



ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES WITH SPECIAL EMPHASIS ON PROCEDURAL ACCOMMODATIONS

- STUDY -

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MAEIP





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ABOUT THE PROJECT

The project *All = in Access 2 Justice (Svi jednaki u pristupu pravdi)* is implemented by the **Association of Youth with Disabilities of Montenegro** (AYDM) in cooperation with the **Centre for Civil Liberties** (CCL).

The project aims to contribute to the development of policies and raising of the standards in the field of protection of vulnerable groups (primarily PWDs) by advocating for equal rights and equality of parties before the courts in Montenegro, through specific objectives aimed at improving and developing access to justice and fair process for PWDs before the courts and the State Prosecutor's Office.

The development of analyses and research on equal recognition before the law, proceedings before authorities, and in particular access to justice for persons with disabilities in Montenegro, and specific recommendations and models of records of court proceedings involving PWDs, would greatly contribute to the definition and implementation of standards that guarantee equality and fairness in access to justice, especially in the segment relating to the rights of persons with disabilities. In this way, the project will provide direct recommendations in the area of guarantees and protection of the right of access to justice for PWDs, especially in the segment of legal capacity institutes and implementation of procedural accommodations during the procedure, as well as help the implementation of the planned measures of the Strategy and Action Plan for the Judicial Reform of Montenegro, which will be represented during and after the project by project partners to the key decision makers, as well as to policy makers and to those who apply the legislation.

The project activities are being implemented within the *Open Competition for small grants for NGOs with the aim of supporting the achievement of a higher level of democracy and the rule of law in Montenegro, with the focus on judicial reform*, launched by the **Centre for Monitoring and Research** (CeMI) in partnership with **Centre for Democracy and Human Rights** (CEDEM) and **Network for Affirmation of European Integration Processes** (MAEIP), and within "*Judicial Reform: Upgrading CSO's capacities to contribute to the integrity of judiciary*", project which financed by the **European Union**, through **instrument for pre-accession (IPA)**, and co-financed by the **Ministry of Public Administration**.

I INFLUENCE (OF APPLICATIONS) OF DIFFERENT MODELS OF APPROACH TO DISABILITY ON THE GUARANTEES OF RIGHTS OF PERSONS WITH DISABILITIES / CONTEXT ANALYSIS

1.1.

“The human rights of persons with disabilities could be understood to the extent to which we are aware of the different models of disability and their impact on the guarantees and respect for the rights and dignity of the persons with disabilities. The knowledge about the models of approach to disability is equally important for the activists, those who advocate for the rights of PWDs and for the decision makers and policy creators, and is important as alphabet is for the students in the school. If you don't learn it well you will forever remain illiterate.” (Vujačić, M, quotation often used in lectures about human rights of persons with disabilities)

Throughout the history different models of approach to disability have been used, and in accordance with that the disability was “treated” as a different issue and a

phenomenon^[1], i.e. for centuries as a problem, and mainly as a problem of the individual that is facing it. Thus the long-term application of the **medical model of approach to disability** has influenced the perception of disability as a problem of an individual that should be solved and cured, i.e. that the persons with disabilities should be taken care of at homes or in the medical or social protection institutions (hospitals, homes, specialised centres). The **functional model** has been applied with similar outcomes, this model perceived persons with disabilities as non-functional i.e. as limited in performing the basic life functions, and the key treatment was the rehabilitation, above all medical rehabilitation through treatments with physical therapists, speech therapists, defectologists (special educators) and experts of similar professions, with the aim to repair (damaged, reduced, or upgrade the non-existing) functions of the persons with disabilities. The functional model that is also called the professional model remains to be used to the greatest extent by the associations that represent the rights of children with disabilities, and also by the state i.e. by the systems that although declaratively advocate for human rights, continue to see the problem in the persons with disabilities, that are less functional, i.e. capable, and they do not see the problem in the system that should be changed by removing the obstacles and by creating the equal opportunities, or better to say by *equalising the opportunities*.

Out of these two basic models, as a combination, emerge the **moral and charity models of approach to disability**, which also see the problem in the person with disability. While the moral model refers to (and in the literature mentions solely) viewing women with disabilities as asexual and dysfunctional for the traditional role of a woman as a mother, the charity model calls for the humanity and assistance of the society to the persons with disabilities (by calling for and invoking compassion, charity and sympathy) through donations and other humanitarian activities so that PWDs would be taken care of. This attitude towards PWDs again resulted with the lack of responsibility of the system, which does not call for a change and application of the law, but invites the society to make donations for treatments or rehabilitation of PWDs, as the only way to solve the problem.

Such approaches leave the gaps in the legislation and in practice widen the gap and leave inequalities as a natural outcome. They lead to permanent segregation and exclusion of persons with disabilities, and there are theories that persons with disabilities were destroyed due to beliefs that they inflict damage to the society, particularly in militarist societies^[2].

1 In the guidelines for trainers, the *Office of the UN High Commissioner for human rights* defines different approach models, and their consequences, i.e. the way they treat disability. More about some of the models can be find at this link: <http://bit.ly/2TWOevK>, pages 8 – 18.

2 Examples of Greek poleis and Hitler's gas chambers.

In the societies and systems where these models have been applied, or are still being applied as relapses of earlier systems, the persons with disabilities are not asked about their own opinion and feelings about the treatment of others, and they are not given the opportunity to participate in making decisions that refer to them.

The common consequence of these models, that are fundamentally different only in methods and outcome, (while the medical model sees the solution in full/total recovery, according to functional model the functions of PWDs should be improved for their benefit, but not at the same time for exercising and easier access to other human rights^[3], the charity model strives to one of these two outcomes: healing or repairing of functions, but with the help of society, however it does not aim at changes in awareness, accepting disability and access to rights), is the fact that **there are no legal guarantees** and that it is *justified* (because it is considered logical) to deprive PWDs of rights. Thus, throughout the history the first acts that in any way treated the issues of PWDs were the so called Rehabilitation Acts (France, England, USA), and disability is mentioned directly for the first time only in the *UN Declaration on the Rights of Persons with Disabilities* (1975), the *World Programme of Action Concerning Disabled Persons* (1982), and the *UN Standard Rules on Equalisation of Opportunities* (1993). All three of these documents are non-binding in nature.

Thus from a relation that views disability as incapacity, or reduced capacity, poor and discriminatory guarantees of rights emerge (which do not respect the autonomy and choice of persons with disabilities), but proceed from the presumed incapacity as the problem of an individual. Therefore in the legal solutions, including those in the area of access to justice and in judiciary, in the norms "reduced judgement capacity", "impediment in development", "powerless", "inability to communicate", "inability to make a signature", and many other "reasons" for not prescribing alternative options are stated, but with exclusivities without the right of persons with disabilities to choose for themselves, and with insults to their personality and dignity, they are forced into certain regimes, without choice of options, with violation of privacy, and disparagement, and ultimately without involving persons with disabilities in these processes and procedures because they are considered incapable of their own rights and interests, and others are given the implied power to make decisions on their behalf and for them.

As the terms not only represent linguistic expressions, but also represent the relation and attitude towards phenomena or human characteristics, and which ultimately determine the policy, whether it is act or omission, then the terms in the legislation also

3 The basic objection to the functional model is the fact that, for example, he does not view health care as a right but a necessity, while neglecting all other rights. So, it starts with the inability of the PWDs as a problem, and not with the need for society to adapt to the individual capabilities of the PWDs. Therefore, medical rehabilitation is not guaranteed as a right, to reduce the progression of impairment and to improve the quality of life, but only to "cure" PWD. If this is not possible then the right to medical rehabilitation and all other rights are not guaranteed, as the "case" is considered hopeless.

indicate the actual attitude towards people and their characteristics or those attributed to them with the belief that these traits are conditioned by their natural and social predisposition, what has been considered as flaws in recent history (*The Office of the United Nations High Commissioner for Human Rights, 2014: 8-18*).

