



Udruženje mladih sa hendikepom Crne Gore  
Association of Youth with Disabilities of Montenegro

RIGHT OF PERSONS WITH DISABILITIES ON EQUAL ACCESS TO JUSTICE

## **PREVIOUS MATTER OF ALL RIGHTS**

-PUBLICATION-



Project is financed by European Union



Udruženje mladih sa hendikepom Crne Gore  
Association of Youth with Disabilities of Montenegro

**RIGHT OF PERSONS WITH DISABILITIES ON EQUAL ACCESS TO JUSTICE**

**PREVIOUS MATTER OF ALL RIGHTS**

**-PUBLICATION-**



Project is financed by European Union





**RIGHT OF PERSONS WITH DISABILITES ON EQUAL ACCESS TO JUSTICE**

**PREVIOUS MATTER OF ALL RIGHTS**

**-PUBLICATION-**

Podgorica, November 2016.

**Publisher:**

Association of Youth with Disabilities of Montenegro

**For publisher:**

Marina Vujačić

**Author:**

Miroslava-Mima Ivanović

**Translation:**

Anđela Radovanović

**Design and production:**

Nina Cvetkovski

**Print:**

Štamparija Lapis

**Number of copies:**

20



Project is financed by European Union through project “Triple A for citizens: access to information, advice and active help”. Content of this publication is solely responsibility of AYDM and it does not reflect the official opinion of the donors who are financing its implementation.

## CONTENT:

<b>FOREWORD .....</b>	<b>6</b>
<b>I INTRODUCTION .....</b>	<b>7</b>
<b>II TERM OF RIGHT ON EQUAL ACCESS TO JUSTICE .....</b>	<b>9</b>
<b>III INTERNATIONAL LEGAL GUARANTEES OF RIGHT ON EQUAL ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES .....</b>	<b>11</b>
<b>3.1. Convention on the Rights of Persons with Disabilities .....</b>	<b>11</b>
<b>IV ANALYSIS OF SITUATION IN MONTENEGRO .....</b>	<b>14</b>
<b>4.1. Legal framework .....</b>	<b>14</b>
4.1.1. <i>Equality of persons with disabilities in exercising right on access to justice</i>	15
4.1.2. <i>Equal recognition of persons with disabilities before the law .....</i>	16
4.1.3. <i>Right of persons with disabilities on free legal aid .....</i>	18
4.1.4. <i>Right of persons with disabilities on fair and public procedure .....</i>	19
<b>4.2. REALISATION RIGHT OF PERSONS WITH DISABILITIES ON EQUAL ACCESS TO JUSTICE IN PRACTICE .....</b>	<b>22</b>
4.2.1. <i>Equal recognition of persons with disabilities before the law .....</i>	22
4.2.2. <i>Right of persons with disabilities on free legal aid .....</i>	23
4.2.3. <i>Right on effective access of persons with disabilities to institutions covered by analysis .....</i>	24
4.2.4. <i>Right of persons with disabilities to use own language and alphabet .....</i>	26
4.2.5. <i>Participation of persons with disabilities in proceedings before institutions covered by analysis .....</i>	28
<b>V CONCLUSIONS AND RECOMMENDATIONS .....</b>	<b>33</b>
<b>ABOUT ORGANIZATION .....</b>	<b>35</b>
<b>BIOGRAPHY OF AUTHOR .....</b>	<b>36</b>
<b>LITERATURE AND REFERENCES .....</b>	<b>37</b>

## FOREWORD

Right on access to justice is one of the basic human rights in all democratic societies based on the rule of law. “Access to justice is not just a right in itself but also empowers individuals to enforce other rights”.<sup>1</sup> It is guaranteed by numerous international and domestic regulations and its exercising in practice depends on many material and procedural rights.<sup>2</sup>

Considering the importance of equal realisation of this right by persons with disabilities (hereinafter PWD) for their inclusion in all areas of life, Association of Youth with Disabilities of Montenegro (AYDM) started with realization of the project “**From legal guarantees to equality in practice**”. in January 2016. The project is financed by European Commission through the project “**Triple A for citizens: access to information, advice and active help**”, which is realized by the European Citizen Action Service and partners from European Union, Western Balkans and Turkey. *The goal of the project “From legal guarantees to equality in practice” is to improve realisation of right of PWDs on equal access to justice, and its activities, beside creation of this Publication are: free legal aid, Conference on the right on access to justice of PWDs and advocacy for improvement of the conditions for equal access to justice of these persons.*

*Goal of this Publication is to highlight positive examples in Montenegrin norms and practice, but also to give recommendations for necessary improvements in order to create conditions for equal exercising the rights of PWDs before the institutions of the system through giving overview on most important international legal guarantees in this area, analysis of domestic legal framework and situation in practice. The adoption of the strategic document which will define activities and dynamics on changes of legal regime of legal capacity in order to harmonize it with the Convention, is stipulated by Analyses of compatibility of regulations in Montenegro with Law on Prohibition of Discrimination of Persons with Disabilities and the UN Convention on the Rights of Persons with Disabilities, together with recommendations for harmonization.<sup>3</sup> In that sense, recommendations and conclusions of this Publication will give to Ministry of Justice and other relevant institutions clear overview on necessary measures which have to be undertaken in order to provide PWDs equality in exercising right on access to justice.*

Publication consists of several parts, as follows: introduction, term of the right on equal access to justice, international legal guarantees of right on equal access to justice of persons with disabilities, analysis of the situation in Montenegro and conclusions and recommendations. At the end of the Publication is given short description of the organization and used literature and references.

1 Handbook on European law relating to access to justice, Luxembourg: Council of Europe (CoE), European Court of Human rights (ECHR) & European Agency for fundamental rights (FRA), 2016, Pg.3;

2 Explanation available in Chapter II Term of equal access to justice, Pg. 6

3 Montenegrin version available on:

<http://www.mmp.gov.me/vijesti/165188/Usvojena-Analiza-o-uskladenosti-propisa-u-Crnoj-Gori-sa-Zakonom-o-zabrani-diskriminacije-lica-sa-invaliditetom.html>

## I INTRODUCTION

*The law is the art of goodness and equity.*<sup>4</sup>

Every democratic society tends to the rule of law, through, inter alia, equality of all citizens, in legal guarantees, as well as in enjoying rights in practice. *In order to exercise legal guarantees of human rights and freedoms in line with principle of equality and antidiscrimination, every country has to prescribe and undertake additional measures (principle of affirmative action) in relation to specific groups which due to different barriers face with discrimination in exercising their rights and obligations.* Existence or non-existence of such legal guarantees and their realization in practice represents reflection of the level of inclusiveness of the society and its readiness to respect the value of rule of law in all aspects of life.

Montenegro has opened negotiation process with European Union more than 3 and a half years ago, and **Chapter 23. Judiciary and fundamental rights** has been in focus since the beginning, while expecting concrete results in this area. Although concrete and measurable results are expected from Montenegro, *right of PWDs on access to justice is still on the margins.* This is shown by many researches about discrimination in Montenegro and status of PWDs which citizens recognize PWDs as one of the most marginalized groups in. Unfortunately, although state institutions are recognized as one of the subjects which should have the most important role in protection of the rights of this group, the researches show that devotion of civil society organizations in this area is much bigger than devotion of these institutions.<sup>5</sup>

While initiating any proceeding before state and local authorities for exercising their rights, PWDs face many barriers which prevent them to be parties in those proceedings and to use their authorizations in them in line with principles of human rights. *Legal personality of many persons with intellectual, mental, multiple and often physical or sensory impairment is denied due to legal barriers, so these persons neither can be parties in any proceeding, nor enjoy their rights. On the other side, PWDs with full legal capacity face many barriers even at the beginning of the initiation the proceedings for exercising their rights: they cannot enter into the offices where they have to submit requests, cannot get information where and how to submit a claim, they cannot submit a criminal charge in Braille or report discrimination in the sign language. Therefore, most PWDs are constrained to use attorneys, although that is not an obligation, but legal possibility.*

---

4 *Ius est ars boni et equi*, Roman maxim

5 Centre for monitoring and research (CeMI), research "Perception of the position of persons with disabilities", Podgorica: AYDM, 2015, available on: [http://umhcg.com/wp-content/uploads/2013/11/Rezultati\\_Izvjestaj-istrzivanja\\_UMHCG-2015\\_ENG.pdf](http://umhcg.com/wp-content/uploads/2013/11/Rezultati_Izvjestaj-istrzivanja_UMHCG-2015_ENG.pdf)

researches of Ministry for Human and Minority Rights, available in Montenegrin on: <http://www.minmanj.gov.me/biblioteka/istrzivanja>



In rare proceedings where PWDs use their rights on their own, they face too long procedures and unequal decision-making compared to decision making on rights and obligations of persons without disabilities, which makes initiation of these proceedings pointless. So, these persons wait up to half a year for Decision on their Request, and for Judgment a few years, while for violation of their personal rights and dignity of person they get a very low amounts of charges for non pecuniary damages compared with amounts of charges for non pecuniary damages related to equal the same rights off persons without disabilities. This state forces PWDs to seek information and help for exercising their rights at non-government sector, at first at organizations of persons with disabilities. *In 2016, 124 PWDs or members of their families asked for legal information, advices and representation from AYDM.*

In order to increase confidence of this marginalized group in institutions of the system and possibilities of interaction with them, it is needed to undertake a range of measures and activities. *In this Publication, data about all stated barriers which PWDs face during exercising right on access to justice and recommendations of the concrete measures for their removal are given.*

## II TERM OF RIGHT ON EQUAL ACCESS TO JUSTICE

One of the rights which on clearest way reflects respect of the principle of rule of law and equality and antidiscrimination is right on equal access to justice which, can be said, is a previous matter of all rights. This right has to be considered broadly because it includes equality before the law, as well as equality in implementation of these laws in practice.

Equality before the law means that the legal system prescribes equal scope of rights and obligations for all individuals under its jurisdiction. Considering diverse possibilities of different groups in the society, it implies prescription and implementation of the principle of affirmative action for marginalized groups.

Equality in implementation of the law is achieved through exercising *right on access to justice, which core of are procedural rights: right on effective access to relevant decision-making authority, right on public and fair hearing, right on the reasonable length of the proceeding, right on effective legal remedy, right on adequate compensation. Right on effective access to relevant decision-making authority is a precondition for exercising other rights of individual in the proceeding* because without exercising it, the proceeding cannot be initiated. This includes availability and accessibility of relevant decision-making authorities, as well as some elements of the right on the fair trial.

*Right on the public and fair hearing* (in proceedings before the court – *right on fair and public trial*) implies right on effective access to relevant decision-making authorities, but also *guarantees of principles of equality of arms and contradiction and right to reasoned decision*. In order to ensure that principles of justice and equity are really implemented in every proceeding, *it is necessary to provide transparency and public inspection within them*. Publicity of the hearing can be only limited if protection of public order and morality, national security and privacy of individual prevail over public inspection in administration of justice.<sup>6</sup> “*Equality of arms involves ensuring that each party has a reasonable opportunity to present its case in conditions that do not disadvantage either party*”.<sup>7</sup> Therefore, parties in the case are guaranteed range of rights, within which, depending on the type of the procedure, are: *right to use own language (right on interpretation), right on legal aid, right on self-representation or representation by the attorney, right on defense, right on legal advice by the relevant authority*. Fair and equitable decision making in every proceeding is impossible without implementation of the principle of contradiction, which includes rights of the party in the proceeding to: *have knowledge of, and comment on, all evidence (facts and case material) which can influence the final decision, have sufficient time to familiarise oneself with the evidence in proceeding and to produce evidence*.

