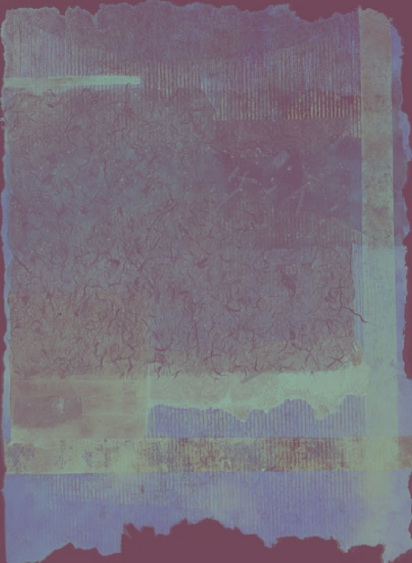


ASSESSMENT OF THE LEGAL CAPACITY REFORM Legislation and Practice



Assessment of the Legal Capacity Reform

Legislation and Practice

ადამიანის უფლებების სწავლებისა და მონიტორინგის ცენტრი

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The opinions expressed in the research are the sole responsibility of the authors and may not express the position of the Open Society Foundations (OSF).

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Introduction

The concept of legal capacity plays a key role in the human rights system.¹ Its unimpeded implementation is an invariable and necessary precondition for the enjoyment of a number of rights and freedoms.² The importance of this concept is further enhanced in relation to various vulnerable groups (e.g., persons with disabilities, women, migrants, and asylum seekers) who have historically had their legal capacity limited or deprived altogether.³

Despite the existing important international acts and standards in this field, full understanding and the implementation of the concept of the legal capacity 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, both in Georgia and worldwide, is still substantially hindered. The UN Committee on the Rights of Persons with Disabilities (hereinafter – “Committee”) has repeatedly stressed that most states have yet to understand the concept of legal capacity under a human rights-based approach.⁴

The support model in Georgia was established as a result of the decision of the Constitutional Court of Georgia in 2014,⁵ which abolished the existing system of guardianship in the country and introduced a new – supported decision-making model. 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, the content of some of the aspects of the legislation as well as the implementation of the reform remains to be problematic.

The purpose of this research is to assess the five-years experience of the implementation of the legal capacity reform in Georgia and to review the main challenges in legislation, as well as the institutional framework and practice in this regard.

1 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 1.

2 Full or partial restriction on exercise of legal capacity deprives persons with disabilities of the opportunity to exercise for example, right to vote, right to marry, the reproductive rights, the right to give informed consent to medical interventions, etc; Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 8.

3 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/37/56, 2017, para. 15.

4 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 3; Despite reforms in some countries, legal capacity is still somewhat limited by law or practice (e.g. the Czech Civil Code, which was reformed in 2014, still provides for certain restrictions on legal capacity; see, European Union Agency for Fundamental Rights, Implementing the United Nations Convention on Rights of Persons with Disabilities (CPPD), An Overview of Legal Reforms in EU Member States, 2015, p. 9).

5 Decision of the Second Panel of the Constitutional Court of Georgia N 2/4 / 532,533 – “Citizens of Georgia – Irakli Kemoklidze and Davit Kharadze v. Parliament of Georgia”, 2014.

The document is divided into four main parts and practically repeats the stages of the supported decision-making system. The first part deals with the essence of the concept of supported decision-making and reviews its significance, the second chapter analyzes the stage of recognition of a person as a support recipient and deals with both, the decision-making procedure by the court and the assessment of a person's psychosocial needs. The third part reviews the support process in decision-making, while the fourth part analyses the oversight mechanism towards the support cases.

Methodology

The document was developed with the involvement of the following organizations:

- ▶ Part I. Supported Decision-making – the Essence and Significance of this Concept – Human Rights Education and Monitoring Center (EMC) and Partnership for Human Rights (PHR);
- ▶ Part II. Recognition of Person as a Recipient of Support – Partnership for Human Rights (PHR), Global Initiative on Psychiatry – Tbilisi (GIP-Tbilisi), Georgian Association of Social Workers (GASW) and Human Rights Education and Monitoring Center (EMC);
- ▶ Part III. Supported Decision-Making Process – Human Rights Education and Monitoring Center (EMC), Georgian Association of Social Workers (GASW) and Partnership for Human Rights (PHR);
- ▶ Part IV. Monitoring of the Supported Decision-Making Process – Georgian Association of Social Workers (GASW) and Human Rights Education and Monitoring Center (EMC).

For assessing the issues identified in the framework of the research, the process was carried out through the following tools: Analysis of international Standards; Analysis of national legislation, policies and practices; Working meetings with relevant actors; Collection of public information and analysis of secondary sources.

Analysis of International Standards

In the framework of the research, international standards, primarily the provisions of the 2006 UN Convention of the Rights of Persons with Disabilities, the General Comments of the Committee operating under this Convention and its recommendations made towards various countries, as well as the reports of the UN Special Rapporteur on the Rights of Persons with Disabilities have been analyzed.

Analysis of National Legislation, Policies and Practices

In the framework of the research process, the national legislative acts and bye-laws regulating the supported decision-making system were analyzed. Among them, the tools used in the assessment process of psychosocial needs, as well as the instruments employed by the social workers during the monitoring process were studied. The research of existing practice also included the analysis of the conclusions of the psychosocial needs assessment drawn up

by the LEPL – Levan Samkharauli National Forensic Bureau⁶ and the court decisions⁷ on the appointment of support.

Working Meetings with Relevant Actors

For the effective identification of the challenges in the support system, numerous working meetings have been held during the research process. Among them, two focus groups were held with the participation of social workers, in which a total of 16 social workers participated, as well as two in-depth interviews with senior social workers have been carried out. During the research, meetings have been held with the LEPL – Levan Samkharauli National Forensic Bureau, the Ministry of Internally Displaced Persons from the Occupied Territories, Labor, Health and Social Affairs, the Office of the Public Defender of Georgia, the Administration of the Government of Georgia, the Parliament of Georgia and the Administration of the President of Georgia.

To identify barriers towards the implementation of the legal capacity reform, the project team held a number of meetings with support recipients, their supporters, as well as the other representatives of disability community and their respective organizations.

Collection of Public Information

One of the research tools was requesting public information from the governmental agencies (Ministry of Internally Displaced Persons from the Occupied Territories, Labor, Health and Social Affairs, LEPL – Levan Samkharauli National Forensics Bureau), which enabled the research team to obtain information on relevant statistics, available tools and various general or specific aspects of policy implementation in this area.

Analysis of Secondary Sources

In the framework of the research, the sources relevant in the light of the international standards, country experiences and Georgian context, including, documents developed by international governmental and non-governmental organizations, academic papers, reports on pilot projects carried out in various countries, as well as parliamentary and special reports of the Public Defender of Georgia have been analyzed.

⁶ For the research purposes, 10 conclusions of the evaluation drawn up by the Forensics Bureau in 2016-2018 have been analysed.

⁷ For the research purposes, the court decisions issued in 2016-2019 have been analysed.

Part I. Supported Decision-making – the Essence and Significance of this Concept

Introduction

The UN Convention on the Rights of Persons with Disabilities (hereinafter – “the Convention”) reaffirms the right of all persons with disabilities to be recognized as subjects before the law on equal basis with others and the inherent nature of the concept of legal capacity.⁸ Article 12 further clarifies this right and its related standards and obliges States Parties to take all necessary measures to ensure that persons with disabilities exercise legal capacity, to abolish substituted decision-making systems, and to establish support mechanisms in the legislative framework, policy-making and practice, which will respect the autonomy, will and preferences of persons with disabilities.⁹

Given the complexity of the issue, this chapter focuses on the exercise of the concept of legal capacity by persons with psychosocial and intellectual disabilities and the essence of supported decision-making. The chapter is divided into two main parts. The first part analyzes the right to legal capacity and essence of supported decision-making, as well as the content of the state obligations in light of the international standards. The second part of the chapter reviews the barriers towards the implementation of the legal capacity reform in the Georgian context.

1. The Concept of Legal Capacity

Understanding the concept of legal capacity and its implementation in the context of human rights is one of the key principles of the Convention. Its content is not defined in theory and practice in a uniform manner, therefore, taking into account the provisions of the Convention, as well as the recommendations of the Committee, and putting them into practice is essential. At the same time, it is important to study the experiences of other countries, which have introduced the institution of legal capacity in legislation and/or practice.

The purpose of this chapter is to analyze the concept of legal capacity, among others, to review the international standards in this field, to understand the relation of the legal

⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 1, 8.

⁹ Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Argentina as Approved by the Committee as its Eighth Session (17-28 September, 2012), 2012, CRPD/C/ARG/CO/1, para. 20.

capacity to other rights, as well as the characteristics of the system of the supported decision-making.

1.1. A Brief Overview of the Relevant International Instruments

Apart from the Convention, equality before the law, as a fundamental principle of human rights and a necessary precondition for the enjoyment of other rights and freedoms, is enshrined in a number of important international instruments.

The Universal Declaration of Human Rights, as well as the International Covenant on Civil and Political Rights, underscore the importance of the right of all human beings to equal recognition before the law. It is clear that, in establishing the standard, the Covenant also implies the obligation of States with respect to persons with disabilities, although in the articles prohibiting discrimination, disability is not specified separately in the list of relevant grounds. Therefore, it is important that Articles 2 and 26 of the Covenant are interpreted in such a way as to address persons with disabilities and to include the representatives of this group in one of the elements contained in these Articles – “other grounds”.¹⁰

The International Covenant on Economic, Social and Cultural Rights has a special role with regard to the equal protection of the rights of persons with disabilities and the positive obligations of the State in this regard. According to the Covenant, the state obligations can be divided into three components: respecting, protecting and ensuring the exercise of rights. The requirement for the progressive realization of the rights set forth in the Covenant, by all appropriate means, without any discrimination, applies to all persons, including persons with disabilities.¹¹

The prohibition of discrimination is enshrined in Article 14 of the European Convention on Human Rights and Fundamental Freedoms, which implies an obligation to treat persons equally in the exercise of their rights under the Convention. 12th Additional Protocol of the Convention further expands the scope of the prohibition of discrimination and sets out the obligation of equal treatment in the exercise of all rights, including the rights enshrined in the national law. Although disability is not included in the list of grounds protected by the European Convention, the European Court, when interpreting Article 14, underlined disability in “other” grounds for discrimination.¹²

¹⁰ Quinn G., Degender T., Bruce A., Burke C., Castellino J., Padraic K., Kilkelly U., Quinlivan S., The current use and future potential of United National human rights instruments in the context of disability, 2002.

¹¹ *ibid.*

¹² Council of Europe, Handbook on European non-discrimination law, 2013.

The principle of equality before the law is also reflected in other international or regional human rights instruments.¹³ For example, Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women establishes the equality of all women before the law and requires States to recognize the legal capacity of women on equal terms.

The analysis of general and specific international human rights instruments reveals the role of the principle of equality before the law in the exercise of other rights and freedoms. According to international human rights law, this principle is universal, applies equally to different groups of people, and there is no area where its protection is not a primary obligation.

1.2. General Content of the Article 12 of the CRPD

1.2.1 *The Importance of the Concept of Legal Capacity*

Historically, persons with disabilities had their legal capacity limited through various forms of substitute decision-making models – guardians acting on behalf of persons with disabilities are, in most cases, not acting in their interest and often violate their rights.¹⁴ The model of full or partial incapacity, by its very nature, still has the greatest impact on people today – persons under guardianship lose the ability to control their own lives and make basic decisions that are directly related to their fundamental rights.¹⁵

In law or practice, substitute decision-making systems take many forms, such as plenary guardianship,¹⁶ court ruling-based prohibition,¹⁷ and partial guardianship.¹⁸ Despite the variety of forms, all of them have the following characteristics in common: a) a person does not fully exercise the legal capacity; b) decisions are made by the supporter/guardian and these decisions may contradict the position of the person with disabilities; c) decisions are based

13 For example, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights.

14 The United Nations, *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities; Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, 2007.

15 Restriction of legal capacity translates to the restriction of the enjoyment of various fundamental rights by persons with disabilities, including right to vote, respect for family and private life, right to reproductive health, right to liberty; Bulgarian Center for Not-for-Profit Law, *Cost Benefit Analysis of Supported Decision-Making*, 2014; Devi N., *Supported Decision-making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities*, "Journal of Law, Medicine and Ethics", 2013, vol. 41(4).

16 A person with a disability is recognized as incapacitated and the guardian is given the opportunity to exercise all the rights on his/her behalf.

17 Imposition of a legal restriction on a person, by a court decision, based on psychosocial needs, to settle his/her personal matters and make a profit.

18 In this case, the guardian is given the opportunity to exercise only the rights that are specified in the decision on their appointment.

on a person's perceived "best interests" and not on their wishes and choices.¹⁹ Due to the interconnectedness of the concepts of legal capacity and equality before the law, Article 12 of the Convention requires a change of paternalistic attitudes towards persons with disabilities and the abolition of de jure or de facto substitute systems of decision-making,²⁰ which is one of the manifestations of such attitudes.²¹

According to Article 12 of the Convention, all persons with disabilities have full legal capacity, which is a precondition for the enjoyment of civil, political, economic, social and cultural rights. This article does not introduce a new right for persons with disabilities, but rather describes special measures that states must take to ensure their equality before the law in order to actually enable them to enjoy all the rights and freedoms on equal basis with others. However, despite the unequivocal requirement of the Convention in this regard, Article 12 is still one of the most contested provisions to date. All this has to do with the historical experience and stigma that exists towards people with psychosocial and intellectual disabilities.

The full implementation and realization of the concept of legal capacity is of great importance for the independence of persons with disabilities and the realization of their rights. Clearly, without being able to make fundamental decisions about one's own life (e.g., choosing a place to live, getting medical care), a person automatically becomes subjected to objectification and cannot be considered as an independent person with their own thoughts, emotions, and attitudes.²² It is the legal capacity that makes a person a subject under the law, gives him/her the power and opportunity to act in legal relations, to make decisions in a number of areas (e.g. employment, marriage, inheritance, etc.) that are respected by third parties. Accordingly, the concept of legal capacity unequivocally includes the element of holding the rights and obligations and the possibility of exercising them without undue interference by a third party.²³

In order to ensure the full realization of legal capacity, the Convention introduces a supported decision-making model, which is an important innovation in protecting the rights of persons with disabilities and promoting their independent living.²⁴ The support model is

19 Gooding P, Navigating the 'Flashing Amber Lights' of the Right of Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns, "Human Rights Law Review", 2015, vol. 15(1).

20 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 52.

21 Quinn G., O'Mahony C. (eds.), Disability Law and Policy, An analysis of UN Convention, 2017.

22 Quinn G., Degender T., Bruce A., Burke C., Castellino J., Padraic K., Kilkelly U., Quinlivan S., The current use and future potential of United National human rights instruments in the context of disability, 2002.

23 Council of Europe, Commissioner for Human Rights, Who gets to decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities, 2012; Quinn G., O'Mahony C. (eds.), Disability Law and Policy, An analysis of UN Convention, 2017.

24 Inclusion Europe, Key Elements of a System for Supported Decision-Making (Position Paper), 2008.

based on the assumption that all people have the ability to make decisions independently, although they may need help in this process, as well as in developing their skills and exercising their rights. Article 12 explicitly states that a person with a disability must be the one making the decision and their supporter is obliged, if necessary, to provide them with the relevant information, to explain the details of a particular matter and to interpret their wishes during communication with third parties.

1.2.2 Normative Content of Article 12 of the UNCRPD

Article 12 of the Convention consists of five paragraphs and imposes significant obligations on the exercise of the concept of legal capacity by the persons with disabilities. The above article recognizes the equal legal personality of persons with disabilities and their right to enjoy legal capacity in all spheres of life. It emphasizes that all persons with disabilities are recognized as persons before the law, which implies the right to actively utilize the concept of legal capacity and to ensure its full protection by the legal systems.

According to the normative content of Article 12, legal capacity consists of two components. It, on the one hand, implies holding the rights and obligations (legal standing), and, on the other hand, the authority to act on those rights (legal agency).²⁵ However, despite the frequent confusion in theory and practice, this concept differs from the so-called concept of mental capacity. The latter refers to human decision-making skills that naturally varies for different people and depends on many factors, including environmental and social factors. As a result of such confusion when interpreting these concepts, when a person's decision-making skills are limited, their right, derived from their inherent legal capacity, to make specific decisions are often ignored.

Following the concept of mental capacity, decisions related to the limitation of legal capacity are easily made: 1) based on a person's diagnosis (status-based approach),²⁶ 2) in cases where a person makes a decision that is considered to have a negative result/cause himself/herself harm (result-based approach), or 3) when a person's decision-making skills are considered insufficient (functional approach).²⁷ The functional approach seeks to assess mental capacity and, in line with this assessment, reject the concept of legal capacity. Such an approach

25 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014.

26 This approach is common in legal regulations that blanketly restrict particular rights to individuals because of their status, e.g. the right to adopt child, the opportunity to carry out banking regulations, etc.; Dhanda A., *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?* "Syracuse Journal of International Law and Commerce", Vol. 34, 2007, p. 431.

27 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 15.

assesses the extent to which a person can understand the nature and consequences of their decisions and/or use and evaluate relevant information. The Committee considers the functional approach as being flawed due to two main circumstances – 1. It makes discriminatory approaches towards persons with disabilities; 2. It considers that it is possible to accurately assess human brain function and deprives individuals of the right to make decisions based on this imperfect process.²⁸

Despite the inconsistencies and ambiguities in the theoretical or practical definitions of the above concepts, the Convention's position on these issues is clear. In particular, Article 12 deals only with legal capacity and does not include the concept of mental capacity. Moreover, the Convention clearly emphasizes that mental capacity should not be the basis for the restriction of any element of legal capacity (both legal standing and legal agency).²⁹ The Convention not only prohibits such discriminatory restrictions on legal capacity, but also requires unconditional support for the realization of legal capacity.³⁰

1.3. The Essence of Supported Decision-Making

One of the greatest importance in the implementation of the concept of legal capacity is given to the institution of supported decision-making. The Committee makes it clear that the substitute decision-making model is not in line with the Convention and emphasizes the need to introduce the concept of support.³¹ Moreover, when talking about the obligations of the state in this regard, it is necessary to note that in parallel with the introduction and development of supported decision-making, maintenance of the system of guardianship and substitute decision-making regimes is unequivocally contrary to the Convention.³²

The support provided for in Article 12 of the Convention may be expressed through both formal and informal mechanisms tailored to the will of persons with disabilities and their individual needs.³³ However, despite the fact that the institution of supported decision-making is characterized by many peculiarities, its main essence is reflected in the recognition of the right of all persons with disabilities to be recognized as subject before the law, in equal basis

28 Ibid.

29 The Bulgarian Center for Not-for-Profit Law (BCNL), New 'Formula' for Capacity to Act – Opportunity for Everyone to Exercise their Rights, Statement on the Paradigm Shift of Article 12 of CRPD, 2014.

30 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014.

31 Ibid., para. 26.

32 Ibid., para. 28.

33 Gooding P., Navigating in the “Flashing Amber Lights” of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns, “Human Rights Law Review”, Vol. 15, 2015, p. 52.

with others and the recognition of their legal capacity. Consequently, as mentioned above, only persons with disabilities, themselves, are empowered to make decisions about their own lives, however, in certain areas they may need support of different intensities and types.

1.3.1. Key Features and the Scope of Supported Decision – Making

In the process of introducing the concept of legal capacity, states are obliged to take appropriate measures to provide the type of support that persons with disabilities may need to exercise their right to legal capacity.³⁴ Moreover, the UN Special Rapporteur on the Rights of Persons with Disabilities (hereinafter – “Special Rapporteur”) indicates the immediate nature of the obligation to provide such support.³⁵

On the other hand, it is clear that Article 12 of the Convention is quite succinct and does not provide specific guidelines for states in the process of implementation of the reform or supported decision-making model. It is therefore important to review the Committee’s general comments and recommendations to States, as well as the reports of the Special Rapporteur or various relevant organizations. It is from the analysis of the above-mentioned standards that the main features of the supported decision-making model, that states should rely on when implementing reforms in this area, are revealed.

Universality of Support

One of the key principles in implementing supported decision-making is the universal nature of this concept. It should be accessible to all people – intensity of the need for such support, especially when the need is high, should not be a barrier to receiving support.³⁶ Given the vulnerability of people with disabilities, it is clear that any of them can be subject to denial of the legal capacity. However, the Committee also notes that people with intellectual or psychosocial disabilities are disproportionately affected by such regimes.³⁷ In addition, it is important to consider different age groups within support recipients, including the elderly with dementia and Alzheimer’s disease.³⁸

34 UN Convention on the Rights of Persons with Disabilities, 2006, Art. 12 (3); Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 16.

35 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 40.

36 UN Convention on the Rights of Persons with Disabilities, 2006, Art. 12 (3); Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 29 (a).

37 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 9; Flynn E., From Rhetoric to Action, Implementing the UN Convention on the Rights of Persons with Disabilities, 2011, p.16.

38 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/74/186, 2019, para. 29.

Universality of the support includes the obligation of the state to legally recognize the supporter.³⁹ The state should not only recognize their status, but also introduce and facilitate the creation and implementation of such support, especially for individuals who are isolated from society and do not have the opportunity to receive natural support in the community.⁴⁰ In this latter case, the states should carry out deinstitutionalization and ensure the real restoration of the legal capacity to the persons living in institutions.

Clearly, in order for the principle of universality of support to be effectively implemented in practice, it is essential that this service be made accessible informationally, geographically and financially to persons with disabilities. The Committee emphasizes that all procedures, information and communication related to legal capacity should be fully accessible.⁴¹ Form of personal communication should not be regarded as a barrier, even when such communication is unconventional and/or understandable only to a narrow circle of people.⁴² Effective application of universal design and accessibility concepts to the private sector is also essential. This is especially relevant for financial and medical institutions, which should have an obligation to provide information to persons with disabilities in a way that is understandable to them so that they can take actions.⁴³

On the other hand, it is clear that in order to fulfill their obligations under the Convention, States must ensure that support services are available at no or a minimum cost to persons with disabilities. It is essential that lack of financial resources does not create a barrier to receiving support.⁴⁴

The Central Role of Support Recipient

Historically, any kind of support for people with disabilities was based on the medical model and the so-called paradigm of care, where the representatives of this group were dependent on third parties and were considered passive objects of care and not subjects with rights.⁴⁵ Adoption of the Convention changed the paradigm of care with the support model, based

39 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 29(d).

