equal footing with others; it 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 are placed in centers or hospitals at request of their guardians, and do not live in the community. Deprivation of the legal 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.<sup>8</sup> 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 guardian<sup>9</sup>.

Article 12 of the CRPD recognizes persons with disabilities as persons before the law, while acknowledging their legal capacity and the capacity to act. 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. Replacing regimes of substitute decision-making (full or

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<sup>5</sup> Law No. 108/2012 dated 15.12.2012 "On the ratification of the UN Convention "On the Rights of Persons with Disabilities, Official Journal No. 157 (6 December 2012): [http://www.qbz.gov.al/botime/fletore\\_zyrtare/2012/PDF-2012/157-2012.pdf](http://www.qbz.gov.al/botime/fletore_zyrtare/2012/PDF-2012/157-2012.pdf)

<sup>6</sup> Id. Article 4.

<sup>7</sup> Constitution of the Republic of Albania, Article 116  
<https://www.parlament.al/wp-content/uploads/2015/10/kushtetuta-perditesuar-1.pdf>

<sup>8</sup> For more clarifications, General Comment below.

<sup>9</sup> Legal capacity in international law, Lewis, Oliver, Leiden University, 2015  
<https://openaccess.leidenuniv.nl/handle/1887/33834>

partial guardianship) with support regimes does not allow for respondent states to continue with deprivations of legal capacity until support regimes are established. The CRPD through this Article conveys the message that deprivation of legal capacity is no longer an acceptable response for persons with disabilities who exhibit 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.<sup>10</sup>

Article 12 even though does not specifically refer to persons with psychosocial and intellectual disabilities includes them in the definition of persons with disabilities and in practice they are more often than other groups subjects to the deprivation of the legal capacity to act. Many argue<sup>11</sup> 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 ground for deprivation of the legal capacity (to act), the legislation runs contrary to Article 12 of the CRPD.<sup>12</sup> 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.

As can be easily ascertained, there is a strong and clear connection between equal recognition before the law and independent living and discrimination based on disability, since without equal recognition before the law (without legal capacity) a person cannot choose or make decisions in all areas of life and more importantly conduct an full independent living.

Article 12 of the CRPD has important implications for measures that amount to deprivation of legal capacity of persons with disabilities. It requires that the right to legal capacity be respected for persons with disabilities on an equal basis with others. States may not deprive persons with disabilities of legal capacity in a manner that is discriminatory in purpose or effect.

Loss of standing to initiate proceedings, which is conferred on a person because of their disability, is a clear violation of Article 12 and Article 13 CRPD, as it means that people with disabilities will not be able to enjoy access to a court on an equal basis with others. This constitutes a form of disability discrimination

Article 5 of the CRPD<sup>13</sup> prohibits discrimination on the ground of disability. The CRPD defines disability discrimination as: ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise,

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<sup>10</sup> Ibid.

<sup>11</sup> 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>

<sup>12</sup> 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 CPRD, 2009 <http://www2.ohchr.org/english/issues/disability/docs/A.HRC.10-48.doc>

<sup>13</sup> Using the interpretations of disability and discrimination supplied in Article 2 CRPD.

on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation'.<sup>14</sup>

Hence, here is the connection between equal recognition before law and discrimination: deprivation of legal capacity constitutes a form of disability-based discrimination when legal capacity is denied to persons with disabilities on the prima facie basis of disability or where the procedure to deny legal capacity is disproportionately applied to persons with disabilities.<sup>15</sup>

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<sup>14</sup> CRPD Article 2.

<sup>15</sup> Third Party Submission of the PERSON Project in Zuhra HADŽIMEJLIĆ, Marcel CREPULJA and Esad BUSOVAČA against Bosnia and Herzegovina

## METHODOLOGY

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### a) Overall purpose

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The purpose of the research report is to describe the evolvement of the normative framework on equal recognition before law in the of persons with disabilities in connection to non-discrimination and independent living, demonstrating practices, challenges and achievements in Albania.

### b) Methodology

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The methodology firstly aimed at collecting data from various sources, both of primary and secondary nature. In this context, alongside with the document's analysis, there were conducted in-depth interviews in order to retrieve accurate data on the legal practical aspects in Albania and on most recent initiatives undertaken by the Albanian government to conform to the CRPD's requirements post- ratification.

The methodology used for this report is qualitative.

Data collection followed a combination of two methods: (a)document analysis; and (b) interviews with key stakeholders:

a) The document analysis included the review of keypieces of national and international regulatoryframework, studies and research reports.

International legal rules that apply to recognition before law, discrimination based on disability and independently living and inclusion in the community were analyzed andare described in the first chapter. The methodology aimed to offer commentary on the emergence and significance of the legal rules considered.

At the national level, in the second chapter specifically were considered the following policy and legal documents: National Action Plan for Persons with Disabilities, Civil Code, Family Code, Civil Procedure Code, Law on Inclusion and Accessibility and its by-laws, Mental Health Law.

At the international level a summarizing review of the CPRD, General Comments of the Committee on the Rights of Persons with Disabilities, European Convention of Human Rights and specifically selected rulings of the ECHR with the aim to assess the compliance of Albanian legislation with the international framework.

b) In addition to the document analysis, there were conductedsix interviews:

- i) court representatives (2),
- ii) representatives of the central government (2),
- iii) representatives of organizations of persons with disabilities (2).

