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Pursuant to Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, we hereby submit this communication on individual and general measures in the

Case of X and Y v. Croatia

(App. no. 5193/09)

In the present case the European Court of Human Rights (hereinafter referred to as the „ECtHR“) found a violation of Article 6 Paragraph 1 of the European Convention on Human Rights and Fundamental Freedoms regarding the first applicant X and a violation of Article 8 regarding the second applicant Y, related to legal capacity of both applicants.

On October 15, 2012 the Government of the Republic of Croatia submitted an Action Plan in the abovementioned case (DH-DD(2012)998). Concerning individual measures, the Government argued that in case of the first applicant X it was not possible to reopen proceedings concerning the deprivation of legal capacity since such reopening is not allowed by the national legislation and that applicant's representative did not ask for reopening of the proceedings as instructed by the ECtHR. In case of the second applicant Y the national courts, by their final decision, did not divest her of legal capacity following the judgment in the present case. As per general measures, the Government noted that competent ministries are examining the need for undertaking additional general measures regarding the issues identified by the ECtHR in the abovementioned judgment.

COMMENTS ON THE INDIVIDUAL MEASURES

In case of the first applicant, the Government claimed that the ECtHR omitted to recognize that Family Act, which is used as *lex specialis* in case when legal capacity is divested, does not allow reopening proceedings in cases that have entered into force (Section 319(1) of the Family Act) and that therefore Section 428(a) of the Civil Procedure Act was not applicable. Further, the Government argued that the representative of the first applicant did not even request such proceeding to be reopened. Under such circumstances, the Government concluded that there have not been any other individual measures at national authorities' disposal concerning the first applicant.

These circumstances, however, do not prove the Government's claim that there have not been any other individual measures applicable concerning the first applicant. According to Section 324(2) of the Family Act, national courts are authorized to initiate proceeding for restoration of legal capacity *ex officio* and this authority is given to centers for social welfare. According to Section 330(1) of the Family Act, the court may restore legal capacity of a person if reasons for deprivation of such capacity from Section 159 of the same Act ceased to exist. In the present judgment, the ECtHR found that it was not upon the medical expert to decide whether reasons for deprivation of legal capacity exist and that it was upon the judge to balance carefully all relevant factors in order to assess the proportionality of the measure undertaken (§§ 85-86). Therefore, in its very essence, the violation of rights of the first applicant concerned the implementation of Section 159(1) of the Family Act where reasons for deprivation of legal capacity were not properly assessed and a fair balance between all relevant factors on proportionality was not struck when intrusive measure was undertaken. In the light of the ECtHR's judgment that there has been a violation of Article 6(1) of the Convention, the reasons for divesting legal capacity of the first applicant ceased to exist and, regardless of the fact that applicant's representative did not seek reopening of the proceeding, national authorities had other legal instruments at their disposal to revise the status concerning the first applicant's legal capacity.

We also want to emphasize that according to Section 165 of the Family Act, following three years after the decision on deprivation of legal capacity entered into force, the center for social welfare may request medical data to be provided by primary medical care doctors concerning persons divested of legal capacity. In its Action Plan the Government did not show that such a measure was undertaken by national authorities, although the first applicant has been divested of legal capacity for more than four years.

Both the Center for Social Welfare in Ivanec and the Municipal Court in Ivanec are aware of the ECtHR's judgment in the present case, as confirmed by the Government in its Action Plan concerning general measures (translation and dissemination of the judgment), and there is no evidence that these authorities took any legal measures to revise the judicial decision on the first applicant's deprivation of legal capacity despite having various legal instruments at their disposal.

COMMENTS ON THE GENERAL MEASURES

Besides finding violations in the present case, the ECtHR also found violations of human rights of persons divested of legal capacity in two other cases – *X v. Croatia* and *Krušković v. Croatia*. The Government, therefore, should be deeply concerned with the quality of the national legislation and ongoing judicial and administrative case law that leads to abusive consequences. Although in all of these cases the violations of human rights happened against persons divested of legal capacity, the Government has different approaches when considering whether any general measures should be undertaken, as for example in case of *X v. Croatia*¹ and in case of *Krušković v. Croatia*² (both under supervision of the Committee of Ministers). Our associations also provided communications under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in these cases.³