Thus, in a situation where some premises are inaccessible rather than choosing to exercise the rights or conducting procedures (even at homes of PWD), or offer physical assistance when entering a facility, instead of making the institutions accessible as well as the premises in which an authority exercises its competencies, PWDs will be forced to communicate as most people, and only as a last option will they will be offered sign language or other type of communication, and ultimately, if they cannot not make a standard signature, they will be forced to leave a fingerprint which will put them in the category of the illiterate... The most drastic example is the prescribing and application of the institute of (total or partial) deprivation of legal capacity for persons with disabilities, due to "mental illness, mental retardation or *any other cause*, they are unable to take care of their rights and interests^[4]", or when "they endanger with their actions their rights and interests or the rights and interests of others because of a mental illness, mental retardation, excessive drinking or intoxication, senility or other similar reasons^[5]," or extended parental rights when a child "due to impediments in development, disabilities or for any other reasons is not able to take care of his or her personality, rights and interest^[6]," while for example, from the parent who has been deprived of legal capacity is not required to give consent for the adoption of his or her child, but the social service can take the child away and give custody to another family. Furthermore, a person deprived of legal capacity does not have the right to marry and have family, the right to adopt, cannot be subject to medically assisted fertilization, cannot be a donor, or receive an organ, has no right of employment, cannot be a beneficiary of services for life in the community, particularly those which imply a contractual relationship between the user and the provider (direct or indirect), he/she does not have the right to vote and to be elected to functions and many other rights, while medical experiments may be performed on him/her without their consent, may have restricted freedom of movement or be completely deprived of freedom of movement, and can be forcibly placed in an institution and undergo medical treatment^[7]. Thus, it is evident that PWDs are in the abovementioned situations treated as an object, and not the subject of the law. In other parts of the study, it will be clear how these approaches have had an impact on the understanding and guarantees of **reasonable accommodations, affirmative action and procedural accommodations**.

4 Article 235 paragraph 1 of the *Family Law* ("Official Gazette of RMNE", No. 1/2007 and "Official Gazette MNE", No. 53/2016).

5 *Ibid*, paragraph 2.

6 *Ibid*, Article 92.

7 *Law on Protection and Exercising of Rights of Mentally Ill Persons* (*Official Gazette of the Republic of Montenegro* No 32/2005 and *Official Gazette of Montenegro* 27/2013), Article 17, paragraph 4.

Since the above mentioned models did not produce the effects i.e. the expected outcomes related to the "healing" of disability and improvement in the functions of persons with disabilities (on the contrary, the opposite would happen; the number of persons with disabilities increased and their life expectancy became longer) in other words, through their application a satisfactory quality of life was not achieved, people with disabilities, especially through the Civil Rights Movement (1960s America), began to advocate an approach that prioritizes and primarily addresses issues in the surroundings, which in fact limit and hinder equal participation of persons with disabilities. Hence the source of the problem is shifting from a person to an external reality - the environment. This model of approach is called the **social model**, and as key it sees the needs for the removal of barriers encountered by persons with disabilities, which are imposed by the society, consciously or unconsciously; while disability is treated as one of human differences.

The social model of approach is also a response against the institutionalization and taking care of persons with disabilities. It requires development of all the necessary policies and practices, the *equalization of opportunities* from an early age, the development of support services and life in the community, through the assessment of the needs for support for persons with disabilities; monitoring the costs of living resulting from disability and developing compensatory rights in order to achieve equality.

Several decades later, through the development of human rights, people with disabilities begin to assert their rights through a **human rights-based model**. This model overcomes the shortcomings of the social model, that is, it begins to condemn deprivation and seeks punishment for it, and it did not merely define causes (like the social model). In addition, the social model of disability shifts the problem from the individual to the environment, while neglecting the peculiar characteristics of the individual for which the special measures should be prescribed, and in the context of access to justice reasonable and procedural accommodations should be allowed.

The human rights-based model, therefore, places the person as the human being in the centre of attention, who must have all the rights and freedoms that other people acquire by birth, and they become the holders of certain rights when they become of age. While in previous models, the guarantees of some rights have been passed on to others who will "decide in the best interests of the PWD", the human rights-based model of approach to disability finally puts the PWDs themselves at the centre of the law.

The ultimate outcomes of this model include safeguards and the realization of all human rights of persons with disabilities (including those of children with disabilities and women with disabilities) prescribed, first of all, by the UN Convention on the Rights of Persons with Disabilities and then by other international instruments in which creation the persons with disabilities themselves participated, and in which the disability is treated as a human rights issue. From this it follows that the Convention itself distinguishes between impairment as a characteristic of a person, and disability as a social phenomenon (and that the society is responsible for its scale).

UN Convention on the Rights of Persons with Disabilities, ratified by Montenegro in 2009^[8] and in that way committed itself to its implementation, i.e. implementation of the guarantees that the Convention prescribes, it defines **disability** as evolving concept *developmental social concept*^[9] and defines **persons with disabilities** by stating that persons with disabilities are those who have long-term physical, mental, intellectual and/or sensory *impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*^[10].

More recently, the movement of persons with disabilities at the international level, the UN system and other organizations, rather than the term mental disability, more often use the term *psychosocial disability* because people with mental illness encounter various types of psychosocial disability (not being accepted, fear, rejection, inability to fit in with the majority, closeness...). In addition, this term has a much broader meaning, and encompasses several categories of people, sometimes even those with rare impairments, some of whom have not yet received their clear framework and recognition. The previously said speaks sufficiently in favour of the fact of disability as a evolving social concept; that is why the Convention provides the frameworks, guidelines, and standards that each signatory state must reach.

The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms of women with disabilities, children with disabilities, i.e. of all persons with disabilities, and to promote the protection of their human dignity.

Therefore, disability emerges as a combination of physical, sensory, psychosocial, or intellectual impairment with barriers, that is, obstacles in society, be they obstacles in attitudes, barriers in administration, poor and incomplete legal solutions or legal heritage, or obstacles in the environment: physical obstacles (facilities, public surfaces and public spaces), information, communications and technologies or public transport and access to public services.

As a result, there are recent trends in the expansion of categories of persons who fall into the group of persons with disabilities, and in many countries, people with diabetes, with asthma, with HIV/AIDS, extremely slim and extremely obese, among others fall into the category of people with disabilities. *In other words, as persons with disabilities are regarded all those persons who are facing obstacles, inequality of opportunities and choices due to the application of standards that take into account only the general characteristics of the majority of the population when building environments, administra-*

8 Law Ratifying the UN Convention on the Rights of Persons with Disabilities (Official Gazette No. 02/09 from 27 July 2009)

9 See the Preamble to the Convention and the Law Ratifying the UN Convention on the Rights of Persons with Disabilities

10 Purpose of the Convention (Article 1)

tion procedures and guarantees in legal solutions, development and dissemination of information, communications and technologies, and other assets and services.

Therefore, the impairment of one person will be at the same level in different countries and systems, but the level and percentage of disability will depend on and vary from external factors, including guarantees of rights and possibilities to exercise the rights.

Up to now the Convention has been ratified by 177 countries, with an upward trend. However, many states have also ratified both the Convention and its Optional Protocol but have not simultaneously developed guidelines for its implementation and implementation at the national level. Due to the different models of approach to disability represented in many countries of the world, including Montenegro, which still does not fully apply (in legislation and in practice) the social model of approach to disability (let alone the one based on human rights), there is a misapprehension of the Convention, of its principles and principles and obligations of the member states. Ultimately, not only that there is no proper understanding of the Convention, but the definition of persons with disabilities is not transposed and categories of persons with disabilities are often incorrectly defined.

Thus, Montenegrin legislation still did not differentiate between the terms intellectual and mental disability (psychosocial disability), which is the reason why the following terms are often used in the legislation: "mental retardation", "mental illness", "mental incapacity", including **intellectual disability** (reduced cognitive abilities/capacities that are absolutely impossible to cure) and **psychosocial disability** (mental illness: short-term, periodic or long-term, curable or incurable); the term 'mental retardation' is referring to intellectual disability and the terms 'mental sickness', and "mental illness" refer to psychosocial disability, while the term "mental incapacity" may refer to both, depending on the interpretation. A highly intelligent person can acquire psychosocial disability, while there are rare examples of people with intellectual disabilities developing a mental illness.

The drastic problems that these identifications, non-delimitations and misunderstandings cause may refer to the following consequences: in the societies where these two categories do not differ, they are often placed together in the same institutions and treated in the same way; persons with intellectual disabilities are completely deprived of their legal capacity instead of being supported in decision making relative to the limits of ability, while persons with psychosocial disabilities are most often partially deprived of their legal capacity.