The interviews were composed of open-ended questions which aimed at receiving information about existing guardianship model and procedures applicable in Albania. They aimed to complement the documents analysis findings and to include enrich the report with the perspectives of different actors. The findings are in the third chapter.

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## I. INTERNATIONAL LEGAL FRAMEWORK

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### a) Convention on the Rights of Persons with Disabilities

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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.<sup>16</sup> 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 preparation of CRPD text. In particular, most of the doubts were 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 guardianship to object to the decisions of his/her legal guardian.<sup>17</sup> 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.

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<sup>16</sup>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](http://www.qbz.gov.al/botime/fletore_zyrtare/2012/PDF-2012/157-2012.pdf)

<sup>17</sup>Arlen 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=iugNQSë5&sig=x94rq2ze7UBoi40dyfovHyiVDSY&hl=en&sa=X&ved=0ahUKEwj0MO1mrHKAhXD8A4KHZPgB-U4ChDoAQgwMAM#v=onepage&q=legal%20capacity%20international%20law&f=false>

The first paragraph of article 12 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 capacity<sup>18</sup> 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 rights<sup>19</sup>. 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.

Supported decision-making may take place through friends, professionals, networks of selected and trusted persons who help persons with disabilities in their decision-making.<sup>20</sup> 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 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 to giving them more control over their lives.<sup>21</sup> 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.

Article 19 CRPD: Living independently and being included in the community

The CRPD does not grant new rights to persons with disabilities, but rather furnishes instructions and principles on how existing rights specifically for persons with disabilities must be realized. Although this convention states that it has not brought new rights, it mentions some principles such as accessibility or independent living, which are interpreted by some as principles and by others as rights and were never fully interpreted in such a straightforward way.

The CRPD is the first international legal instrument to specifically mention and regulate the right of persons with disabilities to live in the community.

"Independent living/living independently means that individuals with disabilities are provided with all necessary means to enable them to exercise choice and control over their lives and make all decisions concerning their lives."<sup>22</sup>

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<sup>18</sup>Legal 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.

<sup>19</sup>Arlan 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=0ahUKEwj0MO1mrHKAhXD8A4KHZPgB-U4ChDoAQgwMAM#v=onepage&q=legal%20capacity%20international%20law&f=false>

<sup>20</sup> 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](http://bbi.syr.edu/publications/2015/SDM_Overview.pdf)

<sup>21</sup>Ibid.

<sup>22</sup> General comment No. 5 (2017) on living independently and being included in the community

Both independent living and being included in the community refer to life settings outside residential institutions of all kinds.<sup>23</sup> It should be noted that independent living and community involvement is not just a matter of deinstitutionalization. High levels of institutionalization are closely linked to the lack of community services. On the other hand, the lack of community services leaves people with disabilities without choices, and as a result they continue to live, or "choose" to live in institutions. It is important that the process of deinstitutionalization takes place in parallel with the establishment of community services. In this regard, a concern of the Committee on the Rights of Persons with Disabilities was raised in the final conclusions<sup>24</sup>, based on the report submitted by the state of Spain. This concern is precisely due to the lack of resources and services to enable independent living, especially in rural areas, as people with disabilities in these conditions do not have the freedom to choose and are forced to live in residential institutions, as these are the only choice.

In the opening of the article, the equal right of all persons with disabilities is recognized, without making any classification of disabilities based on their type or severity.<sup>25</sup>

States are required to take appropriate and effective measures to enable persons with disabilities to enjoy the right to participate in the community. Understanding the effectiveness of measures can be subjective. Thus, for example, the transfer of persons from large institutions to other formats, where there are far fewer people, does not mean that the measures are appropriate and effective, as the features of large institutions may be duplicated in more formats, small. It should be noted that in the opening of this article, regardless of the title, only the concept of community involvement is mentioned and not independent living. Indeed, community involvement is seen as a vital aspect of their independence and support.<sup>26</sup>

Independent living and community involvement are closely linked to other rights such as; non-discrimination, non-violation of physical and mental integrity, freedom, freedom from inhuman or degrading treatment, autonomy, legal capacity, right to privacy and family life and freedom of movement. However, living in the community is more a lot of these rights together. Community living is also linked to health services, education, social support schemes, the labor market and access to these services and yet, it is not just a matter of accessibility.<sup>27</sup>

Paragraph a) of Article 19 reiterates the right to choose where to live and with whom to live, ensuring (point b) that they must have access to a wide range of home support services, residences, community services and personal assistance.

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<sup>23</sup> Idem.

<sup>24</sup> Concluding observations of the Committee on the Rights of Persons with Disabilities, Spain: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fESP%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fESP%2fCO%2f1&Lang=en)

<sup>25</sup> Legal capacity in international law, Lewis, Oliver, Leiden University, 2015  
<https://openaccess.leidenuniv.nl/handle/1887/33834>

<sup>26</sup> Getting a Life – Living Independently and Being Included in the Community A Legal Study of the Current Use and Future Potential of the EU Structural Funds to Contribute to the Achievement of Article 19 of the United Nations Convention on the Rights of Persons with Disabilities: 2012. [http://www.europe.ohchr.org/documents/Publications/getting\\_a\\_life.pdf](http://www.europe.ohchr.org/documents/Publications/getting_a_life.pdf)

<sup>27</sup> The right of people with disabilities to live independently and be included in the community, 2011.  
<https://www.coe.int/t/commissioner/source/prems/RightsToLiveInCommunity-GBR.pdf>

Personal assistance here is one of the most important forms to ensure that people with disabilities make decisions in daily life while maintaining legal capacity but also maintaining independent living. This is reinforced by a 2012<sup>28</sup> study, which concluded that “personal assistants freely selected by the mentally disabled person themselves promote autonomy and inclusion by helping to develop daily living skills, promote community participation, and in cultural life, managing financial affairs and increasing access to goods and services. ”

It is important when reading this article to place emphasis on equal opportunities and choices with others, so that people with disabilities are not forced to live in a certain format (Item a), Article 19).