The Government is also aware of the obligations set forth by the Article 12 of the United Nations Convention on Rights of Persons with Disabilities (hereinafter referred to as "UN CRPD"). The necessity of due changes of the legislation to improve the position of people with disabilities was emphasized by the Croatian Government in its initial report to the UN CRPD Committee.⁴ In that Initial Report the Government stated that:

"A working group for the preparation of the analysis of impacts of the Family Law application with a proposition of recommendations for its improvement has been established with the MFVAIS.⁵ Based on the gathered data on the application of the Family Law by courts, social welfare centers and other relevant data from professional and scientific institutions, analyses of the effective legal regulation and previous court practice, recommendations for removing any lack of clarities and doubts in the Family Law application will be made and improvements in certain law solutions will be adopted. The working group noticed the need for improving legal regulations in the field of the guardianship institute, in order to fully harmonize protection of rights of persons divested of the work capacity with UNCRPD requirements. The complexity of regulating this field on the normative and institutional and implementation levels will require a systematic long-term work in order to achieve satisfactory impacts of regulations application."

As of 2009, both the People's Ombudsman and Ombudswoman for Persons with Disabilities have been warning the Government and **recommending changes of legislation as well as judicial and administrative case law** to be undertaken in order to ensure compliance with international standards of human rights protection when it comes to legal capacity issues.

¹ Communication by Croatian authorities no. DH-DD(2011)612E

² Communication by Croatian authorities no. DH-DD(2012)374

³ Communication by the NGO (The Shine) no. DH-DD(2012)597E in case of *Krušković v. Croatia* and Communication by the NGOs (The Shine and the Mental Health Europe) no. DH-DD(2012)871E in case of *X v. Croatia* with reply of the Government.

⁴ Initial Report submitted by the Croatian authorities under Article 35 of the CRPD, October 27, 2011, pp. 19-20, CRPD/C/HRV/1 (term of "legal capacity" is mistakenly translated by Croatian Government as "work capacity").

⁵ The Ministry of Social Policies and Youth at present.

In her 2011 annual report the Ombudswoman for Persons with Disabilities again warned the Croatian authorities that it is necessary to amend national legislation, including the Family Act in order to implement international standards. Furthermore, being aware that such process may be long-lasting, the Ombudswoman paid special attention to improvement in national case law in order to ensure that restrictions of fundamental human rights of persons with disabilities are minimalized.⁶

In his 2011 annual report the People’s Ombudsman concluded there have been no positive changes in national case law since 2009, referring to the number of people divested of legal capacity in the Republic of Croatia. The People’s Ombudsman deems it necessary to reform the institute of guardianship without delay and especially to abandon the institute of plenary guardianship.⁷

Statistical data regarding persons divested of legal capacity

As of 31 December 2011 there have been **18,832 persons divested of legal capacity** in the Republic of Croatia, **16.355** of which **were fully divested**.⁸ Restoration of legal capacity is rarely applied and national authorities in 2012 **restored legal capacity to only 62 persons**.

The statistical data further show that deprivation of legal capacity is closely connected to institutionalization of people divested of such capacity. In 2011, **4,842 persons divested of legal capacity were placed in residential social-care homes**. The administrative case law reflected in statistical data shows that the most implemented measure concerned giving permissions to guardians **to sell or put a mortgage on property of these persons which was done in 3.164 of cases** during 2011. Deprivation of legal capacity indeed produces the same effect as recognized by the ECtHR in its judgment in the present case (§ 103) which interferes with private life of all persons in similar circumstances. Taken in conjunction with the nature of violation found in this case, it is reasonable to believe that thousands of other people in the Republic of Croatia face similar problems and violations of human rights continue even after several ECtHR judgments have been brought against the Republic of Croatia concerning people divested of legal capacity.

The following table and graphs give a detailed comparative analysis of official statistical data concerning persons divested of legal capacity in the Republic of Croatia for the period of 2003-2011.⁹

	2003	2004	2005	2006	2007	2008	2009	2010	2011
Total number of persons divested of legal capacity	13.310	13.875	15.220	16.230	16.845	17.810	17.944	18.087	18.382
Number of persons fully divested of legal capacity	N/A	N/A	N/A	N/A	15.023	16.006	16.011	15.761	16.355
Number of proceedings for	2.186	2.244	2.640	2.511	2.301	2.487	2.204	1.987	1.897

⁶ 2011 Report of the Ombudswoman for Persons with Disabilities, pp. 112-116 adopted by the Croatian Parliament in 2012 (Croatian only).