40 Ibid.

41 Ibid., para. 37.

42 Ibid., para. 29 (c).

43 Ibid., para. 17.

44 Ibid., para. 29(e).

45 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 23, 24; Kroger T., Care Research and Disability Studies: Nothing in Common? “Critical Social Policy”, Vol. 29(3), 2009, pp. 398 – 420.

on values such as human rights, equality and social justice.⁴⁶ The current philosophy of the right to independent living includes the provision of a type of support that will enable persons with disabilities, regardless of the type of disability and need, to take control of their own lives.⁴⁷ Under this concept, excessive regulation of the lives of persons with disabilities by support systems is unacceptable.⁴⁸

Unlike substitute decision-making systems, the concept of supported decision-making implies the autonomy of the support recipient, the unconditional prioritization of their wishes and preferences,⁴⁹ which itself constitutes one of the important postulates of provision of support – decision-makers are allowed to make decisions that supporters and/or significant portion of the society do not agree with, to take risks and make mistakes. Clearly, the principle of centrality of the role of a person with disabilities is not limited to the decision-making process. This concept is also relevant before the appointment of supporter – one of the necessary preconditions for the implementation of supported decision-making should be the desire of the person to receive support.⁵⁰ According to the same principle, the recipient of support should have the right to stop receiving support at any time.⁵¹

Taking into Account the Individual Needs of Supported Person

Providing identical support to all people in need of support can be ineffective and even discriminatory.⁵² It is essential that the support provision process should be based on the wishes of the support recipient and their individual needs. Unlike substitute decision-making systems, even in the case of intensive support, the application of the principle of best interests, as well as the restriction of any rights, is disallowed.⁵³ In some cases, identifying human choices and wishes may be associated with particular challenges. However, the Committee makes it clear that even in this case, the principle of “best interpretation of will and

46 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 25.

47 Ibid., para. 26, 28; Morris J., *Impairment and Disability: Constructing an Ethics of Care that Promotes Human Rights*, “*Hypatia*”, vol. 16(4), 2001.

48 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 29.

49 For example, due to its importance, this paradigm was legally guaranteed and became part of the reform during the implementation of the capacity reform in Ireland; see *Assisted Decision-Making (Capacity) Act 2015*; Centre for Disability Law and Policy, National University of Ireland, Galway University, *Legal Capacity Law Reform in Ireland – the Assisted Decision-Making (Capacity) Act 2015* (Briefing Note).

50 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 19.

51 Ibid., para. 29(g).

52 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/37/56, 2017, para. 55.

53 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 29(b)(f).

preferences” should be adopted instead of the concept of “best interest”.⁵⁴ This principle can be applied in practice by considering various factors and sources, for example, a person’s life history, his/her values, past decisions and/or expressed opinions, personal wishes, content of verbal and non-verbal communication, etc.⁵⁵

Intersectoral approaches are essential to address the individual needs of the support recipient. The Committee makes it clear that not only the disability status but also other indicators of vulnerability should be taken into account when exercising capacity.⁵⁶ In the process of providing support, the state should take into account the fact that the community of persons with disabilities is not a homogeneous group and there are representatives of different races, sex, sexual orientation, gender identity, religion, language, national or ethnic minorities in the community.⁵⁷

For example, it is essential to consider aspects of gender equality in the supported decision-making process. Women with disabilities are more likely to be victims of de jure or de facto deprivation/restriction of legal capacity due to their increased vulnerability. Given the substitute, patriarchal, decision-making system, women are often deprived of the ability to control aspects of their own lives, such as the right to choose their place of residence, means to control their finances, decisions related to their reproductive health and so on.⁵⁸ In view of this challenge, the Committee unequivocally calls on States to take all possible measures to provide support to women with disabilities, so that they, *inter alia*, have the opportunity to express their free and informed consent and make decisions about their lives.⁵⁹

Along with gender, age aspect is also important in the planning and operation of the supported decision-making system.⁶⁰ Interrelation between age and disability poses particular

54 *Ibid.*, para. 20, 21.

55 Special Rapporteur on the Rights of Persons with Disabilities, Communication BRA/13/2019, 2019, p. 2.

56 Committee on the Rights of Persons with Disabilities, General Comment No. 3 (2016) on Women and Girls with Disabilities, CRPD/C/GC/3, 2016, para. 44.

57 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 42.

58 Committee on the Rights of Persons with Disabilities, General Comment No. 3 (2016) on Women and Girls with Disabilities, CRPD/C/GC/3, 2016, para. 44, 51; Report of the Office of the United Nations High Commissioner for Human Rights, Thematic Study on the Issue of Violence against Women and Girls with Disability, A/HRC/20/5, 2012; Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, A/67/227, 2012; Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 35; Report of the Special Rapporteur on the Rights of Persons with Disabilities – Sexual and Reproductive Health and Rights of Girls and Young Women with Disabilities, A/72/133, 2017, para. 28.

59 Committee on the Rights of Persons with Disabilities, General Comment No. 3 (2016) on Women and Girls with Disabilities, CRPD/C/GC/3, 2016, para. 64 (c).

60 Issues of the legal capacity and supported decision-making in relation to the elderly are also addressed by separate regional instruments, e.g. Inter-American Convention on Protecting the Human Rights of Older Persons, 2015, Art. 30; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa, 2018, Art. 7, 30; Recommendation CM/Rec(2014)2 of the Committee on Ministers to Member States on the Promotion of Human Rights of Older Persons, 2014.

risks of deprivation or restriction of legal capacity, which in turn increases the risk of institutionalization or forced medical intervention for these individuals.⁶¹ Even beyond the substitute decision-making model, older people with disabilities (especially women) are virtually deprived of the opportunity to make decisions about their lives, in gross violation of the Convention, in particular – Article 12.⁶²

Variety of Support Measures

As noted above, although the Convention addresses the obligation to provide support necessary for the exercise of legal capacity, it does not specify the amount or intensity of support, which is due to the heterogeneous nature of the concept of support. Its content is actually based on the person's desires and needs and responds to Article 3 of the Convention, which establishes one of the fundamental principles of the document – respect for difference and acceptance of persons with disabilities as an integral part of human diversity and humanity.

Obviously, support can be formal and informal, of different types and intensities.⁶³ Despite the existence of various forms of support and possible crisis situations, the right of persons with disabilities to make decisions must be unconditionally provided for.⁶⁴ The Committee emphasizes that a person with a disability may choose one or more supporters in their exercise of legal capacity, as well as receive support in other forms, such as peer support, assistance with communication or advocacy (including self-advocacy).⁶⁵ In addition, support can be provided through a variety of communication methods, including unconventional ones, especially for people who use nonverbal communication to express their choices and wishes.⁶⁶

One of the most interesting ways to provide support is to use the so-called Advanced Planning/Directive,⁶⁷ which allows anyone, including a person with disabilities, to express their

61 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/74/186, 2019, para. 29.

62 According to the Special Rapporteur, they are often deprived of making decisions independently, without the consent of family members, on important issues, such as, for example, daily routine, consent to social and medical care, property inheritance, etc. ; See Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/74/186, 2019, para. 30, 31.

63 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 17.

64 *Ibid.*, para. 18.

65 *Ibid.*, para. 17.

66 *Ibid.*

67 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/40/54, 2019, para. 61; De Jong M.H, et al., Interventions to Reduce Compulsory Psychiatric Admissions: A Systematic Review and Meta-analysis, "JAMA Psychiatry", vol. 73(7), 2016.

will and preferences, which should be followed at time when they may not be in a position to communicate with the outside world and express their desires.⁶⁸ Support should be provided in the advance planning process and this mechanism should be tailored to the person's individual needs and should be non-discriminatory. Although this mechanism is mainly used in the field of healthcare, its scope can be extended to other areas as well.⁶⁹ In addition, one of the mandatory preconditions for the validity of this concept is the expressed will of the person regarding the entry into force and termination of the directive. Such decisions should be reflected in the text of the advance directive and it should not be based on an assessment of a person's (lack of) mental capacity.⁷⁰

Establishment and Functioning of Safeguard Mechanisms

One of the basis for the effective implementation of the concept of support is to prevent the abuse of rights.⁷¹ It is clear that no one is insured against the risk of being subject to undue influence, however, this risk may be exacerbated for those who rely on the support of others when making decisions.⁷² Accordingly, states are obliged to develop various types of safeguards that will be proportional and tailored to the individual, focused on human rights, personal desires and choices and free from conflict of interest or undue influences.⁷³ However, the Committee does not specify what exactly is meant by the concept of undue influence, but does list the elements that characterize such action – usually, these are signs of fear, aggression, threat, deception or manipulation in the relationship between the support recipient and the supporter.⁷⁴

The obligation to prevent undue influence is of particular importance for persons with disabilities in relation to health care. In many cases, when it comes to medical interventions (especially inpatient care), the legal systems completely or partially deprive persons with disabilities of the opportunity to make decisions independently. In contrast to this practice,

68 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 17.

69 Fina V.D., Cera R., Palmisano G. (Eds.), *The United Nations Convention on the Rights of Persons with Disabilities – A Commentary*, 2017, p. 271.

70 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 17.

71 *Ibid.*, para. 20.

72 *Ibid.*, para. 22.

73 It is the existence of such mechanisms that should prevent the support system from incorporating any element of the substitute decision-making model; UN Convention on the Rights of Persons with Disabilities, 2006, Art. 12(4); Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 29(h).

74 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 22.

the concept of support established by the Convention requires only voluntary/non-coercive measures, both in and outside of the healthcare sector.⁷⁵ Consequently, restricting the liberty of persons with disabilities on the basis of various reasons, including medical necessity, harm to oneself or others, is unlawful and arbitrary.⁷⁶

In view of all the above, the state is obliged to repeal any regulation that, based on the fact of disability, with the consent of a third party (including family members), provides for involuntary treatment or placement of a person in a residential facility, including in crisis situations.⁷⁷ With the change in legislation, a change in practice is also essential. For example, all health care representatives who will come in contact with the support provider should provide appropriate consultation to and direct involvement of a person with a disability in the dialogue. To the best of their ability, they should ensure that the relevant decision is made by the person with the disability and not by their supporter and that person with disability is not subject to adverse influence.⁷⁸ Only in this case it will be possible to obtain free and informed consent from a person with disability and to avoid forced medical interventions.⁷⁹

Clearly, developing specific safeguards and adapting them to the context of the country is the responsibility and discretion of the state; However, for the sake of specificity, the Committee also points to the need to establish a mechanism by which third parties can identify the supporters and challenge their actions if they believe that supporters do not act in accordance with the will and choice of the support recipients.⁸⁰

75 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/40/54, 2019, para. 56.

76 The Special Rapporteur emphasizes that these systems are discriminatory (as they only apply to certain groups because of their existing or perceived disability), they limit the capacity of persons with disabilities (because a person does not have the right to decide on their treatment, care and/or hospitalization/placement at the institution). Rapporteur considers these systems as unnecessary and disproportionate considering the content of the right to liberty and security; Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/40/54, 2019, para. 61.

77 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 41-42; Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/74/186, 2019, para. 31; It should be noted that the case law of the European Court of Human Rights in this field is somewhat inconsistent with the Convention (see. *D.D. v Lithuania* (no. 13469/06); *Stanev v. Bulgaria* (GC; no. 36760/06); See also Favalli S., *The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017 – 2023: from Zero to Hero*, “Human Rights Law Review”, Vol. 18, 2018, p. 534).

78 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 41; Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/73/161, 2018, para. 25.

79 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 42; see, also Minkowitz T., *The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions*, “Syracuse Journal of International Law and Commerce”, Vol. 34, 2007.

80 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 29(d).

On the one hand, proper awareness of the recipients of support is essential for the effective functioning of the institution of support, and, on the other hand, for the prevention of abuse of rights or undue influences during the provision of support. The Committee emphasizes in particular that a significant reason for impeding the exercise of right of persons with disabilities to independent living is the lack of relevant information available to them.⁸¹ This barrier, even in the presence of a formally established legal framework, facilitates the control of the life of a person with a disability by third parties – for example, by family members exercising substitute decision-making or limiting the right of a person with disability to make their own decisions.⁸² Accordingly, it is essential for the state to properly inform those involved in the support process about the content of the notion of legal capacity/supported decision-making (including the legal and ethical standards/principles for providing support). Only then, it is possible for all persons involved in the process to properly understand their authority and functions.

The Need of the Community-Based Approach

The concept of legal capacity is closely linked to the right to independent living and to participation in society.⁸³ On the one hand, legal capacity determines the independence of a person with disability and their right to make decisions about their own life, and, on the other hand, living independently in a community is a precondition for the exercise of legal capacity and other rights.

Necessary support for the realization of legal capacity should be provided to a person in accordance with a community-based approach that respects the wishes and priorities of persons with disabilities.⁸⁴ The Committee makes it clear that in order to fully implement the capacity and support system, it is imperative to enable persons with disabilities to formulate and express their wishes and priorities. To achieve this, it is essential that these people live in the community,⁸⁵ especially given the severe impact of institutionalization on decision-making ability and independent living skills.

81 Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on Living Independently and Being Included in the Community, CRPD/C/GC/5, 2017, para. 26.

82 Ibid.

83 Office of the United Nations High Commissioner for Human Rights, Regional office for Europe, Getting a Life – Living Independently and being Included in the Community, 2012, p. 9.

84 Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on Living Independently and Being Included in the Community, CRPD/C/GC/5, 2017, para. 80; Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 45, 46.

85 Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on Living Independently and Being Included in the Community, CRPD/C/GC/5, 2017, para. 80.

Analysis of the above principles reveals the complexity of the support system and the theoretical and practical difficulties associated with its functioning. In order to fully implement this institution in the country, the national model should take into account the centrality of the role of persons with disabilities in decision-making, as well as the diversity of support services in line with the wishes and needs of the support recipients. In addition, it is important that the support system is built on community-based approaches and incorporates mechanisms to prevent undue influences on persons with disabilities and abuse of rights by the supporter/third party.

1.3.2. Difference between Supported Decision – Making and other Regimes

Identifying the differences between the concepts of supported decision-making and substitute decision-making is crucial for the proper implementation and management of capacity reform. However, on the other hand, it is essential to separate the support mechanism from other means of support for persons with disabilities. Given the characteristics of the system of supported decision-making and the fundamental principles of its functioning, the key factors that distinguish it from other concepts, including personal assistance, are clear.

The Committee has repeatedly stated that the service of a personal assistant are essential for the exercise of the right to independent living.⁸⁶ Unlike the support system, it involves providing the necessary assistance to a person with a disability in carrying out daily activities.⁸⁷ Even in the case of personal assistance provision, people with disabilities, their desires and choices play the key role, therefore, what we have is so-called “self-management of service delivery” – persons with disabilities can freely choose the degree of personal control over the provision of services.⁸⁸ It is clear that a person with disability can exercise control over the provision of personal assistance services, if necessary, through supported decision-making.⁸⁹

Supported decision-making also differs from a reasonable accommodation and special protection measures provided by the Convention to ensure equality.⁹⁰ Legal capacity and the fight against discrimination are fundamentally related concepts,⁹¹ moreover, the right to request reasonable accommodation is a complementary element of the system of supported

86 Ibid., para. 16 (d)(iv).

87 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/40/54, 2019, para. 82.

88 Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on Living Independently and Being Included in the Community, CRPD/C/GC/5, 2017, para. 16 (d)(iv).

89 Ibid.

90 Committee on the Rights of Persons with Disabilities, General Comment No.6 (2018) on Equality and Non-discrimination, CRPD/C/GC/6, 2018, para. 25 (c).

91 Ibid., para. 47.

decision-making.⁹² However, a key difference between these concepts is the content of the state obligations – unlike the reasonable accommodation obligation, in the system of supported decision-making there are no limits on the obligations – disproportionate or undue burden does not limit the requirement to provide the support to exercise capacity.⁹³

1.4. Relation of the Right to Legal Capacity to other Rights

The concept of legal capacity is directly related to the enjoyment and exercise of other rights and freedoms set forth in the Convention, including the protection against discrimination, the right to participate in public and political life, the right to health and social protection, and the protection of physical and mental integrity.

Legal capacity and non-discrimination are closely related concepts. Article 5 of the Convention establishes equality of all persons before the law and the obligation to ensure equal opportunities. The definition of discrimination on the grounds of disability is given in Article 2 of the Convention and implies any differential treatment, exclusion or prohibition on the basis of disability.⁹⁴ Restriction of legal capacity is a direct interference with the right of persons with disabilities to equality before the law and, in conjunction with Article 12, violates Article 5 of the Convention.⁹⁵ Protection of equality and non-discrimination in the process of recognition of legal capacity restores the autonomy and dignity of the person under Article 3 (a) of the Convention. In addition, it is clear that the need for support and reasonable accommodation in decision-making should not determine whether a person can exercise his/her legal capacity.⁹⁶

Rights set out in Article 12 are also closely linked to the obligations to ensure accessibility. Article 9 of the Convention requires the identification and elimination of all barriers that exist in relation to facilities, services and access to information. Lack of access to information and inaccessible services for persons with disabilities pose practical barriers to the exercise of their legal capacity.⁹⁷

92 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 34.

93 *Ibid.*, Committee on the Rights of Persons with Disabilities, General Comment No.6 (2018) on Equality and Non-discrimination, CRPD/C/GC/6, 2018, para. 48.

94 Committee on the Rights of Persons with Disabilities, General Comment No.6 (2018) on Equality and Non-discrimination, CRPD/C/GC/6, 2018.

95 Lewis O., *Legal Capacity in International Human Rights Law*, 2015.

96 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014.

97 *ibid.*

Recognition of legal capacity is essentially linked to the realization to the right of access to justice. For exercise of rights and obligations, persons with disabilities must be recognized on equal basis with others during court proceedings and hearings. Access to justice means giving the individuals who experience interference with their legal capacity the opportunity to appeal against such interference by themselves or through an official representative and to protect their rights in court. Support provision to ensure access to justice may include measures such as a variety of communication methods, video testimony in specific cases, reasonable accommodation and modification of court proceedings, the services of a professional translator, and other ancillary means.⁹⁸

Legal capacity also includes the obligation to ensure the right to health, liberty and security of persons with disabilities. Restriction of legal capacity and compulsory placement of persons with disabilities in the institutions constitute gross interference with these rights.⁹⁹ Forced treatment by psychiatrists and other medical professionals violates the right to privacy (Article 17), protection from torture, exploitation, violence and abuse (Articles 15-16). Moreover, the right of persons with disabilities to enjoy the highest attainable standard of health care is based on the paradigm of free and informed consent. The practice of compulsory treatment unequivocally denies a person their legal capacity to make a decision on medical intervention and also constitutes a violation of Article 12. Accordingly, state authorities have an obligation to require health care institutions, including psychiatric facilities, to prioritize informed consent for persons with disabilities, during treatment provision.¹⁰⁰

As mentioned above, the imperative requirement for the full realization of Article 12 is that persons with disabilities should have the opportunity to develop and express their own desires and wishes to be able to enjoy their own legal capacity on equal basis with others. It means giving them the opportunity, under Article 19 of the Convention, to live independently in the community, to make decisions and to have control over their own daily lives, on an equal footing with others.¹⁰¹ The interpretation of the third paragraph of Article 12 clearly implies that the support process should be based on community services.

Substitute decision-making models, in addition to being incompatible with Article 12, potentially violate the right to privacy of persons with disabilities by allowing access to a significant portion of personal data. In the process of introducing a supported decision-making model, states should ensure that the privacy of support recipients and the related information are protected.

98 *ibid.*

99 UN Convention on the Rights of Persons with Disabilities, 2006, Art. 14.

100 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014.

101 Committee on the Rights of Persons with Disabilities, General Comment No. 5 (2017) on Living Independently and Being Included in the Community, CRPD/C/GC/5, 2017.

For the full realization of the right to legal capacity, it is important that the right is recognized and guaranteed in the public and political spheres. Nevertheless, limitation of legal capacity is often used to deprive a person of the right to participate in political life. Based on the concept of legal capacity, it is essential that a person's decision-making capacity or their disability should not be a justifiable ground for restricting this right, including the right to vote and participate in the elections.¹⁰²

From the above reasoning, the complexity of the right to legal capacity and its relation to the exercise of the rights and freedoms provided for in the Convention is clear. States, in the process of introducing and implementing the capacity reform, must take this interrelation into account and take appropriate measures not only to comply with Article 12 of the Convention but also with the rest of the provisions.

1.5 The Essence of Relevant State Obligations

According to Article 12 of the Convention, the main obligation of the state is to ensure that all persons with disabilities can exercise legal capacity. To this end, the state must take a variety of steps, including a comprehensive revision of the legislation to replace the types of guardianship models with the concept of support. When implementing the legal capacity reform, it is important that states legally recognize the status of the supporter and ensure that support is available to all.¹⁰³

In the process of securing the right to legal capacity, one of the objectives of the state should be to support and empower persons with disabilities – to develop their skills so that in the future they can exercise their legal capacity with less intensive assistance. It is important that support recipients are provided with training so that they can decide when they need less extensive support or when they no longer need support to exercise their capacity.¹⁰⁴

One of the most important areas where the state should take comprehensive and important legislative, administrative, judicial and practical measures is the financial and economic independence of persons with disabilities. Independent access to finances and property has always been denied to persons with disabilities due to the medical model. In parallel with the introduction of a new paradigm by the Convention, it is important for states to include the concept of support in this area, which will enable persons with disabilities to fully realize their rights in accordance with Article 12 of the Convention.¹⁰⁵

102 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014.

103 *Ibid.*, para. 29.

104 *Ibid.*, para. 24.

105 *Ibid.*

2. The Barriers towards the Legal Capacity Reform Implementation in Georgia

In parallel with discussing the essence of legal capacity and support system in the light of international standards, it is important to have a general overview of the content of these concepts in the Georgian context. The country ratified the Convention in 2013, thus taking on the obligation to ensure the legal capacity to all persons with disabilities. At the same time, when ratifying the Convention, Georgia adopted a Declaration in relation to Article 12, according to which the country interprets this article in accordance with other human rights instruments and domestic law, in order to ensure maximum legal protection of persons, their dignity, physical, psychological and emotional integrity and property.¹⁰⁶ Although adoption of the Declaration does not, in legal terms, equate to reservation to any of the articles of the international treaty and does not change the degree of fulfillment of an existing obligation, its content more or less indicates that the Government was not prepared to fully reflect Article 12 in legislation or practice.¹⁰⁷

Following the ratification of the Convention, a system of guardianship continued to operate in Georgia, recognizing a person as incapacitated in the event of “mental retardation” or “mental illness” and fully substituting the will of the person. Consequently, the incapacitated person was completely deprived of the opportunity to exercise the rights and actions with legal consequences.¹⁰⁸ Despite the inconsistency of the pre-reform model of legal capacity with the Convention, the process of bringing the legal framework governing this area into conformity with the Convention has not been initiated by the executive and legislative government. Only after the Constitutional Court of Georgia rendered the most important decision in October 2014 in the case of Irakli Kemoklidze and Davit Kharadze v. Parliament of Georgia, the capacity reform was implemented,¹⁰⁹ which formulated and approved the aspects of holding and exercising the rights by persons with psychosocial needs.¹¹⁰

Given the importance and complexity of the capacity reform, this chapter will provide an overview of the content of the Constitutional Court decision and the corresponding reform,

106 The declaration is available: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

107 Human Rights Education and Monitoring Center (EMC), Evaluation of the legal capacity reform and its implementation process, analysis of legislation and practice, 2016, p. 5.