A summary<sup>29</sup> of the key points of this article is the existence of equal opportunities to live in the community (point a). This is done through the recognition and provision of appropriate and necessary services to conduct elections in equal conditions with others (point b) and at the same time through the provision of services for persons with disabilities within the general services provided to the whole population. In relation to the latter, point c) requires the application of the principle of dual access, through underlining, that community services and facilities which are accessible to the entire population must also be accessible to persons with disabilities. According to this principle, in cases when it is inevitable that special services should be built and provided for people with disabilities due to special characteristics, but on the other hand, it is equally important that services for the benefit of the entire population, to be accessible to people with disabilities as well. Here we recall that the articles and principles of the convention apply each other mutually, such as accessibility, non-discrimination, reasonable accommodation and others.

#### **b) General comment No. 5 (2017) on living independently and being included in the community**

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General comments provide interpretation and analysis of specific articles of the CRPD or deal with thematic issue. General comments constitute an authoritative interpretation as to what is expected of States parties as they implement the obligations contained in the CRPD.

The Committee states that living independently and being included in the community of persons with disabilities is based on the core principle that all human beings are born equal in dignity and rights and all life is of equal worth. Article 19 again emphasizes that persons with disabilities are subjects of rights and are rights holders.

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<sup>28</sup> Choice and control: the right to independent living: European Union Agency for Fundamental Rights (FRA), 2012. [http://fra.europa.eu/sites/default/files/fra\\_uploads/2129-FRA-2012-choice-and-control\\_EN.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/2129-FRA-2012-choice-and-control_EN.pdf)

<sup>29</sup> Legal capacity in international law, Lewis, Oliver, Leiden University, 2015  
<https://openaccess.leidenuniv.nl/handle/1887/33834>

Key- words here are inherent dignity, autonomy and independence and the full and effective participation and inclusion in society. Other principles, and specifically relevant for this report is the non-discrimination principle which is essential to implement article 19.

To again emphasize the connection of recognition before law with independent living, the Committee has distinguished denial of legal capacity, either through formal laws and practices or de facto by substitute decision-making as one of the main barriers that disables independent living.

The comment further summons the equality and non-discrimination as fundamental principles that must be applied in the context of legal capacity and in line with the Committee's general comment No. 1, to decide where, with whom and how to live for all persons with disabilities, irrespective of their disability.

In regard to independent living the Committee highlights that non-discrimination is essential in accessing housing, including the elements of both income and accessibility, and adopting mandatory building regulations that permit new and renovated housing to become accessible.

c) General Comment, Number 1<sup>30</sup>(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

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“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.

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<sup>31</sup>. 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.<sup>32</sup>

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

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<sup>30</sup>General comment no.1, 2014 <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>

<sup>31</sup> Emphasis added because the international documents have never fully elaborated the concept.

<sup>32</sup>General 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>

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.<sup>33</sup>

Regarding supported decision-making, the Committee has some important guidelines. According to the Committee, support decision-making 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 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.<sup>34</sup>

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#### d) General comment No. 6 (2018) on equality and non-discrimination

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The committee states that equality and non-discrimination are principles and rights. The Convention refers to them in article 3 as principles and in article 5 as rights. They are also an interpretative tool for all the other principles and rights enshrined in the Convention. The principles/rights of equality and non-discrimination are a cornerstone of the international protection guaranteed by the Convention. Promoting equality and tackling discrimination are cross-cutting obligations of immediate realization. They are not subject to progressive realization. States parties have an obligation to respect, protect and fulfil the right of all persons with disabilities to non-discrimination and equality. In that regard, States parties must refrain from any action that discriminates against persons with disabilities. In particular, States parties shall modify or abolish existing laws, regulations, customs and practices that constitute such discrimination. The Committee has often given examples in that regard including guardianship laws and other rules infringing upon the right to legal capacity. Therefore, the Committee constantly through its comments has made it clear the recognition before law and independent living must be viewed through non-discrimination lens.

#### d) European Convention on Human Rights<sup>35</sup>

The European Court of Human Rights has in many cases referred to the CRPD, acknowledging that it is one of the highest standards for the protection of the rights of persons with disabilities.

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> [http://www.echr.coe.int/Documents/Convention\\_SQL.pdf](http://www.echr.coe.int/Documents/Convention_SQL.pdf)

Regarding equal recognition before the law, the ECtHR has addressed several issues, which have ultimately affected the increase in the level of protection of the rights of persons with disabilities, in cases when they are deprived of the ability to act and especially when they are placed in closed centers or institutions, such as: *Salontaji-Drobniak v. Serbia*, *Stanev v. Bulgaria*, *Stukaturv v. Russia*, *DD v. Lithuania*, *X and Y v. Croatia*, *Alajos Kiss v. Hungary*, *Sykora v. Czech Republic*, *Lashin v. Russia*.