<sup>6</sup> Handbook on European law relating to access to justice, Luxembourg: Council of Europe (CoE), European Court of Human rights (ECHR) & European Agency for fundamental rights (FRA), 2016, pg. 45, 46 & 47;

<sup>7</sup> Handbook on European law relating to access to justice, Luxembourg: Council of Europe (CoE), European Court of Human rights (ECHR) & European Agency for fundamental rights (FRA), 2016, pg. 41;

Respect of the right on public and fair hearing lead to equality of implementation of the law and results in respect of the right on reasoned decision. *“A reasoned decision demonstrates that a case has been heard properly and permits the parties to bring an appropriate and effective appeal”*.<sup>8</sup> Right on effective legal remedy provides individuals with protection from illegal and misappropriated decisions of the relevant authorities, which their human rights and freedoms are violated by. This implies not only legal possibility to submit the legal remedy, but also its availability and effectiveness in practice, i.e. its result in removal of made violations of human rights and freedoms. *Decisions made in the proceedings which stated procedural rights of individuals were violated in are illegal and legally unsustainable*. In the cases when relevant authorities through their (non)acting violate the rights of individuals, they have the right on adequate compensation, of pecuniary as well as non pecuniary damage they suffered due to these actions of the public authorities.

In order to ensure enjoyment of all procedural rights which are essential part of the right on access to justice by PWDs, it is necessary to provide them with individualized support according to disability and procedure they take part in. *Providing necessary support for full and effective participation of PWDs in proceedings is not only the matter of respect of their rights and freedoms, but the matter of respect of principles of the rule of law, legality and sustainability of legal order of the state in general*.

---

<sup>8</sup> Handbook on European law relating to access to justice, Luxembourg: Council of Europe (CoE), European Court of Human rights (ECHR) & European Agency for fundamental rights (FRA), 2016, pg. 44;

### III INTERNATIONAL LEGAL GUARANTEES OF RIGHT ON EQUAL ACCESS TO JUSTICE OF PERSONS WITH DISABILITIES

Right on equal access to justice, as one of the most important human rights is guaranteed by many international legal documents. Some of them are: Universal Declaration on Human Rights from 1948 (Articles 6, 7, 8, 10 and 11)<sup>9</sup>, International Covenant on Civil and Political Rights from 1966 (Articles 2 and 14)<sup>10</sup>, European Convention on Protection of Human Rights and Fundamental Freedoms from 1950 (Articles 6, 7, 8 and 13)<sup>11</sup>, The Charter on Fundamental Rights of the European Union (Articles 20, 21, 47, 48, 49 and 50)<sup>12</sup>. Here we are going to analyze legal guarantees of the right of PWDs on equal access to justice defined by the UN Convention on the Rights of Persons with Disabilities from 2006, as most important international legal document in the area of human rights and freedoms of these persons.

#### 3.1. UN Convention on the Rights of Persons with Disabilities

UN Convention on the Rights of Persons with Disabilities from 2006 is the most important international, legally binding document in the area of human rights and freedoms of these persons which was ratified by Montenegro in 2009. It obliges states parties to implement detailed defined principles and measures, which have a goal to enable enjoyment of already proclaimed human rights and freedoms by PWDs. In the area of equal access to justice, *Convention clearly defines measures which have to be undertaken in order to enable PWDs to enjoy this right by raising them into the rank of human rights and freedoms of these persons.*

Among basic principles of the Convention are recognized *antidiscrimination, full and effective participation and inclusion in all areas of community life, equality of possibilities and accessibility*<sup>13</sup> *Principle of reasonable accommodations, defined by the Convention*<sup>14</sup>, is of great importance, which provides PWDs dignified and fair treatment and implementation of additional measures, when guarantees prescribed by the Convention and domestic legislation are not sufficient for full and effective

9 General Assembly of United Nations, Universal Declaration on Human Rights, downloaded from: [http://www.ombudsman.co.me/docs/deklaracija\\_o\\_ljudskim\\_pravima.pdf](http://www.ombudsman.co.me/docs/deklaracija_o_ljudskim_pravima.pdf), original available on: [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)

10 General Assembly of United Nations, International Covenant on Civil and Political Rights, downloaded from: <http://www.mrs.gov.me/ResourceManager/FileDownload.aspx?rId=155147&rType=2>, original available on: <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

11 Law on Ratification of the European Convention on Protection of Human Rights and Fundamental Freedoms ("Official Gazette of Serbia and Montenegro - International agreements", No. 9/2003 and 5/2005);

12 PCharter of fundamental rights of European Union, downloaded from: [http://arsbih.gov.ba/wpcontent/uploads/2014/01/POVELJA\\_O\\_OSNOVNIM\\_PRAVIMA\\_EVROPSKE\\_UNIJE.pdf](http://arsbih.gov.ba/wpcontent/uploads/2014/01/POVELJA_O_OSNOVNIM_PRAVIMA_EVROPSKE_UNIJE.pdf), original available on:

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>

13 Article 3, Paragraph b, c, e and f of the Law on Ratification of UN Convention on Rights of Persons with Disabilities with Optional Protocol ("Official Gazette of Montenegro - International agreements", No. 2/09 of 27.7.2009);

14 „Reasonable accommodations are necessary and appropriate modifications and adaptations which do not represent an disproportionate burden and which are needed in concrete cases in order to guarantee persons with disabilities enjoyment and exercising of all human rights and fundamental freedoms on equal basis”, Article 2 Indent 4 of the Law on Ratification of UN Convention on Rights of Persons with Disabilities with Optional Protocol ("Official Gazette of Montenegro - International agreements", No. 2/09 of 27.7.2009);

enjoyment of the rights in the concrete case.<sup>15</sup> Non-implementation of this principle in situations when it is needed and it does not represent a disproportionate burden for the subject which has to implement it, is recognized as violation of principle of antidiscrimination on the basis of disability (Article 2, Indent 3 and Article 5 Paragraph 3 of the Convention). These principles are binding in interpretation and implementation of all norms of the Convention, but also in planning, defining and implementing all measures by states parties, in order to harmonize their legal system and practice with the Convention. In the Article 4 the Convention states overview of general obligations of the states parties, among which is stated that states parties have to: “adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention”; “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”; “refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention”; “promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights”.<sup>16</sup> These regulations are implemented in every area of life, including the right of PWDs on equal access to justice.

Considering importance of the right on equal recognition before the Law for enjoyment of all other human rights and freedoms, the Convention in the Article 12 *clearly defines human rights of PWDs on support needed for exercising of legal capacity, as well as effective mechanisms for protection from its abuse (Paragraphs 3 and 4)*. These protection mechanisms have to be proportional to the level of interference of support measures in exercising of rights and interests of PWDs and should ensure that support is given in the way that provides: respect of rights, will and wishes of beneficiaries, prevention of potential conflict of interests and influence by support person, the lowest scope and duration of the measures, as well as regular reviews by the relevant, independent and impartial body or court. Support for enjoying legal capacity and mechanisms for protection from abuse provide PWDs with enjoyment and use of all rights and freedoms guaranteed by this Convention, as well as by legislation of states parties.

In the Article 13 of the Convention, *human rights of PWDs on necessary measures for exercising equal access to justice* are defined. The rights on accommodations in all types of proceedings, including preliminary stages such as investigation are specified. Accommodations in the proceedings should be appropriate to the age of PWD and individualized in order to ensure his/her full and effective participation as direct or indirect participant. This means that PWD must have fully equal chances to undertake all available actions, according to his/her role in the proceeding, like

15 UN Committee on the rights of persons with disabilities, General Comment No 2 Article 9: Accessibility, 2014. godine, rows 25 and 26, downloaded from:

<https://documentsddsny.un.org/doc/UNDOC/GEN/G14/033/13/PDF/G1403313.pdf?OpenElement>

16 Article 4 Paragraph 1 Bullets a,b, d and i of the Law on Ratification of UN Convention on Rights of Persons with Disabilities with Optional Protocol (“Official Gazette of Montenegro - International agreements”, No. 2/09 of 27.7.2009);



persons without disabilities, *and exercising of any procedural right of these persons must not be questioned in any case.* In order to provide this, all officials involved into administration of justice (employed at: police, prosecution, inspections, courts, bodies for execution of criminal sanctions, Ombudsman and other institutions for protection of human rights, state and local authorities which decide on rights, interests and obligations of individuals) have to attend different trainings which they will be educated for interaction and work with PWDs through. This obligation is concretization of the norm of Article 4 Paragraph 1 Point (i) of the Convention.

States Parties of this Convention have to think about obligation of respecting human rights of PWDs on equal recognition before the law and access to justice during planning of the creation of regulations and implementation of the procedures for exercising rights and obligations. This implies that *every PWD, regardless of the type and level of impairment, has to be provided with needed support for realization of these rights* and unobstructed access and interaction with institutions and officials before which rights, interests and obligations of all subjects in society are exercised or protected, *including implementation of the principle of reasonable accommodations* when needed.

## IV ANALYSIS OF THE SITUATION IN MONTENEGRO

### 4.1. Legal framework

Considering importance and complexity of the right on equal access to justice, already the Constitution of Montenegro in several articles gives guarantees of individual rights in its scope. In the preamble of the Constitution, among others, freedom, respect of human rights and freedoms, democracy and rule of law are proclaimed as basic values of public order. *For implementation of these values on exercising and protection of equality, human rights and freedoms of PWDs the guarantee of their special protection in Article 68 is of key importance.*

In the Article 24 the Constitution prohibits limitation of the human rights and freedoms out of the scope permitted by this act and range which is necessary for achieving the purpose which the limitation has been permitted for. *The limitations should be prescribed only by the law and cannot be based on discrimination on the any ground.* (Article 25 Paragraph 2). Additionally, the Constitution does not allow limitations of the rights on: *legal remedy, legal aid; fair and public trial, principle of legality; presumption of innocence; defense; compensation of damage for illegal or ungrounded deprivation of liberty and ungrounded conviction, and even abolishment of the prohibition of: discrimination, inhuman and degrading treatment towards suspects, trial and conviction twice for one and the same criminal offence.*<sup>17</sup> By this is clearly visible how important right on equal access to justice is for respect of basic principles of the Constitution.

These guarantees are further detailed by numerous laws, which regulate substantive as well as procedurally nature of the right on equal access to justice. In this chapter we will give overview and analysis of the Law on Prohibition of Discrimination of Persons with Disabilities, Family Law, Law on Out Contentious Procedure, Law on Free Legal Aid, Criminal Procedure Code (CPC)<sup>18</sup>, Law on Civil Procedure (LCP)<sup>19</sup>, Law on General Administrative Procedure (LGAP)<sup>20</sup>, and Law on Administrative Procedure (LAP)<sup>21</sup>, in the part which these acts relate to full and effective enjoyment of the right of PWDs on equal access to justice.

Considering that framer of the Constitution has prescribed that *ratified international agreements are considered as the component of Montenegrin legal order and has given them advantage in implementation over domestic legislation*, it implies that UN Convention on the Rights of Persons with Disabilities excludes implementation of all regulations which are not harmonized with its provisions.

<sup>17</sup> Article 25 Paragraph 3 and 4 of the Constitution of Montenegro ("Official Gazette of Montenegro", No. 1/07 of 25.10.2007, 38/13 of 2.8.2013);

<sup>18</sup> Criminal Procedure Code ("Official Gazette of Montenegro", No. 57/09 of 18.8.2009, 49/10 of 13.8.2010, 47/14 of 7.11.2014, 2/15 of 16.1.2015, 35/15 of 7.7.2015, 58/15 of 9.10.2015)

<sup>19</sup> Law on Civil Procedure ("Official Gazette of Republic of Montenegro", No. 22/04 of 2.4.2004, 28/05 of 5.5.2005, 76/06 of 12.12.2006, "Official Gazette of Montenegro", No. 73/10 of 10.12.2010, 47/15 of 18.8.2015, 48/15 of 21.8.2015);

<sup>20</sup> Law on General Administrative Procedure ("Official Gazette of Republic of Montenegro", No. 60/03 of 28.10.2003, "Official Gazette of Montenegro", No. 73/10 of 10.12.2010, 32/11 of 1.7.2011) in implementation since 1.7.2017;

<sup>21</sup> Law on Administrative Procedure ("Official Gazette of Montenegro", No. 56/14 of 24.12.2014, 20/15 of 24.4.2015, 40/16 of 30.6.2016) in implementation since 1.7.2017;

#### 4.1.1. Equality of persons with disabilities in exercising right on access to justice

Even Constitution of Montenegro in Article 8 prohibits “direct or indirect discrimination on any ground” and introduces prescriptions and special measures for achieving equality of persons who are in unequal position based on any ground (principle of affirmative action). Law on protection from Discrimination provided discriminated persons with possibility to initiate court proceeding for protection from discrimination, which is urgent.<sup>22</sup> Prohibition of discrimination on the ground of disability is in detail regulated by the Law on Prohibition of Discrimination of Persons with Disabilities, which for the first time was adopted in 2011.