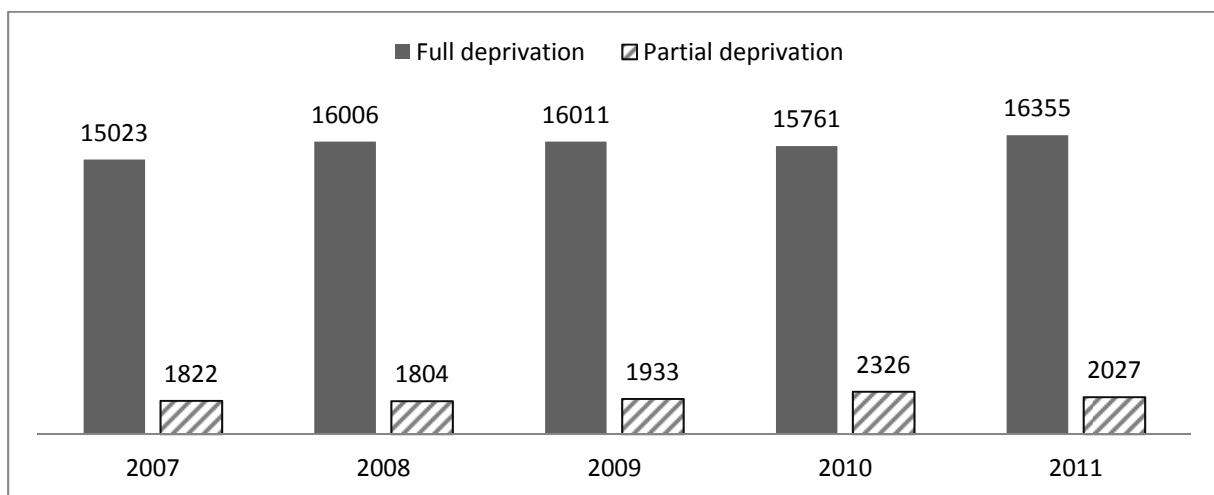
⁷ 2011 Report of the People’s Ombudsman, pp. 98-100, adopted by the Croatian Parliament in 2012 (Croatian only).

⁸ Official statistical data provided by the Ministry of Social Policies and Youth, 2012.

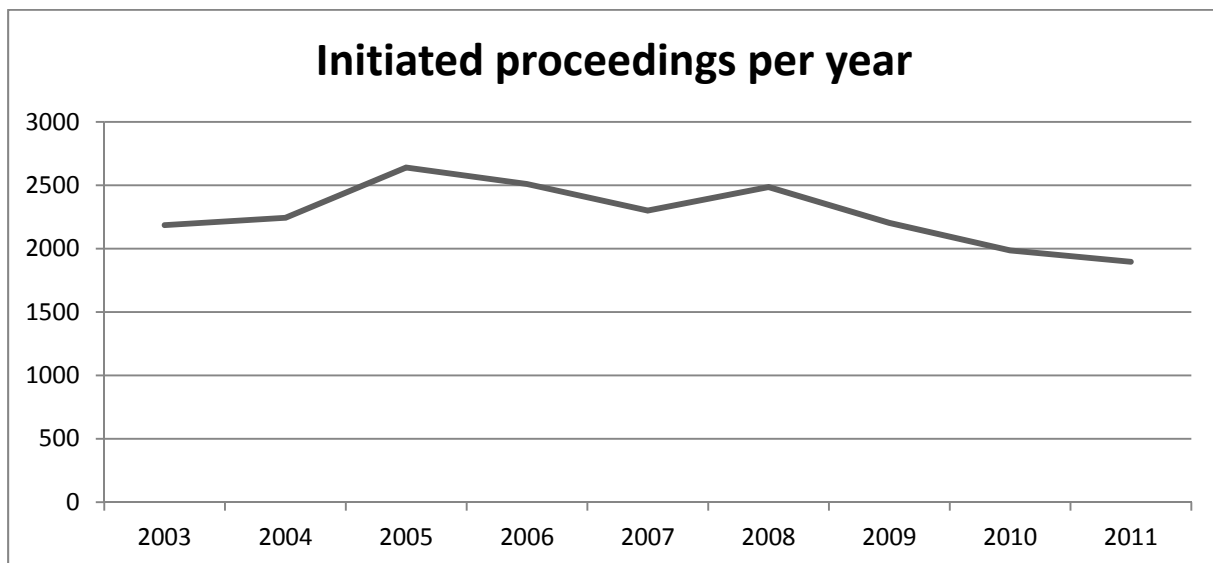
⁹ Official statistical data provided by the Ministry of Social Policies and Youth.