The European Convention on Human Rights does not contain the concept of equal recognition before the law or legal capacity, such as the aforementioned documents and conventions. However, it has examined it in the context of the violation of the rights contained in this Convention, mainly in the context of the right to a peaceful family life, due process of law, or to individual liberty and security. In the decisions judged by this court for the cases in question, there has consistently been a clear link between the ability to act and the violation of the aforementioned rights but also independent living. Placing in centers without obtaining consent, not reviewing the decision or ability to act, not having any opportunity to choose to continue staying in such centers, or the inability to develop relationships with the outside world, or other persons, all have been factors that are related to independent living and community involvement.

This court has already dealt with a number of cases of legal capacity to act, treated in a more procedural way and not in a substantial aspect of the capacity to act. The CRPD recognizes the ability to act as part of equal recognition before the law and as an element that cannot be restricted or removed, while the ECtHR by decisions, although referring to the CRPD on an ongoing basis, allows restrictions, or removal under national legislation, although it imposes many times stricter measures and requires a more comprehensive analysis. So, the ECtHR continues to allow the removal or restriction as long as it is according to the standards set by itself, while the CRPD does not allow the removal or restriction in any case and considers it discrimination. One of the constant criticisms of ECtHR decisions regarding the treatment of legal capacity to act is that it has consistently failed to see it as discrimination against persons with mental disabilities. However, seeing the aforementioned decisions and the recognition of the CRPD as the most powerful instrument in protecting the rights of persons with disabilities restricted, it should be said that the ECtHR is also moving forward with certain steps towards recognizing before the law persons with disabilities and recognizing the ability to act as a universal right, which cannot be restricted.

## II. NATIONAL LEGAL FRAMEWORK

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### a) Codes and legal capacity to act in Albania

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The Albanian legislation provides for a major distinction between the capacity to hold rights and legal capacity to act, meaning to exercise the rights. 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 the legal capacity to act as one of the conditions for engagement in legal and civil relationships. 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"<sup>36</sup>, 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 any person 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 facts and be based on evidence that supports the claims of the plaintiffs. The prosecutor is always notified about the case and receives a copy of the filed request and all evidence that has been deposited in the court.<sup>37</sup> 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.<sup>38</sup>

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<sup>36</sup> This terminology is based on the existing legislation and refers directly to the applicable Codes.

<sup>37</sup> Alban Abaz Brati, "Civil procedure", Dudaj publishing house, Tirana 2008

<sup>38</sup> Çlirim Gjata "Procedura Civile", Luarasi university, Tirana 2009

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 (SS) submits an evaluation of the person, which includes the examination of the development of the personality of the person and a family, educational and social background/context, and makes an assessment of the conditions and suitability of the future guardian or care institution (if this is the case).

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 her/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 the person at her/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.<sup>39</sup>

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

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<sup>39</sup> 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?

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 guardianship<sup>40</sup>.

With regard to the legal guardian, the Family Code establishes several conditions or circumstances under which a person cannot be placed under guardianship such as they are not under guardianship themselves, they have been sentenced to a term of imprisonment, have reached 65 years of age etc. Article 270 of the Family Code provides for the disqualifications for serving as a guardian:

### **b) Law on Inclusion and Accessibility of Persons with Disabilities**

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The law reflects some of the principles of the CRPD and it is more advanced than the rest of the existing legislation, in particular the 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 concrete services that may be delivered by the government, in line with this law. These services include supportive decision-making. According to the law, “supportive decision-making” means 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, which is contrary to the CRPD requirements<sup>41</sup>. 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<sup>42</sup>.

The 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 individuals<sup>43</sup>. 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.

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<sup>40</sup> Civil Code, Family Code, Code of Civil Procedure.

<sup>41</sup> Para. 27 General Comment on Article 12.

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

<sup>42</sup> Para. 21, General Comment on Article 12.

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

<sup>43</sup> Articles 6, 7, Law on inclusion and accessibility.

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”.<sup>44</sup> 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 to be 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. Representatives of the Ministry of Health and Social Protection (MHSP), during the interviews conducted declared that the drafts of the by-laws are being reviewed and pending approval. There are delayed due to crisis situation related to an earthquake in November 2019 and the COVID 19 situation.

However, must be emphasized that a decision of the Council of Ministers (CofM) cannot address the need to reform existing laws on deprivation and restriction of legal capacity. As explained above, the model of legal guardianship is deeply embodied in the main legislation such as: 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 are not subjecting to reformation, the model of deprivation of the capacity to act will remain in force. Despite the good intentions of the law on Inclusion and Accessibility, the decision of the CofM is not the appropriate form to address the legal capacity issue. Principles in legislative processes in Albania require that issues dealing with human rights, such as recognition before law, non-discrimination or independent living must be addressed through laws and not decision of CofM.

The Committee<sup>45</sup> has also expressed its concerns about the insufficient progress made to amend all national legislation that denies or restricts the legal capacity of persons with disabilities, including the Civil Code, Civil Procedure Code, Family Code and the Mental Health Law, and on existing or planned mechanisms for supported decision-making. It is also concerned about the inadequacy of the State party’s legal measures for ensuring the rights of persons with disabilities, in particular persons with intellectual or psychosocial disabilities, to make choices about their lives and enjoy the right to equal recognition before the law.