New Law from 2015, as some of its principles, recognizes: full and effective participation and inclusion of PWDs in all processes where it is decided on their rights and obligations, their equality with others in exercising rights and obligations and respect of equality in all areas of life.<sup>23</sup> These principles are guiding ideas for interpretation and implementation of all provisions of this Law, including norms of Article 14 which defines prohibition of discrimination in area of providing public and private goods and services and Article 15 which precisises types of discrimination grounded on disability in proceedings before the authorities.

In order prevent discrimination on the ground of disability in providing goods and services, in public as well as in private sector, providing goods and services to PWDs must not be rejected, prevented, restricted or made harder in any way, including: *not respecting principle of universal design<sup>24</sup>, making stricter conditions for PWDs, intentional delay in providing goods and services and increase of the costs of providing goods and services to these persons* (Article 14). These prescriptions are concretized related to providing goods and services in specific areas, among which are: access to buildings and areas in public use, information and communication, proceedings before the authorities, freedom of opinion and expression, professional rehabilitation, work and employment, social and child protection and adequate living standard.<sup>25</sup> *Implementation of the Article 14 and other articles of the Law on Prohibition of Discrimination of Persons with Disabilities is made hard or even completely disabled due to referral norms to acts which regulate specific areas, and often contain discriminatory norms related to PWDs* (for example, areas of health, social and child protection, education, public transport etc.).

In the Article 15 of this Law is prescribed that discrimination on the ground of disability before the holders of public powers in proceedings for exercising rights, obligations and interests and/or providing public goods and services to PWDs

<sup>22</sup> Article 24 Paragraph 4 of Law on Prohibition of Discrimination (“Official Gazette of Montenegro”, No. 46/10 of 6.8.2010, 40/11 of 8.8.2011, 18/14 of 11.4.2014);

<sup>23</sup> Article 3 Point 4,5,6 of Law on Prohibition of Discrimination of Persons with Disabilities (“Official Gazette of Montenegro”, No. 35/15 of 7.7.2015, 44/15 of 7.8.2015);

<sup>24</sup> “Universal design is design of products, environment, programs and services in the way that all persons can use them to the fullest extent without need for additional adaptation or special design. Universal design does not exclude existing of assistive resources and aids for some categories of persons with disabilities when they need such a resources.”- Article 2 of Law on Ratification of UN Convention on Rights of Persons with Disabilities with Optional Protocol (“Official Gazette of Montenegro - International agreements”, No.2/09 of 27.7.2009);

<sup>25</sup> Article 11, 12, 15, 18, 22 and 24 of Law on Prohibition of Discrimination of Persons with Disabilities (“Official Gazette of Montenegro”, No. 35/15 of 7.7.2015, 44/15 of 7.8.2015);



(relation with Article 14) is prohibited. None of the holders of public powers must: forbid or limit the right to person and/or child with disability just because of her/his disability, set up different conditions for PWD than for person without disability, carry out any proceeding in the way which disable or make hard full and effective participation of PWDs and exercising their rights, including non implementation of the principle of affirmative action appropriate for disability. The prohibition of violation of the Article 13 of the UN Convention on the Rights of Persons with Disabilities this is clearly highlighted through this.

Although in the Article 5 of this Law the constitutional obligation of all holders of public power and private sector to implement principle of affirmative action towards PWDs (Paragraph 1) is highlighted and precisised, in the Paragraph 2 of this Article *the area of equal access to justice is not clearly pointed out, as one of the areas which this principle has to be implemented in*, but contrary it is covered by the legal standard of other areas of life. Therefore it is not strange that this Law does not recognize and define prohibition of discrimination on the ground of disability in the area of equal recognition before the law, as one of the basic preconditions of the right of PWDs on equal access to justice. Neither principle of reasonable accommodations is defined by this Law, nor public authorities and private subjects are obliged to its implementation.

Although it is one of the most important legal acts in the area of rights of PWDs, Law on Prohibition of Discrimination of Persons with Disabilities does not provide enough guarantees for prohibition and protection from discrimination on the ground of disability in exercising right on equal access to justice. At first, this is because of fail to recognize discrimination in the area of equal recognition before the law, which in legal system and practice of Montenegro is one of the areas where PWDs face most rigorous violations of their human rights and freedoms, but also because the non-implementation of the principle of reasonable accommodations by the public authorities in providing public goods and services and carrying out the proceedings is not defined as discrimination on the ground of disability. This prevents PWDs to initiate proceedings for protection from discrimination in the cases of violation of these rights.

#### **4.1.2. Equal recognition of persons with disabilities before the law**

The Constitution of Montenegro in the Article 17 Paragraph 2 guarantees equality of all persons before the law, regardless of any particularity or personal characteristic, while in Article 19 it guarantees right on equal protection of all rights and freedoms. *These rights are denied and restricted for PWDs through norms of Family Law and Law on Non-Contentious Proceedings.*

PThe Family Law regulates not only conditions and methods for exercising rights in the area of marriage and family, but it also regulates statutory legal issues, including legal capacity of PWDs. In the Article 235 of this Law is stated that “A person of full age who, due to mental illness, mental retardation or due to any other cause,

is not capable of caring on its own about his/her rights and interests **is completely deprived of legal capacity**".<sup>26</sup> In the paragraph 2 of the same Article the partial deprivation of legal capacity of persons who endanger their rights and interests or the rights and interests of other persons is prescribed, due to, among other, "mental illness, mental retardation", "senility or due to other similar reasons". Also, Family Law allows extension of parental rights "after a child comes of age if due to a developmental disorder, disability or due to other reasons he/she is not capable to take care on its own about his/her personality, rights and interests".<sup>27</sup> **These prescriptions not only violate the right of PWDs on equal recognition before the law, recognized in the Article 12 of the UN Convention on the Rights of Persons with Disabilities, but also, contrary to the Family Law itself, persons of full age mark and treat as children.**<sup>28</sup>

Decision on deprivation of legal capacity and extension of parental rights are brought by court in non-contentious proceeding (Article 93 Paragraph 1 and Article 235 Paragraph 3). The proceeding for extension of parental rights is initiated by parent of PWD or custodial body, but not by PWD itself (Article 93 Paragraph 1). Proceeding for deprivation of legal capacity can be initiated by family member of PWD or custodial body, but also by PWD itself "if he/she is capable of understanding the meaning and legal consequences of this proposal".<sup>29</sup> *These proceedings are urgent and have to be completed in 30, i.e. 15 days from receiving the proposal.*<sup>30</sup> Mental capacity of PWD and his/her physical ability to take care about his/her personality, rights, obligations and interests is assessed by the court with opinion of expert witness and custodial body. The periodical review of the court decisions on deprivation of legal capacity of PWDs and extension of parental rights is not prescribed by the Family Law and Law on Non-Contentious Procedure. Thus, this disempowerment of PWDs lasts until some body authorized to initiate the proceeding for deprivation of legal capacity or extension of parental rights, or court ex officio or PWD itself initiates proceeding for return of legal capacity or termination of extended parental rights.<sup>31</sup>

Besides the violation of the right on equal recognition before the law of PWDs, exercising almost all rights in area of marriage and family are conditioned in the Family Law by so called mental capacity (for example, right on marriage and divorce, recognition of paternity or maternity, children rights). Therefore, *even in the cases when PWDs are not deprived of legal capacity, they can come to situation that their rights in the area of marriage and family can be restricted due to supposed mental incapacity, for which estimation of there is a big space for free evaluation by the bodies.*

26 Article 235 Paragraph 1 of Family Law ("Official Gazette Republic Of Montenegro", No. 1/07 of 9.1.2007, "Official Gazette of Montenegro", No. 53/16 of 11.8.2016)

27 Article 92 of Family Law ("Official Gazette of Republic Of Montenegro", No. 1/07 of 9.1.2007, "Official Gazette of Montenegro", No. 53/16 of 11.8.2016)

28 "Child is every person under 18 years of age". – Article 5 Paragraph 1 of Family Law ("Official Gazette of Republic Of Montenegro", No. 1/07 of 9.1.2007, "Official Gazette of Montenegro", No. 53/16 of 11.8.2016)

29 Article 30 Point 4 of Law on Out Contentious Procedure ("Official Gazette of Republic Of Montenegro", No. 27/06 of 27.4.2006, "Official Gazette of Montenegro", No. 73/10 of 10.12.2010, 20/15 of 24.4.2015);

30 Article 29 Paragraph 2 and Article 71 Paragraph 2 Law on Out Contentious Procedure ("Official Gazette of Republic Of Montenegro", No. 27/06 of 27.4.2006, "Official Gazette of Montenegro", No. 73/10 of 10.12.2010, 20/15 of 24.4.2015);

31 Article 42 and Article 72 of Law on Out Contentious Procedure ("Official Gazette of Republic Of Montenegro", No. 27/06 of 27.4.2006, "Official Gazette of Montenegro", No. 73/10 of 10.12.2010, 20/15 of 24.4.2015);

*The Family Law and Law on Non-Contentious Procedure through the institution of full or partial deprivation of legal capacity of PWDs totally prevent these persons to enjoy their rights. In the moment of losing legal capacity or extending parental rights, PWDs totally lose possibility to control own life. Custodian, adopter or parent whose parental rights are extended totally take over decision making about rights, obligations and interests of PWD, who is deprived of legal capacity. This is completely contrary to the UN Convention on the Rights of Persons with Disabilities and the Constitution of Montenegro.*

#### **4.1.3. Right of persons with disabilities on free legal aid**

In the Article 21, the Constitution of Montenegro guarantees right on legal aid provided by the bar, as an independent profession, but also gives possibility to law maker to prescribe providing free legal aid by the law. This has been done in 2011 by adopting Law on Free Legal Aid<sup>32</sup>, which guarantees this right to those citizens who need it because of their difficult material conditions (Article 1).