deprivation of legal capacity initiated									
Number of persons fully divested of legal capacity per year	1.360	1.418	1.425	1.473	1.751	1.681	1.406	1.100	1.297
Number of persons partially divested of legal capacity per year	179	217	216	274	339	290	297	266	247
Number of decisions for selling or mortgaging property of persons	1.741	1.882	2.431	2.696	2.969	2.923	3.456	3.175	3.164
Number of decisions on restoration of legal capacity	25	33	30	45	20	35	49	54	62
Number of complaints against appointment of guardian	6	7	12	6	5	16	16	16	13

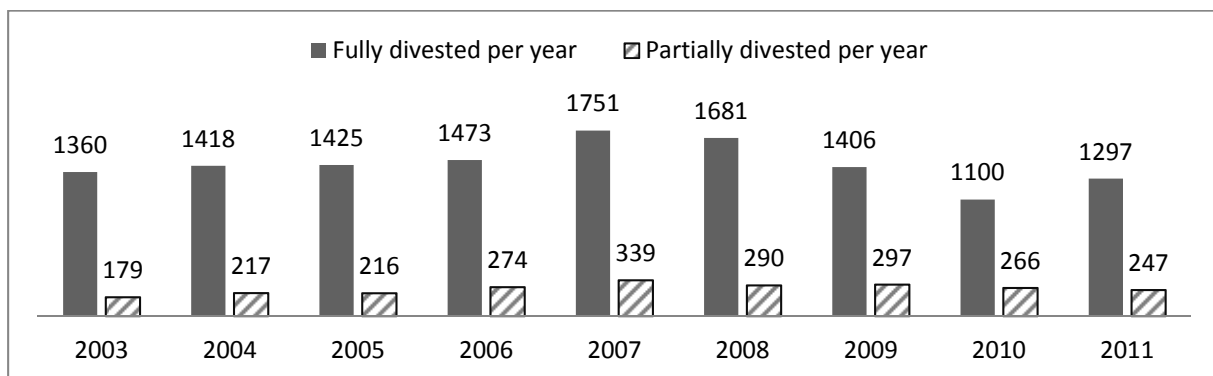
A) Number of persons fully divested of legal capacity vs. number of persons partially divested of legal capacity (as for period 2007-2011).



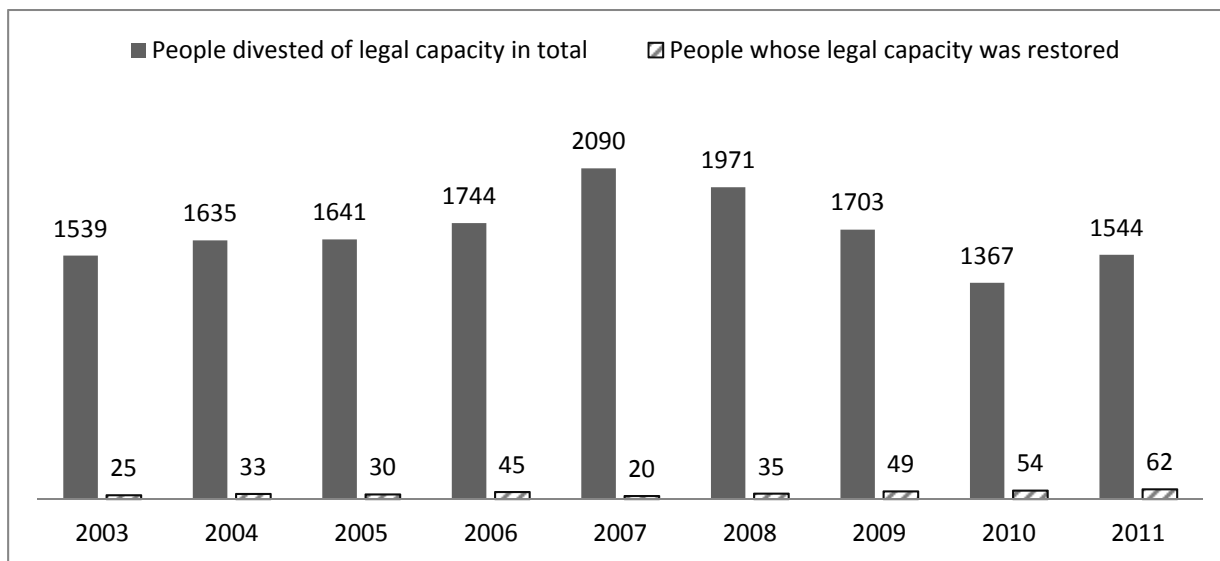
B) Trend of initiated proceedings for deprivation of legal capacity for the period 2003-2011