The Law 93/2014<sup>46</sup> “On the social inclusion and accessibility of persons with disabilities” for the first time makes provisions about independent living for persons with disabilities and specifies also the services that need to be provided, in order for persons with disabilities to enjoy this right. Bylaws have to be drafted and approved for independent living services to become possible. For several years in Albania, the process of deinstitutionalization and independent living in the community of people with disabilities have been reviewed, but the progress is still slow and partial. Most of the times this process has not relied on the standards set by the CRPD. Independent living for people with intellectual disabilities is considered impossible for the time

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<sup>44</sup> Article 6. 7.

<sup>45</sup> Concluding observations on the initial report of Albania, adopted by the Committee at its twenty-second session (26 August – 20 September 2019).

<sup>46</sup> Law No. 93/2014 "On Inclusion and Accessibility of People with Disabilities", Available from: [http://www.qbz.gov.al/botime/fletore\\_zyrtare/2014/PDF-2014/135-2014.pdf](http://www.qbz.gov.al/botime/fletore_zyrtare/2014/PDF-2014/135-2014.pdf)

being and that it is coupled with a variety of barriers. Despite the readiness that persons with disabilities have to live an independent life, their decisions are made from the family or other guardians. Fear and disbelief about the skills from the part of their family and others; economic difficulties, little employment opportunities, alternatives that they have available for habitation, abandonment by family, gender, are among the main factors influencing the opportunities for them to live an independent life, enjoy a healthy emotional state, not be discriminated against and not isolated.<sup>47</sup>

So far, only the Council of Ministers' Decision No. 1074, dated 23.12.2015<sup>48</sup> "For defining actions for the elimination of barriers in communication and infrastructure in offering public services for persons with disabilities" has been approved, but as we have highlighted in the part about accessibility, no significant progress has been made to eliminate barriers, which in turn obstruct independent living.

Article 8 of the law provides for the service of the personal assistant and a Council of Ministers' Decision has to be approved. The decision nr. 874, was approved on 24.12.2019, but it doesn't take into account the recommendation of the Committee and its requirements in the General Comment, such as condition of personal assistants for decent employment, personalized criteria, fund-administration by the person with disabilities her/him self (the funds are still managed by the state institutions). The relationship foreseen in the law cannot be a one-to-one relation, as the social services at municipal level are included in the process as monitoring bodies. While this decision has brought some positive changes, such as the training of the personal assistants, the led by the user idea, based on the preferences of the persons, in fact it has brought no substantial changes in what so far, the personal assistance represents. To this day, the state provides an amount of money which is less than half of the minimum salary in Albania for the service of "caregiving" to some categories of persons with disabilities. Being unable to employ someone with that amount of money, family members end up doing the job on their own. This service is also very paternalistic in nature and medical model oriented as the sum is designed to be withdrawn by the 'caregiver' which takes away choice and control from the person with disability. The new decision is not about to bring any changes in this direction as well, as family members will most likely continue to offer the services because no new services were created and the persons with disabilities cannot have control or chose the personal assistants.

The law 121/2016 "On Services of Social Care in the Republic of Albania" provides for the homecare service<sup>49</sup> for persons with disabilities, which is a typical medical model type of service and that provides no choice and control for persons with disabilities. It remains to be seen how it will work in practice but people with disabilities are concerned that funds and attention will be drawn away from the personal assistant and are going to be put into the home caring service instead. The law and its bylaws were not properly consulted with disability organizations.

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<sup>47</sup> Independent living and inclusion in the community "Perspectives from persons with intellectual disabilities, their families and community service providers: <http://www.helpthelife.org/vet-advokuesit/36-raport-vet-advokues>

<sup>48</sup> Decision of the Council of Ministers no. 1074, dated 23.12.2015 "On the determination of actions to eliminate the obstacles in communication and infrastructure in the provision of public services for persons with disabilities". Available from: [http://www.qbz.gov.al/botime/fletore\\_zyrtare/2015/12/243.pdf](http://www.qbz.gov.al/botime/fletore_zyrtare/2015/12/243.pdf)

<sup>49</sup> Article 12 of the law 121/2016 "On the services of social care in the Republic of Albania".

Article 9 of the law provides for assistive devices, but so far, nothing has been done to even remotely go down that path. The state doesn't provide even the most basic assistive device, the wheelchair.

No concrete engagements to provide independent living services for persons with disabilities and instead of enjoying it as a right, it remains a dream for persons with disabilities. No step has been taken on the deinstitutionalization process.<sup>50</sup>

With regards to living independently and being included in the community, the Committee in its concluding observations<sup>51</sup> has expressed its concerns about the deinstitutionalization process of persons with disabilities, progress made in implementing independent living arrangements and the lack of programmes and in-home, residential and individualized support in the community, including personal assistance for persons with disabilities who require it and benefits for housing, so that they may exercise their right to independent living and to be included in their community, information on legal, administrative and financial measures taken to ensure the right of persons with disabilities to choose their place of residence and where and with whom to live.