In order to contribute to the process of understanding and implementation of the Convention, the UN Committee on the Rights of Persons with Disabilities developed guidelines for certain rights and guarantees of the Convention, through its General Comments.

Thus, not by chance, **General Comment 1**^[11] (published 2014) refers to Article 12 of the Convention: **equal recognition of persons before the law**, arising from the need to further clarify the obligation of States to guarantee an institute of supported decision-making, instead of the institute of deprivation of legal capacity existing as an example in the legislation of some Member States of the Convention, one of them is also Montenegro. In addition, *the Comment clarifies procedural and legal capacity and legal abilities*.

The General Comment 2^[12] (also published in 2014) refers to Article 9 of the Convention, which defines **accessibility**, and, inter alia, refers to the notion of accessibility of the environment, information, communications and services, information and communication technologies and services, as well as public services. In addition, this comment specifically clarifies the notion of minimum accessibility standards and guidelines, as well as reasonable accommodations, intended for individuals in specific situations.

For the purposes of this study, two other Committee Comments developed during 2018 are relevant: First the **General Comment 6**^[13] Refers to the Article 5 of the Convention: **Equality and non-discrimination**, while the **General Comment 7**^[14] Refers to Article 4.3. and Article 33.3. of the Convention, i.e. it defines **the participation of persons with disabilities in the implementation and monitoring of the implementation of the Convention at the level of member states**.

The human rights model implies the involvement and participation of persons with disabilities in making decisions that affect them, and the consultative relationship between other authorities and functions and persons with disabilities when making decisions on their behalf and for them.

However, despite or in vain of all the aspirations of a democratic society based on respect for the diversity and equality, the shift of paradigm of disability does not occur first in the regulations, political agreements and decisions; the changes start in the society that includes both the authorities and the citizens, who give them legitimacy at the elections. In this sense, the moral or political principle of respect for diversity, non-discrimination, or respect for the dignity of the personality of persons with disabilities is not enough, but must be preceded by a change in awareness of disability, which then entails legislative changes and changes in the treatment i.e. application of laws and procedures.

11 Link of the original version <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>
Translated from English language by M. Vujačić.

12 Ibid.

13 Ibid.

14 Ibid.

II INTRODUCTION

A society that strives for the rule of law, (let us remind ourselves that the Constitution, among other things, defined Montenegro as the state of the rule of law), must be based on equality of citizens in substantive and procedural terms. This requires additional efforts through affirmation of inclusive policy, in order to create the conditions for equality of opportunities, i.e. the initial chances have to be approximately equal and the results have to be fairly unequal. In the context of our topic, the main terms will be *reasonable accommodations, affirmative action, and especially procedural accommodations*.

The main strategic and political framework represent the [Action Plan for Chapter 23 \(Justice and Fundamental Rights\), Strategy for protection of persons with disabilities from discrimination and promotion of equality for the period 2017 - 2021 with the Action Plan for implementation for the period 2019-2020, Analysis of the compliance of legislation in Montenegro with the Law on prohibition of discrimination of persons with disabilities and the UN Convention on the rights of persons with disabilities with recommendations for harmonisation.](#)

In addition to the Montenegrin Constitution, the legal framework also entails the laws in the field of anti-discrimination (Law on Prohibition of Discrimination^[15], Law on Prohibition of Discrimination against Persons with Disabilities^[16]), as well as relevant substantive and procedural laws, and selected court decisions as an inevitable auxiliary source.

The basic hypothesis is the following: **the state of Montenegro has special obligations to implement the UN Convention on the Rights of Persons with Disabilities in the part of procedural accommodations, which cannot be avoided by invoking a disproportionate burden, and without them there is no non-discriminatory access to justice for persons with disabilities, and this is exactly the field of application of the Convention where the State of Montenegro is lagging behind in the implementation.** ^[17]

15 "Official Gazette of MNE", No. 46/2010, 40/2011 - other law, 18/2014 and 42/2017.

16 "Official Gazette of MNE", No. 35/15.

17 Law on ratification of UN Convention on the rights of persons with disabilities with the Optional Protocol ("Official Gazette of MNE", No 02/09 from 27.7.2009).

III ACCESS TO JUSTICE AND EQUALITY BEFORE THE LAW

It is a well-known fact that there is no rule of law without non-discriminatory access to justice. It can be said that without a well organised system of access to justice all the legal guarantees of respect for human rights and freedoms only have a formal meaning, i.e. they are placed in the hands of those who have the power to abuse them, without an adequate supervisory and control mechanism that independently and impartially establishes the limits of (ab)use of the power and guarantees the protection.

The essence of equality before the law (and equality in the application of the law) in the context of access to justice represent the following guarantees^[18]: **the right to effective access to a competent decision-making authority** (including the right to free legal aid), **the right to an effective legal remedy, the right to a fair procedure, the right to decision within a reasonable time, the right to a reasoned decision, the right to an adequate compensation.** Therefore, these are the guarantees in the initial phase, during the procedure and after its completion (execution), without them the rights prescribed by the legal order, except in the ideal situation of their impeccable application, would only be mere proclamations.

The legal guarantees listed above further oblige the states that wish to be based on the rule of law when it comes to persons with disabilities. Here they are placed on a special test of humanity, respect for human rights which requires additional effort, or a certain preferential treatment, which proves the commitment, or more precisely answers the question: *are the human rights (specifically those of PWDs) taken seriously?*

At the beginning another issue emerges and that is (non)existence of the records of proceedings involving persons with disabilities, in any capacity, and thus there are no records of the needs for allowing procedural adaptations, nor the records on the degree of judicial protection.

When it comes to keeping records of the procedures in which PWDs are participants in the procedure, we received the following information based on requests for

18 UN Convention of the rights of persons with disabilities in the Article 5 prescribes:

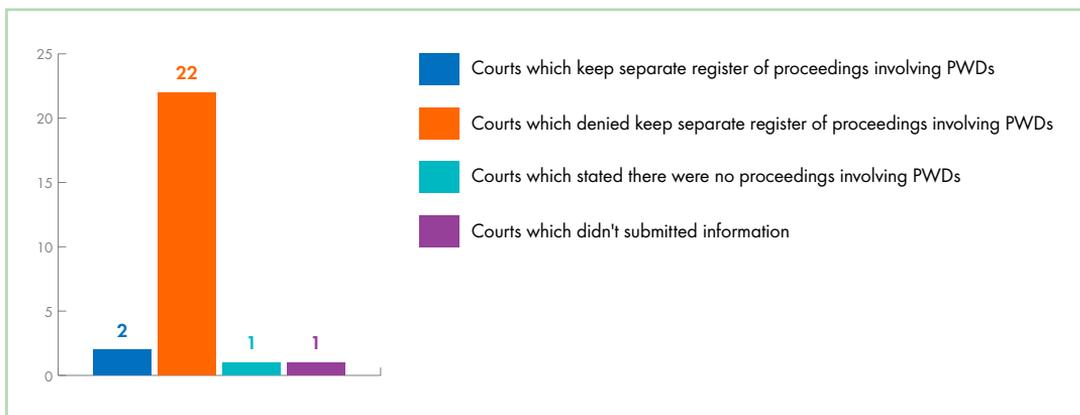
States parties recognize that all persons are equal before the law and are entitled to equal protection before the law and enjoy the equal benefits of the law, without any discrimination.

States parties shall prohibit any discrimination on the basis of disability and shall guarantee to all persons with disabilities equal and effective legal protection against discrimination on any grounds.

In order to promote equality and terminate discrimination, states parties shall take all the appropriate steps to ensure that reasonable accommodations are provided.