108 Ibid., p. 8.

109 In total, 67 acts were amended as a result of the reform. Changes are available: <https://info.parliament.ge/#law-drafting/8456>.

110 According to Article 12 (4) of the Civil Code of Georgia, *A person with legal capacity is deemed to be a person in need of psychosocial support (the 'beneficiary of support') – a person who has a fixed psychological, mental/intellectual disorders which, when interrelating with other impediments, may prevent him/her from participating in public life fully and effectively on equal terms with others if such a person meets the conditions under paragraphs 2 and 3 of this article; furthermore, these impediments, without appropriate advice and aid, significantly make it harder for the person to freely express his/her own will and to make an informed and conscious choice in an area defined by the court.*“

as well as the review of the main barriers that significantly hinder the implementation of the reform and the exercise of the legal capacity by persons with disabilities.

2.1. The General Overview of the Legal Capacity Reform Implementation

As mentioned above, the implementation of the legal capacity reform was based on the decision of the Constitutional Court. The subject of dispute in court were the main legislative acts regulating the guardianship model¹¹¹ – the Civil Code, the Civil Procedure Code and the Law of Georgia “on Psychiatric Care“. In accordance with Articles 14 (equality before the law), 16 (right to free personal development), 17 (inviolability of honor and dignity, prohibition of torture and inhuman treatment), 18 (inviolability of personal integrity), 36 (right to marry) and 42 (procedural rights) of the Constitution of Georgia, the court considered the system of guardianship and declared the regulations contained in the above acts as unconstitutional.

On the one hand, this decision of the Court is crucial and revolutionary in terms of redefining and developing the concept of legal capacity in the country, and on the other hand, the reasoning of both the Court and the parties to the dispute¹¹² is not fully in line with the Convention and the Committee’s views, which could become the basis for the formation of heterogeneous approaches in terms of defining and implementing the concept in practice and law. It is important to note that the Court did not recognize the right to legal capacity as an absolute right, but rather considered the notion in terms of Article 16 of the Constitution, the right to free development of the individual, which is unequivocally inconsistent with the Convention and the Committee’s view on the right to legal capacity as inherent and universal right.

Although the Court did not consider the right to exercise a legal capacity as an absolute right, it stated that even a significant limitation of cognitive skills could not be considered as a sole basis for a complete limitation of a person’s legal capacity.¹¹³ However, the decision unequivocally allows for limitation of capacity in certain cases, including “dynamically developing illness” or “extremely severe and irreversible” mental health problems.¹¹⁴ Clearly,

111 Regulations that concerned the procedures for the court declaring a person as legally incapable, the authority of a guardian and custodian, as well as the legal status of a person subjected to guardianship.

112 For example, according to the plaintiff, “in the case of extensive mental retardation or persistent schizophrenia, a person can be completely deprived of the opportunity to make a decision. Therefore, in this case, the complete substitution of the will of the guardianee by the will of the guardian is justified”; Also, “decisions regarding the guardianee must be made in accordance with the interests of the guardianee”; see, Decision of the Second Panel of the Constitutional Court of Georgia N 2/4 / 532,533 – “Citizens of Georgia – Irakli Kemoklidze and Davit Kharadze v. Parliament of Georgia”, 2014, paras. 9, 12.

113 Ibid., para. 12.

114 Ibid., paras. 23-24; 34, 42.

one of the main reasons why the system of guardianship was deemed unconstitutional is a blanket restriction of the right to exercise legal capacity rather than an understanding of its absolute nature.¹¹⁵ Nevertheless, this decision laid groundwork for a large-scale reform, which should have substantially changed the legal status of persons with psychosocial and intellectual disabilities.

A special working group has been set up by the Parliamentary Committee on Legal Affairs to bring the legislation in line with the decision of the Constitutional Court. It was this group that, on February 26, 2015, initiated a package of legislative changes consisting of 67 acts,¹¹⁶ which entered into force on April 1 of the same year. As a result of these changes, the guardianship model was replaced with the system of supported decision-making. In the legislation, terms such as “mental retardation” and “mental illness” were replaced by the definitions – “support recipient” and “person with psychosocial needs”. The reform restored full capacity for support recipients and introduced procedures for identifying psychosocial needs to determine the need for support and appointing a supporter.

In addition, in order to determine the individual needs of persons recognized as incapacitated, the reform introduced 5-years transition period starting from April 1, 2015, during which the guardians of incapacitated persons and the representatives of the administration of inpatient psychiatric or specialized institutions were obliged to apply to the court for an individual assessment to determine the degree of support provision.¹¹⁷ To date,¹¹⁸ there are 6116 registered support recipients of which 2923 were declared incapacitated before the reform,¹¹⁹ at the same time, 6647 supporters have been registered since the reform, out of which 5779 persons hold active status.¹²⁰ Given the number of support recipients, as well as the need for protection of their rights, it is important to maintain and refine the relevant legislative and policy framework and existing practices.

115 For an in-depth analysis of the mentioned decision of the Constitutional Court of Georgia, see, Human Rights Education and Monitoring Center (EMC), Evaluation of the legal capacity reform and its implementation process, analysis of legislation and practice, 2016; Public Defender of Georgia, Legal Capacity- Legislative Reform Without Implementation, 2016.

116 This package is available at <https://info.parliament.ge/#law-drafting/8522>.

117 With respect to a person declared incapacitated before 1 April 2015, who is placed in an inpatient psychiatric institution, the institution should apply to the court for recognition of that person as a recipient of support and individual assessment within 2 years from 1 April 2015; The term set aside for a similar action for a guardian and a specialized institution is 4 years; See. Civil Code of Georgia, Art. 1508¹.

118 According to August 2020 data.

119 Correspondence of the Ministry of Internally Displaced Persons from the Occupied Territories, Labor, Health and Social Affairs of Georgia N 01/10439, 01.09.2020.

120 Ibid.

2.2. General Overview of Barriers to the Implementation of Legal Capacity Reform in the Georgian Context

Although the abolition of the system of guardianship and the introduction of the concept of support was unequivocally a step forward in the Georgian reality and the content of the reform is largely compatible with the principles and provisions of the Convention, challenges remain in terms of the implementation and content of the reform.¹²¹ The main barriers¹²² to the introduction and implementation of the support system are as follows:

Legislative Barriers – The challenge in this regard is the ambiguity and/or inadequacy of regulation at any stage of the appointment and implementation of supported decision-making (in the process of identifying psychosocial needs, providing support and monitoring support provision). In addition, one of the most important challenges for people with disabilities when exercising their legal capacity is the formulation of some parts of the legislation – setting blanket restrictions on support recipients in relation to a number of issues. These restrictions substantially violate the rights of members of this group in areas such as labor and employment, participation in political and public life, respect for private and family life, and more.¹²³

At the same time, in order for all persons to enjoy equal rights under the legislation of Georgia, the Law of Georgia “on the Elimination of All Forms of Discrimination”, which directly refers to disability as one of the grounds for discriminatory treatment, is essential. The Law “on the Rights of Persons with Disabilities”, adopted by the Parliament of Georgia in July 2020, also focuses on the prohibition of discrimination on the grounds of disability. It is important to note that the Law also defines the denial of reasonable accommodation as a form of discrimination, which is an essential principle for ensuring equality of persons with disabilities and their inclusion in all spheres of society. However, despite the existing challenges in this general regulation and the supported decision-making legislation, the Law failed to take into account the human rights standard of legal capacity and the obligations of government agencies to effectively implement and operate the support system.¹²⁴

121 Human Rights Education and Monitoring Center (EMC), Evaluation of the legal capacity reform and its implementation process, analysis of legislation and practice, 2016; Public Defender of Georgia, Legal Capacity- Legislative Reform Without Implementation, 2016; Report of the Public Defender of Georgia on the Situation of Human Rights and Freedoms in Georgia, 2017, p. 126, 301.

122 The above barriers were identified in 2019 by the Human Rights Education and Monitoring Center (EMC), the Partnership for Human Rights (PHR), the Georgian Association of Social Workers (GASW) and the Global Initiative in Psychiatry – Tbilisi (GIP – Tbilisi) through desk research, interviews with experts, and focus group meetings with all actors involved in the support provision process (support recipients, supporters, service providers, judges, social workers, representatives of the Levan Samkharauli National Forensics Bureau).

123 See, Human Rights Education and Monitoring Center (EMC), Evaluation of the legal capacity reform and its implementation process, analysis of legislation and practice, 2016; Public Defender of Georgia, Legal Capacity – Legislative Reform Without Implementation, 2016.

124 See statement – “Persons with Disabilities and Organizations Respond to the Adoption of the Law on the Rights of Persons with Disabilities” available at: <https://emc.org.ge/ka/products/shshm-pirebi-da-organizatsiebi-shshm-pirta-uflebebis-shesakheb-kanonis-mighebas-ekhmianebian>.

Institutional Barriers – One of the main challenges in this regard is the overload of the agencies responsible for the implementation of the support system, the need for effective tools in the process that are in line with the Convention, and the lack of human and financial resources. In some cases, it is also problematic to ensure effective coordination between agencies.

One of the challenges at the institutional level – barriers to service delivery are particularly noteworthy. In particular, no support service has been introduced in the country to date, which is why there is virtually no effective alternative to relying on family members (as supporters).¹²⁵ Even within this system, it is problematic to systemically and systematically inform all the actors involved in the supported decision-making process (agencies, support recipients and supporters) about the effectiveness and the content of the support system and its practical aspects, which precludes effective implementation of the reform. On the other hand, there is a severe lack of services that would ensure the implementation of the decisions made by the support recipients, the exercise of their right to independent living and the development or refinement of the necessary skills needed for persons to make those decisions.

One of the most pressing barriers to the introduction of the concept of legal capacity is the practice of institutionalization of people psychosocial and intellectual disabilities. Individuals placed in large institutions are completely deprived of the opportunity to have connections with the outside world, and to make decisions independently about their own lives. Consequently, the legal capacity of these persons remains only formally guaranteed.

Informational Barriers – As mentioned above, one of the most important barriers to the introduction and implementation of the concept of legal capacity is the lack of awareness of relevant actors (government agencies and various service providers, support recipients and supporters)¹²⁶ about the content and functioning of the support system. On the one hand, the state does not take relevant steps in this direction in terms of actively informing all actors and on the other hand, support recipients do not have access to relevant information in formats accessible to them (including in easy-to-read format). Along with the informational vacuum, the stigma and discriminatory attitudes towards people with disabilities are particularly pronounced in society, which has a particularly negative impact on the exercise of capacity by members of this group. Elimination of this problem should become one of the top priorities of state policy.

Practical Barriers – Barriers in practice are largely due to legislation, court decisions or the improper functioning of the institutional framework. Among other factors, a particular

¹²⁵ Given the various challenges, representatives of the specialized institutions and social workers are unable to effectively perform their support duties.

¹²⁶ Especially when it comes to medical and financial institutions.

challenge is the provision of support – it is often problematic that the concept of support is confused with the functions of other institutions (e.g., guardian,¹²⁷ caregiver, personal assistant). It is also difficult to establish a fine line between the functions of supporters and the family members (who, in most cases are supporters).

Due to the various legislative, institutional, practical or informational barriers to the exercise of the legal capacity by persons with disabilities, it is clear that the state policy is ineffective in implementing the reform of legal capacity and ensuring real changes in the legal status of persons with psychosocial needs. Elimination of these barriers, due to their nature, shall only be possible as a result of coordinated, pre-planned, systematic and consistent approaches among government agencies.

Conclusion

International human rights law clearly underlines the importance of equality before the law – the concept of equality is essential for a free exercise of all human rights and freedoms by any human being. It is even more important for persons with disabilities – as they have historically been deprived of the right and opportunity to make decisions about their own lives.

Clearly, there are a number of theoretical and practical ambiguities in the analysis of the concepts of legal capacity and equality before the law. With regard to persons with disabilities, well-established practice of the so-called medical model is still reflected around the world in the operation of guardianship and other alternative systems of substitute decision-making. Guidelines for states in this area are set out in the Convention and international instruments clarifying the norms of the Convention, including the reports of the Committee and the Special Rapporteur. It is from the analysis of their recommendations and special reports that the basic principles (including the centrality of the role of the support recipient, the prioritization of their wishes and needs, community-based approaches, etc.) are identified, which are essential for introduction of the support system at the national level.

In parallel with international standards, it is important to assess the situation in Georgia. As noted above, a significant part of the legal capacity reform is compatible with the Convention, however, to date, there are a number of barriers to the implementation of the concept of support at the national level. On the one hand, the reform was not followed by the so-called second wave, which would bring certain legal norms in line with the Convention, including legislation limiting the rights of support recipients (including the right to private and family life, right to work, right to participate in political and public life) in a blanket manner. On the

¹²⁷ Which in practice involves decision-making not by the support recipient but by the supporter.

other hand, the state has not presented a clear vision for the effective implementation of the existing reform, which would actually change the legal status of persons with psychosocial and intellectual disabilities.

Based on the above, the state inaction and the superficiality of the undertaken efforts in establishing the concept of capacity at the national level is evident. Given the current situation, in order to protect the rights and needs of thousands of people, it is fundamentally important for the state to assess all stages of the support system,¹²⁸ and to determine and implement systematic and coordinated policies in this area.

128 Correspondence of the Ministry of Internally Displaced Persons from the Occupied Territories of Georgia, Labor, Health and Social Affairs N 01/10439, 01.09.2020.

Part II. Recognition of a Person as a Recipient of Support

Introduction

Relevant international standards indicate that in ensuring legal capacity, the state should provide accessibility of supported decision-making for all persons in need of such support. To this end, it is essential to determine the extent and scope of a person's need; otherwise, the provision of support shall be virtually ineffective.

Recognition of a person as a recipient of support is an important stage of the support system. The Convention does not contain a specific directive in this regard,¹²⁹ however, it is clear that this process is a substantially complex, theoretically and methodologically strenuous that requires the involvement of various specialists, such as judges, social workers, psychologists and /or psychiatrists and includes numerous legislative, practical or ethical elements.¹³⁰

The purpose of this chapter is to identify the key principles and issues on which the process of recognition of a person as a recipient of support should be based. Accordingly, the peculiarities of the decision-making process for the appointment of support by the court, as well as the identification of a person's psychosocial needs will be reviewed.

Taking into account the above mentioned topic, the chapter is divided into three main parts. The first part deals with the issues of determining the person's status as a support recipient, the second part addresses topics related to the assessment of persons's psychosocial needs, while the third part includes thematic recommendations for various government agencies.

1. The Decision-Making Process by the Court

The proper judicial decision-making process is essential element for the effective functioning of the support system. The 2015 legal capacity reform completely changed the course of court proceedings and made mandatory the participation of the prospective recipient of support in the hearing,¹³¹ while the pre-reform model was based on the presumption of incapacity of a

129 In some cases, there is a difference between assigning a status to a person with a disability and determining a psychosocial need. The main purpose of this document is to analyze the latter.

130 Purser K., *Capacity Assessment and the Law: Problems and Solutions*, 2017, p. 1.

131 Civil Procedure Code of Georgia, Art. 368¹⁸.

person¹³² and led to the complete exclusion of a person from the process. On the grounds of “mental retardation” or “mental illness”, the court, on the basis of the application of the relevant authorized person, considered the issue of restriction of civil rights and obligations for the person, in accordance with uncontested proceedings, where at no stage of the procedures the participation of the individual concerned was allowed. The law excluded the possibility of appealing against the decision to recognize the person as incapacitated and to appoint a guardian.

The purpose of this chapter is to discuss the process of appointing a supporter for an individual and all its constituent stages. In particular, it reviews the stages of preparing an application and submitting it to the court, judicial examination of the application and sending it to the Forensic Bureau for the assessment and the stages of court hearings. Another important stage, which includes the assessment issues by the multidisciplinary team of the Forensic Bureau and reviews existing challenges and best international practices in this area, is analyzed in the Second Chapter of the Part II of this research.

1.1 International Standards and Practice

For the exercise of rights and obligations on equal footing with others, persons with disabilities should be recognized equally to others in courts and at the hearings.¹³³ To this end, measures taken under Article 12 of the Convention, along with other practical and institutional guarantees, require that the individual needs of all persons with disabilities are taken into account in the support appointment process and that they are included in the decision-making process. This requirement must be considered in conjunction with Article 13 of the Convention, which in turn sets preconditions for the administration of effective justice.

Access to justice, in addition to access to court buildings, primarily involves taking into account the needs of persons with disabilities during court hearings, access to information, and awareness of judges and the judiciary about the basic principles of protecting the rights of persons with disabilities. In order for court decisions to be based on the needs of persons with disabilities and to actually protect their rights, it is important to train people employed in the judiciary, especially judges, lawyers, social workers and other professionals.¹³⁴

132 Human Rights Education and Monitoring Center (EMC), Evaluation of the legal capacity reform and its implementation process, analysis of legislation and practice, 2016.

133 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014.

134 Resolution adopted by the General Assembly on 17 December 2018, A/RES/73/177.

Article 13 (2) of the Convention also notes the importance of retraining professionals involved in the justice system. This provision is further elaborated by the Committee in its recommendations, which states that in order to increase access to justice for persons with disabilities, it is necessary to train judicial representatives on the following topics: 1. Diversity of persons with disabilities and issues related to their individual needs – to ensure that all persons with disabilities have access to justice on an equal basis with others; 2. Topics of personal autonomy and legal capacity of persons with disabilities; 3. Methods of establishing effective communication in order to effectively achieve the inclusion of persons with disabilities in the justice process.¹³⁵

1.1.1 Procedural Rights in the Process of Effective Implementation of Article 12 of the Convention – Basic Principles

In the process of effective implementation of Article 12 of the Convention and in the process of assigning support to protect a person's procedural rights, the most important document is “International Principles and Guidelines on Access to Justice for Persons with Disabilities”, elaborated with the involvement of the Special Rapporteur in 2020.¹³⁶ The document consists of 10 basic principles, which are equally important for ensuring access to justice for persons with disabilities. However, in accordance with Article 12 of the Convention, in order to bring the procedures for the appointment of a supporter in Georgia in line with the requirements of the Convention, principles N 1, 2, 3, 4, 6 and 7 should be particularly emphasized.

The first principle addresses the legal capacity of all persons with disabilities and therefore requires that none of them have access to effective justice restricted in the process of restoring legal capacity and implementing it in practice. Other principles (N 2, 3, 4, 6 and 7) define the obligation to take special, additional measures to prevent discrimination, to apply the principle of reasonable accommodation, to provide appropriate access to information and to use alternative forms of communication for persons with disabilities to enjoy the right to access to justice on equal footing with others.

In order to restore legal capacity and apply it effectively in practice, these principles and guidelines require States to take the following steps to ensure access to justice:

- ▶ Ensure the right to legal capacity of all persons with disabilities and the possibility of their effective exercise in practice;
- ▶ Recognize and ensure the full legal capacity of persons with disabilities at all stages of court proceedings;

¹³⁵ Human rights in the administration of justice Report of the Secretary-General, Seventy-fifth session, A/75/327, 2020.

¹³⁶ UN Special Procedures, “International principles and guidelines on access to justice of persons with disabilities”, 2020.

- ▶ Ensure that approaches such as “cognitive incapacity” and “mental capacity”, used to assess functional and mental health status, are not utilized to limit a person’s legal capacity;
- ▶ Review and amend all policies, guidelines, practices and legislative documents that directly or indirectly restrict the legal capacity of persons with disabilities, including in relation to those persons to whom the substitute decision-making approach is applied and whereby persons with disabilities are denied access to justice on an equal footing with others;
- ▶ Review and amend all laws, policies, guidelines and practices that impose restrictions on access to court that exclude persons with disabilities from participating in proceedings that determine their legal capacity;
- ▶ Review and amend all legislation, policies, guidelines and practices that prohibit witnesses who are persons with disabilities from testifying, on the grounds of legal capacity;
- ▶ Review and amend all legislation, policies, guidelines and practices that empower medical professionals to be leading experts in determining the legal capacity of persons with disabilities and their ability to make decisions;
- ▶ Review and amend all legislation, policies, guidelines and practices that deprive persons with disabilities of the opportunity to initiate and conduct legal disputes;
- ▶ Establish effective and enforceable procedures to enable persons with disabilities to receive services tailored to their individual needs so that they can be effectively involved in all stages of the court proceedings;
- ▶ Ensure provision of the services of facilitators where it is necessary to establish effective communication between the court and the person with a disability, enabling the effective involvement and participation of the person with a disability at all stages of the proceedings;
- ▶ Ensure that persons with disabilities who have a limited capacity for any reason have the right to appeal or request a change of decision, seeking reinstatement of their legal capacity, and to have access to a lawyer in the process.

In the process of appointing a supporter for a person, determining the areas and scope of support, it is important for the court to be guided by the principles set out in the Convention. Court decision in this regard should be based on the presumption of independent decision-making and the need for possible support in the process, which may otherwise be formulated as principles of *free will, autonomy, pluralism and adaptive support*.¹³⁷

137 Bizchut, Supported Decision-Making Service for Persons with Disabilities.

Wishes and preferences – each person has desires and aspirations that can be expressed and under the influence of these preferences individuals begin to act to make decisions in order to lead their own lives in accordance with the above desires and aspirations.

Freedom – Every person has the right to lead his/her life according to their wishes and preferences, to receive the necessary support from the relevant state structures or third parties, when the obligation to provide such support arises. Legal capacity, as a necessary legal precondition for integration into society and living life to the fullest, is a fundamental right of every human being.

Pluralism – there is no single “right” way to make a decision. Consequently, there can be no professional criteria for establishing a general, model standard for support recipients with different needs. The scope of support should be determined on a case-by-case basis, based on the specific needs of the person.

Adaptive Support – The exercise of the right of persons with disabilities to independence, autonomy and capacity requires adaptive support from the state and society. This implies, first of all, that the nature of support is determined by the individual needs of the support recipient. Different people may need different types of support in different aspects of social life, therefore it is especially important that support services are tailored to the needs of specific individuals.

