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SOCIAL MODEL OF DISABILITY: FUTURE AND CHALLENGES IN ITS APPLICATION IN BULGARIAN LEGISLATURE

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Abstract: *The Convention on the Rights of Persons with Disabilities (CRPD) is often defined as a paradigm shift in the rights of persons with disabilities. Implementing it is a major undertaking requiring the involvement of many groups of stakeholders. The needed reforms are not only from legal nature, but also a major shift in the way society views disability. The purpose of this report is to outline the differences between the Social constructionist model of disability and the Pre-Social model (usually called Medical approach) because there is still a big misunderstanding in the Bulgarian legal doctrine about the significance of CRPD. The second part of the report describes steps Bulgaria has undertaken in order to synchronize its legislature with this international treaty. This paper argues that the big challenges and reforms are yet to come.*

Keywords: *persons with disabilities, mental disability, psychological disability, CRPD, Convention on rights of persons with disabilities, Bulgarian legislature, Natural Persons and Support Measures Act, Persons with disabilities act, UN, incapacity*

I. EVOLUTION OF THE CONCEPT OF MENTAL DISABILITY:

The definition of the word "mental disability" is important, because it is not only a theoretical construct, but also intertwines with philosophical and legal topics about existential-ontologic views.

The medical model defines disability as resulting solely from a person's physical condition, which leads to a reduced quality of life, and the only way to restore it is through medical procedures that lead to a state of "normality". The main strategies used by the medical model are related to the correction of the existing insufficiency and the provision of medical, psychological and professional rehabilitation. The concept of a fair society, viewed through this prism, includes investing in health care and other related services to heal the disability, to improve the functions of the physical body so that these persons can be included in society to the extent their condition allows. The person is assigned a passive role, only in theory is he the active one in the legal relationships, but in fact – he is an object, his will – completely replaced. The concept of substitute decision-making is embedded in the traditional institutions of guardianship and curatorship and it hasn't changed that much for the last millennia. Thus, the legal and social order is too focused on the individual, which results in other members of society to more easily believe in certain stereotypes about people with mental illness, to presume how far their possibilities extend without even having enough information about them. This approach has been heavily criticized by scientists and activists dealing with social justice for people with disabilities in the last four decades.⁴⁵

In the 1960s and 1970s, the more modern "social" model of disability was established, and it proposes that there is no equivalence between disablement and disability. The term "disability" is broader and includes, but is not limited to, personal disablement. Instead, other circumstances are taken into account, namely: environmental barriers that hinder the full and effective participation of persons with disabilities in society. Thus, the focus is shifted from the individual impairment to the interaction between persons with impairments and attitudinal and environmental barriers. The society, therefore, must answer the question how to provide an accessible

⁴⁵ Finkelstein, 1980; Oliver, 1990, 1996; UPIAS, 1976

environment for such persons. The main strategies are related to the removal of existing barriers and the creation of a universal design – i.e products that can be used by all people, regardless of their disability or lack of such. The disablement is not seen as an insurmountable consequence of the disability, but as a consequence of the lack of support, which can be compensated by appropriate support measures and networks that should be accessible to everyone. Thus, mental disability becomes a psycho-social phenomenon.

These challenges are very relevant for all people with disabilities, but it is even harder for people with mental illnesses. The reason is the apparent conflict between the right to equality before the law (Article 12 of the CRPD) and the right to life (Article 10 of the CRPD), as well as the protection against exploitation, violence and harassment (Article 16 of the CRPD). The medical model does not offer a reasonable solution as to how a person who does not understand the nature and significance of their actions, could make a decision about their medical treatment or how to engage in civil contracts. It seems impossible to respect the wishes of this person, and at the same preventing their exploitation. Another challenge is the fact that mental illness is usually a dynamic condition. Therefore, it is possible that the person has different decision-making capacity in different moment. Capacity should be attached to a particular legal decision at a particular time.⁴⁶⁴⁷

II. MEDICAL AND SOCIAL MODEL IN BULGARIA:

Bulgaria ratified CRPD in 2012 and with this came the obligation to put its legislation in line with the Convention. This is a major challenge that, eight years after its ratification, is still being ignored, given the thriving debate around the world. The moment for a gradual change in the right direction was also missed (by following Recommendation № R (99) 4 of the Committee of Ministers of the Council of Europe on the principles of legal protection of incapacitated adults). The existing academic and public discussion, as far as there is one, focuses on the question of whether there is a need for reform in the existing legal regime. According to the international obligations of Bulgaria, however, the right question to ask is not **whether** but **when and how change will take place**.

