

## **Guiding Questions for the focus areas of the IX Session of the Open-ended Working Group on Ageing: Autonomy and independence**

### **1) In your country/region, how is the right to autonomy and independence of older persons defined in legal and policy frameworks?**

In Serbia the right to autonomy and independence is guaranteed through Constitution. Serbian Constitution explicitly prohibits discrimination based on age and the prohibition of discrimination based on age was later expanded in the Law on Prohibition of Discrimination<sup>1</sup>. Article 23 of the Law on Prohibition of Discrimination explicitly guarantees the right to dignified living conditions without discrimination as well as the right to equal access and protection from neglect and disturbance in using healthcare and other public services. The Law on Health Protection<sup>2</sup> explicitly guarantees equal access to services to persons over the age of 65. The Law on Social Protection<sup>3</sup> explicitly stipulates creation of tailor made plans for service provision for persons over the age of 65. Legal framework in Serbia differentiates between legal entity that is guaranteed to every citizen at birth and is inalienable, and legal capacity that is a narrower concept and relates to person's ability to make decisions with potential legal repercussions. A person is generally considered in full legal capacity upon turning 18 and persons can be deprived of legal capacity through court decision. If a person is partially deprived of legal capacity, they are equal to a person between 14 and 18 years of age. Being fully deprived of legal capacity is equal to a person below 14 years of age. Two pieces of legislation regulate processes related to depriving a person of legal capacity: Family Law<sup>4</sup> and the Law on Noncontentious Proceedings<sup>5</sup>. Both, processes of depriving a person of legal capacity and of restoring one's full legal capacity are treated as urgent/ emergency proceedings. A recent development in Serbian legislation is that the law now stipulates that in cases when a court deprives a person of legal capacity, there is a mandatory review process to establish whether full legal capacity can be restored within three years. This is a significant step forward in comparison to previous period. The procedure for depriving one of legal capacity demands review by a court expert. At least two medical doctors of the appropriate specialist profile must examine the person who is the subject of the procedure.

### **2) What other rights are essential for the enjoyment of the right to autonomy and independence by older persons, or affected by the non-enjoyment of this right?**

Non-enjoyment of the right to autonomy and independence also puts other human rights at risk, those guaranteed by national legislation and international treaties. Serbian Constitution guarantees the right to dignity as well as the right to physical and psychological integrity. The Laws on Health and Social Protection also guarantee the right to health and social protection. The guarantees of the Law on

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<sup>1</sup> "Official gazette of RS", no. 22/2009

<sup>2</sup> " Official gazette of RS ", no. 107/2005, 72/2009, 88/2010, 99/2010, 57/2011, 119/2012, 45/2013, 93/2014, 96/2015, 106/2015 and 113/2017

<sup>3</sup> "Official gazette of RS", no. 24/2011

<sup>4</sup> "Official gazette of RS", no. 18/2005, 72/2011 and 6/2015

<sup>5</sup> "Official gazette of RS", no. 25/82 and 48/88, no. 46/95, 18/2005, 85/2012, 45/2013, 55/2014, 6/2015 and 106/2015

Prohibition of Discrimination are also jeopardized by non-enjoyment of the right to autonomy and independence.

### **3) What are the key issues and challenges facing older persons in your country/region regarding autonomy and independence? What studies and data are available?**

Firstly, and related predominantly to autonomy is that recently education has been organized for court judges in relation to cases of depriving persons of legal capacity. This is especially important for older persons living with some form of dementia because it is a progressive disorder. Prior to this, a person in any stage of dementia would be fully deprived of legal capacity by court of law, which deprived persons in early stages of dementia of getting legal support and making decisions related to their living arrangements and property.

Another issue is access to adequate legal support. Adequate and accessible free legal assistance should be available, to ensure that every socially vulnerable older person receives free legal assistance in exercising personal, proprietor and other rights in court and in front of other public institutions. In procedures where older persons are being declared partially legally incompetent, they need adequate representation; Older people are entitled to participate in choosing a person who will support them in exercising their legal capacity.