FAI^[19] sent to all courts in the territory of Montenegro^[20]:

To the question: **Is there a separate register of proceedings involving PWDs** **two courts** have given positive answers, namely: **the High Misdemeanour Court of Montenegro (HMCMNE)** and **the Basic Court Kolašin (BCKL)**, while **22 courts** have denied keeping a separate register, and those are: **Basic Court Herceg Novi (OSHN)**, **Supreme Court (SC)**, **High Court Bijelo Polje (HCBP)**, **High Court Podgorica (HCPG)**, **Administrative Court (AdCMNE)**, **Podgorica Minor Offenses Court (MOCPG)**, **Commercial Court (CC)**, **Basic Court Ulcinj (BCUL)**, **Basic Court Kotor (BCKO)**, **Basic Court Rožaje (BCRO)**, **Basic Court Bijelo Polje (BCBP)**, **Basic Court Pljevlja (BCPV)**, **Basic Court Podgorica (BCPG)**, **Basic Court Nikšić (BCNK)**, **Basic Court Danilovgrad (BCDG)**, **Basic Court Cetinje (BCCT)**, **Basic Court Bar (BCBR)**, **Basic Court Žabljak (BCŽB)**, **Basic Court Berane (BCBA)**, **Court of Appeal (ApC)**, **Misdemeanor Court Budva (MCBD)**, and the **Constitutional Court (CoCMNE)**, **1 court** replied that there had been no proceedings involving parties with disabilities in the last 5 years and that there was no need for this reason to keep a separate register - **Plav Basic Court (BCPL)**, while **1 court** did not answer the question - **Misdemeanor Court Bijelo Polje (MCBP)**.



When asked: Is there any other way of marking cases in procedures involving PWDs?

Two courts responded that there was, or if necessary, another way of marking the case would be used, namely: **BCNK** (which keeps internal records of procedures involving PWDs) and **BCPV** (there were no procedures but the PWDs would be inscribed on the covers of those case files), **one court** replied that all cases are recorded in the database of the Judicial Information System (PRIS) which does not have a separate part that would single out PWDs – **BCCT**, **one court** stated that it keeps the registers, which according to the jurisdiction of the court are enumerated in Article 255 of the Court Rules of Procedure – **ApC**, **one court** responded that PWDs are recorded through the register of approval for free legal aid - **BCRO**, **seven courts** did not answer the question: **HCPG**, **BCKO**, **BCKL**, **BCDG**, **MCBP**, **BCBR** and **BCBA**; while **13 courts** answered that there was no other way of marking the case, namely: **BCHN**, **SC**, **HMCMNE**, **HCBP**, **AdCMNE**,

MCPG, CC, BCUL, BCBP, BCPG, BCŽB, MCBP and CoCMNE, **one court** replied that in the last five years there were no proceedings in which persons with disabilities participated as parties, and for this reason there was no need for another way of marking the cases – BCPL.

In order to ensure that persons with disabilities enjoy the above mentioned rights equally, it is necessary to provide individualized support adjusted for the type of disability.^[21] This implies both access to the facility itself and the provision of conditions for independent movement and performance of process actions in the facility, and also the conduct of a specific procedure in which the innate human dignity and autonomy of the personality of PWDs will be fully guaranteed.

Starting from the legal provisions and the goal of providing PWDs with unhindered access to the courts, the situation in the national judicial system in this regard is not at a satisfactory level at all. Above all, there is still no *Analysis of Accessibility of Courts for Persons with Disabilities*^[22] which contains an assessment with respect to all accessibility elements, in accordance with the *Law on Spatial Planning and Construction of Facilities* and the accompanying *Rulebook on Close Conditions and Methods of Adjusting a Facility for Access and Movement of Persons with reduced mobility and Persons with Disabilities*.

When it comes to accessibility, we received information from the FAI request that **five courts (BCŽB, BCPB, CC, MCBP and HCBP) do not have the accessibility elements.**

When asked **Which of the accessibility elements can be found in your court?**

- **six courts** replied that they have **flat entrance**, namely: SC, HMCMNE, AdCMNE, BCBA, ApC and MCBP while **20 courts** replied that they do not have the flat entrance, namely: BCHN, HCBP, HCPG, MCBP, MCPG, CC, BCUL, BCKO, BCRO, BCBP, BCPV, BCPG, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCŽB, and CoCMNE.

- **13 courts** stated that they have **sloping ramp** at the entrance: SC, HCPG, BCUL, BCKO, BCRO, BCPV, BCPG, BCPL, BCNK, BCKL, BCDG, BCBR and ApC, while also **13 courts** denied the existence of the sloping ramp, namely: BCHN, HMCMNE, HCBP, AdCMNE, MCBP, MCPG, PS, BCBP, BCCT, BCŽB, BCBA, MCBP and CoCMNE.

- **two courts** have the **vertical lift platform**, namely: SC and ApC, while **24 courts** do not have this accessibility element, those are: BCHN, MCMNE, HCBP, HCPG,

21 Impairment is an individual characteristic of a person, while disability is an external characteristic, i.e. a social phenomenon.

22 Although the Supreme Court made the Analysis, it does not contain an assessment on the elements of accessibility, nor does it refer to legal provisions that define the obligations for accessibility of public buildings, including courts.

CoCMNE, MCBP, MCPG, CC, BCUL, BCKO, BCRO, BCBP, BCPV, BCPG, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCŽB, BCBA, MCBBD and CoCMNE.

- **three courts** have **inclined platform lift**, namely: MCPG, BCCT and AC, while **23 courts** denied the existence of this element of accessibility, those are: BCHN, SC, HMCME, HCBP, HCPG, CoCMNE, MCBP, CC, BCUL, BCKO, BCRO, BCBP, BCPV, BCPG, BCPL, BCNK, BCKL, BCDG, BCBR, BCŽB, BCBA, MCBBD and CoCMNE.

- **nine courts** have a **lift inside the building** – internal dimensions of the lift are at least 110x140 cm, door width at least 90 cm. Therefore, MCPG, CoCMNE, six courts responded that they have a lift without stating the dimensions, namely: SC, AC, HMCME, HCPG, BCPG, MCBBD, while CoCMNE mentioned that it has got two lifts of the following dimensions 115x95 cm, at least 75 cm. On the other hand, **17 courts** do not have the lift, those are the following courts: BCHN, HCBP, MCBP, CC, BCUL, BCKO, BCRO, BCBP, BCPV, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCŽB and BCBA.

- **two courts** responded that they have **tactile guide paths and warning strips for the movement of persons with visual impairments**, those are: MCPG and BCPG, while **23 courts** responded negatively: BCHN, SC, HCBP, HCPG, AdCMNE, MCBP, CC, BCUL, BCKO, BCRO, BCBP, BCPV, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCŽB, BCBA, AC, MCBBD and CoCMNE, **one court** responded that tactile guide paths and warning strips are in the implementation phase – HMCME.

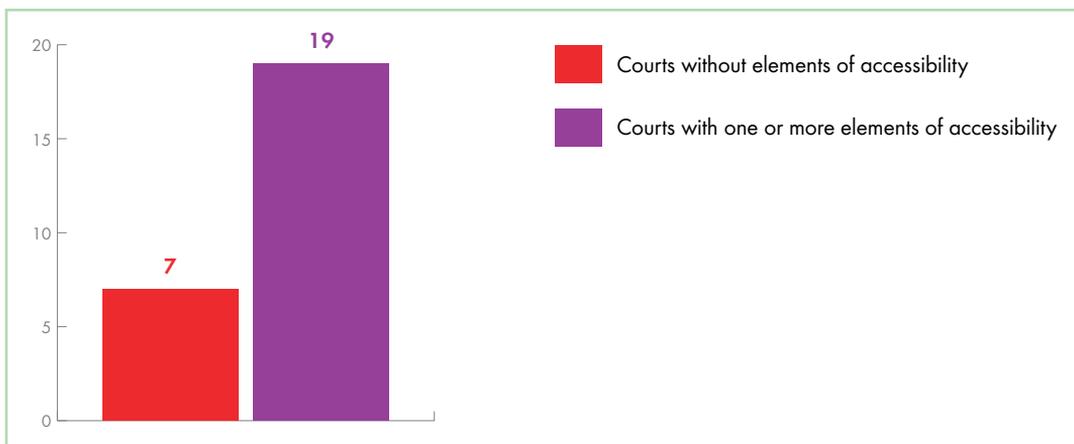
- **five courts** replied that in the court they have **orientation plan for the movement within the facility/relief plan of the facility**, they are: AdCMNE, MCPG, BCUL, BCKO and BCPG, while **20 courts** replied that they do not have the orientation plan in the building, those are: BCHN, SC, HCBP, HCPG, MCBP, CC, BCRO, BCBP, BCPV, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCŽB, BCBA, AC, MCBBD and CoCMNE, **1 court** replied that the relief plan of the facility is in the implementation phase – HMCME.