It is important that the decision regarding the appointment of a supporter to the person is justified and that the attitude/wishes of the prospective recipient of support regarding the decision are reflected in it. In particular, the decision should answer the following questions:¹³⁸

- ▶ General information about the person and their environment;
- ▶ Areas or situations where a person has difficulties in making a decision;
- ▶ Areas or situations from the past where a person had difficulties in making a decision;
- ▶ The person’s attitudes about supported areas and situations (whether he or she thinks support will be beneficial in the process);
- ▶ Strengths / resources of the person;
- ▶ The societal attitudes towards these difficulties;
- ▶ Community resources;
- ▶ All the other issues that will be important in the individual case to justify the decision.

138 Shebang N., Dimitrova M., Aleksieva P., Georgiev I., Valentina Hristakeva V., Vladimirova S., Malinova I., Aleksandrova L., Andonova A., Naydenova S., Guidebook to rights enforcement, 2014

1.1.2. Selection of the Supporter

One of the important issues that the court should consider during the process is the compatibility of the support recipient and the supporter, including the absence of conflict of interest, his/her ability to be an effective supporter in a particular field and the existence of trust between them, which should be one of the leading criteria during the compatibility assessment of the supporter and the recipient of the support, by the court.¹³⁹ In accordance with the general principles and international standards of the Convention, in the process of selecting a supporter, full effectiveness of the supporter in a particular field is achieved in systems where the support provision is understood as a service, with a focus on professional supporters, their qualifications, and ability to establish effective communication with the support recipient. A second alternative, in the process of selecting an effective supporter, for the court, may be to review whether the future supporters have completed a training/retraining. As for the relationship of trust between the supporter and the recipients of the support and the examination of the absence of conflict of interest by the court, it can be achieved by the effective involvement of the potential support recipient in the course of the decision-making process. Also, due to the importance of examining these concrete issues, it should be regulated at the legislative level and specific guidelines should be developed for the judiciary.

Any approach to the supported decision-making model should meet the needs of a person with a disability. Accordingly, the selection of supporter should be conducted with a direct involvement of an individual concerned. Preference should be given to a person whom the prospective recipient of support has known for longer. Moreover, the appointment of several support persons should be allowed, this is especially important when a person is in need of relatively intensive support. Several supporters who are aware of a person's different abilities may be better able to identify his or her wishes and support needs. It is necessary to consider several important criteria in the process of selecting a supporter:

- ▶ Relevant supporter selection criteria and selection procedures should be developed;
- ▶ There must be a supporter registration system.

1.1.3. Standards of Communication with the Prospective Recipient of Support in the Decision – Making Process

Establishing communication by court representatives with potential support recipients to ensure their effective involvement and participation in the process is a prerequisite for access to justice. Communication is a very important factor for effective support provision, as well

¹³⁹ Council of Europe, Commissioner for Human Rights, Who gets to decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities, 2012.

as for the decision making process. Communication is a two-way process – one person sends the message/information and the other person understands and receives it. To establish a specific communication channel, people communicate through words, objects, photos, pictures, symbols and gestures. For the successful communication, it is essential to focus on the person and determine which method of communication works best for them.

In addition to verbal communication, there are forms of alternative (system used instead of speech) and complementary (system used in conjunction with speech) forms of communication. Alternative and complementary forms of communication are diverse and it is necessary to assess which system suits a person the most. Alternative and complementary communication requires support provision and the introduction of new systems, namely:

- ▶ Without assistance: gestures, facial expressions;
- ▶ In need of assistance: Aids; for example, pictures, computers or special communication devices.¹⁴⁰

Alternative forms of communication may be required by the court to establish communication with persons with disabilities, including those with intellectual disabilities. A person may have difficulty expressing their own desires and preferences and introducing them to other people. Some people, for example, need communication devices or the person they are talking to may need to use special techniques to understand their wishes.¹⁴¹

Supporting someone in making a decision or in the process of making a choice is directly related to how much you can understand that person. Providing good and valuable support, understanding their desires, interests, attitudes, is possible only if you listen to them and are interested in what they really want. The court's relationship with the prospective support recipient should be based on this approach, in order for the judge to actually be able to involve the person with a disability in the decision-making process, to communicate with them and to hear them out.

1.2 Legislative Regulation and Challenges in the Support Appointment Process – the Georgian Context

According to the post-reform legislation, the process of appointing a support person can be divided into several stages: 1. Preparing an application and submitting it to the court, 2. Examining the case by the court and referring it to the Forensic Bureau, 3. Assessment of the

140 Shebang N., Dimitrova M., Aleksieva P., Georgiev I., Hristakeva V., Vladimirova S., Malinova I., Aleksandrova L., Andonova A., Naydenova S., Guidebook to rights enforcement, 2014.

141 Inclusion Europe, Key Elements of a System for Supported Decision-Making (Position Paper), 2008.

person by the Forensic Bureau, preparing a conclusion and sending it to the court; 4. Court hearing and completion of the process of appointing a supporter.

1.2.1 Preparation of the Application and Submission to the Court

The appointment of a supporter for a person begins with the submission of an application to the court; the right to file an application rests directly with the person who wants to become a support recipient, his/her family member, legal representative, guardianship and custodianship body, psychiatric or specialized institution.¹⁴² The law does not specify the form that should be completed when filing an application in court. However, the Code of Civil Procedure sets out the general requirements for the content of an application that must be submitted to the court. Among them is a list of areas in which a person wants to be supported.¹⁴³

However, this list is not exhaustive and at the same time, other legislative acts and/or internal instructions do not define how the areas can be formulated to maximize the essence of the supported decision-making, the individual needs of the person and their choice. In the absence of such regulations, the list of areas is quite problematic, its scope, which often deals with such issues and aims to provide such kind of support that is not in line with the main essence of the reform (supporting in the formation of the will and the decision-making process). For example, the court authorizes the supporter as a rights holder and gives the right to the supporter to fully exercise the rights him/herself.¹⁴⁴ The areas of support are often narrowed, which also contributes to additional problems and leads to inconsistent practices. For example – support in obtaining an ID card is enshrined in the decisions, while the decision may also concern conducting relations with administrative bodies. A note in the decisions indicating that a support recipient “needs assistance in all other areas” beyond the requested sphere is also problematic.¹⁴⁵ In addition, the article defining the general list of areas of civil law is important, which explicitly states that support in these and other areas, defined by the court, must be reflected in the person’s exercise of their rights. Despite a similar record in procedural law, often the conclusions of the Forensic Bureau as well as court decisions are framed in a way that emphasize the restriction to exercise of certain rights.¹⁴⁶

Based on the case law, at the stage of preparing the application and submitting it to the court, several important shortcomings can be identified, which in turn are related to the lack of institutional support for the reform:

¹⁴² Civil Procedure Code of Georgia, Art. 368¹⁴.

¹⁴³ Ibid., Art. 369¹⁵.

¹⁴⁴ Public Defender of Georgia, Legal Capacity- Legislative Reform without Implementation, 2016.

¹⁴⁵ Human Rights Education and Monitoring Center (EMC), Evaluation of the legal capacity reform and its implementation process, analysis of legislation and practice, 2016.

¹⁴⁶ Analysis of the case law carried out in the framework of the research.

- ▶ Applications are vague in most cases, they do not clearly specify areas to be assessed, and do not specify the requests. This is problematic insofar as such vague requests will, subsequently, lead to difficulties in taking into account the interests of the support recipient, in the proceedings. In almost all cases, the main objective for addressing the court is related to the management of financial resources.

This problem can be directly related to the lack of awareness of the support recipients, their family members and future supporters about the main essence of the reform since the beginning of the reform to date. Also, this is related to the absence of a support provision as a service, when it becomes possible to provide professional support by qualified and knowledgeable individuals;

- ▶ The purpose of filing an application before the court is usually not to promote an independent living of the person, but to impose restrictions on the exercise of a particular right, which in itself already contradicts the requirements of the supported decision-making model;
- ▶ Specifying the areas of support is not based on the individual needs of the person, as at this stage the specific needs of the prospective recipient of support are not fully identified. This issue is problematic because it is not discussed either at the stage of court proceedings or at the Forensic Bureau, which is why there is often a wide list of areas included in the decisions that may not even be directly related to a person's needs at that time.

The ambiguity of the requests in the application allows the court to request a broader psychosocial assessment of a person and make a corresponding decision. Such an approach does not in itself take into account the initial requests of the applicant and assesses the persons at court's own discretion. As a result, we get a broad psychosocial examination of the person, which is not an assessment of the person's difficulties in making decisions in different areas and an evaluation of their strengths in that regard.

1.2.2. The Judicial Examination of the Case and Referring to the Forensic Bureau

After the application requesting the appointment of a supporter is submitted to the court, if the court accepts the application, an expert examination is appointed immediately.¹⁴⁷ At this stage, the readiness and knowledge of the judiciary on the supported decision-making model, the social model for the assessment of persons with disabilities and the basic princi-

¹⁴⁷ Civil Procedure Code of Georgia, Art. 363²⁰.

ples of the Convention become particularly important. This significance stems from the fact that the questions addressed to the Forensic Bureau, on the one hand, as mentioned above, due to the ambiguity of the application, gives the court opportunity to further expand the required assessment areas and, on the other hand, to ask questions that do not go beyond the essence of the supported decision-making model. The answers to which shall help the court make a decision tailored to the individual needs of the person. Subsequent practice of the reform shows that there are serious challenges in this regard, which hinder the effective implementation of the reform.

The questions asked by the court to expert examiners are inaccurate, are not aimed at identifying the individual decision-making needs of the person, and repeat the general provision of the law. The questions, asked by the court, are not formulated in light of a particular right.¹⁴⁸ Because of this, it is factually impossible to identify the real needs of the support recipient and to determine the extent of support needed to effectively exercise specific rights.

1.2.3. Court Hearing and Completion of the Supporter Appointment Process

With regard to the court hearing process, legislation is vague in some cases and requires additional legislative provisions to ensure uniform court practice and, most importantly, protect the interests of the support recipients and their right to the accessible justice. One such issue is the regulation of court proceedings concerning the issue of recognition of a person as a recipient of support.

Prior to the reform, the declaration of incapacity of a person belonged to an uncontested category of cases, which involved the establishment of legally significant facts and did not take into account the consequences that would arise for a particular person in exercise of their rights.¹⁴⁹ The peculiarity of the uncontested proceedings was the issue of involving the persons with disabilities in the court proceedings, as it was more in the interests of a stakeholder, who was different from the prospective incapacitated person.

The support reform has changed this approach and today the case of recognizing a person as a recipient of support is no longer heard under uncontested proceedings. It is a form of independent court proceeding that provides guarantees of mandatory participation and

¹⁴⁸ Human Rights Education and Monitoring Center (EMC), Evaluation of the legal capacity reform and its implementation process, analysis of legislation and practice, 2016.

¹⁴⁹ Ibid.

mandatory protection in the process for a prospective support recipient.¹⁵⁰ It is true that, formally, the process of recognition of a person as a support recipient is no longer a matter for uncontested proceedings, but it still does not ensure the full participation of an individual concerned, as it does not provide for litigation and thus full involvement of the prospective recipient of support in the process. Such an approach raises questions about the effective exercise of procedural rights.¹⁵¹ Such ambiguity further complicates the process when the issue of recognizing a person as a recipient of support is raised by a third party and person to be recognized as a support recipient does not agree with the areas and scope of support. In such a case, it is important for the legislation to provide a clear response to the need to initiate a lawsuit.

Another significant shortcoming caused by the lack of specific regulation in the legislation relates to the case where the prospective recipient of support does not agree with the appointment of a particular person as a supporter. The Code of Civil Procedure does not provide specific regulation on this topic, while the compatibility of the supporter and the recipient, the qualification of the supporter and the examination of conflicts of interest between them should be the main purpose of the court proceedings and should be based on respect for the autonomy and interests of the person with disability.

Although the support appointment process provides for the mandatory involvement and participation of this person in the process, in the absence of appropriate legislative guarantees and instructions on how to achieve this, the involvement of a person with a disability is merely formal at the stage of the proceedings. It can be said that the only evidence of the areas of support and its scope is the conclusion of the examination. The court hearing also serves only to establish the facts and not to examine the objective circumstances of the appointment of support. One of the reasons for this, in addition to the lack of relevant regulations, is the insufficient preparation of the judiciary in the process of initiating and implementing the reform, on the basic principles of the Convention and the essence of the supported decision-making model, including standards for communication with persons with disabilities.

Thus, the existing case management system does not adequately provide for the right of a prospective support recipient to refuse to receive support, to engage effectively and fully in the hearing. This, in turn, can be said to lead to incomplete protection of the right to justice of the support recipient.

¹⁵⁰ Civil Procedure Code, Art. 363¹⁸.

¹⁵¹ Human Rights Education and Monitoring Center (EMC), Evaluation of the legal capacity reform and its implementation process, analysis of legislation and practice, 2016.

At the end of the court proceedings, the court makes a decision on the recognition of a person as a recipient of support, which must address issues such as: the right/rights in relation to which a person receives support, as well as the scope of support, the rights and responsibilities of the supporter/supporters, and the reporting obligations by the supporter/supporters, duration of support provision and also, specific circumstances, which concern the individual needs of the person and implementation of the decision based on the needs of the person. Although this provision of procedural law is quite general, it still points to the need for support not with regard to all rights, but the specific directions according to the needs of a particular person and indicates what kind of support should be provided. Nevertheless, court decisions often consider the right of a supporter as a restrictive, in fact, replacing the will of the person receiving the support in most cases:¹⁵²

- ▶ Court decisions in some cases, instead of utilizing the support mechanism, actually involve a decision to substitute the will of a person, which directly indicates to the representative authority of the supporter; It is important to note that post-reform civil law recognizes the case where a supporter is allowed to enter into necessary agreements on behalf of the recipient of the support, in his or her best interest.¹⁵³ However, this provision concerns extremely exceptional cases, focusing only on the possibility of concluding an agreement, and considers this as only a temporary and necessary measure to prevent significant harm to the recipient of the support. While this provision should be used in extreme cases, for example, when a person is in a comatose state, in reality, it is used in most of the decisions.
- ▶ Court decisions that actually address reform requirements and do not use substitute support formulations in their decisions, are also found in practice. However, even in this case, the decision is not based on the individual needs of the person and support is appointed in the exercise of all rights.
- ▶ Most court decisions do not define the scope of support, which complicates both enforcement of the decision and effective monitoring by the oversight body, namely, the social workers.
- ▶ Court decisions do not in all cases include the justification that will clarify the grounds for assigning support to a person in a particular area, validity of appointing a particular supporter, absence of conflict of interest between supporter and support recipient, and other important issues in relation to individual needs.¹⁵⁴

152 Analysis of the case law carried out in the framework of the research; Human Rights Education and Monitoring Center (EMC), Evaluation of the legal capacity reform and its implementation process, analysis of legislation and practice, 2016; Public Defender of Georgia, Legal Capacity- Legislative Reform without Implementation, 2016.

153 Civil Procedure Code, Art. 1293 (4).

154 Public Defender of Georgia, Legal Capacity- Legislative Reform without Implementation, 2016.

2. The Assessment of the Person's Support Needs

Identifying psychosocial needs is one of the most complex steps in the support system. Its complexity derives from the dynamic nature of one of the main objectives of assessment, determining a person's decision-making skills – no one disputes that every person has their own, unique ability in this area, which varies considerably according to the field, time and context.

Given the heterogeneity of decision-making skills, it is clear that the essence and intensity of a person's need for support can vary considerably depending on the context. However, such changes should not jeopardize a person's exercise of their legal capacity; Moreover, States should take all measures to provide support to persons with disabilities tailored to their needs.

Proper management of the process of identifying psychosocial needs essentially determines the effectiveness of the subsequent stages (recognition of the person as a support recipient, support provision in the decision-making process, monitoring of support cases). Accordingly, States must comprehensively implement all relevant measures to improve the system for determining the need for support of individuals.

2.1. Basic Principles of Evaluation

The process of psychosocial needs assessment is based on different models in different country contexts and, in some cases, is essentially related to the definition of disability.¹⁵⁵ Prior to the adoption of the Convention, the medical model was largely rooted in legislation and practice, while the Convention explicitly focuses on social and human rights-based models.¹⁵⁶ Unfortunately, despite the paradigm shift by the Convention, the existing assessment processes for persons with disabilities are still significantly problematic and flawed.¹⁵⁷

155 Waddington L., Priestley M., Sainsbury R., Disability Assessment in European States: ANED Synthesis Report, 2017.

156 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Belgium, CRPD/C/BEL/CO/1, 2014, paras. 7-8; Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Cyprus, CRPD/C/CYP/CO/1, 2017, para. 5; Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Slovakia, CRPD/C/SVK/CO/1, para. 11-12.

157 The Committee considers the presence of medical elements in various types of assessment processes as problematic in the context of a number of countries. e.g., see Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Greece, CRPD/C/GRC/CO/1, para. 5 (2019); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Bulgaria, CRPD/C/BGR/CO/1, para. 60 (2018); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Latvia, CRPD/C/LVA/CO/1, para. 7 (a) (2017); Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1, para. 56 (c) (2017).

Due to the complexity and difficulty of the evaluation, there is no so-called “gold standard” for its implementation,¹⁵⁸ however, analysis of country experiences and various relevant international standards outlines the general principles on which this system should be based.

Identifying the need for support instead of determining the legal capacity status

One of the main challenges of the evaluation process is the inadequate definition of its purpose in theory or practice, contrary to the Convention. In many cases, assessment process is understood not as means to identify a person’s need for support, but as a basis for a complete or partial limitation of person’s capacity.

Such an approach, rooted in law or practice, is criticized by the Committee, which clearly indicates to the inherent nature of the concept of legal capacity and considers any system of evaluation, which aims to determine the presence or absence of legal capacity to be inconsistent with the Convention. To this end, the Committee sharply distinguishes between the concepts of legal and mental capacity and indicates that a person’s decision-making skills should not affect his or her capacity status in any way.¹⁵⁹ In particular, the concept of mental capacity is entirely related to decision-making skills, which vary in time and context, and its variation is apparent despite the existence of disability status.¹⁶⁰ Legal capacity, on the other hand, is a legal concept and implies holding, enjoyment of rights by a person and the recognition of legal effect for their actions.¹⁶¹

Taking into account the paradigm shift by the Convention, the Committee notes that in order to ensure the effective support provision process, States should develop non-discriminatory indicators to identify needs.¹⁶² It is important that the purpose of the assessment is not to limit a person’s capacity status in any way and to focus unconditionally on mental capacity deficits, but to identify social, economic and legal barriers, and the person’s needs, determine the intensity and type of support needed and ensure their exercise of the capacity to the fullest extent.¹⁶³

158 Purser K., *Capacity Assessment and the Law: Problems and Solutions*, 2017, p. 73.

159 Bach M., Kerzner L., *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, 2010, p. 18; The Office of Public Advocate, Victoria, Australia, *Supported Decision-making: Background and Discussion Paper*, 2009, p. 5.

160 Council of Europe, *A Study on the Equal Recognition before the Law, Contribution towards the Council of Europe Strategy on the Rights of Persons with Disabilities*, 2017, p. 6.

161 Bantekas I., Stein M.A., Anastasiou D., *The UN Convention on the Rights of Persons with Disabilities: A Commentary*, 2018, p. 352.

162 Committee on the Rights of Persons with Disabilities, Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 29 (i).

163 Bach M., Kerzner L., *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, Advancing Substantive Equality for Persons with Disabilities through Law, Policy and Practice*, 2010, p. 18, 25, 99; World Health Organization, *Realizing Supported Decision Making and Advance Planning*, 2017, p. 38.

Establishment of the process on the human rights paradigm

Thorough focus on human rights is essential in the assessment process, as it determines the access to and enjoyment of fundamental rights by specific individuals.¹⁶⁴ It is essential that, at the assessment stage, the person is seen as a full member of the community.¹⁶⁵

When discussing the human rights-based approaches, it is important to mention the principles of the Convention and emphasize that they need to be applied in the evaluation process. Needs assessment should be based on values such as, for example, non-discrimination, respect for the ideas of diversity and humanity, equality.¹⁶⁶ Given the human rights paradigm and the values of the Convention, one of the essential issues to be taken into account is the protection of the dignity of the person subject to evaluation. It is essential that this process protects person's physical and mental integrity and does not at any stage lead to their inhuman or degrading treatment.¹⁶⁷

In addition, during the assessment, it is essential to maintain proportionality, which means protecting and respecting a person's privacy and thus minimizing unnecessary interference in this regard.¹⁶⁸ It is important to consider a number of procedural aspects as well. These include the elimination of conflicts of interest in the process,¹⁶⁹ respect for the personal information of the person subject to an assessment and protection of confidentiality,¹⁷⁰ as well as treating the person on equal footing with others (so-called normalization principle / approach).

Centrality of the role of a person with disability during the assessment process

Understanding the central role of the person subject to an assessment should be considered an unconditional priority in the process of identifying his or her needs.¹⁷¹ Parties involved

164 Assessing Legal Capacity: Improving Quality and Consistency <<https://www.lco-cdo.org/en/our-current-projects/legal-capacity-decision-making-and-guardianship/final-report/5-assessing-legal-capacity-improving-quality-and-consistency/>>

165 Work Forum on the Implementation of the UN Convention on the Rights of Persons with Disabilities in the EU and the Member States, Disability assessment from a human rights perspective, Catalina Devandas, United Nations Special Rapporteur on the Rights of persons with disabilities, p. 1; Purser K., Capacity Assessment and the Law: Problems and Solutions, 2017, p. 174.

166 Waddington L., Priestley M., Sainsbury R., Disability Assessment in European States: ANED Synthesis Report, 2017, p. 174.

167 Ibid.

168 National Institute for Health and Care Excellence, Decision-making and Mental Capacity, 2018.

169 Purser K., Capacity Assessment and the Law: Problems and Solutions, 2017, p. 71.

170 Ibid., p. 174.

171 Waddington L., Priestley M., Sainsbury R., Disability Assessment in European States: ANED Synthesis Report, 2017, p. 171.

in the process must take into account the importance of personal autonomy, which means, among other things, that only persons with disabilities, themselves, (and not their supporters and /or family members) have the authority to make decisions about their lives. Moreover, like other members of society, they also have the right to make mistakes and make “unpopular” decisions.¹⁷² Adopting such a paradigm in the assessment process itself precludes the possibility for resorting to the substitute decision-making forms.

