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**INTERNATIONAL REQUIREMENTS FOR ASSURING
THE RIGHT TO LEGAL CAPACITY FOR PERSONS WITH DISABILITIES**

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*Equality under the law is a basic general principle of human rights protection and is indispensable for the exercise of other human rights. It is reflected in a lot of international and regional treaties as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights etc. The most important step in assuring the right to legal capacity for persons with disability was the adoption of the **Convention on the Rights of Persons with Disabilities**. Becoming a part of this Convention, our country should review the laws allowing for guardianship and trusteeship, and should take action to develop laws and policies to replace regimes of substitute decision-making by **supported decision-making**, which respects the person's autonomy, will and preferences.*

Key words: *equality; legal capacity; guardianship; trusteeship; persons with disabilities; supported decision-making; human rights; capacity of use; exercise capacity.*

Our internal regulations do not define the notion of legal capacity, but regulates the constituent parts of that concept, **exercise capacity** and **capacity of use**. In accordance with Article 18 of Civil Code, Nr. 1107 from 06.06.2002, the person's ability to have and exercise civil rights and obligations, represents the **capacity of use**. **Exercise capacity** represents the ability of person to acquire and exercise civil rights, by his own act, to assume civil obligations and execute them.

Proceeding from the regulations in force, we can conclude that the concept of legal capacity is a generic notion that covers the concepts of exercise legal capacity and legal capacity of use. The same approach regulates the laws of Romania, Russia, Ukraine and other countries. The capacity of use, so the ability of a person to have rights comes along with birth and lasts throughout life, no person may be limited or lacking in the capacity to use.

Unlike the capacity to use, the exercise capacity is conditioned by the person's age, starting with the age of 18 years old or after the age of 16 years old, according to Article 20, Civil Code of the Republic of Moldova⁷⁶. The exercise capacity of individuals may be limited or totally diminished, according to our internal legal regulations.

Dividing the concept of legal capacity in two constituents, capacity of use and exercise capacity, our legislation ensure the right to legal capacity to all the persons, explains our internal experts, but is there the simple existence of right enough for ensuring the right to legal capacity, without ensuring the free exercise of that rights?! Related to the right to legal capacity, the Commissioner for Human Rights explained that capacity to hold rights automatically entails the capacity to exercise them⁷⁷. In his opinion, human rights scholars argue convincingly that article 12 of the CRPD vests persons with disabilities with both of these aspects of legal capacity. In other words, the capacity to hold rights automatically entails the capacity to exercise them with appropriate supports acceptable to and chosen by each individual.

The equally recognition of the legal capacity for all the persons was developed through a lot of international instruments to which our country is party, such as Article 6 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948 at the Palais de Chaillot, Paris, proclaims that "*Everyone has the right to recognition everywhere as a person before the law*". Article 26 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, states that

⁷⁶Civil Code of the Republic of Moldova, No. 1107 of June 06, 2002

⁷⁷<https://wcd.coe.int/ViewDoc.jsp?id=1908555>

„All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”, Article 16 of the same act provides that *„Everyone shall have the right to recognition everywhere as a person before the law.”*

Unfortunately, although our country ratified all of those international acts, some important steps on this field were not done. Most of all, our constitutional regulations⁷⁸ requires the priority of the international regulations as against national regulations, but our internal judicial practice goes on another road.

Our Civil Code, No. 1107 of June 06, 2002 and Civil Procedure Code⁷⁹No. 225-XV of May 30, 2003 No. 225 similar to the legislations from other countries, for example Russia, Ukraine, Romania etc., regulates the possibility to declare the judicial incapacity for the persons with disabilities on the bases of the judicial act.