- **two courts** have **signs in Braille on the doors of individual rooms at the height of 90 up to 120 cm**, namely: MCPG and BCPG, **two courts** replied that signs in Braille are in the implementation phase – HMCME and AdCMNE (“on the doors of individual rooms there are no signs in Braille, they are being made”), **22 courts** replied negatively, namely: BCHN, SC, BCUL, HCBP, HCPG, MCBP, CC, BCKO, BCRO, BCBP, BCPV, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCŽB, BCBA, AC, MCBBD and CoCMNE.

- **three courts** have the **toilet for persons with disabilities** (internal space for turning is 150 cm), namely: AdCMNE (stated that it has four toilets with the internal space for turning 160x110), MCPG and BCPG (without stating the dimensions), **one court** stated that there are two toilets but that they are not entirely adapted for PWDs – HMCME, **one court** did not provide answer to that question – BCBA, **21 court** stated that they do not have this element of accessibility, those are: BCHN, SC, HCBP, HCPG, MCBP, CC, BCUL, BCKO, BCRO, BCBP, BCPV, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCŽB, AC, MCBBD and CoCMNE.

- **one court** stated that it has **another element of accessibility**, namely BCPG (counters for persons with disabilities), **nine courts** stated that they do not have other elements of accessibility: MCBBD, MCPG, MCBP, AdCMNE, BCPV, BCBP, HCBP, CC and

BCŽB. The other courts, **16 of them** did not state/reply whether they have some other element of accessibility, those are: BCHN, SC, HMCMNE, HCPG, BCUL, BCKO, BCRO, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCBA, AC and CoCMNE.



In the end, it should be noted that the courts provided information on specific accessibility elements on the basis of their own assessments, and that no monitoring of the accessibility of the courts was done by a field visit organized by the AYDM.

However, the fact that all the answers to the questions related to accessibility were provided to a greater extent indicates the awareness of the problems by the courts themselves, which further indicates the possibility of progress in this area in the forthcoming period. These changes should start with the development of specific project tasks for the adaptation, i.e. the adjustment of the premises where the courts are located.

IV INTERNATIONAL AND NATIONAL LEGAL FRAMEWORK

The right to access to justice is defined by the most important international human rights documents. We will mention some of them: *the Universal Declaration of Human Rights* from 1948. (Articles 6, 7, 8, 10, 11), *International Covenant on Civil and Political Rights* from 1966 (Articles 2 and 14), *the European Convention for the Protection of Human Rights and Fundamental Freedoms* from 1950 (Articles 6, 7, 8, 13), *Charter of Fundamental Rights of the EU* from 2000 (Articles 20, 21, 47, 48, 49, 50).

Certainly the most important source of international law is the 2006 UN Convention on the Rights of Persons with Disabilities. The Convention is based on the following fundamental principles:

- 1) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- 2) Non-discrimination;
- 3) Full and effective participation and inclusion in society;
- 4) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- 5) Equality of opportunity;
- 6) Accessibility;
- 7) Equality between men and women;
- 8) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The listed principles are binding in the interpretation of the normative part of the Convention and will prevail in the event of conflict with the national legislation, as prescribed by the Constitution of Montenegro^[23]. In particular, we emphasize the obligation of *reasonable accommodations*, which, if they do not represent a disproportionate burden for the entity that must implement them, is recognized as a form of discrimination (Article 2, line 3, and Article 5 paragraph 3 of the Convention).^[24]

The basic commitments that the State has accepted under the Convention can be summarized as follows:

- adopting of appropriate legislative, administrative and other measures,
- taking measures, including legislative ones, in order to amend and repeal all the laws, regulations, by-laws, customs and practices that represent discrimination against persons with disabilities,
- refraining from taking any act or practice inconsistent with the Convention,
- ensuring that public authorities and institutions comply with the Convention,
- promoting the training courses and training of professionals and the staff working with persons with disabilities in the field of rights recognized by the Convention in order to better provide services and assistance.

Therefore, this is a wide range of negative and positive obligations that are of preventive and proactive type.

Articles 12 and 13 of the Convention are essential to our subject. The issue of legal capacity arises as a separate topic and is defined by the Article 12 of the Convention, and is a ***condition sine qua non*** for all other rights and actions from the standpoint of innate human dignity and autonomy of personality, and is therefore given a special status. As this issue is essential for the procedural capacity itself, and it is often subject to abuse and backward legal standardization, it is stipulated in paragraphs 1, 2 and 3 of this Article:

“States Parties reaffirm that persons with disabilities everywhere are entitled to recognition of legal capacity.

States Parties recognize that persons with disabilities enjoy legal capacity on an

23 Article 9 of the Constitution of Montenegro reads: “The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation.”

24 “Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. **It includes all forms of discrimination, including denial of reasonable accommodation.**”

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

equal basis with others in all aspects of life.

States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”^[25]

The Article 13 defines the issue of access to justice: “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including *through the provision of procedural and age-appropriate accommodations*, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

“In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

Before we move on to a national legal framework relevant to our subject, we must state that Montenegrin legislation, both substantive and procedural, that regulates the limitation and deprivation of legal capacity, as well as the extension of parental rights, is a residue of old perceptions and is not in conformity with the Convention. Furthermore, through the analysis of a number of court decisions concerning discrimination against persons with disabilities in the area of accessibility, there is a lack of reference to the Convention, which suggests that this is either ignorance of its provisions or lack of self-assurance to apply it directly. In any case, these topics need to be further worked on (training courses would be organised), which is an obligation stemming from the Convention itself.^[26]

The Constitution of Montenegro^[27] in the Article 9 stipulates that ratified international treaties are considered an integral part of the national legal order and that they shall prevail when they regulate relations differently from domestic legislation. In the context of the Convention, this provision is of paramount importance. The following constitutional provisions are also relevant: Article 24, which provides that restrictions on human

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

paragraph 5: “Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”

26 More details can be found in the publication *The right of persons with disabilities to equal access to justice*: <https://bit.ly/3as0qYr>

27 “Official Gazette of MNE” No. 1/07, 38/13.

rights and freedoms may be introduced only to the extent permitted by the Constitution and with a legitimate aim; that restrictions may be prescribed by the law and should not be based on discrimination (Article 25), that certain rights are non-derogable (including those relating to the basic procedural guarantees). Furthermore, the Article 8 prohibits any direct or indirect discrimination, on any grounds and space for affirmative action is open; the Article 17 guarantees equality before the law, while Article 19 provides for equality of protection of all the rights and freedoms; Article 21 introduces the right to free legal aid. The Constitution also contains a set of provisions that guarantee just and fair procedure, and in Article 68 it opens the space for special protection of persons with disabilities.

FOR A MORE DETAILED ANALYSIS OF LEGISLATION PLEASE SEE THE STUDY – [RIGHT OF PERSONS WITH DISABILITIES TO EQUAL ACCESS TO JUSTICE](#)^[28]

28 More information on the **right of persons with disabilities to equal access to justice** is available on the pages 15-22 and on the **right to use the language in proceedings** on the page 26.

V THE NOTION OF REASONABLE AND PROCEDURAL ACCOMMODATIONS

1.1.

At the very beginning of the chapter, let us recall that the Convention defines reasonable accommodations as *necessary and appropriate modifications and adjustments that do not constitute a disproportionate or inappropriate burden, and are needed in specific cases to guarantee the enjoyment or exercising of all the human rights and fundamental freedoms by the persons with disabilities on equal grounds.*

Non-application of this principle is recognized as a violation of the principle of non-discrimination on the basis of disability.

Having in mind that this term is most commonly used in the context and in relation to the concept of accessibility; the Committee on the Rights of Persons with Disabilities in its General Comment no. 2, in conjunction with Article 9 of the Convention - Accessibility, has clarified this notion.

*“Accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an **ex ante** duty.*

States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service. States parties need to set accessibility standards, which must be adopted in consultation with organizations of persons with disabilities, and they need to be specified for service-providers, builders and other relevant stakeholders. Accessibility standards must be broad and standardized.