Focusing on the will and desire of a person with a disability¹⁷³ implies, on the one hand, the need to inform the person and consider their opinion to the fullest extent¹⁷⁴ and, on the other hand, excludes the use of coercive measures against the person. Moreover, in order to increase the involvement and role of the individual in the assessment process, states have an obligation to apply the concept of reasonable accommodation.¹⁷⁵

Given the content of the above principles, it is clear that States need to undertake significant work to revise the assessment model from a human rights perspective.¹⁷⁶ Ultimately, they must ensure that policies that are implemented shift from care, protection model towards the removal of environmental barriers.¹⁷⁷

2.2. Psychosocial Needs Assessment – Legal and Practical Aspects

After analyzing the principles to be considered in the evaluation process, it is important to focus on the legal, institutional or practical aspects of identifying psychosocial needs. For the effective functioning of the system, proper legal regulation is essential, as well as a well-functioning institutional framework and tools that can effectively identify a person's needs.

172 Bulgarian Center for Not-for-Profit Law, Supported Decision Making or how People with Intellectual Disabilities or Mental Health Problems can Live Independent Lives, 2014, p. 5; Resource Centre for People with Mental Disability – “Zelda”, Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, p. 57.

173 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Latvia, CRP-D/C/LVA/CO/1, 2017, para. 7 (a).

174 Purser K., Capacity Assessment and the Law: Problems and Solutions, 2017, p. 72.

175 Waddington L., Priestley M., Sainsbury R., Disability Assessment in European States: ANED Synthesis Report, 2017, p. 43.

176 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 65.

177 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of India, CRP-D/C/IND/CO/1, 2019, para. 7 (b).

2.2.1 Assessment Process – the Importance of Legislative and Policy Instruments

One of the indicators of the effectiveness of the assessment process is the existence of a sound legislative framework. One interesting example in terms of legal regulation is the case of Canada (Ontario). While the legislation in force in this area focuses on the substitute decision-making approach,¹⁷⁸ it is important to identify issues that are subject to legal regulation and are relevant to the functioning of the support system. In particular, on the one hand, the Law regulates, broadly, the assessment system, and on the other hand, the assessment regulation is set by the bye-law.¹⁷⁹ The above regulation covers the forms of assessment and, in addition, deals with such important issues as raising the qualification and certification of the person responsible for assessment. The legal regulation of assessment issues is also enshrined in the Irish “Assisted Decision-Making Act”,¹⁸⁰ which lists the aspects of decision-making skills that need to be evaluated,¹⁸¹ and sets out the state’s role in creating a special guide for the professionals involved in the assessment. In addition to the above-mentioned legal regulations, the opinions of experts in the field are essential, as to what the relevant legislation should cover. For example, according to Bach and Kerzner, the legislation governing the support system should clearly define the body conducting the evaluation and the main purpose of this process is to identify the need for support.¹⁸²

Along with the legal regulation of the evaluation process, it is important to develop guidelines, codes of practice and/or ethical standards in this area.¹⁸³ These documents are usually created on the basis of existing legal acts and ensure their proper implementation, they set relevant standards and give practical recommendations to specialists in the field.¹⁸⁴ It is important for any professional involved in the evaluation as it sets the benchmarks for their performance and promotes the adoption of consistent practice.¹⁸⁵ It is important that such documents are flexible, provide information on best practices and are regularly updated.¹⁸⁶

178 Substitute Decisions Act, 1992, S.O. 1992, c.30; <https://www.ontario.ca/laws/statute/92s30>.

179 Ontario Regulation 460/05, Capacity Assessment, <https://www.ontario.ca/laws/regulation/050460>.

180 Assisted Decision-Making (Capacity) Act, 2015, <http://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/print.html>.

181 This law is again based on the medical model in this section and, in case of non-compliance of decision-making skills with the legal test provides for the limitation of the legal capacity of the person subject to assessment.

182 Bach M., Kerzner L., *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, 2010, pp. 141 – 143.

183 Purser K., *Capacity Assessment and the Law: Problems and Solutions*, 2017, p. 175.

184 For practical aspects of the implementation of the assessment process, see, this Research, Part II, Chapter 2.2.3.

185 Purser K., *Capacity Assessment and the Law: Problems and Solutions*, 2017, p. 175.

186 *Ibid.*, p. 177.

Relevant literature in this area lists the issues that need to be addressed in such guidelines.¹⁸⁷ These include a clear definition of the objective of the assessment process, actors implementing the procedure, the basic principles of assessment, informing and obtaining consent from the person subject to evaluation, as well as communication aspects, assessment peculiarities in different areas and age categories. However, although most of these documents in some countries¹⁸⁸ do not meet the requirements of the Convention to some extent, as they provide for the possibility of a substitute decision-making model, their elaboration should be considered an important measure in the light of efforts to establish common practice and provide detailed information to professionals.

2.2.2 Actors Involved in the Evaluation Process

In parallel with the legal regulation of the assessment process and elaboration of relevant policy documents, it is essential to maintain an appropriate institutional framework in this area. Clearly, depending on the context of the country, such mechanisms differ from one another, however, the assessment carried out by a multidisciplinary team is considered to be the most acceptable experience,¹⁸⁹ as it allows for a broad and comprehensive assessment of a person's needs and challenges they face.¹⁹⁰

The practice of individual countries shows that when identifying needs, the multidisciplinary team may include physicians, occupational therapists, social workers, physiotherapists, speech therapists, and others.¹⁹¹ Canadian experience is also noteworthy,¹⁹² where the responsibility for conducting the assessment and supervising the process rests with the Capacity Assessment Agency,¹⁹³ and professionals such as a social worker, doctor, psychologist,

187 *Ibid.*, p. 176, 178.

188 See: Attorney General's Department, New South Wales, Capacity Toolkit, 2009; Victorian Law Reform Commission, Guardianship, Final Report 24, 2012, p. xxxvii; National Institute for Health and Care Excellence, Decision-making and Mental Capacity, NICE Guideline, 2018; Scottish Government, Communication and Assessing Capacity, A Guide for Social Work and Health Care Staff, 2008.

189 Purser K., Capacity Assessment and the Law: Problems and Solutions, 2017, p. 169; Waddington L., Priestley M., Sainsbury R., Disability Assessment in European States: ANED Synthesis Report, 2017, p. 151.

190 Council of Europe, Assessing Disability in Europe – Similarities and Differences, report drawn up by the Working Group on the assessment of person-related criteria for allowances and personal assistance for people with disabilities (Partial Agreement) (P-RR-ECA), 2002, p. 20.

191 Waddington L., Priestley M., Sainsbury R., Disability Assessment in European States: ANED Synthesis Report, 2017, p. 152; Bulgarian Center for Not-for-Profit Law, New "Formula" for Capacity to Act – Opportunity for Everyone to Exercise their Rights, 2014, p. 29.

192 Although the Canadian experience in this section is inconsistent with the requirements of the Convention, as the assessment process provides for the possibility to restrict person's capacity, Canadian experience in applying multidisciplinary approaches is important.

193 Law Commission of Ontario, Legal Capacity, Decision-making and Guardianship, Final Report, 2017, p. Xii.

occupational therapist can participate in the process.¹⁹⁴ In establishing such multifaceted approaches, the recommendation of the Council of Europe should be taken into account, according to which it is better if a representative of one profession does not play a dominant role in the multidisciplinary team.¹⁹⁵

Clearly, merely identifying the actors conducting the assessment and introducing a multidisciplinary approach cannot ensure the establishment of a sound institutional framework. In addition, there needs to be a clear communication between the members of the multidisciplinary team and they need to be provided with adequate information.

Ineffective communication may occur between members of the multidisciplinary team, given their different professions, although it is essential to ensure that their work is coordinated during the assessment and that gaps are filled in this area. To ensure effective collaboration, experts point to the need to develop special guidelines that define the participation of those involved in the assessment process and indicate the actors responsible for evaluating specific standards.¹⁹⁶

At the same time, it is crucially important for the State to take appropriate measures to ensure that the persons involved in the assessment act in accordance with the aims and ideas of the Convention.¹⁹⁷ In this regard, there exists, on the one hand, the practice of continuing education and provision of information to professionals¹⁹⁸ and, on the other hand, the establishment of procedures for the selection and certification of persons involved in the process.¹⁹⁹ In terms of provision of information, the Committee's view is unequivocal, emphasizing the commitment of States to ensure that all actors involved in the support process are trained on the legal capacity and supported decision-making issues.²⁰⁰ Clearly, such recommendations also apply to those involved in the evaluation process²⁰¹ and aim to ensure the smooth, uniform and effective functioning of the entire support system. It is also essen-

194 See: <https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacityoffice.php#caodo>.

195 Council of Europe, *Assessing Disability in Europe – Similarities and Differences*, report drawn up by the Working Group on the assessment of person-related criteria for allowances and personal assistance for people with disabilities (Partial Agreement) (P-RR-ECA), 2002, p. 20.

196 Purser K., *Capacity Assessment and the Law: Problems and Solutions*, 2017, p. 168.

197 Waddington L., Priestley M., Sainsbury R., *Disability Assessment in European States: ANED Synthesis Report*, 2017, p. 177.

198 See, Victorian Law Reform Commission, *Guardianship*, Final Report 24, 2012, p. 123.

199 Ibid.

200 See Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Germany*, CRPD/C/DEU/CO/1, 2015, para. 26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Mongolia*, CRPD/C/MNG/CO/1, 2015, para. 21.

201 European Network of Academic Experts in the Field of Disability (ANED), *Disability Assessments in European States*, ANED Synthesis Report, 2018, p. 44.

tial that individuals undergo special training in assessment procedures and regulations, as well as in communicating and establishing trust-based relationships with those subject to assessment.²⁰² On the other hand, it is important not only to provide relevant information to the actors involved in the assessment, but also to identify the extent to which their visions are in line with the Convention. An interesting practice in this regard is the case of Malta, where persons involved in the assessment of persons with disabilities are interviewed by the Commissioner for the Rights of Persons with Disabilities and the Executive Director of the Commission to assess the extent to which their views are consistent with the Convention.²⁰³

In view of all the above, it is clear that one of the main prerequisites for the effectiveness of the evaluation system is the existence of a coherent institutional framework, the proper functioning of which should be ensured by providing clear information to the stakeholders regarding their responsibilities and principles of cooperation, by developing multidisciplinary approaches and constantly training professionals.

2.2.3 Practical Aspects of the Assessment

In addition to the functioning of a proper legal or institutional framework for the evaluation process, a number of practical aspects need to be considered, which have a significant impact on its functioning and the final outcome. These include assessment tools, communication with the person being evaluated, time and place of the assessment, etc. Clearly, there are no uniform standards in these areas, but the analysis of the country practices and relevant literature reveals the issues that need to be taken into account in order to carry out the process properly and effectively.

General practical aspects

Although the country experiences in practical aspects are not fully in line with the Convention (as it provides for the assessment of capacity and the possibility of its limitation), it is important to review the relevant parts that are in line with the support model.²⁰⁴ In particular, those responsible for assessment should take into account that: 1) decision-making skills differ at different times and in relation to different issues; 2) a person's decision-making skills

202 Purser K., *Capacity Assessment and the Law: Problems and Solutions*, 2017, p. 173.

203 On experiences of other countries, see. Waddington L., Priestley M., Sainsbury R., *Disability Assessment in European States: ANED Synthesis Report*, 2017, p. 174-175.

204 See, Victorian Law Reform Commission, *Guardianship*, Final Report 24, 2012; National Institute for Health and Care Excellence, *Decision-making and Mental Capacity*, NICE Guideline, 2018; Attorney General's Department, New South Wales, *Capacity Toolkit*, 2009.

should not be assessed in terms of his or her age, appearance or behavioural characteristics; 3) the decision-making skills of a person should not be assessed according to the content of the decision made by them, based on result of the assessment of such a decision by the assessor; 4) assessment should be carried out in a trusted and collaborative environment; 5) the autonomy and personal space of the person must enjoy unconditional protection during the assessment; 6) assessment should be as flexible as possible and should take into account the person's life history, including his or her cultural and linguistic background.

Time and place of evaluation

Various relevant documents focus on selecting the time and place/environment for the assessment where the person's skills will be most accurately assessed.²⁰⁵ In particular, this process should take into account the social and psychological factors that may have caused additional stress to the person.²⁰⁶ Therefore, it is essential that the assessment is conducted in an environment where noise, stressful situations²⁰⁷ are reduced, and the person being assessed feels safe and secure. For example, conducting an assessment in a family setting is almost always more effective than conducting an examination in an environment unfamiliar to a person (including at the government agencies).²⁰⁸

The timing of the assessment is crucial to accurately identify needs. For example, evaluators should consider the degree of fatigue a person experiences and the possible side effects of the medication they are taking (if any).²⁰⁹ When setting the assessment, the time period when the person's participation, communication and decision-making skills are likely to be most effective should be taken into account.²¹⁰

Ensuring the involvement of a person and communication issues

Voluntary involvement and informing of the person subject to an assessment (despite the complexity of his/her needs) plays a major role.²¹¹ To this end, prior to the assessment, the

205 Victorian Law Reform Commission, *Guardianship*, Final Report 24, 2012, p. 122.

206 Attorney General's Department, New South Wales, *Capacity Toolkit*, 2009, p. 22.

207 *Ibid.*

208 Victorian Law Reform Commission, *Guardianship*, Final Report 24, 2012, p. 122.

209 Attorney General's Department, New South Wales, *Capacity Toolkit*, 2009, p. 21-22; Purser K., *Capacity Assessment and the Law: Problems and Solutions*, 2017, p. 87.

210 Victorian Law Reform Commission, *Guardianship*, Final Report 24, 2012, p. 122.

211 *Ibid.*, p. 113; Blanck P., Flynn E., *Routledge Handbook of Disability Law and Human Rights*, 2017, pp. 151 – 152; Attorney General's Department, New South Wales, *Capacity Toolkit*, 2009, p. 63.

assessors should inform the person, in an understandable and acceptable form of communication (including easy-to-read formats²¹²), on the purpose of the assessment, the form, the possible outcomes and benefits of participating in the assessment, as well as available instruments if the person does not agree with the result of the assessment.²¹³

In conducting the assessment, it is essential that stakeholders, to the best of their ability, ensure that stress is reduced and that the person is involved in the process to the fullest extent,²¹⁴ and that the most appropriate form of communication is established.²¹⁵ These forms can include both verbal and non-verbal communication (e.g., through various visual materials (photos, drawings, symbols)).²¹⁶ In some cases, due to the need for alternative means of communication or difficulties in communication with a person due to language barriers, the process should take into account the participation of an appropriate specialist (e.g. translator, speech specialist).²¹⁷

Another important issue that actors responsible for the assessment should consider in the communication process is the person's experience with institutionalization (if any). It is important that they take into account the negative effects of this practice on human life, including the lack of ability to make independent decisions. Evaluators need to understand that these factors can influence human behavior (e.g. distrust towards the evaluation process) and disguise their real potential. With these issues in mind, every effort should be made to ensure that the person being evaluated is involved in communication and expresses his or her views and wishes.²¹⁸

212 e.g.. See, Attorney General's Department, New South Wales, Capacity Toolkit, 2009.

213 National Institute for Health and Care Excellence, Decision-making and Mental Capacity, NICE Guideline, 2018, p. 22; Attorney General's Department, New South Wales, Capacity Toolkit, 2009, p. 63; Bulgarian Center for Not-for-Profit Law, Supported Decision Making or how People with Intellectual Disabilities or Mental Health Problems can Live Independent Lives, 2014, p. 5.

214 National Institute for Health and Care Excellence, Decision-making and Mental Capacity, NICE Guideline, 2018, p. 22.

215 E.g. Persons diagnosed with dementia, persons with intellectual disabilities, persons with psychosocial disabilities, etc. ; See, Scottish Government, Communication and Assessing Capacity, A Guide for Social Work and Health Care Staff, 2008, p. 19.

216 Department for Constitutional Affairs, Mental Capacity Act 2005, Code of Practice, 2007.

217 Attorney General's Department, New South Wales, Capacity Toolkit, 2009, p. 65; Blanck P., Flyin E., Routledge Handbook of Disability Law and Human Rights, 2017, pp. 151 – 152; National Institute for Health and Care Excellence, Decision-making and Mental Capacity, NICE Guideline, 2018, p. 22.

218 Scottish Government, Communication and Assessing Capacity, A Guide for Social Work and Health Care Staff, 2008, pp. 24-25.

Certain ethical aspects of the assessment

An essential element of the human rights-based assessment process is the maximum consideration of ethical aspects. Clearly, at each assessment, the stakeholders may face different challenges in this regard, but ensuring two key components – the autonomy and confidentiality of the person being assessed – should be an unchanging priority.

It is important that those responsible for the assessment unconditionally maintain the confidentiality and protect regulations when collecting, using or disclosing personal information.²¹⁹ It is essential that responsible actors provide the assessed person with information about the need and purpose of data collection and process only the information that is relevant for the purposes of the assessment.²²⁰

Approaches to protecting the autonomy of persons with disabilities, prioritizing their will and desires are especially important when a person refuses to participate in the assessment. At this time, it is essential that actors involved in the process do their best to identify the reasons for refusal to participate and find ways to address them, including whether the refusal is caused by distrust, rejection of the challenges and / or stigma.²²¹ At this time, the evaluators may consult with the support network of the person or give the person the opportunity to involve in the evaluation process the person acceptable to him/her.²²²

Objective and tools of evaluation

At the beginning of the process, first of all, it is important for the evaluator to establish a relationship, trust and then diligently and thoroughly evaluate the person, how much he/she is aware of various issues/facts, how much information he/she has to help make relevant decisions,²²³ and how much he/ she understands the essence of the decisions they make and the impact of these decisions on their life.²²⁴ It is essential to also assess a person's ability to understand and meet their needs. It is important that the evaluator discusses certain decision-making situations with the individual to identify his or her ability to understand risks and benefits and different alternatives, and communicate

219 Attorney General's Department, New South Wales, Capacity Toolkit, 2009, pp. 37-38.

220 Ibid., pp. 38 – 39.

221 Scottish Government, Communication and Assessing Capacity, A Guide for Social Work and Health Care Staff, 2008, p. 15.

222 National Institute for Health and Care Excellence, Decision-making and Mental Capacity, NICE Guideline, 2018, p. 23.

223 Capacity Assessment Office, 2005; Victorian Law Reform Commission, Guardianship, Final Report 24, p. 113.

224 National Institute for Health and Care Excellence, Decision-making and Mental Capacity, NICE Guideline, 2018, p. 21.

the taken decision,²²⁵ as well as his or her values and the reasons and circumstances for making specific decisions.²²⁶

To effectively identify the need for support, it is essential to use effective and goal-oriented tools during the assessment. In addition, the human rights-based approach clearly implies the need to review the assessment methods frequently.²²⁷ A number of standardized tests and scales are used in the assessment; however, as noted above, there is no unified approach globally in this area.²²⁸ Assessment data obtained through various tools, together with clinical trials, provide a more or less complete picture of a person's need for support.

In-depth analysis of assessment tools goes beyond the scope of this study,²²⁹ however, a review of their general content is essential to identify the characteristics of such tools, general areas of assessment, and other practical aspects. Clearly, all documents individually identify and group the areas in relation to which support needs have to be identified, although they typically cover areas such as personal and public life, education, employment, financial matters, health and safety, communication, interpersonal relationships, and support network, various social factors (e.g. social stigma, cultural circumstances) and more.²³⁰ It is important that the tool contains not only a general list of areas, but also a description of their content, the evaluator should focus on given the specificities of each area.²³¹

In addition to the above issues, various, including Finnish,²³² experiences relate to the areas of assessment/self-assessment such as a person's life experience (including import-

225 Purser K., *Capacity Assessment and the Law: Problems and Solutions*, 2017, p. 78.

226 Attorney General's Department, New South Wales, *Capacity Toolkit*, 2009, pp. 68 – 69.

227 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the Former Yugoslav Republic of Macedonia**, CRPD/C/MKD/CO/1, 2018, para. 6.

228 Yuwadee V., *Understanding The Support Needs of People with Intellectual and Related Developmental Disabilities Through Cluster Analysis and Factor Analysis of Statewide Data*, Theses and Dissertations, Paper 75, 2013, pp. 69-70.

229 e.g., Support Intensity Scale (SIS), American Association on Intellectual and Developmental Disabilities; the Instrument for the Classification and Assessment of Support Needs (I-CAN), Nain Mina Parjaan, Kehitysvammaisten Palvelusaatio, D-START (Disability Support Training and Resource Tool), ICAP (Inventory for Client and Agency Planning), ONI (Queensland Ongoing Needs Identification), SAQ (InControl UK – Self Assessment Questionnaire); ICF Checklist Version 2.1a, Clinician Form for International Classification of Functioning, Disability and Health; WHO Disability Assessment Schedule 2.0 (WHODAS 2.0); *The Development of a Tailored Support Needs Assessment Tool for Uniting, Care Disability's Flexible Options Program: Life Visioning and Support Needs Assessment Tool*, 20-23; G. Ragesh, A. Hamza, K. Sajitha, *Guideline for Social Work Assessment in Mental Health Settings*, 2015.

230 *Guidelines for Interviewing People with Disabilities: Supports Intensity Scale*, American Association on Mental Retardation, p. 1.

231 An example of such an approach is the case of Scotland, which provides detailed recommendations on what issues evaluators should focus on. Although this document, like other guidelines, provides for a substitute decision-making system, the rest of its convention aligned part is important to be included in the support system; See: Scottish Government, *Communication and Assessing Capacity, A Guide for Social Work and Health Care Staff*, 2008.

232 See <https://kvps.fi/wp-content/uploads/2020/04/Nain-mina-parjaan.pdf>.

ant life events), the person's strengths and skills,²³³ and the circumstances he or she is willing to change. It is also noteworthy that the tools not only identify a person's need for support in a particular sphere, but also indicate the form,²³⁴ intensity,²³⁵ and type of support.²³⁶ Clearly, the position and opinions of the person being assessed are essential in the process.

When identifying issues in accordance with the assessment tool, the person in charge of the assessment usually follows the questions listed in the same document. Clearly, such a questionnaire varies by instrument, but it is important to use open-ended questions that allow the assessor to better communicate with the person, on the one hand, and to receive comprehensive information about the person's support needs, on the other. In order to obtain objective information, the evaluator should formulate the question in a neutral way and not indicate the probable answer in the question itself.²³⁷

The tools also independently determine the duration of the assessment. However, for its effectiveness, it is important that the assessment is postponed to reduce the duration of the process and/or to prevent the person from finding themselves in a stressful situation.²³⁸ Several meetings can also be scheduled to continue the process.²³⁹ In addition, since this process often leads to stress and loss of self-esteem for the persons being assessed, it is advisable to consider the emotional support by the evaluators after the completion of the process.²⁴⁰

Conclusion developed as a result of the evaluation

Developing a conclusion as a result of the assessment is one of the most important and at the same time difficult steps in identifying a person's psychosocial needs. This document should

233 See also, Office of the Public Advocate, Queensland Government, *A Journey towards Autonomy? Supported Decision-making in Theory and Practice*, 2014, p. 9.

