

# ASSESSMENT OF THE LEGAL CAPACITY REFORM Legislation and Practice



Package of Recommendations

ადამიანის უფლებების სწავლება და მონიტორინგის ცენტრი

**EMC**

Human Rights Education and Monitoring Center



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## Introduction

The concept of legal capacity plays a key role in the human rights system. Its unimpeded implementation is an invariable and necessary precondition for the enjoyment of a number of rights and freedoms. The importance of this concept is further enhanced in relation to various vulnerable groups who have historically had their legal capacity limited or deprived altogether.

Despite the existing important international acts and standards in this field, full understanding and implementation of the legal capacity concept of persons with disabilities remains to be a significant challenge. The right of the representatives of this group to equal recognition before the law and the ability to make decisions about their lives independently is still substantially hindered.

As a result of the 2014 decision of the Constitutional Court of Georgia (“Citizens of Georgia – Irakli Kemoklidze and Davit Kharadze v. the Parliament of Georgia”), the guardianship system was abolished and a new model – supported decision-making – was introduced in the country. Although the reform is an important step forward in ensuring the exercise of legal capacity and is largely compatible with the principles enshrined in the UN Convention on the Rights of Persons with Disabilities, part of the legislation as well as the implementation of the reform remains to be problematic.

This paper is based on the research – “Assessment of the Legal Capacity Reform: Legislation and Practice”, which assesses the implementation of the legal capacity reform in Georgia and identifies the challenges in this area.

The document replicates the stages of the supported decision-making system (recognition of the person as the recipient of support, the support process in decision-making and monitoring of the support cases) and includes relevant recommendations for changes in legislation, institutional framework and practice.

## The Stage of Determining a Person as a Recipient of Support by the Court

- ▶ In order to increase the substantiation of decisions concerning the recognition of a person as a support recipient, develop a training program for judges aimed at increasing their knowledge of the principles of the UN Convention on the Rights of Persons with Disabilities, Article 12 and the supported decision-making model;
- ▶ Develop a guideline for judges and lawyers, which will enable them to communicate more effectively with persons with disabilities in the process of recognizing a person as a recipient of support, to identify their wishes and individual needs;
- ▶ The decision concerning the recognition of a person as a support recipient should be fully focused on identifying individual needs and wishes in relation to the decisions made by the persons with disabilities. To ensure this, the relevant instructions and guidelines for judges, LEPL – Levan Samkharauli National Forensic Bureau employees, social workers and lawyers should be developed;
- ▶ The instructions should be developed, that will allow judges to formulate questions based on the essence of the supported decision-making and the social model of disability assessment before sending the application to the LEPL - Levan Samkharauli National Forensic Bureau;
- ▶ The court decisions should be based solely on the essence of the legal capacity reform, which is connected with the assistance of a person in formulating their wishes and choices and does not involve the restriction of any rights of persons with disabilities and/or going beyond supporting a person in formulating their wishes and assisting them in the decision-making process;
- ▶ Before appointing a specific person as a supporter, the judge should examine in detail the relationship between the support recipient and the supporter, including the absence of conflict of interest and, if necessary, the supporter's knowledge and ability to effectively support the person in a specific sphere;
- ▶ The application form for recognition of a person as a recipient of support should include a specific list of areas that, at the application stage, would help the person request the appointment of a supporter in areas that are more specific and tailored to the individual needs of the person; Also, such an application form should be available in an easy-to-read format for the prospective recipient of support;

- ▶ In order to ensure that the court decision is based on the procedural interests of the prospective support recipient and is in line with the person's individual needs, the specific instructions for the preparation of the application should be developed. It is also important that the instructions for the preparation of application are available in an easy-to-read format for the prospective recipient of support;
- ▶ The civil procedure legislation should be amended which will bring the process of recognition of a person as a support recipient in line with Articles 12 and 13 of the UN Convention on the Rights of Persons with Disabilities. In particular:
  - Clearly define the possibility of initiating a litigation/transforming the proceedings related to the recognition of a person as a support recipient into a lawsuit;
  - The law should define the right of the prospective supported person to refuse to receive support, which will be a ground for initiating a lawsuit and / or leaving the application without consideration.