In the case of individuals who have rare impairments that were not taken into account when the accessibility standards were developed or who do not use the modes, methods or means offered to achieve accessibility (not reading Braille, for example), even the application of accessibility standards may not be sufficient to ensure access for them. In such cases, reasonable accommodation may apply.

In accordance with the Convention, States parties are not allowed to use austerity measures as an excuse to avoid ensuring gradual accessibility for persons with disabilities. The obligation to implement accessibility is unconditional, i.e. the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden

of providing access for persons with disabilities. The duty of reasonable accommodation, contrarily, exists only if implementation constitutes no undue burden on the entity.”

The obligation to provide reasonable accommodation is an **ex nunc** duty, which means that it is enforceable from the moment it is necessary for the individual with disability, in a given situation, for example, at work or at school, in order to enjoy their rights on an equal basis in a specific context. In this situation the accessibility standards can be an indicator, but they cannot be considered as prescribed.

Reasonable accommodation can be used as a means of ensuring accessibility for the disabled person in a particular, specific, situation. It seeks to achieve *individual justice* in the sense of ensuring non-discrimination or equality, while respecting the dignity, autonomy and choices of the individual. Therefore, a person with a rare impairment may seek an accommodation that does not fall within the scope of any accessibility standard.

Unlike reasonable accommodations, procedural accommodations are related to a specific procedure before the court/court proceeding and enabling the participation in it and cannot be disproportionate, as is sometimes the case with reasonable accommodations. They relate to the manner of participation, including the manner of questioning/hearing the party in the proceedings, the form and type, or method of communication, etc. (e.g. sign language, Braille, easy-to-understand and easy-to-read format), whatever option the person with disability chooses himself/herself.

Summarized data from the FAI request showed that "hearings are generally not postponed due to the unavailability of authorized sign language interpreters, inaccessibility of the court facility, access to the court, or the courtroom itself, or other reasons". However, such answers were provided in most cases without explanations, although the same courts that denied postponing of the hearings on any basis in matters concerning for example accessibility responded that they were inaccessible.

When asked if there were hearings in procedures in which participants were persons with disabilities and which were delayed because of:

- unavailability of authorized court interpreters for sign language – two courts/SC and HCPG replied that they do not keep records about whether some of the hearings, in which PWDs participated, were postponed, **one court** – AC did not provide the answer to the question, while the remaining **23 courts** denied postponing of the hearings on those grounds, namely: BCHN, HMCMNE, HCBP, CoCMNE, MCBP, MCPG, CC, BCUL, BCKO, BCRO, BCBP, BCPV, BCPG, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCŽB, BCBA, MCBP and CoCMNE.

- inaccessibility of the court facility, access to the court or the courtroom itself – one court / SC replied that it does not keep the records about whether hearings in which PWDs were participating were postponed, **one court** – AC did not provide the answer to that question, while the remaining **24 courts** denied that the hearings

were postponed on that ground, namely: BCHN, HMCMNE, HCBP, HCPG, AdCMNE, MCBP, MCPG, CC, BCUL, BCKO, BCRO, BCBP, BCPV, BCPG, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCŽB, BCBA, MCBP and CoCMNE.

- **some other reasons that hindered restricted or impeded equal access to court/justice for persons with disabilities?** **One court/SC** replied that it does not keep the records about whether hearings in which PWDs were participating were postponed, **four courts** – BCHN; AC, BCRO and HCPG did not provide the answers to the question, **21 court** denied that hearings were postponed on this ground, namely: HMCMNE, HCBP, AdCMNE, MCBP, MCPG, CC, BCUL, BCKO, BCBP, BCPV, BCPG, BCPL, BCNK, BCKL, BCDG, BCCT, BCBR, BCŽB, BCBA, MCBP and CoCMNE.

When asked If there were proceedings in which it was requested or provided Braille or other alternative form of communication, specifically at the request of PWDs as participants in the proceedings? **one court** replied affirmatively – BCBA, **two courts** did not answer the question: AC and BCKO; **two courts** replied that they would provide alternative form of communication if the need for it emerged – BCBR and HCPG; **one court** stated that it does not keep the separate records on proceedings in which participants are PWDs - SC, while **20 courts** replied negatively to this question, namely: HMCMNE, AdCMNE, BCPL, BCPG, BCNK, BCKL, BCDG, BCCT, BCŽB, BCPV, BCBP, BCRO, HCBP, BCUL, CC, MCPG, MCBP, BCHN, MCBP and CoCMNE.

1.2. GENERAL COMMENT – OTHER MATTERS

In General Comment no. 6, which refers to the Article 5 of the Convention (Equality and non-discrimination), it is stated: “Reasonable accommodation” is a single term, and “reasonable” should not be misunderstood as an exception clause; the concept of “reasonableness” should not act as a distinct qualifier or modifier to the duty.^[29] This is not a way to estimate the costs of accommodations or the availability of resources - this happens at a later stage, when assessing a “disproportionate or unnecessary burden”. Rather, reasonableness of accommodations represents a reference to its relevance, appropriateness, and effectiveness for the person with disability. Adaptation is reasonable, therefore, if the purpose(s) for which it is exercised are attained and adapted to the needs of the person with disability; “disproportionate or unnecessary burden” should be understood as a unique concept that sets the boundary on the duty to provide reasonable accommodation. Both terms should be considered synonymous insofar as they relate to the same idea: that the requirement for reasonable accommodation must be related to the possible excessive or unjustified burden on the accepting party;

29 Page 7 of the *General Comment*. Link of the original version; <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx>,

“Reasonable accommodation” should also not be confused with “specific measures”, including “affirmative action” measures. Although both concepts aim to achieve **de facto** equality, reasonable accommodation is a duty of non-discrimination, while specific measures entail preferential treatment of persons with disabilities over others to address the issue of historical/ systematic/systemic exclusion from the exercise of rights.

Examples of specific measures include temporary measures to combat the low number of women with disabilities employed in the private sector and support programs to increase the number of participants with disabilities in tertiary education. Similarly, reasonable accommodations should not be confused with the provision of support, such as personal assistants, in comparison to the right to live independently and to become involved in the community, or to achieve legal capacity with support.

“Procedural accommodations” in the context of access to justice should not be confused with reasonable accommodation; while the latter is limited by the concept of disproportionality, procedural accommodations are not.”^[30]

... “These accommodations are distinguishable from reasonable accommodation in that procedural accommodations are not limited by disproportionality. An illustration of a procedural accommodation is the recognition of diverse communication methods of persons with disabilities standing in courts and tribunals.”^[31]

1.3. GENERAL COMMENT NO.1 ON THE ARTICLE 12 – EQUAL RECOGNITION BEFORE THE LAW

Freedom from discrimination in recognition of legal capacity restores autonomy (guarantees autonomy) and respects human dignity in accordance with principles 3a of the Convention. The freedom to make one's choices requires legal capacity. Independence and autonomy include the power to make decisions in a lawful manner. The need for support and reasonable accommodation in decision making will not be used to examine a person's legal capacity. Respect for diversity and acceptance of persons with disabilities as part of human diversity and humanity is incompatible with the provision of legal capacity through assimilation..., the right to support the exercise of legal capacity

30 Ibid.

31 Ibid, page 13

cannot be limited by the claim of disproportionate or unnecessary burden. The state has an absolute duty to provide access to support to exercise legal capacity.^[32]

States Parties have an obligation to ensure that persons with disabilities have access to justice on an equal basis with others. Recognition of the right to legal capacity is essential for access to justice in many aspects. In order to exercise rights and obligations on an equal basis with others, persons with disabilities must be recognized before the law as persons with equal status in courts and tribunals.

States Parties must also ensure that persons with disabilities have access to legal representation on an equal basis with others. This has been identified as a problem in many jurisdictions and must be addressed, including to ensure that persons experiencing obstacles in their right to legal capacity have the opportunity to challenge such interference on their own behalf or through legal representation - and to defend their rights before the court. People with disabilities are often excluded from key roles in the justice system as attorneys, judges, witnesses or jury members.^[33]

32 Ibid, page 8

33 Ibid, page. 10.

VI GUARANTEES OF REASONABLE ACCOMMODATIONS IN THE NATIONAL LEGISLATION

The Law on the Prohibition of Discrimination against Persons with Disabilities does not define the concept of reasonable accommodations, nor does it stipulate the lack of their provision as discrimination. **The Law on Courts, the Law on Notaries and the Law on Advocacy** do not prescribe reasonable accommodations. In addition, the Law on Courts does not prescribe procedural accommodations either. It is the same with other relevant laws.