### c) Law on Mental Health

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Another piece of legislation which continues to permit deprivation of the legal capacity to act is the Law on Mental Health.<sup>52</sup> This law in its definitions allows treatment of a person without his consent<sup>53</sup>. 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 behavior;

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<sup>50</sup>Lala, S. (2016). Independent living, a right, yet a dream for people with disabilities in Albania. [Internet]. Tirana Observer. Available from: <http://www.tiranaobserver.al/jetes-e-pavarur-nje-e-drejte-por-ende-nje-enderr-per-personat-me-aftesi-te-kufizuar-ne-shqiperi/>

<sup>51</sup> Concluding observations on the initial report of Albania, adopted by the Committee at its twenty-second session (26 August – 20 September 2019).

<sup>52</sup> Law on Mental Health, no. 44/2012

[http://www.shendetesia.gov.al/files/userfiles/shendeti\\_mendor/Ligji\\_Nr.44,\\_2012\\_per\\_shendetin\\_mendor.pdf](http://www.shendetesia.gov.al/files/userfiles/shendeti_mendor/Ligji_Nr.44,_2012_per_shendetin_mendor.pdf)

<sup>53</sup> Article 20 Law on Mental Health

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.<sup>54</sup>

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 refuse treatment.

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#### d) Albanian Electoral Code

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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")).<sup>55</sup> 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. Also, the Constitution of the Republic of Albania contains several articles which support the removal of the legal capacity on the basis of a final court decision<sup>56</sup>. Persons with final court decision to have removed the legal capacity to act, cannot vote. Many public positions are conditioned by legal capacity (to act).

By virtue of not being 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.<sup>57</sup>

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#### e) Law on Protection against Discrimination

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With the introduction and advancement of human rights in Albania, it became necessary to introduce provisions in the Criminal Code and protection from various forms of discrimination, qualifying as an offence and subject to punishment, all those cases of torture occurring due to discrimination. Further, in the context of effective protection of human rights and based on European Union's recommendations, it emerged the necessity of a special law to protect and guarantee the rights of every individual in Albania. As a result, the law "On Protection against Discrimination" Nr. 10221 dated 04.02.2010 was approved, which authorized the establishment of the Office of the Commissioner for Protection against Discrimination. The Commissioner would be a firmer guarantee to address discriminatory situations against persons with disabilities

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<sup>54</sup> Article 20 Law on Mental Health

<sup>55</sup> Article 44(c) AEC.

<sup>56</sup> Article 45, paragraph 2, Constitution of the Republic of Albania:

<http://www.qbz.gov.al/Kushtetuta%20me%20pjese/Pjesa%20e%20dyte,%20Te%20drejtat%20dhe%20lireite%20themelore.pdf>

<sup>57</sup> [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)

and all target groups protected by this law. Albania was one of the last countries in the region that adopted the law on Protection against Discrimination, while in other neighbors' countries to Albania this law had been approved and implemented long time ago. Nevertheless, a more optimistic picture can be noted in the area of anti-discrimination policies and legal framework since then. The Office of the Commissioner has been established and since then, referring to the latest report of the Commissioner (2019) there have been filed 225 cases of discrimination and 20 were disability-based discrimination cases. Based on continuous monitoring through the years and experience of organizations, cases of discrimination based on disability continue to remain low and only in urban centers.<sup>58</sup> The reasons are numerous and complex. There is a lack of proactive role from institutions dealing with cases of discrimination, loss of community confidence in institutional solutions and lack of self-awareness about discrimination. The low level of discrimination cases before the Commissioner for Protection from Discrimination is also mentioned in the Resolution of the Parliament of the Republic of Albania of 19.4.2018<sup>59</sup>, which expresses the Parliament's concern about their low number.

The application of the law is not fully efficient. This, in particular, is related to the fact that decisions that have ruled sanctions such as fines, have no power of an executive title; therefore, legislative changes should be made in this regard.

The law provides regulation, implementation and observance of the principle of equality related to a list of non-exhaustive grounds, where disability is included. The scope of this law is to ensure each individual's right equality under the law, equal protection by law, equal chances and opportunities to exercise the rights and freedoms of the individual as well as effective protection against discrimination.

The law foresees the classical forms of discrimination: direct and indirect discrimination, but it also contains denial of reasonable accommodation, victimization and discrimination because of association. The law does not contain the concept of multiple discrimination, which would tackle many situations of disable people belonging also to other vulnerable communities such as women, children, Roma people etc. The law itself discriminates against persons with mental and physical disabilities, when it foresees that the Commissioner can be dismissed in case of an occurring mental or physical disability. In regard to recognition before law, the laws and policies against discrimination have not addressed the core issue. From the interviews was discovered that the law will be amended, and concretely the articles discriminating based on disability, multiple discrimination definition will be provided, and the decisions imposing fines by the Commissioner will automatically have executive powers.

Regarding the equality and non-discrimination, the Committee in its concluding observations for Albania<sup>60</sup> has also expressed its concerns about the availability of remedies, including in cases of

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<sup>58</sup>(in rural areas the Commissioner for Protection from Discrimination has no offices. They can be found only in a few main cities).