Free legal aid includes covering costs of: *legal information, legal counselling, preparation of pleadings, representation in proceedings before the court, the State Prosecution, the Constitutional Court of Montenegro and public executor and in the procedure for out-of-court dispute settlement, as well as exemption of paying costs of court proceeding (Article 2). Hence, this right does not include free representation in: administrative proceeding, proceeding before the Inspection, the Ombudsman of Montenegro and European Court of Human Rights.*

*The right on free legal aid is guaranteed, by this law, to all PWDs regardless of their material conditions, and are they residents of Montenegro or they are stateless persons and foreigners lawfully residing in Montenegro.<sup>33</sup> It can be concluded that law maker supposed these persons are brought in bad material condition by existence of disability due to additional living costs. PWDs, as well as other right holders, are provided with free legal aid by attorneys in the order from the list, which is sent to basic courts by Bar Association of Montenegro. This means that PWD, regardless of specific adaptations which he/she needs for exercising right on equal access to justice, can not choose attorney from the list of Bar Association, which will provide him/her with free legal aid on adequate way.*

This right is exercised by submitting request in the Office or Officer for the free legal aid in the Basic court which territory PWD has permanent or temporary residence on.<sup>34</sup> *In the Law adaptations of proceeding for exercising this right by PWDs are not guaranteed, therefore right of these persons on equal, full and effective participation in this proceeding is legally not enough protected and is left to free assessment of authorized officials.*

<sup>32</sup> Law on Free Legal Aid ("Official Gazette of Montenegro", No. 20/11 of 15.4.2011, 20/15 of 24.4.2015)

<sup>33</sup> Article 12 and 13 Point 3 of Law on Free Legal Aid ("Official Gazette of Montenegro", No. 20/11 of 15.4.2011, 20/15 of 24.4.2015);

<sup>34</sup> Article 27 and 34 of Law on Free Legal Aid ("Official Gazette of Montenegro", No. 20/11 of 15.4.2011, 20/15 of 24.4.2015);

#### 4.1.4. Right of persons with disabilities on fair and public proceeding

As personal rights, the Constitution of Montenegro recognizes right on fair and public trial, which includes principle of publicity and reasonable length of the proceeding by the independent, impartial court established by the law, as well as right on legal remedy.<sup>35</sup> The Constitution has guaranteed these rights in detail by prescribing rights in their core, especially considering the need for protection of the rights of the accused in the criminal proceeding.<sup>36</sup>

One of the basic principles and goals of criminal, civil and administrative, but also other proceedings before the bodies of public authorities in Montenegro is a principle of truth and equity. It implies that all facts and circumstances, important for deciding in concrete case, have to be assessed truthfully, rightly and fully in order to make lawful and equitable decision, which is precisely prescribed by the procedural laws. In order to ensure implementation of the principle of truth, every proceeding is conducted according the rules, precisely determined by the law and the Constitution, which provide fair and equitable decision making based on the equality in every specific case – principle of legality and constitutionality. These rules imply guarantees of procedural rights, which are essential parts of the right on equal access to justice and some of them are: right to use own language or language which participant in the proceeding understands<sup>37</sup>, right of the party to make a statement about every fact of significance for decision making<sup>38</sup>, right on self-representation or representation by the attorney<sup>39</sup>, right on defence<sup>40</sup>, right on help and counselling (instruction) to unlearned party<sup>41</sup>, right on review (review, insight and transcription) the documents of the case<sup>42</sup>. Obligations which all parties in the proceeding have are: to appear before the court on the court summons or to justify if he/she does not appear, as well as to state and tell truth<sup>43</sup>, kao i da iznesu i govore istinu<sup>44</sup>. *Violation of the stated rights and obligations leads to unlawful decision, which must not produce legal effect and has to be removed from the legal order as null.*

Procedural laws in some scope define measures which should ensure respect of procedural rights and obligations of PWDs. These measures relate to: *places where hearings, i.e. discussions, are held, place and manner of interrogating party with disability, manner of taking the oath and signing records and other documents by these persons.*

35 Article 20 and 32 of Constitution of Montenegro (“Official Gazette of Montenegro”, No. 1/07 of 25.10.2007, 38/13 of 2.8.2013);

36 Article 29, 30, 31, 33, 35, 36, 34, 37 and 38 of Constitution of Montenegro (“Official Gazette of Montenegro”, No. 1/07 of 25.10.2007, 38/13 of 2.8.2013);

37 Article 8 and 9 Paragraph 2 and 5 CPC, Article 9 Paragraph 2 and Article 99 LCP, Article 12 Paragraph 2 and 3 LGAP and Article 9 Paragraph 2 LAP;

38 Article 8 LGAP, Article 14 LAP, Article 6 LAP;

39 Article 64 CPC, Article 88 LCP, Article 45 LGAP, Article 56 LAP;

40 Article 12 CPC;

41 Article 14 CPC, Article 12 LCP, Article 5 Paragraph 1 and 2 LGAP, Article 9 LAP;

42 Article 203, 203a and 203b CPC, Article 148 LCP, Article 69 LGAP, Article LAP;

43 Article 100 Paragraph 2, Article 107 Paragraph 3, Article 119 Paragraph 1, Article 138 Paragraph 1 and 2, Article 323, Article 324, Article 325 Paragraph 1 and 4, Article 327 Paragraph 1 and 3 and Article 457 CPC, Article 181, Article 182, Article 231 Paragraph 1, Article 246 Paragraph 1, Article 293, Article 298 Paragraph 3 and 4, Article 376 Paragraph 3, Article 452 LCP, Article 60 Paragraph 1, Article 62, Article 149 Paragraph 3, Article 168, Article 175 and Article 186 LGAP;

44 Article 113 Paragraph 2, Article 115 Paragraph 2, Article 126 Paragraph 1 and 2 CPC, Article 10, Article 239 Paragraph 2 LCP, Article 11, Article 172 Paragraph 1, Article 183 Paragraph 1 and 4 LGAP and Article 105 Paragraph 3 LAP;



In order to exercise their rights, PWDs must have *effective access to relevant decision-making authorities*. *Obligations of accessibility of all buildings in public use for PWDs and persons with reduced mobility* were defined by the Law on Spatial Development and Construction of Structures and they had to be fulfilled until August 2013<sup>45</sup>, with implementation of accessibility standards in detail prescribed by the bylaw<sup>46</sup>. *Procedural laws do not define any measure which relevant decision-making authorities are obliged to undertake to enable right on effective access to these authorities to PWDs. They, oppositely, prescribe exclusion from the rule that hearings (main hearing and/or discussion) are held in the building of state or local authority before which the proceeding is being conducted<sup>47</sup>, so they can be held on another place when one of the parties is PWD*. Therefore, CPC allows main hearing to be held in another building if “the premises of the court’s building are inappropriate for the main hearing” (Article 306 Paragraph 2). This certainly could relate to cases when PWD cannot be present on the main hearing due to inaccessibility of the court’s building, but not to cases when he/she, is not able to come to main hearing due to other barriers. Law on Civil Procedure (LCP) (which, according to the Article 107 Paragraph 3 of the Law on Administrative Procedure will also be implemented in administrative procedure) prescribes that hearing will be held out of the court’s building “if it is necessary or if it saves time and costs of the proceeding”<sup>48</sup>. This norm of the LCP can be interpreted in the way that the hearing is allowed to be held outside of the court’s building when party with disability could not access it due to its inaccessibility, or some other reason (for example, lack of accessible transport, assistance etc.). The similar is prescribed in the Article 132 Paragraph 6 and Article 148 of the LGAP, but here the cost effectiveness of the proceeding, i.e. thoroughly, faster or more simple discussion of the administrative matter is highlighted, not necessity.

Procedural laws contain norms which place and manner of interrogating PWDs are prescribed by, and which are different than interrogation of other parties in the proceeding, which is *direct discrimination on the ground of disability*. CPC in the Article 164 Paragraph 6 prescribes that accused persons will be interrogated at the place they reside or he/she will be provided with transport to the court’s building if “*due to illness or other irremovable impediment*” he/she is unable to appear on court’s summon. The similar is prescribed in the Article 310 Paragraph 1 for witnesses and expert witnesses, who are unable to appear before the court due to “*a long-term illness or other impediments*”. Besides it is prescribed as exception in the Article 112, Paragraph 3 that witnesses with disabilities can be interrogated by “*technical devices for the transmission of image or sound, so the parties can make them questions even though they are not present in the same premises as the witness*”. In civil proceedings witnesses can be interrogated in the premises they reside in,

45 Article 73 and 165 Law on Spatial Development and Construction of Structures (“Official Gazette of Montenegro”, No. 51/08 of 22.8.2008, 40/10 of 22.7.2010, 34/11 of 12.7.2011, 40/11 of 8.8.2011, 47/11 of 23.9.2011, 35/13 of 23.7.2013, 39/13 of 7.8.2013, 33/14 of 4.8.2014);

46 Regulation on closer conditions and manner of adaptation of buildings for access and movement of persons with reduced mobility and persons with disabilities (“Official Gazette of Montenegro”, No. 48/13 of 14.10.2013, 44/15 of 7.8.2015);

47 Article 306 Paragraph 1 of the Criminal Procedure Code, Article 111 Paragraph 1 of the Law on Civil Procedure, Article 132 Paragraph 5 and Article 148 of the Law on General Law on General Administrative Procedure;

48 Article 111 Paragraph 2 LCP;

if they can't appear due to "old age, illness or severe physical defects"<sup>49</sup>, while in administrative proceeding these parties can be interrogated in the building where they reside "due to illness or bodily incapability"<sup>50</sup>. LCP in the Article 111a prescribes right of the party to undertake civil proceeding actions outside the place of hearing and to equally participate in it with use of electronic communications. Party can use this right if consent of another party for that is given. This way of participation in the proceeding can be implemented to interrogation of witnesses and expert witnesses and other participants in the proceeding. The similar is prescribed in the Article 142 Paragraph 3 of the LGAP, which the conduction of the discussion through video call is enabled by, if there are technical conditions and if a party requests that. Awareness of the law maker about its obligations to provide PWD with equal, full and effective participation in the proceeding is clearly shown by the prescriptions which oblige all present and parties in the criminal procedure to stand up when judge enter into the court room and while talking to court<sup>51</sup> and reason of prescribing mandatory defense for accused with disability<sup>52</sup>.

Although the right to use own language and alphabet is guaranteed to all parties in the proceedings before the institutions, *interrogation of persons with hearing and/or speech impairments and their oath-taking*, when they act in the role of the witness, is realized by sign language interpreter only in exceptional situations. CPC in the Article 100 Paragraph 2 prescribes *obligation of instruction and statement of the party* in the proceeding whether he/she wants to exercise right to use own language, i.e. language which he/she understands. Given instruction and statement of the party are inscribed in the record (Article 100 Paragraph 3). However, *interrogation of persons with hearing and/or speech impairment will be performed in sign language only if it is impossible to communicate with these persons in writing* (Article 106 Paragraph 2). Beside, instead of sign language interpreter, the phrase "person with whom the accused person is able to communicate" is used, which gives a wide possibility to invite for interpreter not enough qualified and/or partial person. Almost in the same way the interrogation of witnesses with hearing and/or speech impairments in civil and administrative proceedings is regulated, with the fact that laws which regulate these proceedings use discriminatory terms "deaf" and "mute".<sup>53</sup> Also, *these persons make an oath by interpreter only if they are illiterate*.<sup>54</sup>

Precise rules for signing the record and other documents for illiterate persons with physical disability are prescribed, *without possibility* of choice of these persons. In the Article 210 Paragraph 4 and 5 of the CPC is precisely highlighted that illiterate person should put the fingerprint of the index finger of the right-hand, but if that person, due to physical impairment cannot put the fingerprint of this finger, it has to be highlighted finger which fingerprint is given from, and persons without arms verify record in the way they read it or it is read to them. A person, who cannot sign documents by hand in civil and administrative proceeding, signs authorisation by

49 Article 238 Paragraph 3 LCP;

50 Article 171 Paragraph 4 LGAP;

51 Article 335 CPC;

52 Article 69 Paragraph 1 CPC;

53 Article 241 Paragraph 2 and 3 LCP and Article 172 Paragraph 2 LGAP;

54 Article 117 Paragraph 4 CPC and Article 174 Paragraph 3 LGAP;

fingerprint.<sup>55</sup> Differently to civil proceeding, where party who cannot sign herself/himself, signs record by the fingerprint (Article 122, Paragraph 3), *in the administrative proceeding record and submission are signed by another person with his/her name*<sup>56</sup>. Therefore, PWDs are not allowed to sign records and other documents in the way they choose.