Legal capacity (or lack of such) is regulated by Persons and the Family (PFA) act. According to it, upon reaching the age of 18, persons become adults and fully capable of acquiring rights and obligations solely by their actions. Minors and adults who are unable to make decisions due to mental illness become incapable. The severity of the mental state defines whether the capacity is partially or fully lost. Legal acts are performed by their guardians on their behalf. Adults with such suffering, whose condition is not so severe, are placed under curatorship. They perform legal actions with the consent of their curator, except for small transactions to meet their current needs or when they spent what they have acquired through their job. In the above mentioned cases, they are fully capable of performing those actions on their own. The placement of a person under guardianship/curatorship requires the simultaneous presence of the following two prerequisites: 1. the person has mental condition (medical criterion) 2. the person cannot take care of his / her affairs (legal criterion).

This legal regime was first introduced in 1949 and it is not in harmony with the modern social model for disability. It reflects very different socio-economic organization of society. The terminology of PFA and the idea of disability, which can lead to loss of legal capacity, is outdated and discriminatory. The terms which PFA are "mental retardation", "mental disease" and they do not meet the standards of modern society or those of CRPD.

The prevailing model in Bulgarian legislation is this of substituted decision-making, there is no viable alternative to it, and the "care" of individuals is identified with the deprivation of their

⁴⁶ Salzman, L. – Rethinking Guardianship (Again), p. 45

⁴⁷ Joshua M. Baruth, MD, PhD and Maria I. Lapid, MD - Influence of Psychiatric Symptoms on Decisional Capacity in Treatment Refusal

civil rights.⁴⁸

This became the reason for Constitutional Case N10 /2014, when the Ombudsman of the Republic of Bulgaria requested the establishment of unconstitutionality of Art. 5, para. 1 of the on Persons and the Family Act (PFA) in the part "and become incapable" and Art. 5, para 3 by the Constitutional Court. There were already two major decisions of European Court of Human Rights (ECHR), by the power of which Bulgaria was convicted for violation of the rights of people with disabilities⁴⁹. The request of the Ombudsman was denied. The conclusions of the Constitutional Court in Case N10/2014 are very different than the ones reached by other constitutional courts in other countries with very similar legislature on the matter. The Bulgarian Constitutional court didn't find the deprivation of legal capacity problematic and instead, issued a decision, according to which the deprivation is part of the safeguards created by the state to protect people with disabilities. These conclusions cannot be shared, because of several reasons: The Constitution guarantees the equality of citizens before the law (Art. 6, para. 2, first sentence), and also "the dignity and rights of the individual" (Art. 4, para. 2). It is clear that people with disabilities must be able to enjoy the same guarantees of equality before the law and protection of their rights. Discrimination based on personal status is prohibited (Art. 6, para. 2, second sentence). "One of the basic principles of the rule of law is that the legislation reflects and develops the principles and rights enshrined in the Constitution."⁵⁰, and according to modern understandings, deprivation of legal capacity (especially as disproportionate as in the current Bulgarian laws) is an act of discrimination, disregard of inherent dignity of people with disabilities and an imminent danger to the exercise of individual rights. Due to the presented arguments, the abolition of the full deprival of legal capacity is the only way to preserve the spirit of the Constitution.

The second argument is that the declaration of such provisions as unconstitutional "will create a significant gap in the legal regime of persons with disability and it will lead to the abolition of the safeguards provided by law to incapacitated persons." This argument also cannot be shared, because currently there is no legal regime that meets the specific needs of people with mental illness in Bulgaria, instead norms of guardianship and trusteeship are used, and they are specially designed to protect the interests of minors. As the Convention proclaims the principles of autonomy, independence, the right to personal choice and the mobility of persons with disabilities, their rights cannot be satisfied under these norms.

In 2016-2018, the first steps were taken to update the existing legislation with the introduction of the Bill on Natural Persons and Support Measures. The Bill on Natural Persons and Support Measures provided that every person, acquires the right to be a holder of rights and obligations since birth (passive legal capacity) and at the age of 18 becomes fully capable solely through their actions to acquire rights and obligations (active legal capacity). If an adult, as a result of mental disability, is unable to take care of their affairs, or experienced serious difficulties in carrying out specific legal actions on their own, then they could exercise their rights with the help of support measures. The interests of the natural persons under this bill were protected by the introduction of safeguards, which consisted of temporary prohibitions in the execution of an order or action, affecting the health or property of the incapable.

Although the Bill posed a number of practical challenges, its adoption (which still hasn't happened in 2020) would have been a major step forward in protecting the rights of people with disabilities in Bulgaria.