The national legislation indirectly prescribes the principle of procedural accommodations that do not fully protect the integrity and dignity or respect the choice of a person with a disability.

The hearing of the defendant through an interpreter is prescribed by the Criminal Procedure Code (CPC), Article 106 paragraph 2: "If the accused person is deaf, the questions shall be asked in writing, and if s/he is mute, s/he shall be asked to answer in writing. **If the hearing may be performed in such a manner, a person with whom the accused person is able to communicate shall be summoned as an interpreter**". The Law on Litigation (LL) prescribes the same, in Article 241, paragraph 2. Therefore, the sign language interpreter is prescribed as a last option, which depends on the court's decision and not one of the options available to the party, whose choice is crucial. Additional standards on access to information and communication in proceedings before the authorities and access to justice for persons with visual impairments (enlarged format, electronic format, Braille), or other persons in need of an *easy-to-understand and easy-to-read* format do not exist, although the Convention prescribes them.

For a more detailed introduction to the analysis of guarantees of the procedural accommodations in Montenegrin regulations, we would like to refer you to: [Guidelines on the right of persons with disabilities to procedural accommodations in proceedings before the authorities of Montenegro.](#)

VII COURT PRACTICE

The *Guide for Lawyers and Judges on the Free Legal Aid Institute*^[34] gives a good summary of court practice in disability protection proceedings initiated by persons with disabilities due to discrimination in access to facilities and surfaces in public use.

Some indications:

It can be concluded that there has been a harmonization of court practice following these judgments.

It is evident that there are no references to the Convention and General Comments in the judgments, so there is a need for additional training courses.

The question of enforceability (forced enforcement) emerges, particularly of the part of statement that is referring to the elimination of the cause of discrimination. The precise claim, *inter alia*, required: *ordering the respondent to take all the necessary measures, i.e. to make its facility accessible so that the discrimination would not happen again*. This part of the claim was in two proceedings by the lower courts rejected for the reason "that such request is contrary to the Article 26 item 2 of the Law on Prohibition of Discrimination". This provision stipulates that a lawsuit may request: "a prohibition of the act that might cause discrimination, or a prohibition of the repetition of an act of discrimination". **It can be assumed that the lower instance courts have interpreted this provision solely as a negative obligation, thus restrictively, without neither considering the meaning of the norm itself, nor the international standards.**

Although this has been corrected in several Supreme Court review decisions, the question of forced enforcement remains (how to force someone ... to make a facility accessible to persons with disabilities), but the initial failure to admit this part of the claim leads to the conclusion that our courts are not familiar with the provisions of the UN Convention, and that training courses on adaptation principles and reasonable accommodations are necessary.

34 *Guide for Lawyers and Judges on the Free Legal Aid Institute* (pages 39-42). Available at the following link: <https://bit.ly/2TtHoKH>

VIII FINAL CONSIDERATIONS AND RECOMMENDATIONS

The objective of the project can be summarized in three needs: to innovate legislation and align it with the UN Convention on the Rights of Persons with Disabilities, to increase decision makers' capacity to apply the Convention's elements and principles, and to change the factual situation. In this paper, it has been shown that Montenegrin legislation is not in accordance with international standards on human rights of persons with disabilities, that practitioners do not apply the UN Convention on the Rights of Persons with Disabilities, i.e. they do not apply the Constitution of Montenegro in the context of supremacy of international law. The need for additional training courses is obvious.

We particularly emphasize the necessity for amendments to the *Family Law and the Law on Non-contentious Procedure*, but also the *Criminal Code*, the *Criminal Procedure Code*, and the *Law on Civil Procedure*. Substitute decision making must give way to supported decision making. We are aware that this is a time-consuming and multidisciplinary approach; we urge that at least the initial steps be taken soon. Guaranteeing legal capacity, or more precisely maintaining it in all possible situations, is a prerequisite for guaranteeing the inherent dignity and autonomy of the individual, without which we cannot speak of an inclusive society that is based on solidarity.

We have also shown how important it is for the court, both in physical terms (court as a facility) and symbolically (court as place of justice), to be accessible and available to persons with disabilities.

Entrance to the facility, movement through the space, access to administration and the court proceeding itself must be arranged in such a way to give persons with disabilities a full sense of accessibility. Only in this way can we speak of full respect for the UN Convention on the Rights of Persons with Disabilities, in this aspect of human life. The research has shown that much more remains to be done, starting with the uniform record keeping.

Procedural accommodations are a special kind of adjustment. The complaints about unreasonable costs, disproportionate burden, or any other excuse are not applicable when it comes to this category. It is true that sometimes it takes time, but the most important thing is that there is a genuine and clear intention.

We accept the fact that our society is still conservative in this sense, one of the reasons being the existing legislation that impedes the breakthrough of contemporary understandings, or rather the full humanization of relationships in this important aspect of

human life.

On the other hand, the citizen-court relationship is the best indicator of the willingness of a community to ensure equal access to justice and protection of human dignity. It can be said that this test is the essence of this project.

RECOMMENDATIONS:

- Harmonize Montenegrin legislation in the areas of *access to justice, freedom of movement, freedom and security of persons, freedom from torture, cruel, inhuman or degrading punishment, protection of the integrity of the person and equal recognition before the law* with the UN Convention on the Rights of Persons with Disabilities;

- Arrange uniform record keeping of procedures that are initiated, that is, conducted against persons with disabilities, through the adoption of standardized registration form and adequate technical support.

- Strengthen the capacities to support licensed interpreters (the use of sign language) and provide Braille, electronic form and enlarged format, and consider the need for permanent employment of the required number of court interpreters (keeping records would indicate the necessary number) which would be at disposal of courts, which would also allow the application of the principles of effectiveness - cost-effectiveness of the procedure, but also enable persons with disabilities to participate in the proceedings in their own language, taking into account the complete absence of potential conflicts of interest, given that this principle is not currently ensured due to the very small number of sign language interpreters and therefore even less licensed sign language interpreters;

- Make additional accommodations to the facilities, both in terms of approach itself and in their interior in the context of reasonable and then procedural accommodations, not only for the purpose of moving and staying in the facility, but also for facilitating the right to work for persons with disabilities;

- Provide and secure the means and technical equipment necessary to provide procedural accommodations in court proceedings;

- Provide additional training courses with the aim to introduce the UN Convention on the Rights of Persons with Disabilities with particular reference to the principle of procedural accommodations.

REFERENCES

Action plan for Chapter 23 (justice and fundamental rights);

Analysis of the compliance of the legislation in Montenegro with the Law on the Prohibition of Discrimination against Persons with Disabilities and the UN Convention on the Rights of Persons with Disabilities, with recommendations for harmonization.

European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950.

Convention on the Rights of Persons with Disabilities (Decree Proclaiming the Law Ratifying the United Nations Convention on the Rights of Persons with Disabilities with an Optional Protocol ("Official Gazette of Montenegro-International Treaties", No.002/09));

Criminal Code of Montenegro ("Official Gazette of MNE", No. 70/2003, 13/2004 - corr. and 47/2006 and " Official Gazette of MNE", No. 40/2008, 25/2010, 32/2011, 64/2011 - other laws, 40/2013, 56/2013 - corr., 14/2015, 42/2015, 58/2015 - other law, 44/2017, 49/2018 and 3/2020);

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Family Law ("Official Gazette of RMNE", No. 1/2007 and "Official Gazette of MNE", No. 53/2016);

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Universal Declaration of Human Rights from 1948

Constitution of Montenegro ("Official Gazette of MNE", No. 1/2007 i 38/2013 - Amendments I-XVI)

Guide for Lawyers and Judges on the Free Legal Aid Institute, Association of Youth with Disabilities of Montenegro, Podgorica, June 2019.