*Implementation of the principle of affirmative action which will provide their equality and full and effective participation in proceedings is not guaranteed to PWDs in Montenegrin procedural law, but oppositely, measures which have a goal to overcome existing barriers which discriminate them on the ground of disability, are prescribed. These measures themselves represent direct discrimination on the ground of disability, because they imply different and unfavourable treatment toward PWDs, seemingly creating impression that they contribute to realisation of procedural rights of these persons, but not that they in fact confirm inevitability of existence of barriers.*

## **4.2. EXERCISING THE RIGHT OF PERSONS WITH DISABILITIES ON EQUAL ACCESS TO JUSTICE IN PRACTICE**

Data about exercising right of PWDs on equal access to justice we received by the requests for free access to information. We have decided that our research will be related to possibilities of exercising this right of PWDs before the: centers for social work (13 of them), local offices and employment bureaus of the Employment Agency of Montenegro (22 of them), centers and security departments of the Police Department of Montenegro (21 of them), Basic State Prosecutions (13 of them) and courts (15 of them), Constitutional Court of Montenegro and Ombudsman of Montenegro, because protection and exercising rights of PWDs before and by these institutions is of essential importance for this population. In total, 117 requests for free access to information were sent to 50 institutions. We didn't receive answers from seven institutions, as following: Center for Social Work for Municipality of Rožaje, Center for Social Work for Municipalities Mojkovac and Kolašin, Basic courts in Ulcinj, Nikšić and Rožaje, Ministry of Sustainable Development and Tourism and Administration for Inspection Affairs. Requested information related to period between January 1<sup>st</sup> 2010 and February 1<sup>st</sup> 2016.

### **4.2.1. Equal recognition of persons with disabilities before the law**

Requests for free access to information were sent to: *centers for social work (hereinafter CSW), Ministry of Labour and Social Welfare and Supreme Court of Montenegro, requesting information on PWDs deprived of legal capacity and/or over whom parental rights were extended. Beside these stated in the introduction of this Chapter, on our requests CSW for Municipality of Danilovgrad and CSW for Municipalities of Plav and Gusinje did not answer. The rest of the nine CSW rejected our requests because of lack of jurisdiction, not having information and need for creating of new information.*

<sup>55</sup> Article 95 Paragraph 2 LCP and Article 47 Paragraph 2 LGAP;

<sup>56</sup> Article 56 Paragraph 5 and Article 66 Paragraph 6 LGAP;

In answer to our request, *Ministry of Labour and Social Welfare* stated that “it does not have document which statistical data related to the number of persons deprived of legal capacity and number of persons with extended parental rights are given in”<sup>57</sup>. Ministry has additionally stated, as argument of not having requested information, that proceedings for deprivation of legal capacity and extension of parental rights are under the jurisdiction of the courts. The Supreme Court of Montenegro stated that it does not keep evidence about PWDs deprived of legal capacity and/or over whom parental rights are extended.<sup>58</sup>

Only the Basic Court in Plav gave us information about non-contentious proceedings for full or partial deprivation of legal capacity of these persons within the answer on question about participation of PWDs in proceedings before this institution. In the requested period 20 non-contentious proceedings for full deprivation of legal capacity of PWDs were initiated before this Basic Court (hereinafter: BC) – four in 2011, one in 2012, two in 2013, two in 2014, two in 2015 and in the first two months of 2016 nine proceedings. Sharp raise of number of non-contentious proceedings for deprivation of legal capacity of PWDs in 2016 can be explained by right of custodians of these persons (which implies deprivation of legal capacity of PWDs) on material allowance in the amount of 193€, which was prescribed by the Law on Amendments on Law on Social and Child Protection from 2015<sup>59</sup>. Seems that many persons “who take care” about PWDs and who are not their parents have decided to deprive them of legal capacity in order to get material allowance.

PWD, whose legal capacity was decided on, participated in none of twenty non-contentious proceedings for deprivation of legal capacity, due to the same reasons which were the reasons for initiation of the proceeding, (for example “due to retardation in mental development and psychological illness”, “existence of blindness”, “due to existence of mental illness”, as stated in the Information of this court). Only one proceeding was initiated by the CSW for Municipalities Plav and Gusinje and it was concluded by withdrawal of Recommendation for deprivation of legal capacity of PWD. The rest of 19 proceedings were initiated by natural persons and in all of them the requests were adopted, and therefore PWDs (ten with intellectual, eight with mental and one person with sensor impairment) were fully deprived of legal capacity. Only five proceedings were concluded within the legal deadline, while some of them lasted up to four months.<sup>60</sup>

#### 4.2.2. Right of persons with disabilities on free legal aid

Data about exercising the right of PWDs on free legal aid were requested from basic courts (BC), as the bodies which jurisdiction the realization of this right is in. Beside courts stated in the introduction of this chapter, we did not receive information about exercising this right from BC in Bar.

57 Information from Ministry of Labour and Social Welfare No. 07-8/16-2 of 3.2.2016.godine;

58 Decision of the Supreme Court of Montenegro Su V No. 182/16 of 17.3.2016;

59 Article 2 of the Law on amendments of Law on Social and Child Protection, (“Official Gazette of Montenegro”, No. 42/15 of 29.7.2015), i.e. Article 39a of Law on Social and Child Protection (“Official Gazette of Montenegro”, No. 27/13 of 11.6.2013, 1/15 of 5.1.2015, 42/15 of 29.7.2015, 47/15 of 18.8.2015, 56/16 of 23.8.2016, 66/16 of 20.10.2016);

60 Information from the Basic Court in Plav, V-Su. No.414/2016, of 14.10.2016;



Out of total 11 BCs, which sent us information about exercising this right by PWDs, only in four of them (BC in Berane, BC in Danilovgrad, BC in Kotor and BC in Plav<sup>61</sup>) these persons have unobstructed access to offices i.e. officers for free legal aid. There were PWDs who realized this right before all of the BCs who sent information to us. In total 1664 persons have realized right on free legal aid since adoption of the Law on Free Legal Aid, out of which 97 were PWDs (5,82% of the total number). The lowest number of PWDs who realized this right were before the BC in Kolašin and BC in Herceg Novi, one person per BC<sup>62</sup>, these persons have unobstructed access to offices i.e. officers for free legal aid. There were PWDs who realized this right before all of the BCs who sent information to us. In total 1664 persons have realized right on free legal aid since adoption of the Law on Free Legal Aid, out of which 97 were PWDs (5,82% of the total number). The lowest number of PWDs who realized this right were before the BC in Kolašin and BC in Herceg Novi, one person per BC<sup>63</sup>. Considering that PWDs are 11,4% of population of Montenegro, according to the last census, and that in groups recognized by the Law on Free Legal Aid they have bigger percentage, number of persons who realized right on free legal aid shows they do not have equal access and possibility for exercising this right.

#### 4.2.3. Right on effective access of persons with disabilities to institutions covered by the analysis

Information related to accessibility of the buildings where they are placed was requested from all institutions covered by the analysis. Beside those stated in the introduction of this chapter, we did not receive answers from Basic State Prosecution in Bar and BC in Bar. Basic State Prosecution in Bijelo Polje and Berane rejected our requests because they do not have requested information and/or sending requested information implies creation of the new one.<sup>64</sup>

Out of 11 CSW which answered our requests, seven of them rejected requests because of not having information. CSW for Municipalities of Plav and Gusinje, according to the answer on our request<sup>65</sup>, has all accessibility elements for PWDs, while CSW for Capital Podgorica and Municipalities within Capital Golubovci and Tuzi “possesses accessible entrance and ground floor, platform for providing access to three levels of the building, orientation plan for movement in the buildings and tactile guidance lines, accessible halls, offices, toilets, doors on the offices wide 90cm and one parking place”<sup>66</sup>. CSW for Old Royal Capital of Cetinje has accessible entrance and allows unobstructed movement for persons with physical disability, but it does not have orientation plan for movement in the building, notice boards, door handles

61 Decision from the Basic Court in Berane, V-Su. No.903/16 of 10.10.2016; Letter from the Basic Court in Danilovgrad, I-Su No. 61/16 of 13.10.2016; Decision and information from the Basic Court in Kotor, Posl.No.V-Su.520/2016 of 10.10.2016. and Information from the Basic Court in Plav, V-Su.No.415/2016, of 14.10.2016;

62 Letter from the Basic Court in Kolašin, Su.No.255-1/16, of 10.10.2016 and Decision of the Basic Court in Herceg Novi, Posl.No. I-1 Su 58/16 of 24.10.2016. with e-mail of 28.10.2016;

63 Decision of the Basic Court in Podgorica, Su V No. 5/16-25 of 13.10.2016;

64 Decision of the Basic State Prosecutor’s Office in Berane, TUSPI No. 7/2016 of 10.10.2016. and Decision of the Basic State Prosecutor’s Office in Bijelo Polje TU. No. 374/16 of 10.10.2016;

65 Information from the Center for Social Work for Municipalities Plav and Gusinje, No. 02-1605, of 6.10.2016;

66 Information from the Center for Social Work for Capital Podgorica and Municipalities within Capital Tuzi and Golubovci 04-14318 of 29.9.2016;

and electrical installations and parking place according to the accessibility standards.<sup>67</sup> CSW for the Municipalities of Kotor, Tivat and Budva has accessible halls, offices, toilet, door and window handles and electrical installations, notice board and parking place, but does not have orientation plan for movement in the building, accessibility elements for overcoming height differences on the entrance and two levels of the building.<sup>68</sup> These CSW did not make analysis of the fulfillment accessibility standards in buildings where they are placed, because, as they stated, Ministry of Sustainable Development and Tourism undertook these activities for priority buildings.

*None of the local offices and employment bureaus of the Employment Agency of Montenegro (hereinafter: LO and EB) is fully accessible for PWDs. 11 of them have enabled access to the building and overcoming height difference between levels in them, but not accessible halls and offices. Eight EB and three LO of the Employment Agency of Montenegro are totally inaccessible for PWDs.*<sup>69</sup>

*Only three centers and security departments of the Police Department of Montenegro (hereinafter: SC and SD) are accessible for PWDs (SC Podgorica, SD Tivat and Šavnik), four of them have enabled access to the ground floor of the buildings, SC Nikšić has ramp, but built contrary to the standards and which could not be used, while 13 SCs and SDs are totally inaccessible. None of SCs and SDs has vehicle for transport of suspects accessible for PWDs.*<sup>70</sup>

*None of 10 Basic State Prosecutions (hereinafter: BSP) which sent information to us, none has fulfilled all accessibility standards. BSP Kolašin has all accessibility elements, except orientation plan for movement in the building<sup>71</sup>, while BSP Kotor, in the building where it was placed in July 2016, does not have orientation plan for movement in the building, notice board and parking place for PWDs<sup>72</sup>. BSP Nikšić and Rožaje have provided unobstructed entrance and access to the ground floor of the building, but not access to all levels of the building and orientation plan of the building.<sup>73</sup> Five BSPs do not have ensured unobstructed entrance into the building, orientation plan of the building and other accessibility elements, except in some cases, accessible toilets, electrical installations, stairs and offices.<sup>74</sup> In BSP Podgorica work on adaptation of the building according to accessibility standards for PWDs is currently in progress.<sup>75</sup> Out of eight BSPs, who sent information whether they conducted analysis of the fulfillment of the accessibility standards in their buildings, only two (BSP Cetinje and Herceg Novi) conducted it, while the rest of six prosecutions stated that undertaking those activities is not in their jurisdiction, most often because of not having ownership on the building.*

67 Information from the Center for Social Work for Old Royal Capital Cetinje No. 07-2489 of 29.9.2016;

68 Information from the Center for Social Work for Municipalities Kotor, Tivat and Budva No. 01-2250/2 of 27.10.2016;

69 Letter from Employment Agency of Montenegro No. 0601-2910 of 15.3.2016;

70 Information from Ministry of Interior, No. UPI-007/16-570/03 of 17.2.2016. and Letter of Security Department No. 46/1-UPI-007/16-570/2 of 22.2.2016;

71 Notification of BSP Kolašin, Tuspi. No. 3/16 of 5.10.2016;

72 Information from BSP Kotor, TUSPI No. 5/16 of 29.9.2016;

73 Decision and Information from BSP Nikšić Tuspi No. 4/16 of 11.10.2016. and Decision and Information from BSP Rožaje TUSPI No. 4/16 of 28.9.2016;