Guardianship, as provided and applied under the Moldavian Civil Code was recognized as a form of protection for the persons with intellectual disabilities and mental illness, for preventing different of their rights abuse. Unfortunately this form of protection the right of persons declared incapable removes a person's legal personhood and places it with other person or institution (the guardian). The beneficiaries of guardianship are frequently placed into residential institution, and there is a direct link between institutionalization measures and establishing guardianship. Most of all, following the interviews with the specialists involved in the process of legal capacity deprivation and the persons which were declared incapable results the conclusions that the reasons of requesting the persons deprivation are: the deprivation of the person's patrimonial goods, for assuring the persons institutionalization, access to the pension and allowances entitled to the persons etc.⁸⁰

A person declared incapable, on the bases of a judicial act, is deprived of the possibility to engage in even basic socio-legal relationships, such as marriage, divorce, concluding a work contract, voting, having own property, claiming social benefits, consenting a medical treatment and even apply to the court for being restored in exercise capacity. These arrangements are directed to policies and practices of excluding the persons with mental and intellectual disabilities from society. The opposite of these positions was stated by the entry into force in 2007 of the **Convention on the Rights of Persons with Disabilities**.

The Convention on the Rights of Persons with Disabilities (hereinafter called CRPD) is an international human rights treaty adopted by the United Nations General Assembly on 13th December 2006 and came into force on 3rd May 2008 following ratification by the 20th State Party. Through the states which ratified⁸¹ the UN CRPD are Luxembourg, Maldives, Poland, Portugal, Romania, Bulgaria, Belgium, and the USA (signed by 16 states member) etc. The European Union signed the UN CRPD at 30 March 2007⁸², on that date the Convention was opened for signing. From that date, the Convention was signed by the entire EU member (27 states) and other 120 world's states, including our country.

As a result of Law No. 166-XVIII of 09.07.2010, the Republic of Moldova ratified the UN CRPD. The UN CRPD requires the states which ratified it to assure that the persons with disabilities can freely and fully exercise their right, in equal conditions with all the persons. That means that all the states have to assure the conformity of their legislation, policies and programs are consistent with the Convention on the Rights of Persons with Disabilities, within their competence. The countries that have ratified the Convention should take all necessary actions in the following areas: access to education, employment, transport, infrastructures

⁷⁸Constitution of the Republic of Moldova of July 29, 1994, Art.8.

⁷⁹ Civil Procedure Code of the Republic of Moldova No. 225-XV of May 30, 2003 No. 225

⁸⁰ Study: The system of guardianship in practice in the Republic of Moldova, Human rights and Vulnerability of Persons Declared incapacitated, coordinated by Ludmila Ciocan, with the support of the United Nation Office of the High Commissioner for Human Rights, Chisinau 2013.

⁸¹<http://indicators.ohchr.org/#>

⁸²http://europa.eu/rapid/press-release_IP-07-446_en.htm

and buildings open to the public, granting the right to vote, improving political participation and ensuring full legal capacity of all persons with disabilities. Inclusive, the convention parties must “review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by **supported decision-making**, which respects the person’s autonomy, will and preferences. Regimes of substituting decision-making can take many different forms, including plenary guardianship, judicial interdiction, and partial guardianship.

In order to adjust the provisions of the legislation in force, in particular, the provision of Civil Code and Civil Procedure Code, our country has to revise our internal legislation and to operate a lot of modifications, to create and pilot a lot of mechanisms for assuring a free exercising of legal capacity for persons with disabilities. Article 12 of the CRPD, produces a total change of the paradigm of internal regulations on legal capacity, the impact of the relevant provisions of the need for legal capacity to become more inclusive and tolerant of human diversity and flexible to the needs.

The essence of legal capacity does not result from the ability of the individual to realize or conduct his/her actions. Consequently, legal capacity as a concept does not merge with the concept or assessment of the mental capacity of a person, but rather *the essence of legal capacity results from the quality of being a person and subject of law and regulations need to be concerned about what kind of support requires the person to exercise legal capacity.*

Unlike there are no regulations in force, related to the institution of lacking the exercise capacity, to determine the limits of rights’ substitution of the person declared incapable with the guardians, on this conditions, we can consider that we are, not only in the presence of rights’ substitutions, but in the presence of full personality’s substitutions.