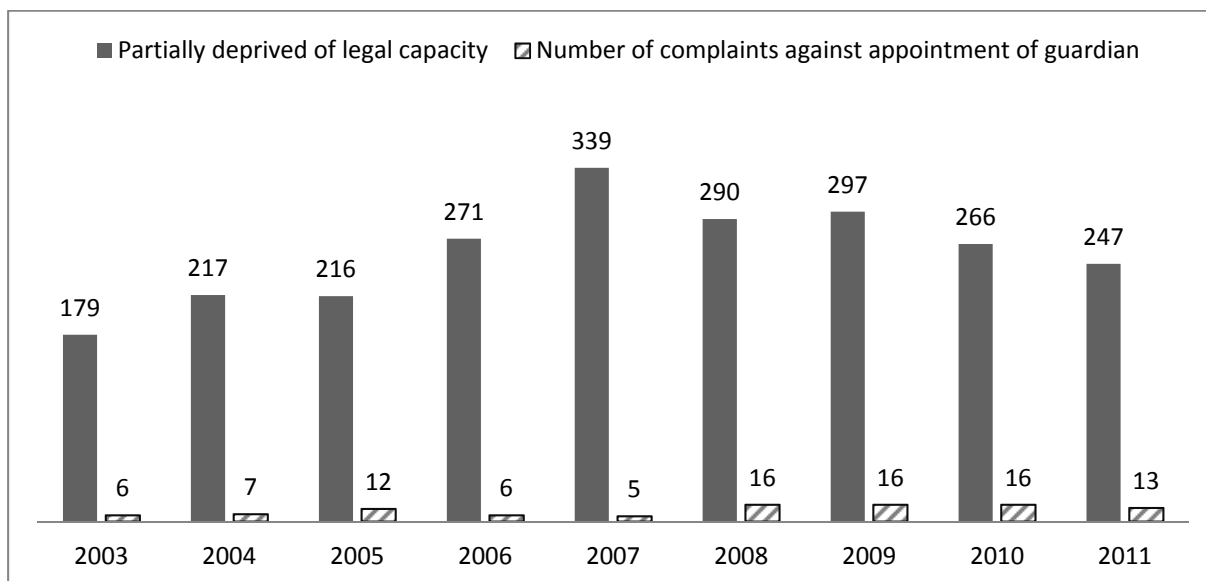
C) Number of persons fully divested of legal capacity vs. persons partially divested of legal capacity for the period 2003-2011



D) Number of people divested of legal capacity (fully and partially) vs. number of people whose legal capacity has been restored in the period of 2003-2011



E) Number of people partially divested of legal capacity vs. number of people who complained at the appointment of the guardian in the period 2003-2011



At the basis of presented numbers and charts A) and C) it is obvious that there is practically no differentiation between full and partial deprivation of legal capacity, although partial deprivation of such capacity is a **less intrusive measure** and available to national authorities as of Family Act changes in 2003. The Ombudswoman for Persons with Disabilities also confirmed that there is evidence of massive use of full deprivation of legal capacity institute to which mainly persons with psycho-social disabilities (mental health problems) are subjected.¹⁰

While statistical data show slight decrease in the number of proceedings for deprivation of legal capacity per year (Chart B), the numbers in Chart D show a minimal number of proceedings for restoration of legal capacity on annual basis. Non-recognition of legal instruments for restoration of legal capacity is evident in the abovementioned Action Plan submitted since the Government did not resort to these instruments to remedy the first applicant's legal status within the context of individual measures. Furthermore, although Section 165 of the Family Act prescribes the possibility that centers for social welfare periodically revise circumstances which led to deprivation of legal capacity in individual cases, this legal provision does not place any obligation on respondent authorities to do so. Therefore, **there is no automatic revision system** prescribed in Croatian legislation and deprivation of legal capacity may be endless for persons concerned.