234 E.g. The SIS tool addresses the need for different forms of support (when no support is needed, verbal or gestural support, physical support, etc.).

235 E.g. The instrument – Nain Mina Parjaan – indicates the need for support in frequency (rarely – in individual cases or once a month; often – weekly; daily) and hourly dimension (<1 hour, 1-4 hours, more than 4 hours); The SIS tool has a similar approach (1) support frequency (more than monthly, monthly, weekly, daily, hourly); 2) Support time during the day (not required, less than 30 minutes, from 30 minutes to 2 hours, from 2 hours to 4 hours, 4 hours or more)).

236 E.g. The tool – Nain Mina Parjaan – indicates the level of support needs in a particular area (1. Minimal support in case of need; 2. Need for close communication with the supporter and the need to receive special instructions; Active support of the supporter in deciding on several issues; Need for constant support from the supporter).

237 Attorney General's Department, New South Wales, *Capacity Toolkit*, 2009, pp. 68-69.

238 National Institute for Health and Care Excellence, *Decision-making and Mental Capacity*, NICE Guideline, 2018, p. 21

239 IASC Reference Group *Mental Health and Psychosocial Support Assessment Guide*, IASC Reference Group on Mental Health and Psychosocial Support in Emergency Settings, 2012.

240 National Institute for Health and Care Excellence, *Decision-making and Mental Capacity*, NICE Guideline, 2018, p. 25.

clearly outline the person's need for support and its intensity in relation to specific spheres. It is also possible to indicate in the report such information as the timing of the reassessment, a vision for the future of the person's skills development and possible measures to be taken in this regard.²⁴¹

The experience of Canada is interesting in this regard, where the guiding principles developed by the Assessment Agency review the issues of assessment and conclusion elaboration.²⁴² This document, like other relevant guidelines, focuses on the importance of clearly outlining a person's needs and decision-making skills. In addition, it is essential that findings of the assessor are justified in the document.²⁴³ Therefore, it is necessary to complete all the documents available during the assessment and use them in the process of drawing up the conclusion. To this end, evaluators should keep files that reflect the content of the interviews and describe the terms and environment of the evaluation.²⁴⁴

In order to reach the validity of the conclusion, it is important that it summarizes and relates to the information recorded and verified by the assessor, which he/she received from the assessed person, their family, service provider or multidisciplinary team consultants.²⁴⁵ However, while different sources of information (e.g. medical history, expert opinions, information provided by family members and close friends) may be used to make a conclusion, it is essential that the subjectivity of these sources does not have a decisive influence on the assessment process and priority is given to the information received from the person subjected to the assessment.

Drawing a valid conclusion becomes especially problematic when a professional has a large amount of information to analyze. Balancing different pieces of information is challenging, and supervision, teamwork, and/or a multidisciplinary approach may be needed to discuss all aspects comprehensively and make a final decision. The above challenges are addressed in the UK, where evaluation provides the opportunity to strike a balance between different opinions, and the final decision is taken by the court and the assessor is only a part of the team that identifies the needs of the individuals. However, throughout this process there is always a need to return to certain aspects of the assessment, the methodology – the functional tests and the set of evidence. That is why it is necessary for the assessor to extract the

241 The British Psychological Society, *What Makes a Good Assessment of Capacity?* 2019.

242 Ontario Ministry of the Attorney General, Capacity Assessment Office, *Guidelines for Conducting Assessments of Capacity*, 2005.

243 Department for Constitutional Affairs, *Mental Capacity Act 2005, Code of Practice*, 2007.

244 Ontario Ministry of the Attorney General, Capacity Assessment Office, *Guidelines for Conducting Assessments of Capacity*, 2005.

245 See, for example, British experience- National Institute for Health and Care Excellence, *Decision-making and Mental Capacity*, NICE Guideline, 2018, p. 23.

maximum information in the process and if this fails, to document it as well, as such a reference also influences the final decision.²⁴⁶

Finally, the analysis of the legislative, institutional or practical aspects of the implementation of the assessment clearly shows the complexity and difficulty of this process. In order to overcome the possible challenges in this direction, it is important to take measures such as, for example, the introduction of clear legislation, the establishment of multidisciplinary approaches, the development of appropriate guidelines for professionals, etc. Although some of the content of relevant documents in different countries does not fully comply with the standards set by the Convention, it is essential that principles that are compatible with the Convention and the standards for the implementation of the assessment are taken into account by the support system.

2.3. Assessment of the Psychosocial Needs in the Context of Georgia

In addition to the review of relevant international standards and country experience, it is important to analyze the Georgian context. As a result of the legal capacity reform in 2015, the framework for determining a person's psychosocial needs was established. In particular, this process was linked to the legal proceedings in the court – after receiving an application for recognition of a person as a support recipient, the court suspends the proceedings and appoints an expert examination of the person's psychosocial needs. Despite the changes made as a result of the reform, a number of legislative or practical challenges remain.

Given the importance of the expertise process, this subsection aims to review the legislation governing this process, as well as the relevant institutional framework and practices, and to identify the challenges in this area.

2.3.1. Legislative Regulation of Psychosocial Needs Assessment

Psychosocial needs assessment is regulated by three main acts – the Code of Civil Procedure of Georgia, the Law of Georgia on Psychosocial Needs Assessment and the Order of the Minister of Labor, Health and Social Affairs on the Approval of Rules and Standards for Psychosocial Needs Assessments.²⁴⁷ It is the above-mentioned legislation that defines the legal, economic and organizational aspects of conducting a mandatory examination for recogniz-

²⁴⁶ The British Psychological Society, What Makes a Good Assessment of Capacity? 2019.

²⁴⁷ The rule of conducting the assessment of psycho-social needs is established by the normative act. More specifically, it covers a variety of details, including the responsibilities of each member of the multidisciplinary team, its scope and standards.

ing an individual as a person with a psychosocial need.²⁴⁸ Relevant legal regulations define expert examination as an interdisciplinary activity that includes the assessment of medical-psychiatric, functional, psychological, social adaptation, and other relevant aspects.²⁴⁹ The legislation emphasizes the importance of processing psychiatric, socio-household, occupational-labor and psychological data within the framework of evaluation.²⁵⁰

The law indicates the objectives of conducting the assessment; these are to determine the degree of mental / intellectual deficits of a person; Assess their social adaptation skills and, therefore, determine the characteristics of support provision.²⁵¹ The reference to the defining features of support in the legislation is essential for the introduction of a human rights-based approach in this area. Therefore, it is important that the whole evaluation process is focused on the realization of these objectives.

In addition to the above, separate aspects that the existing legislation sets out in the evaluation process, should be emphasized. In particular, the legislation defines the body responsible for conducting the expert examination – the Levan Samkharauli National Forensics Bureau and indicates that a multidisciplinary approach should be used to assess a person's psychosocial needs.²⁵² The current legislation defines the Bureau as an entity with the exclusive right to conduct the expert examination, which complicates the possibility of conducting an alternative examination and submitting it to the court.²⁵³ The relevant legal framework also lists the standards required for conducting the examination and regulates issues such as, for example, the responsibilities of the multidisciplinary team, the place of evaluation and the participation of the person subject to evaluation in the process, elaboration of the expert conclusion and etc.²⁵⁴

Regarding legislation, the issue of forced subjection of a person to the expert examination is especially problematic. Legislation and practice do not provide for the intensive involvement of a social worker and the use of non-coercive methods in an event of a person's refusal to participate in the assessment. According to the existing regulations, in case a person whose support needs are being assessed, clearly refuses the expert examination and substantially

248 Law of Georgia on Psychological needs assessment, Art. 1.

249 Ibid., Art.4(1).

250 Ibid., Art. 5.

251 Ibid., Art.4(2).

252 Ibid., Art. 6-7.

253 Human Rights Education and Monitoring Center (EMC), Analysis of the capacity system reform and its implementation process, 2016, p. 42.

254 Law of Georgia on Psychological needs assessment, Art.10, 12-13; Order N 01-16 / N of the Minister of Labor, Health and Social Affairs of Georgia on the Approval of the Rules and Standards for Psychosocial Needs Assessment, 2015, Annexes N 1 and N 2.

violates his/her or other persons' rights, the court has the right to issue a decision to subject a person to compulsory examination, based on the motion of the Bureau and with the participation of the guardianship and custody authority, as well as the person's lawyer.²⁵⁵ It is important to highlight some significant shortcomings in the existing regulations in this regard. First, it is the use of coercive measures against a person, which, as mentioned above, grossly violates international standards of personal autonomy and personal inviolability. In addition, unlike involuntary psychiatric care, the legislation governing compulsory expert examination does not clearly provide for the possibility for a person subjected to the assessment to appeal a court decision.²⁵⁶ In addition, due to the lack of legislative specificity, it is unclear based on which rights violation the court makes a decision on compulsory examination. In view of the above and given that support constitutes a right of a person and not their obligation, compulsory examination is inconsistent with the Convention.

2.3.2. Psychosocial Needs Assessment – Institutional Framework

Analysis of the functioning of the institutional framework shows key challenges such as, for example, the lack of relevant guidelines, the lack of provision of information regarding capacity and support to those responsible for evaluation, coordination related challenges and lack of human resources. These shortcomings are a prerequisite for potentially significant obstacles to the human rights paradigm-based assessment process, and the state needs to take comprehensive steps to address them.

According to the existing legislation, the Bureau is responsible for conducting the expert examination. This obligation is fulfilled by a multidisciplinary team, which includes: a psychiatrist, a psychologist, a social worker and an occupational therapist.²⁵⁷ If necessary, the Bureau has the right to invite another specialist to participate in the examination, although this decision is not obligatory for the multidisciplinary team.²⁵⁸ It should be noted that since the introduction of the rule of psychosocial need assessment, to date, no such specialist has been invited.²⁵⁹

The challenge on the institutional level is, on the one hand, to strengthen the actors responsible for evaluation and, on the other hand, to ensure effective coordination between the mul-

255 Civil Procedure Code of Georgia, Art. 363²⁰.

256 Human Rights Education and Monitoring Center (EMC), Analysis of the capacity system reform and its implementation process, 2016, pp. 40-41.

257 Or a person who treats persons with psychosocial needs in physical, mental or social terms through selected specific activities; See: Law of Georgia on Psychological needs assessment, Art. 7.

258 Law of Georgia on Psychological needs assessment, Art.9

259 LEPL – Levan Samkharauli National Forensics Bureau, correspondence N 5001636620; 23.03.2020.

tidisciplinary team. No guidelines have been developed at the national level, which would elaborate the standards for conducting the assessment, the responsibilities of the assessors, the specificities of communication with the persons being assessed, issues related to identifying the need for support in specific areas, and so on.

In the absence of guidelines, the state does not take appropriate steps to keep practitioners informed about capacity and support issues, including through training, which can be a significant impediment to ensuring an effective and human rights-based process. Given the state's inaction in terms of information provision and the significant number of assessments to be conducted, the Bureau's human resources are scarce. For example, in 2018 the Bureau issued a total of 1973, and in 2019 – 2214 conclusions, while a total of 10 psychiatrists, 6 psychologists and 5 occupational therapists were allocated for expert evaluation.²⁶⁰

In addition, coordination between the team members and involvement of social workers in the evaluation process is a challenge. To date, there is no concept or vision on how a multidisciplinary team should work together on a case – all experts conduct assessments independently and, from the point of view of social workers, except in exceptional cases, experts do not contact each other to share opinions.²⁶¹ It should be noted, that the existing regulations regulate the participation of the social worker in the voting process (for the adoption of the conclusion) and in order to avoid additional, strictly formal visit (only for signing the expert report), it became possible to participate in the process electronically or through other means.²⁶²

Coordination gaps are most acute with social workers, indicating that they have virtually no contact with other experts, except when they cross paths with the multidisciplinary team member at the LEPL – Agency of State Care and assistance for the (Statutory) Victims of Human Trafficking.²⁶³ At the same time, in terms of coordination,²⁶³ another challenge for social workers is the post-evaluation period – as a rule, they receive information about the final conclusion of the examination and the decision only after the trial.²⁶⁴ Given the above, improper consideration of the role of the social worker and difficulties in the coordination process substantially limit the possibilities of conducting a social model-based process and make it difficult to identify the barriers faced by the person subjected to an assessment.

260 Ibid.

261 Research carried out with social workers.

262 Order of the Minister of Labor, Health and Social Affairs of Georgia №01-16 / n “On Approval of the Rules and Standards for Psychosocial Needs Assessment”, Annex # 1, Article 8, Paragraph 4 (2015); Ministry of Internally Displaced Persons from the Occupied Territories of Georgia, Labor, Health and Social Affairs, Correspondence N 01/10439, 1.09.2020.

263 Research carried out with social workers.

264 Ibid.

2.3.3. Standards and Practical Aspects of Expert Examination

Assessment tools and a number of practical aspects, including ensuring the involvement of the person being evaluated, the time and place of the process, communication standards, the conclusion process, are a prerequisite for effective identification of a person's psychosocial needs. Therefore, it is essential to analyse these areas in the context of Georgia.

The objectives of the evaluation and its relevance to the task of defining the need for support, its scope and form

Outpatient forensic psychosocial examination is appointed on the basis of a court decision, which presents a set of questions before the examination, in relation to a specific person subject to an assessment. The list of questions includes issues such as mental, cognitive/intellectual deficits, restrictions on participation in public life, degree of social adaptation, need for support. The court also identifies areas in which the person being examined may need support.

Question on the field of support includes an extensive list of different directions: relations with banking institutions, consent to treatment and purchase of medication, determining the place of residence and education, ability to make basic transactions, etc. The court also seeks to identify any other areas in which the assessed person may need support. This extensive list exposes the expertise to the need to use an evaluation methodology that will make it possible to identify the need for support in all areas.

As mentioned above, the Court identifies the following issues for the Bureau to evaluate:

- ▶ The degree of mental, intellectual impairment of a person;
- ▶ The degree of a person's participation in public life;
- ▶ The degree of a person's adaptation to the environment.

A matter of discussion is the relevance of determining the degree of mental, intellectual impairment in relation to the assessment of the need for support – whether it is possible to identify the need, form and extent of support without determining the degree of the above impairments or whether the issue is an objective of the outpatient psychosocial assessment. According to the clinical model of capacity, knowledge of the diagnosis is important insofar as it gives us information about the causes of the condition, its dynamics, prospects for improvement-deterioration, and treatment options. Therefore, in determining the need for support, or at least its duration, it is important to consider the diagnosis and the degree of

impairment. However, it is questionable whether this issue should be included in the tasks of outpatient forensic psychosocial examination, especially considering that before the need for support is assessed, basically everyone is already diagnosed, and under current law, the Bureau has the right to request all pre-existing medical documentation. In addition, assessing the degree of impairment, raises additional questions, as it more reflects the vision of the medical model of disability and aims to categorize persons (low, medium, high degree of impairment/adaptation); Clearly, information about the degree of impairment allows for a more or less accurate determination of the support intensity (e.g., in the case of a pronounced impairment, we expect to assume the need for intensive support), although this information gives us less insight into the specific forms of support.

It is noteworthy that the court request for an assessment of the degree of impairment is no longer found in some of the conclusion dated 2018; In addition, support related questions are specified. In particular, the scope of support, role and functions of the support are specified, it is required to specify the areas (if any) in which the person can exercise their rights independently, but the task for the examination still includes several areas and does not specify based on the exercise of which rights the person should be assessed. Questions to psychosocial examination, which are in line with the objectives set by the current legislation, pose the task of assessing the impairment, participation in public life, the degree of adaptation to its environment, which focuses mainly on the description of deficiencies, does not provide sufficient information about individual support needs. In addition, when the court/judge does not specify the scope of the need for support, it will, to some extent, lead to the determination of the need for support in almost all areas, which is practically impossible from a methodological and procedural point of view and is a dangerous practice, as these conclusions shall not identify individual needs of a person and determine the specific area, form or intensity of support.

Time and place of the assessment and degree of involvement of the person

The multidisciplinary team adopts a conclusion within 1 month of the court appeal, except for the time of receipt of additional materials requested by the Bureau.²⁶⁵ When drafting a conclusion, the relevant regulations provide for the mandatory presence and participation in the process of the person undergoing the assessment.²⁶⁶ Apart from this regulation, there are no standards for effective involvement of a person in the process, for example, informing him/her about the process and communicating with him / her in an acceptable form. Com-

265 Order of the Minister of Labor, Health and Social Affairs of Georgia №01-16 / n “On Approval of the Rules and Standards for Psychosocial Needs Assessment”, Annex # 1, Article 2.

266 Ibid., Article 6(1).

munication problems are particularly emphasized by social workers and as they indicate the need to acquire specific knowledge and training in effective communication with persons subjected to an assessment.²⁶⁷ A particular problem is communicating and using its alternative means with individuals who have a verbal communication problem. In this case, social workers try to involve this person in the evaluation process, which, in many cases, fails and basic information is obtained from family members and potential supporters.²⁶⁸

As for the place of evaluation, according to the existing regulations, only a state of health is considered as a valid reason for a person's absence from the multidisciplinary team meeting. In this case, based on the court decision, the team's out-of-office meeting is held according to the location of the person, in a medical or other institution or at the residence of the person.²⁶⁹ The normative reality also allows for the participation of the person who is being assessed, in special cases, through electronic means of communication. An appropriate protocol is drawn up on this.²⁷⁰ It should be noted that this exception is only generally indicated in the rules governing assessment procedures and does not explicitly define such cases. For example, the regulations, do not indicate the socio-economic vulnerability of a person to make an exception for attending an in-person meeting at the Bureau and they do not emphasize the importance of assessing a person in an informal setting.

Evaluation implementation standards

An overview of its general standard is essential in the implementation of the assessment. The Minister's Order on the Approval of the Rules and Standards for Psychosocial Needs Assessment shall provide a list of areas to be assessed, and includes topics, and in some cases, assessment procedures and tools for each specialist.

The general standard of psychiatric evaluation defines the methodology of conducting the examination and the extensive list of areas/topics to be evaluated. According to this standard, psychiatric examination is performed using the method of psychiatric clinical interview, which involves observing a person's behaviour in the duration of the interview. A psychiatric examination is conditionally divided into two parts and includes an assessment of the person's medical history and his or her mental state at the time. An extensive list of areas of study

²⁶⁷ Research carried out with social workers.

²⁶⁸ Ibid.

²⁶⁹ Law of Georgia on Psychological needs assessment, Art.11. Order of the Minister of Labor, Health and Social Affairs of Georgia №01-16 / n "On Approval of the Rules and Standards for Psychosocial Needs Assessment", Annex # 1, Article 6(2).

²⁷⁰ Order of the Minister of Labor, Health and Social Affairs of Georgia №01-16 / n "On Approval of the Rules and Standards for Psychosocial Needs Assessment", Annex # 1, Article 6(3).

includes areas such as: major complaints, medical history (anamnesis), life history, mental state at the moment, features of cognitive and emotional processes and more. This standard of assessment, based on its methodology and content, repeats the assessment conducted for the diagnostic purposes.

The psychiatric examination is the largest in scope and contains data on both the existing medical documentation and the results of the assessment performed within the examination. Some of this data is largely irrelevant in identifying the need for support. According to the assessment standard, different types of data about the person are processed; These include information on early development, hereditary factors, family members' health status, as well as cognitive and academic skills, factual knowledge, functional skills, and other areas. A significant part of the presented information is mainly focused on the description of the deficiencies / symptoms of the examined person, on the basis of which the diagnosis and the degree of impairment is formulated. Assessment results contain less information about a person's strengths, resources, and potential development opportunities. In addition, in the list of assessment topics the issues are found that are irrelevant to identify a person's need for support and, moreover, its wording can be considered stigmatizing (e.g., voice – weak, husky; physical characteristics – overly provocative, sloppy dressing; content of ideas – poor associations, etc.).

In the general standard of psychological assessment of a person, in the list of tests and assignments, common tests / assignments assessing a specific mental function / ability can be found. For example, attention tests: "Burdon test", "Schultz table" (simple tasks that assess visual attention), memory: "10 words" (verbal learning assessment task) and others. The tasks given in the list are scarce and do not allow for a complete assessment of any of the areas. For example, both attention assessment assignments are tools for assessing visual attention, while memory-assessing assignments are used to assess auditory comprehension and verbal learning skills. Visual memory and other forms of memory assessment tasks are not listed. In addition, the list does not include assignments that assess relevant skills such as problem comprehension and problem-solving.

In addition, the standard provides some tests, where compliance with the objectives of the expert examination is questionable, such as the Thematic Apperception Test (a projection test that assesses disguised/unconscious motives and human social environment perception), and the Luscher Color Test (personality assessment test), "Multidisciplinary Standardized Survey of Personality" (Personality Assessment Test). The list also includes separate assignments or assessment processes without specifying the assessment procedure and the materials to be used.²⁷¹

271 For example, the method of classifying objects: tasks may be assessed on the basis of the provision of verbal (e.g. words) or visual (e.g. cards) materials.

In the standard for assessing a person, the occupational therapist specifies methods for assessing specific areas: 1. Interviewing a person and his / her trusted person; 2. Monitoring the activities and environment of the person; 3. Processing additional information from educational, employment, medical and other institutions or sources. The same standard lists the issues to be addressed by an occupational therapist – 1. Actions and participation in public life (e.g. learning and application of knowledge, interpersonal relationships, public, social and civic life); 2. Environmental factors (support and relationships, available services, mood / attitudes); 3. Additional factors (limitation of action and participation in public life and interaction with the environment, degree of social adaptation of the person, possibility of improvement or deterioration of the current situation). The issues to be assessed by the occupational therapist are unequivocally important in determining the need for support, however, some of them are duplicated with the social worker assessment standards (e.g. communication, self-care, relationships).

The general standard for assessing a person by a social worker lists issues to be assessed, such as personal awareness, emotional state, relationships with family members, social activity / behavior, perception / orientation, and more. In addition to this standard, the 2019 amendments to the Order on the Approval of Rules and Standards for Psychosocial Needs Assessment need to be highlighted, as a result of which the social worker's assessment form (Appendix N 3) and the instruction for filling in this form (Appendix N 4) were approved. The latter sets standards for social workers for completing the assessment form and for the case management and includes sections such as introduction, demographic section, individual appraisal / descriptive section, and conclusion. The instruction also requires social workers to assess a person's skills according to the degree of their detection, according to the following standards – never (a person cannot show this or that skill at all), sometimes (in a certain situation a person can show this or that ability), often (the person mostly shows the relevant skill), always (the person has the ability to act independently). Despite the potential of such records to determine the intensity of support, in the context of a one-time, short evaluation and in the absence of detailed guidelines, it is difficult to accurately determine the degree to which a person demonstrates a certain skill and to identify their strengths.²⁷²

The conclusion form of the social workers is presented in two parts in the document – Part IV – negative conclusion and Part V – positive conclusion. Both are based on each of the areas discussed in detail in the evaluation form. The conclusion itself consists of two parts: the numerical part (lists the areas in which, based on the assessment of the social worker, the person needs or does not need support) and the reasoning (which reflects the recommendations of the social worker and the rationale for the decision).