## The Assessment of Person's Support Needs

- ▶ The legal framework governing the procedure of the involuntary assessment of a person should be revised and must be aligned with the content of Article 12 of the UN Convention on the Rights of Persons with Disabilities, which, *inter alia*, will prohibit the practice of compulsory expertise, will guarantee the autonomy and inviolability of the person and prevent the application of other types of coercive measures against them;
- ▶ Legislation should define the right of multidisciplinary team members to refuse to issue an expert opinion;
- ▶ Legislation should clearly regulate the possibility of conducting an alternative multidisciplinary examination of a person's psychosocial needs. The legislation should indicate the relation of this conclusion to the report elaborated by the LEPL – Levan Samkharauli National Forensic Bureau;
- ▶ Specific guidelines should be developed to provide a comprehensive overview of assessment-related issues and provide professionals involved in the process with clear theoretical and practical standards for assessment, including the peculiarities of establishing communication with the assessed persons and informing them, the issues related to co-

ordination between the multidisciplinary team members, the list of circumstances to be considered in the process of drawing up the assessment conclusion, etc.;

- ▶ Government should strengthen the state agencies involved in the assessment process and provide with human and financial resources that are necessary for their effective functioning;
- ▶ Effective inter-agency communication between the LEPL – Levan Samkharauli National Forensic Bureau and the Guardianship and Custodianship body should be ensured;
- ▶ All actors involved in the assessment process should be permanently informed and systematic training should be provided to them. Such activities must address the issues such as essence of legal capacity and models of supported decision-making, the importance of assessment and the theoretical and practical aspects of its implementation, effective inter-agency coordination, communication techniques with the person being assessed, tools for effective identification of the support needs, etc.;
- ▶ In order to improve the evaluation process, a sufficient number of specialized social workers should be allocated and their equipment with relevant tools, as well as their proper supervision should be ensured;
- ▶ The environment tailored to the needs of the person to be assessed and reasonable accommodation in the evaluation process should be guaranteed at the legislative and practical levels;
- ▶ The assessment tools and forms must be reviewed in the light of human rights-based approach and the evaluation tools should be developed, that will unconditionally aim to identify the support needs (in terms of specific areas, as well as forms and intensity of support), will focus on the strengths of the person (in addition to their needs), foresee the close cooperation within the multidisciplinary team, describe the standards in a detailed manner and prevent their duplication between the team members;
- ▶ The assessment standards/forms should exclude the possibility of employing the irrelevant and stigmatizing formulations concerning the persons subject to the assessment.

## The Supported Decision-Making Process

- ▶ The Law of Georgia “on the Rights of Persons with Disabilities” should define the human rights standards of the legal capacity and supported decision-making and determine the consequent state obligations;
- ▶ The legal provisions that blanketly restrict the rights of support recipients (including with regard to the employment, participation in elections, right to personal and family life, citizenship and movement, the rights to health and social protection) should be abolished;
- ▶ The legislative regulation, which makes the agreement concluded by the supported person void in the absence of a signature of the supporter, as well as the provision, which makes the approval of supporter as a prerequisite for the validity of transactions should be abolished;
- ▶ The legislative regulations, which prescribes the blanket obligations of the supporters to supervise the support recipient’s medical service provision, as well as fulfilment of his/her tax obligations should be abolished;
- ▶ The grounds for termination of the support relationship should clearly include the refusal of the support recipient and/or supporter;
- ▶ In cases when it is objectively impossible to identify a person’s will and choice, the legislation should provide for the introduction of the “best interpretation of wills and preferences” test;
- ▶ The government should develop and pilot the Model of professional supported decision-making. Based on the results of the pilot, the support service should be created and implemented. In the process of developing this service, the Government should allocate sufficient human and financial resources;
- ▶ The mechanisms for strengthening the supporter, which will include relevant services (including the possibility of receiving information and advice on their functions, temporary exemption from the performance of their functions), as well as monetary and/or non-monetary benefits for the performed work should be established;
- ▶ The support recipients and supporters should be provided with permanent training on the concepts of legal capacity and supported decision-making, as well as the related issues. The information to support recipients should be provided in the form of communication acceptable to them (including easy-to-read formats). Additionally, the specific

guidelines should be developed for both parties of support, which will address a range of theoretical and practical aspects of the support provision;