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Law on Non-contentious Proceedings ("Official Gazette of RMNE", No. 27/2006 and "Official Gazette of MNE", No. 20/2015, 75/2018 - other law and 67/2019);

Law on Prohibition of Discrimination ("Official Gazette of MNE ", No. 46/2010, 40/2011 - other law, 18/2014 and 42/2017);

Law on the Prohibition of Discrimination against Persons with Disabilities („Official Gazette of MNE", No. 35/15);

Law on Protection and Exercise of Rights of Mentally Ill Persons ("Official Gazette of RMNE", No. 32/2005 and "Official Gazette of MNE", No. 27/2013);

Criminal Procedure Code ("Official Gazette of MNE", No. 57/2009, 49/2010, 47/2014 - decision of AdC, 2/2015 - decision of AdC, 35/2015, 58/2015 - other law and 28/2018 - decision of AdC);

ABOUT ORGANIZATIONS

Association of Youth with Disabilities of Montenegro (AYDM)

is a non-governmental, non-profit organization founded on 22 October 2001, registered under No. 1322 with the Ministry of Justice.

The Association is dedicated to providing support, opportunities and programs to strengthen the personal, educational and professional development of young people with disabilities. It brings together young people and students with all types of disabilities (*cross-disability approach*), as well as other young people without disabilities who are willing to participate and together with us are struggling to create a more inclusive society.

It deals with providing psycho-social support, creating conditions for inclusive education, encouraging young people with disabilities to acquire higher education, initiatives for appropriate legislative solutions, raising public awareness...

We carry out our activities through six programs, which are: Program for Education, Program for Employment and Development of Human Resources, Program for Independent Living, Program for Accessibility, Legal and Anti-Discrimination Program, and Program for International Cooperation.

You can get more information about the activities through the website [UMHCG](#) and portal [DisabilityINFO](#).

Centre for Civil Liberties (CCL) was founded in 2013 with the idea that through the affirmation of the protection of human rights and freedoms, people ready for civic activism will gather, with the necessary professional basis, dedicated to the principles of an open society.

At the beginning of the work, in 2014, a number of well-received initiatives were implemented. Particularly significant was the review and analysis of the relationship between the Constitutional Court and the Supreme Court in the field of the consequences of positive decisions on citizens' constitutional appeals. Proposals for improvements to the criminal legislation were submitted from the perspective of the protection of human rights and freedoms as part of the public debate.

After these few initiatives, there was a lull as the founders and members still had too many commitments in professional engagements, and some individually continued to work through various forms and other CSOs to represent the goals promoted in the founding acts of CCL. In 2019, we renewed the CCL initiative. With the personal efforts and understanding of several donors, CCL has embarked on realization of some of the basic

ideas. Thus, the project "Effectively to the Rule of Law" was realized, which recognized the problem of an effective legal remedy in the administrative procedures of Montenegro.

The web site of the organization CCL was created, and the project "Active locally indispensable nationally" was introduced, which will contribute to greater initiative of citizens, protection of human rights and freedoms, education of citizens on the rights of participation and decision making at the local level.

CCL will have a multimedia portal "Open Space" within the project this year, through which it will interactively open space for citizens to express their free opinions and present citizens' initiatives. Last but not least, I am particularly pleased that we were part of the project "All = in Access 2 Justice" with AYDM.

ABOUT AUTHORS



Marina Vujačić - AYDM

She was born on 25 June 1986 in Nikšić and finished elementary school "Branko Višnjić" in 2001 in Golija, where she was born, and then the high school "Stojan Cerović" in 2005 in Nikšić. She graduated from the Faculty of Philosophy in Nikšić in 2009, Study program in Sociology. She is a student of postgraduate studies in Social Policy and Social Work at the University of Montenegro, Faculty of Political Science, which she enrolled in October 2018. She was selected for the second time as Executive Director of AYDM in April 2019, for a five-year term beginning 1 May 2019. Previously, from 29 August 2011 to 30 September 2017, Marina was the Executive Director of AYDM for the first time. She resigned as Executive Director in August 2017 due to appointment to public office. She was State Secretary to the Ministry of European Affairs in the Government of Montenegro from 31 August 2017 to 1 March 2018. During her term of office, she coordinated the drafting of numerous strategic documents of the Ministry and those adopted by the Government in the process of negotiations with the EU. She has chaired the Consultative Body for the Implementation of the Public Information Strategy on Montenegro's Negotiations with the EU, chaired the meetings of the Commission for European Integration, etc. She has participated in various seminars and trainings in the fields of: human rights, protection against discrimination, rule of law, governance and leadership, communication in the process of EU negotiations, planning and writing projects for EU funds, financing NGOs from public funds, research, running a public advocacy and lobbying campaigns and all individual disability topics. She was involved in drafting and writing of: human rights report on persons with disabilities for Montenegro for 2010, 2011, 2012 and 2013, she is the author or co-author of other research, reports and publications. As the most important, she draws attention to the drafting of the *Alternative Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities in Montenegro* and its presentation to the members of the Committee in Geneva (Switzerland), in August 2017. She is currently a member of the Working Group on the drafting of the Action Plan for the Implementation of the Recommendations of the UN Committee on the Rights of Persons with Disabilities. She

is a trainer on the topic of human rights of persons with disabilities, non-discrimination, inclusive education, models of disability, social attitudes and media attitudes towards disability, equal opportunities and many others. She is involved in the education of persons with disabilities, teaching staff, public administration employees, lawyers, judges, representatives of political parties, students, high school students and many other target groups working with PWDs or in positions of drafting and/or implementation of laws and policies. She was a member of various Government Working Groups and Bodies from 2012 to 2017. She is the coordinator of the Disability Portal - Disabilityinfo.me initiated and edited by AYDM. She is also the editor of DisabilityINFO magazine.



Boris Marić – CCL

He has graduated from the Law Faculty of the University of Montenegro. Further developed through the School of European Integration, organized by the CCE, the Centre for Development of Non-Governmental Organizations (CDNGOs) and the European Movement in Montenegro, with the support of FOSI ROM, and the School of Democratic Leadership, organized by the Nansen Dialogue

Centre in Montenegro and the Council of Europe, as well as through a series of trainings in public policy and organizational management.

He started his employment at CDNGO as an editor of the NGO Newsletter, which he followed with further work in local self-government within the Secretariat for Sport, and then in the public company "Water and Sewerage", which he left from the post of head of a sector.

Afterwards, he was the director of the Parliamentary Party Movement for Change, where he was also the head of its parliamentary club in the Capital City Assembly, from which he himself with a group of like-minded people was expelled in a non-statutory manner for trying to publicly defend the programme and statutory provisions of the Movement for Change and the spirit of that political subject itself.

He was a member of the Working Group for the Preparation of the Accession Negotiations for Montenegro for Chapter 23 - Justice and Fundamental Rights, in front of the CCE, as well as the Governing Board of the broadest national coalition of NGOs "Collaborating to the Goal", until the appointment to the post of Minister of Labour and Social Welfare in the Government of Electoral Trust. He performed the ministerial function as an independent intellectual and a recognized civilian activist. The activities in managing the ministry were presented in a detailed report that he has drafted with his advisers.

He was a lecturer at the School of Democracy, organized by CCE with the support of the Friedrich Ebert Foundation. He is the author of numerous articles in the field of democracy and European integration, as well as co-author of several publications, some of which should be highlighted: Europe in my city - civil society, local governments, citizens - the role and place in the process of European integration, citizens' attitudes and perceptions of Integrative Processes; Judiciary and Public Judgment; Handbook for the Practical Application of the Aarhus Convention; Montenegrin Elections in envelope; Effectively to reach the Rule of Law, etc.

He is currently the Executive Director of the Centre for Civil Liberties - CCL, which focuses on the rule of law, and therefore monitoring the work of the judicial system of Montenegro, especially from the perspective of the exercise of human rights and freedoms.



Sergej Sekulović – CCL

He has graduated from the Law Faculty of the University of Montenegro. He also graduated from postgraduate studies at the Centre for Interdisciplinary Studies at the University of Sarajevo and the University of Bologna in the field of human rights and democracy. He has passed the Bar exam. He is an attorney (Member of the Bar Association since 2012), political analyst,

Vice-President of the Association of Lawyers of Montenegro, author of several professional articles, studies and columns on legal and social issues.







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