²⁷² Research carried out with social workers; Jgharkava, N. Capacity reform in Georgia – Challenges from the Perspective of Social Work, 2018.

Despite the existence of an evaluation form for social workers and relevant instructions, there are significant challenges in using and filling the form. The social worker is provided with a list of areas where the person may need the assistance of a supporter, based on an application from the bureau and a court order. According to social workers, challenges start at this stage when, in some cases, the application from the bureau does not include information about what the desires wants to assess.²⁷³ The social workers themselves try to obtain information, contact a potential supporter about the content of the statement in court or address the bureau to obtain more information.

The conclusion made by the social worker is based on the assessment of the areas and the questions given in the assessment forms. There are a number of challenges in filling out both conclusion and evaluation forms. According to the social workers, after the implementation of the legal capacity reform, they were not trained at all on relevant issues, including the assessment and drawing up the conclusions. Therefore, they need to acquire and deepen their knowledge in this regard.²⁷⁴ This challenge is further exacerbated by the lack of differentiation of cases, specialization and professional supervision in specific areas, which is an important impediment to effective assessment on the one hand and prevention of conflict of interest on the other.²⁷⁵

In addition, according to social workers, one of the main challenges is the formality of the evaluation process and, consequently, the evaluation forms. The reasons for this are, *inter alia*, the lack of knowledge in this area, overwork of social workers and lack of time (including with regard to deadlines); Social workers also find that they basically only assess the living conditions and relationship of the support recipient with the supporter, while they are unable to functionally assess the support recipient and find it difficult to discuss the person's rehabilitation prospects.²⁷⁶

Conclusion elaborated as a result of assessment

As a result of the expert examination, multidisciplinary team issues a negative or positive conclusion. A positive conclusion confirms the existence of such mental, intellectual or cognitive impairment of a person that prevents his/her full and effective participation in the society, while a negative conclusion denies the above. The conclusion should be substantiated and include a description of the actions that were taken in the course of the group work. It is important to note that a positive conclusion cannot be made solely on the

273 Research carried out with social workers.

274 Ibid.

275 To prevent the person from being involved in the evaluation process and subsequent support or monitoring process.

276 Research carried out with social workers.

basis of a person's diagnosis. The positive conclusion should indicate the recommended deadline for reviewing the decision (maximum 5 years). In this regard, the position of some social workers is noteworthy, who state that they do not participate in the review term determination and only agree with the decision made by the other experts of the multidisciplinary team, which, among other things, violates the principle of teamwork.²⁷⁷ There is no room for a time-related record in the evaluation form for social workers, which supports their above statement.

Decisions by multidisciplinary team members on each area are taken by a majority vote.²⁷⁸ A team member with a dissenting opinion should attach his / her opinion to the conclusion.²⁷⁹ It is noteworthy that team members do not have the authority to abstain from voting (e.g. due to lack of competence), which, in some cases, may force the expert to undertake decision-making obligation and give unequivocal answers to court questions. All of the above may raise questions about the accuracy of the conclusion.²⁸⁰ There are also cases when the number of votes is evenly divided during the voting – at this time the conclusion is evaluated by the court. Imposing such an obligation on a court, that assigns expert examination on the basis of lack of special knowledge, may put disproportionate burden on the court.²⁸¹ In parallel with the refinement of existing legislation in this area, the practice of inviting additional specialists may be considered to eliminate such challenges.

The information provided in the findings is scarce and formal, especially given the essence of capacity and support. In many cases, a person is presented in the findings not as an active subject whose will, choice, and support needs to be identified in the assessment process, but as a passive object of observation.

The findings usually include information about the processes that confirm the impairment, although they do not provide sufficient information about the difficulties and needs of the person. For example, the description of cognitive processes by a psychologist is limited to a list of each field and brief explanations (e.g. perception – subject based, attention – scattered, etc.). Information presented in a similar form indicates the existence of a certain impairment, however, does not explain the specific needs of the person (e.g., what type of information perception is complicated, etc.).

²⁷⁷ Ibid.

²⁷⁸ Order of the Minister of Labor, Health and Social Affairs of Georgia №01-16 / n “On Approval of the Rules and Standards for Psychosocial Needs Assessment”, Annex # 1, Article 8(3).

²⁷⁹ Law of Georgia on Psychological needs assessment, Art.13 (6) – (9).

²⁸⁰ See Human Rights Education and Monitoring Center (EMC), Analysis of the capacity system reform and its implementation process, 2016, pp. 40-41.

²⁸¹ Ibid.

The report makes little reference to the needs of the individual in relation to specific areas and the intensity of support and possible forms. The description of the examination is mainly focused on the description of the deficiencies, although it is not related to the performance of a specific task / need for support in relation to the person. For example, one of the findings described the person as “inaccessible to communication, not responding to either verbal or non-verbal cues.” The same conclusion states that a person “is persistently looking at the candy“. This record shows that communication skills are assessed primarily on the basis of identifying speech difficulties, and that “persistent look” is not interpreted as a means of communication through which an individual expresses his or her desires.

In addition, the findings of the examination are often vague, do not provide sufficient information about the specific skill / function and its determinants, and leave room for different interpretations. A typical example of this is the assessment of a person’s orientation in time, place and environment. In this case, the assessment is likely to be based on the relevance of the verbal answer to the question – if the answer is correct, the person’s orientation is assessed positively, and in the case of an incorrect or incomplete answer, the person’s ability is assessed as an impairment. E.g. as one of the findings describes, “the subject of the study cannot orient in time, when asked what the current year is, he silently tells us “now is autumn”; Cannot specify the current month and date“ (Note: The date of the assessment indicated in the report was indeed fall). These and other similar records, presumably show blanket approach towards the person being evaluated.

It is even more ambiguous for assessments to assess issues such as, for example, a person’s critique of his or her condition/reality,²⁸² description of problematic behaviour, symptoms, and so on.²⁸³ The challenge is also the contradictions in the analysed information – the studied conclusions present conflicting information in the records submitted by the specialists. For example, a person’s evaluation report is described by various specialists as: “Can recognize banknotes,” “Can tell which is 20 tetri, maybe by accident” and “cannot distinguish between banknotes”. The two entries made by one specialist in different paragraphs are contradictory and at the same time vague – “can group objects according to physical characteristics” and “does not understand the meaning of colour, shape and size”.

282 Mainly, in the last part of the conclusion, in almost all the studied cases, we find a similar record: “Criticism of one’s own situation and the existing reality is sharply reduced.” It is noteworthy that in some cases, when describing any other function or skill about the same person, it is possible to “extract” conflicting information. For example, although a person determines what he or she can do independently and in what cases he or she needs support, however, the report formally makes a reference to the sharp decline in self-criticism.

283 The relevant tool, method or procedure is not specified and the context is not described. For example, in the conclusions we find short, two- or three-word notes about different skills: “Vocabulary – scarce”, “Interests – strictly limited”, “Does not understand the purpose of the examination” and others. In some cases the description is much more extensive, though insufficient as it is not linked to the context.

Apart from the fact that a significant part of the information described in the results of the study is vague and requires additional information, such as the method, the context, we can hardly find an explanation to what extent a person's behaviour is related to their ability to express wishes and make decision, based on which the recommendation should be issued and the decision taken. In addition, some of the information presented in the findings is often irrelevant to the purposes of the examination and the need for support, such as data on a person's physical condition, mother's pregnancy, family or relatives' health, peculiarities of the way person dresses, moves and keep a balance, and etc. In many cases, the information described is irrelevant not only for decision on support provision, but also for assessment of diagnosis and functioning.²⁸⁴

Another shortcoming of the studied conclusions is the language used to describe the results. Especially when describing the results of psychiatric and psychological examinations, often, professional terms are used. Due to the purpose and objective of the assessment, the main audience of the document is persons with non-medical education, which will prevent them from understanding and fully comprehending the text. On the other hand, major shortcoming is unethical, derogatory evaluative phrases towards a person. For example, when describing emotional or thought processes, we often come across definitions such as "immature, infantile, sluggish, primitive, banal, superficial."

An analysis of the content of the findings makes clear its formal nature, the lack of an in-depth analysis of the support needs of the assessee, including in the relevant areas, the lack of focus on the person's strengths in light of specific rights. Ultimately, these shortcomings lead to challenges not only in identifying the need for support of a person, but also in determining the form and intensity of such support (the assessment conclusion does not provide record on the form and intensity of support), which in itself has a sharply negative impact on the functioning of the support system.

Conclusion

The process of assigning support to a person is characterized by a number of challenges that hinder the effective implementation of the requirements of Articles 12 and 13 of the Convention. Despite the general provision in the legislation that it is mandatory for a person to be involved in the process of appointing a supporter for them, this requirement of international and national law, without the relevant guidelines and instructions in place, is merely formal and does not provide for effective involvement of persons with disabilities in decision-mak-

²⁸⁴ E.g. "The person being examined has undeveloped lower limbs, he is runty. Skin – clean. Subcutaneous adipose tissue – weakly expressed".

ing process. The reason for this is also that despite the requirement of international standards that persons employed in the judiciary should have knowledge about the supported decision-making and the various forms of communication with persons with disabilities, it has not been implemented in practice. Furthermore, legislation is often vague and allows for different interpretations in the absence of a proper explanation.

On the other hand, analysis of international standards and country experience reveals the importance of identifying a person's psychosocial needs for the effective implementation of the support provision process. Given the limited experience of countries in implementing the support system, it is problematic to identify uniform practice in this area, although it is possible to pinpoint key issues that are essential to the implementation of a human rights-based assessment. In particular, in order to effectively identify person's needs, it is important to properly define the purpose of the assessment, ensure the central role of the person in the process of assessment, follow human rights standards, enact clear legislation and develop effective policy documents / guidelines for actors involved in the process, taking into consideration number of practical aspects (communication and information provision related issues, assessment tools and aspects of the elaboration of the conclusion).

An important issue in the context of Georgia is the establishment of multidisciplinary approaches in the evaluation process, by law and emphasizing that one of the purposes of assessment is the identification of the needs of the individual.²⁸⁵ However, on the other hand, there are significant challenges that threaten the effectiveness of the process and its implementation according to a human rights-based paradigm. These include the practice of conducting a compulsory assessment, lack of training / awareness raising measures and guidelines for actors involved in the process, deficiencies in coordination between multidisciplinary team members, the formality and / or superficiality of the assessment findings, and more. Due to the problematic nature of these issues, it is important for the state to take measures to eliminate them in the shortest time period.

²⁸⁵ However, as practice shows, it is not the need for support in decision-making that is identified, but the need for care, which is contrary to Article 12 of the Convention.

Recommendations

Given the challenges, the state should consider the following recommendations:

At the Stage of Determining a Person as a Recipient of Support

- ▶ 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.

At the Assessment Stage 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 coordination 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.

Part III. Supported Decision-Making Process

Introduction

Support in decision-making is central to the overall support system. It is this process that should ensure the implementation of international and national standards and regulations in practice and increase the quality of the support recipients' autonomy, independence and control over their own lives.

Clearly, it is not possible for a person to achieve absolute autonomy and independence in every sphere of life – it is important to recognize the many factors that affect our lives, including those that are around us and the role they play in our life.²⁸⁶ When making decisions, especially personal decisions, each person needs some type of support from friends or family, however, in the end, after understanding the information and possible outcomes, he or she makes the decision independently.²⁸⁷

While every person may need support in making some decisions, given the barriers in society, the need for relatively intensive support for certain individuals (including those with psychosocial and intellectual disabilities) is even more apparent. In addition to formally acknowledging this need, it is essential that the support provision process does not take on a paternalistic approach and restrict the rights, autonomy and independence of the support recipients.

Due to the limited experience of different countries, it is difficult to determine unequivocally what effective support may look like, although an analysis of international standards and the context of countries reveals key features (including at the legal, institutional or practical level) that are essential to the implementation of this system.

This chapter focuses on the supported decision-making process and reviews the key issues in this regard. This section is divided into three main parts. The first part reviews the essence of supported decision-making and the preconditions for its implementation, the second part analyzes the legislative, institutional and practice framework related to the support process in light of international standards and country experiences, and the third part reviews the context in Georgia.

286 Finna V.D., Cera R., Palmisano G. (Eds.), *The United Nations Convention on the Rights of Persons with Disabilities, A Commentary*, 2017, p. 270.

287 *Ibid.*; *The Working Group on Legal Capacity and Supported Decision-making, A Statutory Framework for the Right to Legal Capacity and Supported Decision-making*, 2014, p. 4.

1. General Characteristics of the Supported Decision-Making System

Supported decision-making is an unconditional alternative to guardianship. In this case, the legal capacity is fully maintained and the support recipient has the opportunity to receive support in one or more areas of life.²⁸⁸

It is clear that supported decision-making is a general concept and includes a number of formal and informal approaches and mechanisms. Due to the heterogeneity of individuals and groups in need of support, it is difficult to select and focus on just one specific form of support. Moreover, adopting the same model/approach may be ineffective and even discriminatory for people with different needs.²⁸⁹ Given this challenge, ongoing pilot projects in different countries aim to identify the effectiveness of support for certain groups and to formulate possible recommendations.²⁹⁰

Despite the heterogeneity of the content and forms of support models, the commitment of the state in this regard is clear – it must ensure that such a system of support is established that is based on the wishes and will of the support recipients.²⁹¹ The purpose of this chapter is to review these and other prerequisites for effective support provision and generally explore the support mechanism.

1.1. Preconditions for the Support Provision

Unlike other support or empowerment services for people with disabilities, providing the support necessary to exercise legal capacity is part of the state's immediate obligation.²⁹² Moreover, it is clear that the standards set by the Convention do not envisage specific ways for states to provide support, however, their analysis reveals the key preconditions that need to be taken into account when operating this system.

- ▶ **Establishment of support provision on human rights paradigm** – Such an approach implies an unequivocal prioritization of the basic principles of the Convention. In partic-

288 Resource Centre for People with Mental Disability – “Zelda”, Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, p. 7.

289 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 55.

290 Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, Final Report, 2014, p. 529.

291 Committee on the Rights of persons with Disabilities, Concluding observations on the initial report of the Philippines, CRPD/C/PHL/CO/1, 2018, para. 25

292 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/34/58, 2016, para. 40.

ular, the provision of support should take into account principles and values such as, for example, respect for dignity, individual autonomy and independence of the individual; Unconditional adherence to the principles of non-discrimination and equality,²⁹³ taking into account the gender and cultural context in support provision process, and etc.²⁹⁴

- ▶ **Voluntary nature of support provision and centrality of the role of the support recipient** – One of the basic principles on which the support provision should be based is its voluntary nature, the autonomy of the support recipient and the prioritization of his/her will and choice. To this end, the issues of appointment, provision and termination of support should depend on the will of the person and the possibility of undue influence on them should be prevented. In introducing this principle, it is essential, on the one hand, for supporters to embrace their facilitative / supportive role, which excludes paternalistic attitudes towards support recipients,²⁹⁵ and, on the other hand, for the system to understand that support recipients have the right to make mistakes, take risks, change their minds, and make the decisions third parties may not agree with.²⁹⁶
- ▶ **Accessibility and availability of support** – Support from family, friends or loved ones is unconditionally important, however, relying on this source of support system alone cannot effectively address the challenges in this area, especially in the long run.²⁹⁷ Therefore, States should ensure that various support services and mechanisms are available to all persons with disabilities, regardless of their place of residence and geographical location. In addition, it is important that such mechanisms are financially (free or at minimal cost to persons with disabilities) and information wise accessible.²⁹⁸
- ▶ **Needs-based Support** – The right of support recipients to independence, autonomy and full legal capacity often depends on receiving so-called *adaptive support* – the obligation of the state to ensure reasonable accommodation that would facilitate the realization of the will of the person.²⁹⁹ To this end, in the process of planning and implementing support, it is essential to employ concepts such as reasonable accommodation, which in this case means providing information to support recipients in an accessible format (including non-verbal communi-

293 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 28.

294 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, paras 28 – 29; Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/34/58, 2016, paras. 48–56.

295 Finna V.D., Cera R., Palmisano G. (Eds.), *The United Nations Convention on the Rights of Persons with Disabilities, A Commentary*, 2017, p. 271.

296 Disability Services Division of Victorian Government, *Supporting Decision-making, A Quick Reference Guide for Disability Support Workers*, 2012, p. 10-12.

297 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/34/58, 2016, para. 49.

298 *Ibid.*, paras. 48-56; Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 29.

299 Bizchut, *Supported Decision-Making Service for Persons with Disabilities*, p. 12.

cation, easy-to-read formats); Guaranteeing the quality of independence for the recipients of support; Giving time to the support recipients when they making a decision, and etc.³⁰⁰ In order to implement this principle, it is possible for a person to receive support from several people/groups of supporters with different experiences (especially when they need intensive support) to meet their needs as much as possible.³⁰¹

- ▶ **Support recipient living in the community** – In order to provide effective support, the person must be actively involved in the decision-making process and must be able to exercise control over their own life.³⁰² The institutional environment does not allow for this – any type of decision regarding a person (including decisions related to daily life) is made by a specific institution, which precludes the independence of individuals utilizing such services and hinders their opportunity to make decisions about their lives.³⁰³ Accordingly, states should take steps towards deinstitutionalization and provide community-based support for persons with disabilities.³⁰⁴
- ▶ **Involvement of persons with disabilities** – Another key principle on which the support model should be based is to ensure the active and effective involvement of persons with disabilities in the process of developing appropriate legislative or institutional reform. Their involvement in the development, implementation, monitoring and evaluation of support services / mechanisms is particularly important.³⁰⁵

In addition to the above principles and approaches, it is essential that personal factors are taken into account when planning and delivering support, which has a significant impact on support effectiveness.³⁰⁶ These include the age of the support recipient,³⁰⁷ type of their residence,³⁰⁸ degree of independence,³⁰⁹ socio-economic vulnerability, family environment and more.

300 IDEA Project, Reference Document of Project, p. 29.

301 Inclusion International, Position Paper – Key Elements of a System for Supported Decision-making, 2008.

302 The Bulgarian Center for Not-for-Profit Law (BCNL), Guidebook for Rights Enforcement, 2014, p. 9.

303 Ibid.

304 Committee on the Rights of Persons with Disabilities, General Comment N 1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 2014, para. 46.

305 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, paras. 74 – 75; Committee on the Rights of Persons with Disabilities, General Comment N 1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 2014, para. 50.

306 See, Bizchut, Supported Decision-Making Service for Persons with Disabilities, p. 26.

307 For example, young people, due to their age and limited control over their lives, may have challenges to take full advantage of the benefits of the support system.

308 The more limited a person's strengthening services are, the greater is the role of support in decision-making.

309 Support is offered to people with different needs, however, it is clear that the process is different for those who have identified their will and desire and face a challenge in communicating or enforcing it and for those who have less experience in receiving support and have challenge in identifying the will to do so.

1.2 General Mechanism of Supported Decision-Making

In addition to analyzing the principles and approaches to support provision, it is important to review the general mechanism and framework of support, which includes important issues such as forms of support, status of stakeholders involved in the process, areas in which support is relevant, and etc.

1.2.1. Forms of Support

In relation to forms of support, international standards emphasize its diversity and heterogeneity. In particular, both the Committee and the Special Rapporteur indicate that such support may take both formal and informal forms – for example, formal support, support agreements,³¹⁰ peer support,³¹¹ support network,³¹² practice of open dialogue,³¹³ independent advocacy, advance directives and etc.³¹⁴

Despite its diverse nature, the more formal support mechanism is, the better it protects the support recipient from undue influence, since there is a document/range of documents in the formal system that outlines the powers of the supporter and the support recipient, the scope of support, supporter responsibilities, protection issues and etc. However, it is important that the system in place should be flexible enough and it should take into account the existence of both types of support.³¹⁵

One of the main challenges in the support provision process is the management of crisis situations. In particular, there are situations when, despite taking all possible measures, the will and choice of the person could not be identified. The Committee points out that, in such cases, the answer should not be to deny the person of their legal capacity, instead, the test of

310 In most cases, it means the conclusion of an agreement between the supporter and the support recipient, for the purposes of establishing a support relationship, and, in some cases, it may be a representative agreement.

311 Which means mutual support for/by people with similar needs / life experiences.

312 In most cases, it means the existence and support provision by a group of people (family members, acquaintances, relatives, service providers, etc.) around a person in need of support.

313 The practice of open dialogue was established in Finland and involves regular meetings facilitated by the service provider with the participation of the support recipient and his / her network, where, based on the principle of transparency, decisions are made regarding the treatment of the person. The process focuses on the will and choice of the person with a disability and maintains his or her full legal capacity.

314 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 27; Committee on the Rights of Persons with Disabilities, General Comment N 1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 2014, para. 17; Mental Health Europe, *Autonomy, Choices and the Importance of Supported Decision-making for Persons with Psychosocial Disabilities: MHE Position Paper on Article 12 UN CRPD on Legal Capacity*, 2017.

315 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 58.

the best interpretation of a person's will and choice should be used, as a last resort measure.³¹⁶ When adopting this test to identify a person's will and choice, it is essential to take into account the choices previously made by the person, their values, attitudes, actions, verbal or non-verbal communication, and more.³¹⁷

1.2.2. Parties Involved in the Support Process and their Status

Many public and private actors are involved in the support system. Each of them has an important role to play in the proper functioning of this institution, however, a clear identification of the rights and obligations of the parties to the support relationship – the supporter and the recipient – is essential to bring the laws and practices of any country in line with the Convention. Clearly, these issues are regulated differently in different contexts; however, it is important to review the key principles on which international standards and the practice of states are more or less in agreement.

The support recipient plays a central role in the support system.³¹⁸ Only they have the right to make decisions about their own life, and, if necessary, to have access to support at will.³¹⁹ The centrality of the support recipients' role in the support process implies their authority to select people who they trust, who share their values and respect their will, and select one or more supporters (including a support network³²⁰).³²¹ Relying on the will of a person with

316 Mandate of the Special Rapporteur on the rights of persons with disabilities, OL BRA 13/2019, 2019, p. 2.

317 Ibid; Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 31; For example, this case is provided for in Peruvian law. At a time when the appointment of a supporter is necessary, the judge makes such a decision; the court takes into account the previous relationship between the supporter and the support recipient, determines the scope and effects of the support, and seeks to implement the best interpretation of that person's will and wishes. see Martinez – Pujalte A., Legal Capacity and Supported Decision-making: Lessons from Some Recent Legal Reforms, 2019, p. 16; Also important in this regard is the Bulgarian draft law, which differently regulates support in case of risk (serious and immediate risk to a person's life, health and property) and involves trusted persons (person in need of support, family members / relatives / friends, actors involved in support) in a network of council / supporters. The function of such a council would be to provide the best interpretation of a person's will and choice. In this case, the court is understood as means of protection – the decision made by the council is presented to the court; See, Mental Health Europe, Autonomy, Choices and the Importance of Supported Decision-making for Persons with Psychosocial Disabilities: MHE Position Paper on Article 12 UN CRPD on Legal Capacity, 2017, pp. 9-10.