74 Information from BSP Cetinje TUSPI No. 6/16 of 3.10.2016, Decision and Information from BSP Herceg Novi Tu. No. 330/2016 of 28.9.2016, Decision from BSP Pljevlja TUSPI No. 6/16 of 28.9.2016, Letter from BSP Plav TU.No.256/2016 of 28.9.2016. and Information BSP Ulcinj SPI No. 4/6 of 26.9.2016;

75 Decision and Information from BSP Podgorica, TUSPI No. 14/16 of 6.10.2016;

Supreme Court of Montenegro conducted analysis of the accessibility of the buildings of courts under its jurisdiction in 2015.<sup>76</sup> The Analysis is related only to elements of overcoming height differences, therefore it is not comprehensive. Only in two BCs (BC in Kolašin and Ulcinj) is ensured access for persons with physical disability but in the way there is a special courtroom on the ground floor, so they “do not have a need to go to the upper floor of the building”.<sup>77</sup> OEight BCs have ensured access to the ground floor for persons with physical disability, while *entrances in four BCs are totally obstructed for these persons*. In the BC in Podgorica works on adaptation of the building for PWDs, i.e. installation of all accessibility elements are being undertaken.<sup>78</sup>

The Constitutional Court of Montenegro has accessible halls, elevator, toilets on all three levels, *but not unobstructed access and entrance into the building for persons with physical disability*.<sup>79</sup> Building of the institution of Ombudsman of Montenegro has accessible entrance, halls, one toilet and elevators, but not other accessibility elements.<sup>80</sup>

#### 4.2.4. Right of persons with disabilities to use own language and alphabet

Information about right of PWDs to use own language and alphabet in proceedings were requested from all institutions covered by the analysis. Beside those stated in the introduction of this chapter, *we did not receive answer on our requests from: Ministry of Labour and Social Welfare, CSW for Municipalities of Plav and Gusinje and BC in Danilovgrad. BSPs Bijelo Polje and Berane and BC in Bijelo Polje rejected our requests because of not having information, i.e. need for creation of the new one*.<sup>81</sup>

Only CSW for Old Royal Capital of Cetinje gave information on exercising right of PWDs to use own language and alphabet in the proceedings before this institution. In it communication with persons with hearing and/or speech impairment is maintained directly in writing or by relatives and it is impossible to communicate in sign language or/and in Braille.<sup>82</sup> The Employment Agency of Montenegro stated that in none of its LO and EB is possible to communicate in sign language and/or in Braille.<sup>83</sup>

Eight SCs and SDs did not give us information whether is it possible to communicate in sign language and/or in Braille (SC Berane and Pljevlja and SD Rožaje, Andrijevića, Plav, Pljevlja, Šavnik, Ulcinj and Tivat). *Out of the rest of 12, it is possible to communicate in this way only in SD Kotor with engagement of interpreter*. In SC Nikšić and SD Mojkovac, there were in total 13 proceedings which persons with hearing and/or speech impairments participated in. With these persons communication was maintained directly in writing or by family member.

76 Analyses of accessibility of courts to persons with special needs, Podgorica: Supreme Court of Montenegro, 2015, downloaded from: <http://sudovi.me/podaci/vrhs/dokumenta/2301.pdf>

77 Analyses of accessibility of courts to persons with special needs, Podgorica: Supreme Court Montenegro, 2015, pg. 6, downloaded from: <http://sudovi.me/podaci/vrhs/dokumenta/2301.pdf>

78 Decision of the Basic Court in Podgorica Su V No. 5/16-25 of 13.10.2016;

79 Decision of Constitutional Court of Montenegro Su No. 228/16-1 of 29.3.2016;

80 Decision of Protector of Human Rights and Freedoms of Montenegro 03-344/16 of 25.3.2016;

81 Decision of BSP Bijelo Polje TU No. 374/16 of 10.10.2016, Decision of BSP Berane, TUSPI No. 7/2016 of 10.10.2016 and Decision of the Basic Court in Bijelo Polje, V-Su. No. 1283/2016, of 17.10.2016;

82 Notification from Center for Social Work for Old Royal Capital Cetinje, No. 07-2489, of 29.9.2016;

83 Letter from Employment Agency of Montenegro No. 0601-2910 of 15.3.2016;

Out of 11 BSPs, which accepted our requests, four of them did not give us information whether it is possible to communicate in sign language and/or in Braille (BSP Cetinje, Kolašin, Nikšić and Plav). In BSPs Bar, Herceg Novi, Kotor, Ulcinj and Podgorica it is possible to communicate in sign language and/or in Braille with the help of interpreter, while it is impossible in BSPs Rožaje and Pljevlja. PWDs, according to statements of BSPs Cetinje, Kolašin, Kotor, Nikšić, Rožaje, Ulcinj and Pljevlja, did not request communication in sign language and/or in Braille. Only before the BSP Rožaje there were three proceedings which three persons with hearing and/or speech impairments participated in. With these persons communication was maintained with help of sign language interpreter.<sup>84</sup> Considering that, according to statements of BSPs, *Rulebook on internal work of the State Prosecution does not prescribe keeping special evidence about PWDs, these institutions were unable to give us precise information about the way of participation and communication with these persons.*

Out of 10 BCs which accepted our requests, BC in Bar did not give us information whether there is possible to communicate in sign language and/or in Braille. In the BCs in Berane, Cetinje, Herceg Novi, Kotor, Pljevlja and Podgorica it is possible to communicate in sign language and/or in Braille with the help of interpreter, while it is impossible in the BCs in Kolašin and Plav. PWDs, according to statements of the BCs in Herceg Novi, Plav, Pljevlja and Žabljak, did not request communication in sign language and/or in Braille. Although two persons with visual impairment participated in two proceedings before the BCs in Kolašin and Plav, these courts did not received nor create any document in Braille.<sup>85</sup> Considering that, according to statements of the BCs, *Court Procedure and Judicial Information System (PRIS) do not prescribe keeping special evidence about PWDs, these institutions could not give us precise information about way of participation and communication with these persons.* In the Constitutional Court of Montenegro it is possible to communicate in sign language and/or in Braille with the help of interpreter, but there were not cases of receiving or creating documents in this alphabet.

The Ombudsman of Montenegro would enable communication in sign language and/or in Braille with the help of interpreter, but there were no need for that, because communication with persons with hearing and/or speech impairments was maintained through written and electronic correspondence. ***In none of the institutions which gave us answers are employers educated to communicate in sign language and/or in Braille.*** In the Ministry of Justice, which jurisdiction placement of court interpreters and keeping evidence about them is in, there is none registered sign language court interpreters<sup>86</sup>, which means that as sign language interpreters in proceeding before the bodies are engaged persons whose competences were not assessed and verified by the system institutions.

84 Decision and Information from BSP Rožaje, TUSPI. No. 5/16, of 28.9.2016;

85 Information from Basic Court in Kolašin, V-Su.No. 255-1/2016, of 10.10.2016. and Information from the Basic Court in Plav, V-Su.No.414/2016, of 14.10.2016.

86 Ministry of Justice of Montenegro, List of permanent court interpreters, Podgorica: Ministry of Justice, 2016. downloaded from: file:///C:/Users/Korisnik/AppData/Downloads/Spisak%20sudskih%20tuma%C4%8Da%20-%20a%C5%BEuriran%2015.novembra%202016.godine.pdf



#### 4.2.5. Participation of persons with disabilities in proceedings before the institutions covered by the analysis

Information about exercising procedural rights of PWDs before the relevant decision making institutions were requested from all institutions covered by the analysis. Beside those stated in the introduction of this chapter, on our requests we *did not receive answers from CSW for Municipalities Plav and Gusinje*, while nine CSW, BSPs Bijelo Polje and Berane and BC in Bijelo Polje rejected our requests because of not having information or need for creation of new one. *Additional problem in collecting needed information is legal gap, because keeping evidence about participants in procedures on the ground of disability is not obligatory for any of the institutions covered by the analysis.* Institutions which provided us with information have done it on the basis of case files and consultations with employers.

According to the statements of CSW for Old Royal Capital of Cetinje, since adoption of the Law on Social and Child Protection in June 2013, there have been held only two sessions of the First Instance social-medical Commission which reports, assessments and opinions are the base for decision of CSW on rights of PWDs on allowances for help and care of other person and personal disability allowance<sup>87</sup>. First meeting was held on 26.4.2015, and second one on 6.12.2015, which means that *it has passed more than two years since adoption of the Law based on which PWDs submitted requests for exercising fundamental rights on the basis of disability. Deadline until which CSW is obliged to decide on the request of PWD is maximum one month.*<sup>88</sup> On these two sessions in total 331 requests for exercising the right on allowance for help and care of other person and/or personal disability allowance was discussed; 99 of them were rejected, which is 29,9% of the submitted requests. Breaking deadlines for deciding on the requests of PWDs and non-justified decisions in the proceedings for exercising rights on allowance for help and care of other person and personal disability allowance are problems which AYDM recognized in proceedings before almost all CSW through providing free legal aid.

On the basis of the Law on Professional Rehabilitation and Employment of Persons with Disabilities, adopted on 5.8.2008<sup>89</sup>, rights of PWDs on incentive measures for professional rehabilitation and employment are recognized. PWDs, whose disability is not assessed, have right on assessment of disability by commissions for professional rehabilitation and employment of persons with disabilities, and according to its level, other measures of active employment policy. However, these first instance and Second instance Commissions, were formed on 5.7.2012, and first sessions were held in period between 28.12.2012 (First Instance Commission for Professional Rehabilitation and Employment of Persons with Disabilities, EB Podgorica) and 5.3.2014. (Second Instance Commission for Professional Rehabilitation and Employment of Persons with Disabilities). *In practice this means that many PWDs have waited almost four years to exercise rights recognized by the Law.* Out of 947

87 Article 81 of Law on Social and Child Protection ("Official Gazette of Montenegro", No. 27/13 of 11.6.2013, 1/15 of 5.1.2015, 42/15 of 29.7.2015, 47/15 of 18.8.2015, 56/16 of 23.8.2016, 66/16 of 20.10.2016);

88 Article 212 Paragraph 1 of LGAP;

89 Law on Professional Rehabilitation and Employment of Persons with Disabilities ("Official Gazette of Montenegro", No. 49/08 of 15.8.2008, 73/10 of 10.12.2010, 39/11 of 4.8.2011, 55/16 of 17.8.2016);

requests, since adoption of the Law until the end of requested period there have been solved 915 of them, out of which 32 requests have been rejected. Against only six (18,75% of the rejecting decisions) appeals were filed, out of which three were adopted. *Small number of filed appeals shows low possibility of PWDs to use available legal remedies in order to exercise their rights.*

According to the statements of the Police Department of Montenegro<sup>90</sup>, PWDs participated in proceedings only before four SCs and SDs as follows: SD Mojkovac (13 proceedings, out of which one criminal, ten misdemeanor and two charges, but it is not known whether they resulted in requests for initiating the proceeding before the Prosecutor's Office), SC Nikšić (four proceedings, out of which one criminal and three misdemeanor), SC Bar (one criminal proceeding) and SD Tivat (two criminal proceedings). In these proceedings there were in total 20 accused with disabilities (15 with hearing and/or speech impairments, one with visual impairment, three with physical disability and one whose type of disability was not stated) and 11 victims with disability (out of which eight with hearing and/or speech impairment and one with intellectual and one with multiply disability – visual impairment and physical disability, while for one victim type of disability was not stated). *Out of nine proceedings which PWDs were victims in, six of them were related to the violation of the Article 36 of the Law on Domestic Violence Protection<sup>91</sup>, one on violation of the Article 10 Paragraph 2 of the Law on Public Order (physical attack)<sup>92</sup> and one for homicide from the Article 143 of the Criminal Code of Montenegro<sup>93</sup>.* There were no charges of PWDs or against PWDs which SCs and SDs of the Police Department of Montenegro did not proceed on, *but also not self initiated proceedings by these institutions because of violation of the rights of PWDs.* According to the information that we received from BSP Plav, Rožaje and Ulcinj, it can be concluded that PWDs participated in proceedings before SD Plav, Rožaje and Ulcinj.<sup>94</sup>