It is noteworthy that one of the main arguments that many Bulgarian researchers and practitioners use to oppose the necessity of reform is related to the protection of the interests of

⁴⁸Bulgarian Center for not-for-profit law. (2011) Equality of People with Disabilities in the Exercise of Fundamental Human Rights under the UN Convention on the Rights of Persons with Disabilities. Analysis of the Bulgarian legislation, p. 14

⁴⁹ Stanev v. Bulgaria; Stankov v. Bulgaria

⁵⁰ Todorova, V. (2015). The Bulgarian discussion on incapacity: between the judgment of the constitutional court and the natural persons and support measures act

third parties; the security of civil matters, or the philosophy that the material interest of the holders of rights is more important than their emotional needs or freedom to express themselves. These views stem from a misunderstanding of the modern dimensions of the special protection that must be granted to persons with mental illness under the current Constitution. The aim, as has already been said, is to guarantee equality before the law, access to justice, a guarantee of the free exercise of civil rights and special protection should not be an obstacle to their exercise. The interests of third parties, the security in civil matters are subject to other regulatory mechanisms and they cannot serve as an excuse for the disproportionate restriction of one's freedom.

In 2018, the UN Committee on the Rights of Persons with Disabilities made the first review of Bulgaria's progress in implementing the UN Convention on the Rights of Persons with Disabilities. It addressed issues related to the application of the principles and provisions of the CRPD in three sections: basic principles and obligations (Articles 1-4 of the Convention), guarantee of specific rights (Articles 5-30 of the CRPD) and specific obligations. The Committee points out that by 2018 in Bulgaria there are no significant signs of change from medical to social model and recommended that the legislation is reviewed and brought more into line with the human rights model of disability. Attention is also paid to the derogatory terminology concerning persons with intellectual or psychosocial disabilities. It is emphasized that there is still legislation that allows the deprivation of legal capacity of people and recommends the adoption of the Law on Natural Persons and Support Measures, which recognizes the legal capacity (both active and passive) of all persons, regardless of their condition.

In response to these recommendations, the Law on Integration of People with Disabilities was repealed and on its place, the Law on People with Disabilities was adopted (in force since January 1, 2019). The discussion around it, insofar as there was one, showed the urgent need to inform the public about the nature and significance of the Convention, as it was mainly focused on employers' quota obligations for hiring people with disabilities, the types of monthly financial support and targeted benefits depending on from the disablement. These are undoubtedly important issues, but similar norms exist in the concept of a just society in the medical model. As if it had not been noticed at all that this law formally introduced the existence of supported decision-making (Art. 65 et seq.). There is still no discussion on the question, either in theory or in practice, of how these measures could be exercised, provided that the institution of deprivation of legal capacity still exists has not been repealed. According to Art. 66 LPD, "Support measures are intended to facilitate **the personal exercise of individual rights** of the person seeking support." It is not yet specified, for example, how a person placed under full interdiction could personally exercise his rights and benefit from the provisions of this law. The described support measures include: consultations with a trained specialist; providing specialized services for supported decision-making; providing a mentor to support the decision making process; preparation of an anti-crisis plan; supported-decision making through support networks; application of protective measures. What is the legal value of any consultations with trained specialists and the services provided in making a supported decision, the lack of consent of the legal guardian/curator leads to a defect in almost every legal transaction the holder of the right made? The measures described should be an alternative to the more restrictive regime compared to deprivation of legal capacity and, once the person has complied with them, there should be no defects in their legal transactions.

The legal regime for supported decision making under LPD is practically unapplicable. Its existence does not fulfill the recommendations addressed to Bulgaria by the UN Committee on the Rights of Persons with Disabilities in 2018.

III. FUTURE CHALLENGES:

Legislative reform concerning the legal capacity of individuals with mental disabilities is still pending in Bulgaria. The most important steps to take are related to:

- Creation of a common normative mechanism, which regulates all issues of legal capacity instead of regulation in special laws. Such a mechanism would be the Law on Individuals and Support Measures, which regulates all issues related to legal personality.

- Establishment of an adequate system for supported decision-making, as the measures are proportional to the individual capabilities of making decisions, the measures are limited in time and the areas in which the person has capacity, of the person and are limited in time. When the measures are limited in a time frame, this decreases significantly the likelihood of exploitation and abuse of persons with disabilities.

- Introduction of institutes final /permanent powers of attorney and permanent wills, where arrangement could be made about the wishes for medical treatment, financial and property matters.

- Improvement the dialogue between NGOs and the state in order to develop legal instruments that benefit all stakeholders.

- Organization of information campaigns for the general public, as well as training for civil servants and magistrates, so that they can understand the meaning of the CRPD and the new paradigm.

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