<sup>59</sup>Resolution on the evaluation of the activity of the Commissioner for Protection from Discrimination (CPD) for 2017

<http://www.qbz.gov.al/Botime/Akteindividuale/Janar%202018/Fletore%2061/REZOLUTE,%20date%2019.4.2018.pdf>

<sup>60</sup> Concluding observations on the initial report of Albania, adopted by the Committee at its twenty-second session (26 August – 20 September 2019).

denial of reasonable accommodation. The Committee has also expressed its concern about the lack of multiple and intersectional discrimination

#### f) National Action Plan on Persons with Disabilities

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In 2016, the Albanian Government approved the National Action Plan for Persons with Disabilities 2016-2020<sup>61</sup>. The aim of this Action Plan of the government is to promote inclusion of persons with disabilities in society, prevent discrimination, and eliminate barriers to accessing services and rights. By implementing this plan, the Government of Albania seeks to improve access to public information and services, facilitate inclusive education, introduce disability assessment based on the biopsychosocial model, as well as expand community-based social services, rehabilitation services and employment promotion measures. In addition, the Action Plan envisions activities which aim to improve or expand on existing programs (including vocational education and training, employment, social services, inclusive education programs, free legal aid, etc.)

Several actions are also envisaged for achieving equality before the law, such as conducting a study on the supported decision-making, amendments to the Criminal Procedure Code for recognition as a party to the proceedings of persons with disabilities. None of these actions has been taken by the Albanian Government.

Meanwhile the plan foresees the establishment of new services which enable independent living. Some of centers for independent living (pilot projects) have been established with the donors' financial assistance. The legal framework on housing also has noted some improvements regarding housing options for persons with disabilities with the aim to enable independent living.

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<sup>61</sup>The plan that was not included in its report since at the time of submission of the report the plan was not approved whereas the National Strategy for People with Disabilities was still in force, which has now been replaced by this plan. Decision of the Council of Ministers no. 483, dated 29.6.2016 On the adoption of the National Action Plan for Persons with Disabilities, 2016–2020: [http://www.qbz.gov.al/botime/fletore\\_zyrtare/2016/PDF-2016/124-2016.pdf](http://www.qbz.gov.al/botime/fletore_zyrtare/2016/PDF-2016/124-2016.pdf)

### III. FINDINGS FROM GROUP INTERVIEWS

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The data speak about court practice with very high tendencies toward full withdrawal of the capacity to act, opting for this extreme measure. In very few cases, the possibility provided for by the Civil Code for partial withdrawal is not used. But, as we will see below, partial withdrawal of the capacity to act, in Albania does not refer to the same meaning as it does in a number of other countries, or the meaning that it seems to be given by the Civil Code, which means opportunities to perform certain limited actions in certain given fields. Judges responded that the practice is not unified, some view partial withdrawal as for certain amount of time and some for areas of legal actions.

Another problem is that there are no provisions regarding restitution of the legal capacity to act after this period. In practice, there is no restitution or re-evaluation, since there are no legal provisions in place about the evaluation or restitution of the capacity to act. The interviewed judges responded that cases must be registered from the court's administration.

As above mentioned, there are very few cases of partial withdrawal and in practice partial withdrawal does not bear any particular significance, compared to full withdrawal. In one of the cases during the interviews, the court ruled for three years (partial withdrawal of the capacity to act) in other words partial means limited in time. There is not possibility of knowing what could or would happen following the termination of this period.

The interviews conducted showed that prosecutors, despite continuous efforts of the court to notify them about the proceedings, did not participate in the process. 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 Service. SS are not present in all proceedings, but they suffice themselves with the submission of an assessment report due to the legal obligation for submitting such evaluation report.

Lack of participation of all stakeholders in the process withdrawing the capacity to act leads to prolongation of court proceedings and increases costs of the process, where the applicants have to cover expenses. Absence of these actors, or rather their formal presence may have an impact in the process of granting a verdict. On the other hand, their absence, diminishes "the importance of the process.

With 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 center; Certification from the Medical Legal Commission; a statement about the applicant's income. However, in addition to the above-mentioned documents, the courts can take in any evidence that deemed necessary. Calling the relatives, presentation of legal documents, reports from different services are some of the evidences that may be required beyond court evidence.

During the interviews were revealed several problems regarding notification of the physicians from the Forensic Medicine Institute. Their absence from the court sessions was one

of the main reasons for overdue court procedures, in addition to the above-mentioned stakeholders. In some cases, the court has addressed the Ministry of Justice to remedy the situation.

'Under these circumstances, in some cases private consulting has been sought, and the financial cost for private counseling is too high, and for many individuals and sometimes unaffordable'

The person whose capacity is sought to be withdrawn/ restricted is interviewed in court by the jury or if he/she cannot come to the court, a member of the jury interviews him/her in the institution. 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."

In some court rulings the reasoning is the following:

"Under these circumstances, withdrawal of the capacity to act of the sick person, when the scientific and legal criteria authorize such as a thing it is imperative to withdraw or restrict his capacity to act since performance of legal acts by the said person would lead to nullification.

It is clear that the assessment 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 withdrawal of legal capacity to act."

The representatives from NGO-s stated that almost in 100% of the requests for withdrawal of the legal capacity are approved by the courts and they conclude with a legal guardian being appointed.

The court sessions are oftentimes postponed for several reasons declare the representatives from NGO-s. This is also reflected in the court rulings, where the court has held on average 15 sessions until the verdict. In terms of timeframe the court proceedings on average take up to 13 months.

NGO-s representatives declared that during their monitoring experience, in no case does the court refer to international legislation, such as CRPD which has been ratified by the Government, or to the ECHR.