Out of 11 BSPs, which answered on our requests, five of them could not give us precise information about participation of PWDs in proceedings before them, *because obligation for keeping these evidences is not prescribed in the Rulebook on Internal work of the State Prosecution.* Out of the rest of six, only before BSP Nikšić there were not PWDs who participated in the proceedings<sup>95</sup>, while in total 18 PWDs participated in nine proceedings before other five BSPs. There was one proceeding before BSP Cetinje 10 persons with visual impairments (one accused and nine witnesses) participated in. These persons independently signed records on their interrogation and accused had attorney set ex officio. Contrary to the Article 256a of the CPC, in this proceeding *Charge motion was submitted 11 months*

90 Letter from Security Department No. 46/1-UPI-007/16-570/2 of 22.2.2016;

91 Law on Domestic Violence Protection ("Official Gazette of Montenegro", No. 46/10 of 6.8.2010, 40/11 of 8.8.2011);

92 Law on Public Order ("Official Gazette of Montenegro", No. 64/11 of 29.12.2011);

93 Criminal Procedure Code of Montenegro ("Official Gazette Republic Of Montenegro", No. 70/03 of 25.12.2003, 13/04 of 26.2.2004, 47/06 of 25.7.2006, "Official Gazette of Montenegro", No. 40/08 of 27.6.2008, 25/10 of 5.5.2010, 73/10 of 10.12.2010, 32/11 of 1.7.2011, 64/11 of 29.12.2011, 40/13 of 13.8.2013, 56/13 of 6.12.2013, 14/15 of 26.3.2015, 42/15 of 29.7.2015, 58/15 of 9.10.2015);

94 Letter from BSP Plav, TU.No.256-1/2016, of Plav, 28.9.2016, Decision and Information from BSP Rožaje, TUSPI. No. 5/16, of 28.9.2016. and Letter from BSP Ulcinj, SPI No. 4/16 of 26.9.2016;

95 Information from BSP Nikšić, Tuspi No. 5/16, of 11.10.2016;

after submission of criminal charge.<sup>96</sup> One accused with physical disability, for whom is not stated whether he/she had attorney, and who was interrogated in the accessible premise of this Prosecution participated before the BSP Kolašin.<sup>97</sup> Three persons with physical disability whose roles in the proceedings were not stated participated in three proceedings before the BSP Plav. They were interrogated in this Prosecution because “their disability did not make hard their appearance in the premises of Prosecution”<sup>98</sup>. Three persons with hearing and/or speech impairments participated in three proceedings before the BSP Rožaje, one in the role of accused and two as victims. It was not stated whether the accused with hearing and/or speech impairment had an attorney.<sup>99</sup> “One person with disability who was driven to the building of BC Ulcinj by family participated in proceeding before the BSP Ulcinj (which is placed on the second floor of this building), where interrogation of this person was conducted on the ground floor where the access for persons with disabilities is enabled by prosecutor in charge on the case”<sup>100</sup>. This person was in the role of the victim, and, as it is visible, BSP Ulcinj did not use legal possibility to provide him/her with transport to its building.

BSPs Cetinje, Herceg Novi and Kotor conducted interrogations and other procedural actions in the proceedings which PWDs participated in out of their buildings, but they do not have right information about the number and date of their undertaking.<sup>101</sup> BSPs Plav, Pljevlja, Rožaje and Ulcinj did not held interrogations and other procedural actions outside of their building, because, as they stated, there was no need for that.<sup>102</sup> BSP Rožaje and BSP Ulcinj stated that there were no PWDs who could not appear on their summon due to inaccessibility of the building where they are placed, nor PWDs who had to sign record in the way prescribed in the Article 210 Paragraph 4 and 5 of CPC. No in BSP Kotor there were PWDs who due to inaccessibility of this Prosecution could not appear on its summon, while in BSP Kolašin they stated there were no PWDs covered by the Article 210 Paragraph 4 and 5 of CPC. BSP state that signing records and other documents in proceedings before these institutions is done according to the rules prescribed in the CPC. Also, they state there were no charges of PWDs or against PWDs which they did not proceed, but also no self initiated proceedings by these institutions because of violation of the rights of PWDs.

Out of 11 BCs which answered on our requests, six of them could not give us precise information about the participation of PWDs in proceedings which were conducted before them, because *Court Procedure does not prescribe obligation and Judicial Information System (PRIS) does not have option of keeping evidence*

96 Information from BSP Cetinje, TUSPI No. 6/16, of 3.10.2016;

97 Letter from BSP Kolašin, Tuspi. No. 4/16 of 5.10.2016;

98 Letter from BSP Plav, TU.No.256-1/2016, of 28.9. 2016;

99 Decision and information from BSP Rožaje, TUSPI.No. 5/16, of 28.9.2016;

100 Letter from BSP Ulcinj SPI No. 4/16, of 29.9.2016;

101 Information from BSP Cetinje, TUSPI No. 6/16, of 3.10.2016, Decision and information from BSP Herceg Novi Tu. No. 331/2016 of 28.9.2016 and Information from BSP Kotor TUSPI No. 6/16, of 29.9.2016;

102 Letter from BSP Plav, TU.No.256-1/2016, of 28.9. 2016, Decision of BSP Pljevlja TU SPI No. 7/16 of 28.9.2016, Decision and information BSP Rožaje, TUSPI. No. 5/16, of 28.9.2016 and Letter from BSP Ulcinj SPI No. 4/16, of 29.9.2016;

about PWDs participating in the proceedings. In total 40 PWDs participated in 49 proceedings before five BCs, as follows: in 12 criminal, 16 civil and 21 non-contentious proceedings. Nine PWDs participated in nine criminal and eight civil proceedings before the BC in Bar. This court, did not stated the roles of PWDs in proceedings, types of their disabilities and way of exercising their procedural rights due to the huge scope of the requested information, except that there “was not necessary that person appears at court”<sup>103</sup>, which means that parties with disabilities were not present on the hearings. Before the BC in Berane there were three civil and one non-contentious proceeding, which four PWDs participated in, twice as claimants, once as defendant and once as initiator of non-contentious proceeding. These PWDs were represented by qualified attorneys, and information whether they attended the hearings is not given. One non-contentious proceeding where PWD was initiator lasted one year and eight months.<sup>104</sup> One criminal proceeding before BC in Kolašin which PWD was accused in lasted one year and nine months. “Since the start of the proceeding ten main hearings have been scheduled out of which four have been held”.<sup>105</sup> The accused had chosen attorney, and four main hearings have been held in the ground floor premises of the court. One criminal, four civil and 20 non-contentious proceedings for deprivation of legal capacity of PWDs<sup>106</sup>, which 25 PWDs participated in were conducted before the BC in Plav. PWD was victim in the criminal proceeding, and he/she was interrogated in court twice. Against acquittal in this proceeding appeal was not filed. PWDs were claimants in three civil proceedings and defendant in the one. PWDs were represented by qualified attorneys out of which one provided free legal aid in all four civil proceedings. “In all these proceedings initiated before the BC in Plav out of 25 persons with disabilities 24 of them due to nature of the illness could not appear on court summon nor be present on the hearing in person”.<sup>107</sup> This court did not undertake actions outside of its building, nor used technical devices for transmission of image and sound in order to give PWDs possibility to participate in the proceeding. One person with physical disability and speech impairment participated in criminal and civil proceeding in the role of claimant before the BC in Žabljak. This PWD was represented by the legal representative (sister) and qualified attorney. He/she was present on the main hearing, while in civil proceeding there “was no need for appearance of this person because there was no need to interrogate he/she, after which decision that claim is rejected as not grounded was made”<sup>108</sup>. This court did not conduct interrogations and other actions out of its building because, as it stated, there was no need for that.

Four basic courts (BC in Herceg Novi, Plav, Pljevlja and Žabljak) did not use technical devices for transmission of image and sound in proceedings which PWDs participated in, and additionally, BCs in Herceg Novi, Pljevlja and Žabljak do not have

103 Information from Basic Court in Bar V Su No. 590/2016, of 29.9.2016;

104 Decision from Basic Court in Berane V-Su.No. 904/16 of 10.10.2016;

105 Letter from Basic Court in Kolašin Su.No. 255/16 of 10.10.2016;

106 Data on out contentious procedures for deprivation of PWDs of legal capacity which were proceeded before Basic Court in Plav, are available on the page 23 of this Publication;

107 Notification from Basic Court in Plav, V-Su.No.414/2016, of 14.10.2016;

108 Letter from Basic Court in Žabljak Su I-1 No. 8/16, of 5.10.2016;



such devices.<sup>109</sup> There were no PWDs in proceedings before the BC in Kolašin and Žabljak who had to sign in the way prescribed in the Article 210 Paragraph 4 and 5 of CPC and Article 122 Paragraph 3 of the LCP, and there were no PWDs who did not appear on the summon of the BC in Pljevlja due to its inaccessibility.

The Constitutional Court of Montenegro also does not keep evidence based on the personal characteristics of parties, such as disability, therefore it could not give us information whether and how many PWDs participated in proceedings before this institution. On 14.5.2014. AYDM submitted the Initiative for start of the proceeding on the review of the constitutionality of the norm of the Article 26 of the Law on Changes and Amendments on the Law on the Election of Councilors and MPs<sup>110</sup>, which the Constitutional Court of Montenegro, contrary to the Law on the Constitutional Court<sup>111</sup>, still has not decided on.

There were 25 proceedings which PWDs participated in before the Institution of the Ombudsman of Montenegro in the requested period, *out of which only one was self initiated by the Ombudsman*. The Ombudsman, also, participated in three civil proceedings in the role of intervener, while in one it did not intervene in the proceeding. All four civil proceedings were initiated because of discrimination on the ground of disability in area of access to buildings and areas in public use.

Out of 25 complaints, four were not proceeded, because claimants did not supplement them with requested information in the given period. One proceeding was stopped because the perpetrator removed violation of the right and its consequences during it. Two proceedings were stopped by Ombudsman due to initiation of proceedings before other institutions, while in one it did not proceed because of no exhausting other legal resources. Violations of the rights of PWDs were recognized in seven proceedings and measures were undertaken or opinions given where is ordered to perpetrators to remove violations and their consequences, while in four proceedings violations of the rights were not recognized. The Ombudsman instructed claimants to initiate proceedings before another institution in three proceedings (10% of the total number), as more effective and expedient in concrete legal issue. The Ombudsman states that eight proceedings were initiated because of inaccessibility or inadequate action of relevant authorities in proceedings for exercising rights of PWDs.

<sup>109</sup> Decision from Basic Court in Herceg Novi, Posl.No. I-1 Su 58/16 of 24.10.2016 with e-mail of 28.10.2016, Letter from Basic Court in Pljevlja V Su-No. 126/16 of 6.10.2016 and Letter from Basic Court in Žabljak Su I-1 No. 8/16, of 5.10.2016;

<sup>110</sup> Available in the Archive of AYDM;

<sup>111</sup> Article 28 Paragraph 2 of Law on Constitutional Court ("Official Gazette of Montenegro", No. 64/08 of 27.10.2008, 46/13 of 2.10.2013, 51/13 of 1.11.2013) and Article 39 Paragraph 2 of Law on Constitutional Court ("Official Gazette of Montenegro", No. 11/15 of 12.3.2015);

## V CONCLUSION AND RECOMMENDATIONS

The Constitution of Montenegro by its norms obliges state and local bodies to prescribe and undertake all needed measures in order to provide PWDs with full and effective enjoyment of right on equal access to justice. The Constitution additionally ensures enjoyment of this right of PWDs in every concrete proceeding which they take part in, by giving advantage in implementation of confirmed and ratified international agreements over domestic legislation.