- ▶ Guidance should be developed for supporters, which will give them practical advice so that they are able to provide effective support in the field of finance, *inter alia*, by reviewing specific case studies;
- ▶ The Guardianship and Custodianship body should be strengthened with financial and human resources and tools in order to be able to effectively administer the support system. Additionally, specialized social workers should be allocated, who will be focused on support matters;
- ▶ The specific guidelines for social workers should be developed, which will deal with the theoretical and practical aspects of the support process (including aspects of working and communicating with the support recipients, support skills enhancement techniques, etc.). The permanent training/retraining for social workers should also be guaranteed;
- ▶ As part of the decentralization process, local social units should be strengthened and be provided with sufficient financial and human resources, as well as expertise so they can work effectively and provide information about the concepts of the legal capacity/supported decision-making to the families with children with disabilities, which might need to receive such kind of support in the future;
- ▶ The strengthening and independent living services (including, housing, employment programs) should be established and developed so that the decisions made by the support recipients can be implemented into practice;
- ▶ The National Bank should develop a special handbook for the banking sector employees, which will outline the concept of the supported decision-making, its practical aspects and the possibility of using various forms of communication (including alternative forms) with support recipients;
- ▶ The psychiatric institutions and boarding houses for persons with disabilities should be deinstitutionalized in order to restore the legal capacity of persons with disabilities in practice.



## Monitoring of the Supported Decision-Making Process

- ▶ The principles foreseen by the international standards (the central role of support recipient, due diligence, independence and regularity) should be reflected in the legislative framework and practice governing the monitoring of support provision;
- ▶ Legislation should address the obligation to conduct effective monitoring on all cases of support provision;
- ▶ Legislation and practice should define the strengthening of the support recipient and supporter as one of the primary objectives of the monitoring process. The functions of the monitoring body should be described in detail in this regard;
- ▶ Legislation and practice should take into account the concept of the centrality of the will and preferences of the support recipient during the monitoring process. The legislation should establish mandatory rules for receiving information from the support recipients, listening and prioritizing their opinions;
- ▶ Conflict of interests should be eliminated in the monitoring process - even the factual possibility of the simultaneous exercise of support and oversight by the same authority should be prevented. Therefore, the legislation and institutional framework should provide for mechanisms and guarantees for independent and effective monitoring;
- ▶ In order to fulfil its obligations, the monitoring body should be strengthened with adequate human and financial resources to enable it to carry out effective and efficient oversight. Responsible persons should have unimpeded access to means of transportation during the monitoring process;
- ▶ A group of social workers specializing in the legal capacity and supported decision-making issues should be allocated and the exercise of professional supervision over them should be ensured;
- ▶ The expertise of those responsible for monitoring should be increased in the relevant spheres. The social workers should be systematically provided with training to gain an in-depth understanding of the theoretical and practical aspects of the concepts of the legal capacity and supported decision-making, on the one hand, and the essence of a human rights model with regard to persons with disabilities, on the other;

- ▶ The support monitoring procedure and tools should undergo changes. The form and procedure for overseeing such cases should be separated from tools designed to monitor the guardianship and custodianship cases, the non-essential issues related to support cases (mainly related to personal care) should be removed and frequent on-site visits and active communication with the support recipients should be prioritized. The oversight process should be focused on identifying how the underlying principles of the support system are being implemented, how much progress is being made, how much the degree of independence and skills of the support recipient has been improved, and what needs to be improved for both the supporter and the support recipient;
- ▶ The oversight process should be transformed from a formal mechanism of monitoring twice a year to an intensive one, involving permanent work with support recipients and supporters, identifying the relevant needs and ensuring their strengthening. In order to achieve this goal, if necessary, in addition to social workers, the involvement of other professionals in the process should be considered;
- ▶ In order to meet the needs identified through monitoring, the strengthening mechanisms/services should be developed for the support recipients and their supporters/family members.