The statistical data also show a low number of complaints against appointment of guardians, especially when compared to the number of persons partially divested of legal capacity (Chart E). Reasons for a low number of cases where legal capacity is restored (Chart D) as well for a low number of complaints against the appointment of the guardian (Chart E) may be also attributed to the fact that in many cases decisions of the courts or centers for social welfare are not served to persons concerned and that those persons do not have any knowledge about the fact that they were divested of legal capacity. Even in the present case the ECtHR found that the decision on depriving the first applicant of legal capacity was not served on her, which also resulted in the inability to use any remedies against the judicial decision (§ 92). Accordingly, it is reasonable to assume that many other people in similar situations are not able to use any remedies against

¹⁰ 2010 Report of the Ombudswoman for Persons with Disabilities, pp. 118-119, adopted by the Croatian Parliament in 2011 (Croatian only).

decisions made by judicial and administrative bodies due to the lack of knowledge about proceedings undertaken to deprive them of legal capacity.

Possible interventions in legislation

As from perspective of Article 12 of the UN CRPD, the Republic of Croatia is **obliged to abandon the system based on divesting legal capacity for all adult persons with disabilities and replace it with the system that is based on supported decision-making.**¹¹ Although this obligation was not under the scope of present judgment, which focused on violations of Articles 6(1) and 8 of the European Convention on Human Rights and Fundamental Freedoms, this does not prevent the respondent state to implement the UN CRPD requirements.¹² Furthermore, the European Union also formally confirmed the UN CRPD on December 23, 2010 and therefore the Committee of Ministers should take the UN CRPD standards provisions into account when referring to reform of legal capacity system in the respondent state.

We are aware that developing the system of supported decision-making would necessarily have to be of long-term nature and that people not covered by that system would still fall within the scope of legislation providing for substitute decision-making (guardianship). Therefore, it is a matter of reality that „a period of transition“ would be needed for the respondent state to fulfill obligations imposed by the UN CRPD regarding legal capacity. However, the existence of „a period of transition“ does not mean that nothing shall be undertaken by the respondent state and that violations of human rights against persons with disabilities (divested of legal capacity) should continue until the new system is established. The Government of the Republic of Croatia should not find the complexity of reforms aimed at establishing system of supported decision-making as an excuse for failing to protect human rights and continuing with the same violations in similar cases.

In that respect, the full execution of judgment in the present case may contribute to preventing human rights violations against people who remain to be under guardianship and those whose legal capacity is questioned during the mentioned “period of transition”. We hereby suggest legal solutions that may be done by amending Family Act following judgment in present case.

In the present case the ECtHR held that *„judges adopting decisions with serious consequences for a person's private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons“* (§ 84). Following this finding the Republic of Croatia, should **amend Section 326(4) of the Family Act** that allows exclusion of persons concerned on the ground of assessment provided by medical expert.

The ECtHR further concluded that *„However, at the end of the day, it is the judge and not a physician, albeit a psychiatrist, who is to assess all relevant facts concerning the person in question and his or her personal circumstances. It is the function of the judge conducting the proceedings to decide whether such an extreme measure is necessary or whether a less stringent measure might suffice. When such an important interest for an individual's private life is at stake a judge has to balance carefully all relevant factors in order to assess*

¹¹ Concluding observation of the UN Committee on Rights of Persons with Disabilities regarding Tunisia (CRPD/C/TUN/CO/1, May 13, 2011, § 23), Spain (CRPD/C/ESP/CO/1, October 19, 2011, § 34), Peru (CRPD/C/PER/CO/1, May 9, 2012, §§ 25, 27), Hungary (CRPD/C/HUN/CO/1, October 22, 2012, § 26), China (CRPD/C/CHN/CO/1, October 15, 2012, § 22) and Argentina (CRPD/C/ARG/CO/1, October 8, 2012, § 20).