However, not only these measures are not concretized and strengthened in the laws which define procedural and material rights of PWDs, but, moreover, norms of domestic discriminatory regulations are more important in practice than prescriptions of the UN Convention on the Rights of Persons with Disabilities. Furthermore, there are not: data base about PWDs and rights recognized or abolished to them, evidence on participation of PWDs in proceedings before the institutions, self-initiated proceedings by relevant bodies because of discrimination and violation of rights of PWDs by public authorities, which shows the fact that state still has not taken measures which represent preconditions for high quality and strategic removal of barriers in area of equal access to justice of PWDs. This situation is in a big extent caused by low level of knowledge and awareness of the public authorities' bodies about obligations accepted by the ratification of the UN Convention on the Rights of Persons with Disabilities. All mentioned in practice means that PWDs in no cases have equal access to justice, because they are deprived of rights only due to their disability, do not have a possibility for full and effective participation in proceedings where is decided about their rights and obligations, legal deadlines for deciding on their rights and obligations are broken, decisions about their rights and obligations are usually without adequate justifications.

On 14th October 2016, within the project "From legal guarantees to equality in practice", AYDM has organized the Conference "Right on access to justice of PWDs - From legal guarantees to equality in practice" where barriers in enjoyment of this right of PWDs were discussed and recommendations for their removal were given.

According to the analyses of the international and domestic legal framework and situation in practice in Montenegro, as well as Recommendations and conclusions from the Conference "Right on access to justice of PWDs - From legal guarantees to equality in practice", following recommendations for improvements in respect of right on equal access to justice of PWDs were developed:

- to work constantly and thoroughly on harmonization of Montenegrin legal system with international legal standards of human rights and freedoms of PWDs and to directly implement UN Convention on the Rights of Persons with Disabilities when domestic regulations are not harmonized with it, in order to respect principle of rule of law and principle of constitutionality and legality;

- to include principles of UN Convention on Rights of Persons with Disabilities in planning, defining and implementation of any proceeding before state and local bodies, including prescription and implementation of the principle of reasonable accommodation where needed;
- to legally regulate keeping evidence about all proceedings where rights, obligations and interests of PWDs are decided about and provide their transparency and availability to all stakeholders and public;
- to conduct detailed analysis and research about possibilities and barriers in exercising right of PWDs on equal access to justice and on the basis of received data strategically plan removal of barriers;
- to constantly organize trainings of public officials in order to ensure effective interaction of these subjects with PWDs and adequate decision making in proceedings which they participate in;
- to ensure necessary preconditions, including licensing interpreters for exercising right of PWDs to use own language and alphabet in sense of using sign language and Braille in proceedings before the institutions;
- to enable availability and use of ITC technologies to PWDs in proceedings before the institutions in order to improve conditions for exercising right on equal access to justice for these persons;
- to continuously and systematically work on adaptation of buildings and other infrastructure of the state and local bodies in order to provide PWDs with access to these institutions;
- to ensure respect of the principle of non-discrimination and principle of constitutionality and legality in processing and deciding about the rights of PWDs, through respect of legal deadlines for undertaking procedural actions and equitable decision making in proceedings;
- to improve engagement of police, inspection and other authorities and prosecution in processing cases of violation of the human rights of PWDs in order to sanction perpetrators;
- to work on raising awareness of the state officials about fact that primary goal in their work must be interest of the client, not savings of the state budget.

## ABOUT THE ORGANIZATION

**Association of Youth with Disabilities of Montenegro (AYDM)** is a non-profit and non-governmental organization, founded on October 22, 2001. It gathers youth with all kinds of disabilities (cross-disability approach) as well as people without disabilities willing to participate and to fight with us for accessibility and inclusion of PWDs in all areas of Montenegrin society.

**Vision of AYDM:** For youth with disabilities, without barriers!

**Mission of AYDM:** AYDM promotes equal position of youth with disabilities in society through activities and initiatives for establishing legal, educational, cultural and social frame that enables it.

Our activities are implemented through 6 programs and one sub-program within which we realize individual projects, and these programs are: Legal program and antidiscrimination, Program for Education, Program for Employment and Development of human resources, Program for Accessibility, Program for Independent Living - sub-program for guide and assistance dogs and Program for International Cooperation.

**Legal program and antidiscrimination** is based on a goal to promote and protect human rights of PWDs. The program has existed since 2004 and within it the counseling is organized and provided, adoption of regulations initiated, rights of PWDs monitored and reports written, publications published, educations and trainings conducted and many other activities within projects or regular activities are implemented. Through this program many comments on regulations prepared by state institutions, as well as by local institutions, especially institutions of the Capital during preparation phase or through parliament's adoption procedure are prepared. Also, adoption of new regulations which define rights of PWDs is initiated and we participate in their creation. Besides projects, AYDM within this program has actively provided and continue to provide free legal aid in exercising rights and protection from discrimination of PWDs before relevant institutions.

## BIOGRAPHY OF THE AUTHOR



Miroslava-Mima Ivanović was born on 9.5.1990. in Kotor, where she has finished primary and grammar school. She has graduated at the Faculty of Law of University of Montenegro in Podgorica in 2013 with average grade A (9.87).

She has been active in AYDM since 2006, and has been professionally engaged on the position of Program assistant since February 2013. She is Coordinator of Legal program and antidiscrimination and sub-program for schooling and assigning of guide and assistance dogs. She is often engaged as a trainer and lecturer for different topics in area of disability, and she was participant on many trainings, seminars and conferences. She regularly participates in monitoring of implementation of laws, prepares amendments and comments on legal acts which are in procedure and participates in work groups for preparation of the regulations (Work group for drafting the Law on higher education, Work group for drafting the Law on Prohibition of Discrimination of Persons with Disabilities, Work group for drafting the Strategy on Protection of Persons with Disabilities from Discrimination and promotion of equality for period 2017-2021 with the Action plan 2017/2018 and Work group for drafting the Law on changes and amendments of the Law on Professional rehabilitation and Employment of Persons with Disabilities). She is a member of Council for issues of persons with disabilities of the Capital - Podgorica.

She is a co-author of the Study “Personal Assistance - key for independent life” and Study “Accessibility of physical environment - human right of persons with disabilities”.



## LITERATURE AND REFERENCES:

- Agency for research of public opinion “Damar” Podgorica Research “Attitude of citizens to discrimination in Montenegro”, Podgorica: Ministry for Human and Minority Rights, 2015;
- Agency for research of public opinion “Damar” Podgorica Research “Attitude of citizens to discrimination in Montenegro”, Podgorica: Ministry for Human and Minority Rights, 2013;
- Analyses of accessibility of courts to persons with special needs, Podgorica: Supreme Court of Montenegro, 2015;
- Centre for monitoring and research (CeMI), research “Perception of the position of persons with disabilities”, Podgorica: AYDM, 2015;
- Dr Miloš Bešić, Research “Discrimination of minority nations and marginalized social groups”, Podgorica: Ministry for Human and Minority Rights and Centre for Democracy and Human Rights (CEDEM), 2011;
- Expert team, Analyses of compatibility of regulations in Montenegro with the Law on Prohibition of Discrimination of persons with Disabilities and the UN Convention on the rights of persons with disabilities, together with recommendations for harmonization, Podgorica: Ministry for Human and Minority Rights 2016;
- Handbook on European law relating to access to justice, Luxembourg: Council of Europe (CoE), European Court of Human rights (ECHR) & European Agency for fundamental rights (FRA), 2016;
- Ministry of Justice of Montenegro, List of permanent court interpreters, Podgorica: Ministry of Justice, 2016;
- Family Law (“Official Gazette of Republic of Montenegro”, No. 1/07 of 9.1.2007, “Official Gazette of Montenegro”, No. 53/16 of 11.8.2016);;
- Charter of fundamental rights of European Union, 2000;
- Regulation on closer conditions and manner of adaptation of buildings for access and movement of persons with reduced mobility and persons with disabilities (“Official Gazette of Montenegro”, No. 48/13 of 14.10.2013, 44/15 of 7.8.2015);
- United Nations, International Covenant on Civil and Political Rights, 1966;
- United Nations, Universal Declaration on Human Rights, 1948;
- UN Committee on the rights of persons with disabilities, General Comment No 2 Article 9: Accessibility, 2014. godine;
- Constitution of Montenegro (“Official Gazette of Montenegro”, No. 1/07 of 25.10.2007, 38/13 of 2.8.2013);
- Requests for free access to information, decisions and information, available in the archive of AYDM;
- Law on Free Legal Aid (“Official Gazette of Montenegro”, No. 20/11 of 15.4.2011, 20/15 of 24.4.2015);

- Law on Amendments of Law on Social and Child Protection (“Official Gazette of Montenegro”, No. 42/15 of 29.7.2015);
- Law on General Administrative Procedure (“Official Gazette of Republic of Montenegro”, No. 60/03 of 28.10.2003, “Official Gazette of Montenegro”, No. 73/10 of 10.12.2010, 32/11 of 1.7.2011) in implementation since 1.7.2017;
- Law on Civil Procedure (“Official Gazette of Republic of Montenegro”, No. 22/04 of 2.4.2004, 28/05 of 5.5.2005, 76/06 of 12.12.2006, “Official Gazette of Montenegro”, br. 73/10 of 10.12.2010, 47/15 of 18.8.2015, 48/15 of 21.8.2015);
- Law on Professional Rehabilitation and Employment of Persons with Disabilities (“Official Gazette of Montenegro”, No. 49/08 of 15.8.2008, 73/10 of 10.12.2010, 39/11 of 4.8.2011, 55/16 of 17.8.2016);
- Law on Ratification of the European Convention on Protection of Human Rights and Fundamental Freedoms (“Official Gazette of Serbia and Montenegro - International agreements”, No. 9/2003 and 5/2005);
- Law on Ratification of UN Convention on Rights of Persons with Disabilities with Optional Protocol (“Official Gazette of Montenegro - International agreements”, No. 2/09 of 27.7.2009);
- Law on Social and Child Protection (“Official Gazette of Montenegro”, No. 27/13 of 11.6.2013, 1/15 of 5.1.2015, 42/15 of 29.7.2015, 47/15 of 18.8.2015, 56/16 of 23.8.2016, 66/16 of 20.10.2016);
- Law on Administrative Procedure (“Official Gazette of Montenegro”, No. 56/14 of 24.12.2014, 20/15 of 24.4.2015, 40/16 of 30.6.2016) in implementation since 1.7.2017;
- Law on Spatial Development and Construction of Structures (“Official Gazette of Montenegro”, No. 51/08 of 22.8.2008, 40/10 of 22.7.2010, 34/11 of 12.7.2011, 40/11 of 8.8.2011, 47/11 of 23.9.2011, 35/13 of 23.7.2013, 39/13 of 7.8.2013, 33/14 of 4.8.2014);
- Law on Constitutional Court (“Official Gazette of Montenegro”, No. 64/08 of 27.10.2008, 46/13 of 2.10.2013, 51/13 of 1.11.2013);
- Law on Constitutional Court (“Official Gazette of Montenegro”, No. 11/15 of 12.3.2015);
- Law on Out Contentious Procedure (“Official Gazette of Republic of Montenegro”, No. 27/06 of 27.4.2006, “Official Gazette of Montenegro”, No. 73/10 of 10.12.2010, 20/15 of 24.4.2015);
- Law on Prohibition of Discrimination (“Official Gazette of Montenegro”, No. 46/10 of 6.8.2010, 40/11 of 8.8.2011, 18/14 of 11.4.2014);
- Law on Prohibition of Discrimination of Persons with Disabilities (“Official Gazette of Montenegro”, No. 35/15 of 7.7.2015, 44/15 of 7.8.2015);
- Criminal Procedure Code (“Official Gazette of Montenegro”, No. 57/09 of 18.8.2009, 49/10 of 13.8.2010, 47/14 of 7.11.2014, 2/15 of 16.1.2015, 35/15 of 7.7.2015, 58/15 of 9.10.2015);