The recently (2014) amended Law on Noncontentious Proceedings explicitly states that court judges must personally interview the person whose legal capacity is being reviewed, unless the interview is impossible due to the person's psychological or physical status. In practice, until recently, according to the research study Deprivation of legal competence: laws and practice in the Republic of Serbia, 2014, Kosana Beker, medical model was the dominant criterion in these processes and in majority of cases medical diagnosis was the deciding factor, with 87% of analyzed cases showing that the judges never interviewed the person whose legal capacity was being reviewed. However, even with the amended Law there is still a possibility for the court to cite psychological or physical status of the person as the reason for not performing a personal interview. With the changes made to the Law it was also made mandatory to review prior cases of persons being deprived of legal capacity and potentially reinstate their legal capacity.

Analysis shows that the practice of depriving persons of legal capacity predominantly affects persons with intellectual difficulties, then persons with psychosocial difficulties and that the ratio of older persons with dementia is on the rise whereas the ratio of persons with addiction is on the decline.

According to the data of the Centers for Social Welfare in 2010 17.2% adults in Serbia had the appointed legal guardian and in 2014 19.2% adults in Serbia had the appointed legal guardian.<sup>6</sup>

As for independence, even though the rights that should grant independence exist in Serbian legal framework, there is also inequality in access to services of health and social care that in practice means that some persons are not able to exercise independent choice. Essentially, health and social care systems should be reformed to better reflect the demographic structure in Serbia. A separate issue is that there is no sufficient support to modification of homes to make them more age friendly and to ensure that older persons can use their capacities and live more independent lives.

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<sup>6</sup> Legal competence: judicial practice and law in Serbia 2016, 2016, Kosana Beker and Tijana Milosevic

Available studies:

Introduction to ageing and human rights of older people in Serbia, 2015, Nevena Petrusic, Natasa Todorovic, Milutin Vracevic<sup>7</sup>

Deprivation of legal capacity: laws and practice in the Republic of Serbia, 2014, Kosana Beker<sup>8</sup>

#### **4) What steps have been taken to ensure older persons' enjoyment of their right to autonomy and independence?**

The major recent step was the amending of the Law on Noncontentious Proceedings (2014), ensuring that court judges must personally interview the person whose legal capacity is being reviewed, unless the interview is impossible due to the person's psychological or physical status. As stated above, education for judges is also a step into the right direction as is the mandatory three year review for persons whose legal capacity has been partially or fully revoked.

According to the Law on Social Protection (2011), creation of tailor made plans for service provision for persons over the age of 65 is mandatory. The same law introduces competition of service providers which should lead to better quality and more variety of services being available.

#### **5) What mechanisms are necessary, or already in place, for older persons to seek redress for the denial of autonomy and independence?**

The existing mechanisms include:

If one's right to autonomy and independence has been denied the institutions to address are Ombudsman/ Protector of Citizens and Protector of Patients' Rights.

If a Law on Prohibition of Discrimination has been breached, the institution to address is Commissioner for Protection of Equality.

Ultimately, if human rights are breached, the institution to address is the Constitutional Court of the Republic of Serbia. This option is available to persons deprived of legal capacity as well, unlike other, lower courts.

#### **6) What are the responsibilities of other, non-State, actors in respecting and protecting the right to autonomy and independence of older persons?**

Non-state service providers must in all their activities adhere to the Constitution and respect the constitutionally guaranteed rights: first and foremost the right to dignity. The media have particular responsibility not to reinforce ageist stereotypes through language and reporting style, because this creates background noise that ultimately influences service provision as well as the decisions made by individual judges in the court of law. Civil sector also has the important role to advocate efficient implementation of the existing legal framework but also to suggest improvements to legislation and practices. Additionally, the civil sector, in cooperation with researchers and academia has the role to

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<sup>7</sup> <https://www.redcross.org.rs/media/1671/introduction-to-ageing-and-human-rights-of-elder-people-1.pdf>

<sup>8</sup> <https://www.mdri-s.org/wp-content/uploads/2013/03/Lisenje-poslovne-sposobnosti.pdf>

decrease the knowledge gap related to ageing related issues in order to provide evidence on which to base recommendations for improving public policy.