One of the representatives declared:

"We are often obliged to help the family members of persons with disabilities during their procedures of removal. We know that what they are asking is against the CRPD, but the system doesn't offer any other solutions and their situation are emergent oftentimes.

The NGO representatives and courts' representatives as well acknowledged that court sessions are too short to allow for an all-inclusive and in depth judgment; they also lack tools and knowledge to know the persons who are being deprived from legal capacity to act; the meetings too brief and there is no proper follow up or interaction with other persons on the side of the experts.

The representatives from the central government, stated that they are in the process of drafting the sub-acts on support- decision making and independent living. However, they speak of no measures regarding the reformation of the "heart "of the problem, which is abolishing the guardianship system in the civil legislation.

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## IV. CONCLUSIONS

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The results of the research speak of important steps made by the Albanian government to comply with its obligations under the CRPD. The legal and policy framework adopted after 2012 is a strong indicator of that, and in particular the Law on Accessibility and Inclusion of Persons with Disabilities and the National Action Plan for Persons with Disabilities 2016- 2020. There were adopted four by-laws regarding accessibility, disability data collection, the establishment of the National Disability Council and personal assistants. However, regarding recognition before law and support decision making systems, and independent living there were no effective actions undertaken so far, despite the statements of the ministry of holding the drafts of the acts and their sooner than later approval.

With regards to discrimination, the Law on Protection against Discrimination, even though the law includes disability amongst other grounds of discrimination, it discriminates itself against persons with mental and physical disabilities by stating that among the reasons for the discharge of the Commissioner is mental and physical impairment. This is found largely in the Albanian legislation and as stated earlier, this is a result of the model of legal capacity to act deeply rooted in the Albanian legal system.

Notwithstanding the evidence on the positive attempts, research shows that the framework implementation and compliance with international standards is undermined due to failure to conduct all-inclusive reforms, no proper mechanisms which have left the authorities with no effective power to enforce article 12. What is more important, there is no real political willpower so far to address the challenges of article 12 regarding the legal capacity to act and support-decision making systems.

The findings of the report from the analysis of the Albanian legislation indicate serious incompatibilities of the national law with the international standards, i.e. the CRPD and the General Comment of the Committee.

The system of legal guardianship is still in use in Albania and so far, the steps taken to comply with international standards have been insufficient or inadequate.

In addition to incompatibility with 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 for the person who is the object/subject of legal capacity deprivation, it still remains a process where the person himself/herself is not involved and is merely a spectator in her/his trial.

The courts do not go in detail on cases under review, but rather in most of instances depend on the reports of the forensic experts. The questions addressed to the experts are too generic. They hold one single meeting which cannot be 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. As mentioned in the legal analysis, the problems of in compliance of the legislation and failure of enforcement cannot be addressed only through the Law on Inclusion and Accessibility.

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 "undoing" and "unlearning" the guardianship-based system. 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.

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.

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 guardianship<sup>62</sup>. 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.

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<sup>62</sup> Interviews with the judges

## V. RECOMMENDATIONS

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This chapter introduces a set of recommendations based on the findings of the report.

As a first step, the establishment of a working group with foreign and domestic experts is recommended. The group must assess the current situation and can schedule interventions and further, prepare the legal amendments.

As a second step (which can parallelly go with the first one) professionals in various fields can be involved in in-depth training to understand what article 12 is about, how support- decision-making will translate into laws and policies.

Concrete steps for the realization of the full compliance of the decision-making supported by CRPD and with the General Comment no. 1:

Repeal existing legislation, starting from the Civil Code, the Family Code, the Code of Civil Procedure regarding the complete abolition of the legal capacity to act;

Amend the the Law on Inclusion and Accessibility, by eliminating the clauses on the issuance of sub-act on support decision making;

Approve a law which regulates specifically the support- decision making;

Design pilot projects for supported decision making to better understand how it works in practice;

Train professionals in the field, especially focusing on employees of the judicial system, continuing further with employees of social services at central and local level

Approve a comprehensive plan regarding the independent living to enable the coordination of different sectors and services;

Approve the sub-law on independent living by creating adequate mechanisms at central and local level responsible for the coordination of independent living services;

Include the multi discrimination definition in the legislation;

Provide trainings regarding the concept of reasonable accommodation.

## ANNEX 1

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### Questionnaire

#### 1. Current model of guardianship (courts/state institutions)

- a) What is the current situation regarding guardianship?
- b) What are the procedures? What are some of the safeguards?
- c) In your opinions, are there any gaps or problems with its implementation and what are they?
- d) What you would improve if so?

#### 2. CRPD model- article 12 (courts / state institutions)

- a) What is your opinion regarding the article 12? How is being implemented?
- b) Do you use it in your decisions? If so, in what ways?
- c) What are the challenges the model might encounter?
- d) What about independent living and non-discrimination? Have you encountered situations where you made use of these rights separately or altogether?

#### 3. Questions for advocacy groups NGO-s/DPO-s etc.

- a) What is your opinion on the implementation of article 12?
- b) How is the situation of persons with disabilities with regards to independent living and non-discrimination?
- c) How do you assess the work of Commissioner on Protection against Discrimination/ The Ombudsman, Courts and other institutions with regards to the above-mentioned?
- d) How do you process with cases of guardianship during your work? (if needed)