In other words, recognizing the right to legal capacity for all the persons with disabilities, the legislation will empower the credibility in viewing persons with disabilities from objects to subjects. Paragraph 1 of UN CRPD, emphasizes the importance of recognizing juridical personality for all the persons with disabilities⁸³, regardless of the deficiency’s severity. Most of all, High Commissionaire for Human Rights in the Council of Europe recommends that all the mechanisms which regulate the possibility of declaring the incapacity of person and guardianship should be cancelled and should recognize the juridical capacity to all the persons with disabilities. The psycho-social or intellectual disability shouldn’t be a reason for lacking them of the presumption of juridical capacity.⁸⁴

M. Bach remarks that, related to CRPD, any appreciation of a persons’ incapacity shouldn’t be based on the persons’ statute (the disability existence) or how much reasonable are the persons’ actions, but there should be recognized the persons’ independence in the process of deciding. He considers that the capacity of decision making is constituted of three components:

- a) Ability of decision making- the person understands the relevant information and can appreciate the nature and the consequences of his/her decision;
- b) Necessary support in the process of making decisions;
- c) Reasonable adaptation from hird parties in the process of decision making.

On the same point of view, M. Bach propose that in the process of appreciating the capacity of making decision, the level of support in exercising legal capacity should be evaluated⁸⁵.If we recognize that three constituents for the capacity of decision making process, represents a very important step to the transition from the substitutive decision making process to the support decision making.

⁸³The right to juridical capacity of persons with disabilities. Comparative study of Moldovan legislation and international standards. The Center of Legal Assistance for persons with disabilities, Chisinau 2013.

⁸⁴ High Commissionaire for Human Rights in the Council of Europe, Who gets to decide? Right to legal capacity for persons with psychosocial and intellectual disabilities, Strasbourg, 20 February 2012.

⁸⁵ Michael Bach and Lana Kerzner, A new paradigm for protecting Autonomy and the Right to Legal Capacit, October 2010.

On the specialized researches, the best practices in granting the support in exercising legal capacity to the persons with disabilities were recognized the legislation of **Sweden**, using the model of **ombudsman staff**, and **British Colombia**, using the model of **support networks**.

In Case Shtukaturov against Russia, the European Court of Human Rights decision from 27.03.2008, the Court finds a violation of article 8 of the European Convention on Human Rights. On that case, the applicant, who was deprived of legal capacity by the decision court at the request of his mother, became fully dependent of his tutor or guardian in almost all areas of life for an indefinite period. In his argument, the Court concluded that the interference with private life was not commensurate with the interests of the Russian Government to protect the interests and health of persons, violating article 8. Such legislation of the Republic of Moldova, Russian Federation declared incapable person cannot marry, cannot be a part of various contracts, cannot be employed, etc.

As in cases of our country⁸⁶ a person which incapacity was declared cannot be a part in a trial, his request is rejected by the aim of being submitted by an incapable person. Related to that right, the Court stated the violation of articles 6, paragraphs 1 (right to a fair trial), because the person was deprived of the possibility to appeal the Court's decision. On the same point of view, the Court stated the violation of the right of the respect for private life (article 8), because the person who was declared incapable became fully dependent of the guardian in all aspects of life, the same happens in our country and the person is deprived of the possibility to marry, to buy etc. The Court concluded that the intervention in the person's private life is not proportional with the Russian Government's interests of person's health and interests.

The recommendations of the European Commissioner for Human Rights highlight the need to make the procedures more affordable end of legal documents for people with disabilities. Moreover, it emphasizes the opportunity to develop an adequate and effective support for the free exercise of legal capacity by persons with disabilities. In accordance with the recommendations in national legal systems must provide people the necessary conditions for free exercise of legal capacity, including to recognize the right of individuals to seek support from others in their decision making, and communicating these decisions, this support must be differentiated adapted and fully meet the needs of the individual, but not in a form not actually missing person entitled to exercise such rights.

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⁸⁶ Article 24 (2) Civil Code of the Republic of Moldova, Nr.1107 of 06.06.2002.

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8. Law for ratifying the UN Convention on the Rights of Persons with Disabilities, No. 166-XVIII from 09.07.2010
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10. International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966
11. Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948

Links:

12. <https://wcd.coe.int/ViewDoc.jsp?id=1908555>
13. <http://indicators.ohchr.org/#>
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