¹² See Article 53 of the ECHR: „Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.“

*the proportionality of the measure to be taken. The necessary procedural safeguards require that any risk of arbitrariness in that respect is reduced to a minimum” (§ 85). Accordingly, the Republic of Croatia should **amend Sections 327 and 328 of the Family Act** in order to ensure that it is upon the Court and not upon medical experts whether extreme interference in private life, such as deprivation of legal capacity is, would be undertaken.*

*“... in the Court’s view it would still be preferable for the judge conducting the proceedings to verify that these conclusions were not arbitrary; to hear witnesses as well as the doctor. In particular, it was for the judge to make any conclusions as regards the issue of divesting the first applicant of her legal capacity” (§ 86). The Republic of Croatia shall amend provisions allowing the national courts to make decision on the basis of the medical report from the hospital where a person concerned is placed for treatment – **Section 327(2) of the Family Act.***

The ECtHR made important conclusion when saying that: *„In order to ensure that the sick and elderly are properly cared for, the State authorities have at their disposal other means than divesting such persons of their legal capacity. Divesting someone of legal capacity is a very serious measure which should be saved for exceptional circumstances” (§ 91). Terms of “very serious measure” and “exceptional circumstances” have significant meaning within the context of the European Convention on Human Rights and Fundamental Freedoms because in line with the ECtHR case law their implementation necessarily has to be subjected to the test of proportionality that corresponds to every single situation and personal circumstances of an individual. In such situation, full deprivation of legal capacity that has severe consequences as identified by the ECtHR (§ 90) and, therefore, the Republic of Croatia shall **amend Section 159(1) of the Family Act in order to abandon full deprivation of legal capacity.***

The ECtHR noted that in the present case *„the decision divesting the first applicant of legal capacity was not served on her, despite the fact that at that time she still preserved legal capacity since the decision in question had not yet become final. However, by failing to inform the first applicant of that decision, the Municipal Court also divested her of the possibility of using any remedies against it. Therefore, any possible defects in the proceedings before the first-instance court could not be remedied at further instance” (§ 92). The Republic of Croatia, therefore, **shall amend Section 329(2) of the Family Act** that allows decisions on divesting of legal capacity not to be served on persons concerned depending on their medical condition.*

It is also of fundamental importance to **amend Article 319(1) of the Family Act** to allow reopening of judicial proceedings of people divested of legal capacity in order to implement decisions of the ECtHR and address individual measures in appropriate manner.

We are aware from different sources, primarily through the communications of the Government of the Republic of Croatia to the UN CRPD Committee and to the Committee of Ministers, that the Government established a task force to identify problems in current legislation and to propose legal solutions. However, nothing about such task force is known to the public or civil society organizations and all possible activities happen without knowledge of the interested public. Furthermore, while being aware that civil society organizations in Croatia advocate for the reform of the system allowing deprivation of legal capacity, the Government never invited or consulted these organizations for the purpose of legislative reform. At this moment, only the communications provided by civil society organizations to the Committee of Ministers in the process of execution of ECtHR judgments serve as channels through which civil society and people with disabilities can express their opinions and get a reply from the Government when it comes to reform of legislation concerning legal capacity.

CONCLUSION

Considering severity of violations identified by the ECtHR in the present case, and taking that in conjunction with other cases concerning people divested of legal capacity in the Republic of Croatia (cases of X. and Krušković, as mentioned above) and that the Government of the Republic of Croatia has been aware for many years that there are significant defects in current legislation and case law concerning guardianship for adults, we unfortunately have to conclude that the respondent Government continues to maintain legislation and consequent case law that may lead to violations of human rights of people with disabilities.

Therefore, we recommend to the Committee of Ministers in respect to the execution in the present judgment:

- 1) To bring an Interim resolution to the Republic of Croatia to express concern over maintaining legislation and case law that may bring to violations of human rights related to legal capacity; to propose legislative interventions and suggest involving civil society in legislative processes with respect to the execution pursuant to Rule 16 of Rules of the Committee of Ministers, and
- 2) To give priority to supervision of judgment in this case according to Rule 4.1 of Rules of the Committee of Ministers since problems identified by the ECtHR are of systemic nature.



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