318 The Bulgarian Center for Not-for-Profit Law (BCNL), Guidebook for Rights Enforcement, 2014, p. 13.

319 WHO, Realizing Supported Decision Making and Advance Planning, 2017, p. 60; Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 27; Office of the Public Advocate of South Australia, Developing a Model of Practice for Supported Decision-making, 2011, p. 21.

320 Support network members may be a person's family members, friends, service providers, volunteers, acquaintances; See Resource Centre for People with Mental Disability – "Zelda", Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, pp. 48 – 50; Bulgarian Center for Not-for-Profit Law, Supported Decision-making or how People with Intellectual Disabilities and Mental Health Problems Can Live Independent Lives, p. 8.

321 The issue of access to multiple supporters is especially important for individuals in need of intensive support; see, Inclusion International, Position Paper – Key Elements of a System for Supported Decision-making, 2008, p. 6; WHO, Realizing Supported Decision Making and Advance Planning, 2017, p. 60.

a disability in the support process also implies their right not to agree with the opinion of others, to learn from the mistakes they made and to take risks.³²² They also have the authority to request a change in the existing support relationship and / or change of a supporter, as well as refuse to accept support at any time.³²³

On the other hand, a supporter is a person who, as a rule, assists a support recipient in the following areas: 1) to obtain and understand information; 2) evaluate possible alternatives and possible consequences of the decision; 3) to express his/her decision; 4) Enforce this decision.³²⁴ Despite their important functions, the supporter should not replace the decision of the support recipient³²⁵ their presence or absence in the process should not be a reason to question the legal capacity of a person with disability. For example, the Special Rapporteur expressed concerns on such a system of support where the validity of a decision made by a support recipient in certain areas depends on whether the supporter approves of it.³²⁶

As mentioned above, it is not permissible for a supporter to exercise functions that are contrary to the position of the support recipient.³²⁷ At the same time, in the performance of their functions, they must ensure that the dignity and autonomy, goals, values and choices of the support recipients are respected, and the person's decision-making and forms of communication are taken into account.³²⁸ It is important for the supporter to be able to establish a trust-based relationship with the support recipient and to be able to effectively identify the person's will and desires.³²⁹ They should not only assist the support recipient in the decision-making process, but also help them develop their independent skills (especially decision-making skills).³³⁰

322 WHO, *Realizing Supported Decision Making and Advance Planning*, 2017, p. 60.

323 Committee on the Rights of persons with Disabilities, *Concluding observations on the initial report of the Philippines*, CRPD/C/PHL/CO/1, 2018, para. 25; Mandate of the Special Rapporteur on the rights of persons with disabilities, OL BRA 13/2019, 2019, p. 5; Committee on the Rights of Persons with Disabilities, *General Comment N 1, Article 12: Equal Recognition before the Law*, CRPD/C/GC/1, 2014, para. 29; Office of the Public Advocate of South Australia, *Developing a Model of Practice for Supported Decision-making*, 2011, p. 21; The Working Group on Legal Capacity and Supported Decision-making, *A Statutory Framework for the Right to Legal Capacity and Supported Decision-making*, 2014, p. 11.

324 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 41.

325 Such supporter functions are highlighted in the legislation of several countries. Among them is the case of Ireland, see *Assisted Decision-Making (Capacity) Act 2015*, Ireland.

326 Mandate of the Special Rapporteur on the rights of persons with disabilities, OL BRA 13/2019, 2019, p. 4.

327 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 27.

328 The Working Group on Legal Capacity and Supported Decision-making, *A Statutory Framework for the Right to Legal Capacity and Supported Decision-making*, 2014, pp. 21-22.

329 Bulgarian Center for Not-for-Profit Law, *Supported Decision-making or how People with Intellectual Disabilities and Mental Health Problems Can Live Independent Lives*, p. 4; The Bulgarian Center for Not-for-Profit Law (BCNL), *Guidebook for Rights Enforcement*, 2014, p. 13.

330 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report, 2014, p. 105.

Clearly, in order to fulfill their responsibilities and provide effective support to the person, the supporter must first have the desire to provide support and sufficient time resources.³³¹ It is also important that their worldview and values are consistent with the basic principles of the functioning of the support system and that they minimize the risks of paternalistic attitudes towards the support recipient. It is essential to have active communication and listening skills that will help the supporter build a trust-based relationship with the support recipient.³³² Ultimately, the support functions can be performed, on the one hand, with effective support skills, and, on the other hand, with the relevant training and supervision, and access to empowerment services, in place.³³³

An important issue is the remuneration of the supporter's activities. Although there are no agreed positions in this regard, individual countries and organizations point to the need to remunerate the activities of supporters.³³⁴ In addition, financial empowerment will enable professional supporters to support several individuals and gain even greater practical experience.³³⁵

Along with analyzing the role of the support recipient and supporters, it is essential to discuss the forms of relationship between them. Different schemes focus only on informal supporters (e.g. family members, friends, relatives) with whom there is already a trust-based relationship. On the other hand, separate mechanisms provide for the existence of types of supporters who do not have a previous relationship with the support recipients, but are third parties and / or professionals who have been trained in advance to perform these functions. In some cases, there is a so-called mixed approach where support is provided with the participation of both types of actors.³³⁶

In cases where a supporter is an individual with whom a person with a disability has some kind of previous relationship, it may be possible to better identify the will and desires of the support recipient, although focusing only on this system is problematic.³³⁷ In this regard, on the one hand, the challenge is higher risk of possible adverse effects on the person by family members as compared to a professional supporter. On the other hand, the person with a disability him/herself may not want his/her family members to provide them support and it

331 The Working Group on Legal Capacity and Supported Decision-making, *A Statutory Framework for the Right to Legal Capacity and Supported Decision-making*, 2014, pp. 21-22.

332 Bizchut, *Supported Decision-Making Service for Persons with Disabilities*, pp. 14 – 15.

333 WHO, *Realizing Supported Decision Making and Advance Planning*, 2017, p. 61.

334 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report, 2014, p. 100; Bizchut, *Supported Decision-Making Service for Persons with Disabilities*.

335 The Bulgarian Center for Not-for-Profit Law (BCNL), *Guidebook for Rights Enforcement*, 2014, p. 56.

336 Report of the Special Rapporteur on the rights of persons with disabilities, *A/HRC/37/56*, 2017, para. 56.

337 *Ibid.*, para. 57.

is important that they have the opportunity to make this choice.³³⁸ Consequently, creating a professional support service will be important for achieving their independence and exercise of legal capacity.³³⁹

In addition, although there is no unified approach as to who can be a supporter, experience of individual countries shows preconditions for excluding the imposition of these functions. For example, Canadian law recognizes exclusionary circumstances, such as the provision of care services to a support recipient.³⁴⁰ Irish law and Bulgarian draft law go even further, along with listing various service providers, they envisage exclusionary circumstances for the supporters, for example, if a person has committed a crime against the support recipient or his/her property and / or there is a restraining order against them, they are guilty of crimes such as fraud, etc.³⁴¹

1.2.3. Overview of Support Areas

The Convention refers to the right of persons with disabilities to exercise legal capacity in all spheres of life.³⁴² Consequently, the number of areas in which a person needs support can be quite diverse. In particular, areas of support may include spheres such as:³⁴³

- ▶ **Personal life** – family and social relations, education and employment, choice of housing, receiving services, leisure, personal disputes, etc.;
- ▶ **Legal issues** – concluding a transaction, signing a contract, drawing up a will, etc.;
- ▶ **Health issues** – treatment, medication, hospitalization, health insurance, healthy nutrition, etc.;
- ▶ **Financial issues** – bank account or credit management, paying taxes, managing financial benefits, inheritance, etc.

338 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 57; Resource Centre for People with Mental Disability – “Zelda”, Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, p. 46 – 47.

339 On support service, see, Research, Part III, Chapter 2.2.1.

340 The Vulnerable Persons Living with a Mental Disability Act, C.C.S.M. c. V90, Part 2.

341 Assisted Decision-Making (Capacity) Act 2015, Ireland; Republic of Bulgaria, Draft Natural Persons and Support Measures Act, Art. 14.

342 Convention, Art. 12(2).

343 Different countries distinguish different spheres, see Bizchut, Supported Decision-Making Service for Persons with Disabilities, p. 17; Disability Services Division of Victorian Government, Supporting Decision-making, A Quick Reference Guide for Disability Support Workers, 2012, pp. 2 – 3.

Despite such a wide list of support schemes and areas, there are significant challenges in terms of implementation, which are caused by different barriers. For example, it is impossible to make decisions in the above areas when a person is institutionalized and deprived of the opportunity to make decisions about his or her own life.³⁴⁴

One of the most important areas in which the need for support is often overlooked and the capacity is limited is the sphere of finance, which includes a person's access to property, inheritance or various types of financial services. In this regard, the Committee clearly indicates the obligation of the State to ensure that all persons with disabilities have access to such services.³⁴⁵

Inadequate support in the field of health care has a significant impact on a person's independence, autonomy and exercise of the concept of capacity. Contrary to international standards, which indicate the need to provide health services to a person solely on the basis of their free and informed consent,³⁴⁶ health systems often intervene against the will of a person with the consent of third parties, including when it comes to institutionalization of persons. Given the current situation, the standard of the Convention is strict and unambiguous – states are obliged to repeal legal regulations which envisage involuntary psychiatric care to persons or their institutionalization at long-term care facilities.³⁴⁷

1.2.4. Support Intensity and Stages

The support system should take into account issues such as the intensity and stages of support provision, in addition to other relevant areas. As mentioned in previous chapters, determining the intensity of support often occurs in the process of evaluating a person.³⁴⁸ In ac-

344 Committee on the Rights of Persons with Disabilities, General Comment N 1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 2014, para. 46.

345 Committee on the Rights of persons with Disabilities, Concluding observations on the initial report of Uruguay, CRPD/C/URY/CO/1, 2016, para. 28

346 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/73/161, 2018, para. 15; Committee on the Rights of Persons with Disabilities, General Comment N 1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 2014, para. 41.

347 Report of the Special Rapporteur on the rights of persons with disabilities, A/74/186, 2019, para. 31; Committee on the Rights of Persons with Disabilities, General Comment N 1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 2014, para. 42.

348 See, Research, Part II, Chapter 2.2.3.

cordance with the general classification,³⁴⁹ such intensity may be low,³⁵⁰ medium³⁵¹ or high³⁵², although it usually changes frequently during support provision.³⁵³

Along with support intensity, it is important to consider the stages of support implementation. A person's need in this regard can be identified in advance by the evaluation process, although even in this case, the existing circumstances may change many times. The experience of different countries sets different models in this regard, but the approaches of Israel³⁵⁴ and Latvia³⁵⁵ are interesting, according to which the support process consists of the following main stages:

- ▶ **Identifying wishes** – As mentioned above, the support process should be based on the will and wishes of the support recipient, therefore, it is essential to identify them in the first place. At this stage, intensive communication is established between the supporter and the person being supported, which is a necessary prerequisite for a trust-based relationship. In some cases, the wishes expressed by the support recipient may even be considered unrealistic by the supporter, however, it is important to understand their role at this stage – instead of judging, they should help the person understand their wishes and provide them information about possible challenges and ways to overcome them.
- ▶ **Collecting Information** – Once a person's will and wishes have been identified, it is important to seek complete information about possible choices (including their pros and cons).
- ▶ **Understanding different choices** – In almost all cases, it is possible to identify several different choices in relation to a particular goal. This stage of decision making is the most sensitive and involves the supporters' understanding of different choices, analyzing their pros and cons, as well as seeing the likely consequences of refraining from making a decision. It is especially important at this stage for the supporter to adhere to neutrality and ethical standards to avoid exerting undue influence on the support recipient.

349 E.g. Bizchut, Supported Decision-Making Service for Persons with Disabilities, Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, Final Report, 2014, pp. 93 – 94.

350 For example, when a person does not need support or needs little support in receiving information, or only needs support in communicating their decision.

351 For example, when a person needs support in finding and understanding information (in a way that is understandable to them) and / or in obtaining information about the likely consequences of that decision.

352 When a person needs support in all stages.

353 Bizchut, Supported Decision-Making Service for Persons with Disabilities, p. 23.

354 Ibid., pp. 19 – 22.

355 Resource Centre for People with Mental Disability – “Zelda”, Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, pp. 42 – 43.

- ▶ **Decision-making** – This stage is a central element in the support process. The function of the supporter in this case is to help the person to make a decision, conceptualize it and plan the implementation process.
- ▶ **Executing the decision** – One of the most important elements of the support process is decision execution. Supporters can be assigned different roles in this direction. These include finding ways to execute a decision and assisting in the process, redirecting the person to appropriate services, and more.
- ▶ **Evaluation of the implemented action** – This is the evaluation of the previous stages, including the decision-making and implementation stage (including in relation to third parties). This stage helps the support recipient, first of all, to make sure of their decision, or to identify what they would like to change in the future.

Clearly, the need to apply all stages of support to any situation and decision may not even exist. However, on the other hand, due to specific circumstances, it is possible to return to the previous stages of support more than once.

1.2.5. Protection Mechanisms of Support Recipients

One of the central roles in the support system rests with the protection mechanisms for the support recipient in the process of exercising his or her rights.³⁵⁶ This mechanism is explicitly provided for in Article 12 (4) of the Convention, which requires Contracting States to provide adequate and effective safeguards to prevent abuse of power. Such mechanisms should guarantee that measures for ensuring capacity exercise are focused on the rights, choices and desires of the individual, are free from conflict of interest and undue influence, tailored to the individual needs of a person, are used for a minimum period, are regularly inspected by a competent, independent and impartial body and are proportional.³⁵⁷ The Committee goes far as to explain the concept of undue influence. It points out that such cases occur when there are signs of fear, aggression, threats, deception or manipulation in the relationship between the supporter and the person receiving the support.³⁵⁸

Before considering specific protection measures, it is important to understand the role of such mechanisms – they are intended to protect the person in the process of providing sup-

356 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 30.

357 Ibid.; The Bulgarian Center for Not-for-Profit Law (BCNL), Guidebook for Rights Enforcement, 2014, pp. 15-16.

358 Committee on the Rights of Persons with Disabilities, General Comment N 1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 2014, para. 22.

port, not to prevent him or her from taking risks and making mistakes.³⁵⁹ According to international standards and country experience, the following measures may be used as protection mechanisms:

- ▶ Persons with disabilities should be able to choose two or more supporters and / or gain access to other types of support, which significantly reduces the risk of adverse influence.³⁶⁰ They should also be given the right to be actively involved in the process and to refuse support at any time.³⁶¹
- ▶ Quality standards should be set for the support process and relevant responsibilities and liabilities (both legal and ethical) should be clearly determined for the supporters,³⁶² also training should be provided for all actors involved in the support provision process.³⁶³
- ▶ A time limit should be set for the support process and the rules for its revision should be established, as well as the monitoring / supervision framework should be defined for such cases.³⁶⁴
- ▶ There should be appropriate liability mechanisms (including courts, administrative bodies) before which a person (including a third person / party) can appeal against the supporter's actions if there is a suspicion that the supporter is not acting in accordance with the support recipients wishes and choices.³⁶⁵ It is also important that there is a mechanism by which the relevant parties can receive information regarding the recognition of a person as a recipient of support.³⁶⁶ In this regard, national human rights institutions have a key role to play in protecting the rights of support recipients, including reviewing and investigating applications, as well as promoting access to legal remedies for these individuals.³⁶⁷

359 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 30.

360 Ibid., para. 30, 62.

361 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 62; Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, Final Report, 2014, p. 110; The Bulgarian Center for Not-for-Profit Law (BCNL), Guidebook for Rights Enforcement, 2014, pp. 15-16.

362 Bach M., Kerzner L., A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, 2010, p. 117.

363 Australian Supported Decision-making Network, Calling for Development of a National Supported Decision-making Framework, 2016, p. 6; Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, Final Report, 2014, p. 110.

364 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 62; Bulgarian Center for Not-for-Profit Law (BCNL), New "Formula" for Capacity to Act – Opportunity for Everyone to Exercise their Rights, 2014, p. 24.

365 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 30; Inclusion International, Position Paper – Key Elements of a System for Supported Decision-making, 2008, p. 8.

366 Council of Europe, A Study on the Equal Recognition before the Law, 2017, p. 71.

367 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 72.

- ▶ Legislation and practice should provide for means of avoiding conflict of interest. *Inter alia*, for this purpose, it is important that the legislation regulates who can be a supporter and on whom such functions should not be imposed.³⁶⁸
- ▶ Legislation and practice should take into account cases of harm and/or risks to the support recipient or third party in the support process and clearly state the responsibilities of the supporter at that time. In this section, it is important to consider issues such as the supporter's obligation to report alleged criminal offenses (this obligation generally exists in the national legal system and applies to all persons), as well as the existence of an internal notification mechanism in the support system to address risk dilemmas. This will prevent the supporter from being left alone in difficult situations.³⁶⁹

The nature and essence of the above mechanisms clearly indicate the complexity and difficulty of the support system. However, their thorough introduction and functioning is essential in the process of implementing the concept of legal capacity in any country.

2. Supported Decision-Making – Relevant Legal, Institutional and Practical Issues

In addition to identifying issues relevant to the support process, including principles, forms of support, the role of actors involved, the specifics of the support stages, it is important to review the legal, institutional or practical issues that ensure the proper and effective functioning of this system.

2.1. Legislative Regulation of Support

The Special Rapporteur emphasizes the obligation of States to adopt a regulatory framework aiming at providing effective and quality support to persons with disabilities.³⁷⁰ Given the topic, it is relevant to review existing international standards (including indicators developed within the framework of the Convention and the UN High Commissioner for Human Rights), as well as the experience of countries.

The study revealed the need to regulate almost all aspects of the support process by legislation. In particular, according to international standards, the domestic legal framework

368 Bulgarian Center for Not-for-Profit Law (BCNL), New “Formula” for Capacity to Act – Opportunity for Everyone to Exercise their Rights, 2014, p. 24.

369 Bizchut, Supported Decision-Making Service for Persons with Disabilities.

370 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/34/58, 2016, para. 60.

of countries should take into account issues such as the standards of the right to receive assistance by persons with disabilities according to their will and choice³⁷¹ (and not their best interests³⁷²) and the state's obligation to ensure reasonable accommodation, accessible, available, and adequate support,³⁷³ recognize various forms of support (including the advance planning mechanism)³⁷⁴ and the importance of their implementation.³⁷⁵

In addition, it is important that legislation clearly takes into account the authority of persons with disabilities to initiate, amend or terminate legal relationships, including support.³⁷⁶ Legal regulation should also address issues such as the right of a person to choose the number of supporters and to be protected from rights violation and / or improper influence.³⁷⁷ The legislation should also regulate the obligations and functions of the supporter, including the preconditions for imposing such duties,³⁷⁸ as well as the possibility of termination of the support relationship on various grounds (e.g. refusal of parties, cases of incompatibility, termination of the time limit set by the court / administrative body) and etc.³⁷⁹

2.2 Supported Decision-Making – Functioning of Institutional Framework

In parallel with legislative regulation, the most important issue is the functioning of the relevant institutional framework, which consists of several systemic elements and es-

371 Such record is found in the Bulgarian draft law, Republic of Bulgaria, Draft Natural Persons and Support Measures Act, Art. 6.

372 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 47.

373 Ibid., para. 63; Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/34/58, 2016, para. 57; EU and OHCHR project Bridging the Gap I, Human Rights indicators for the Convention on the Rights of Persons with Disabilities in support of a disability inclusive 2030 Agenda for Sustainable Development, Art. 12.

374 EU and OHCHR project Bridging the Gap I, Human Rights indicators for the Convention on the Rights of Persons with Disabilities in support of a disability inclusive 2030 Agenda for Sustainable Development, Art. 12; In addition to international standards, such regulation is provided for in the legal framework of different countries. Such is the case, for example, in Spain (Andalusia), where a person is given the opportunity to determine in advance his or her will and choice, which will be included in his or her medical history and will be available to medical staff for use in crisis situations; See Mental Health Europe, *Autonomy, Choices and the Importance of Supported Decision-making for Persons with Psychosocial Disabilities: MHE Position Paper on Article 12 UN CRPD on Legal Capacity*, 2017, p. 10.

375 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, paras. 54, 63; EU and OHCHR project Bridging the Gap I, Human Rights indicators for the Convention on the Rights of Persons with Disabilities in support of a disability inclusive 2030 Agenda for Sustainable Development, Art. 12.

376 EU and OHCHR project Bridging the Gap I, Human Rights indicators for the Convention on the Rights of Persons with Disabilities in support of a disability inclusive 2030 Agenda for Sustainable Development, Art. 12.

377 Mandate of the Special Rapporteur on the rights of persons with disabilities, OL BRA 13/2019, 2019, p. 5; Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 47; EU and OHCHR project Bridging the Gap I, Human Rights indicators for the Convention on the Rights of Persons with Disabilities in support of a disability inclusive 2030 Agenda for Sustainable Development, Art. 12.

378 The Working Group on Legal Capacity and Supported Decision-making, *A Statutory Framework for the Right to Legal Capacity and Supported Decision-making*, 2014, p. 11; Republic of Bulgaria, Draft Natural Persons and Support Measures Act, Art. 6.

379 Republic of Bulgaria, Draft Natural Persons and Support Measures Act.

entially determines the effectiveness of the support system. In particular, when talking about the institutional framework, it is important to highlight, on the one hand, imposing and strengthening sufficient functions of the relevant agencies, and, on the other hand, issues related to the creation of a support service and ensuring its smooth functioning.

2.2.1. Support as a Service

As mentioned above, international standards emphasize the need to establish a diverse support system, which can be reflected in the introduction of both formal and informal mechanisms.³⁸⁰ Clearly, a person may receive support from both a family member and / or a relative, as well as a professional supporter, and such a right must be recognized by the state.³⁸¹ It is essential that the support provided to a person is based on his or her choice and that there are alternatives in the selection process. For example, in many countries there are cases where persons receive support from family members simply because there is no other type of service in which professional actors would be involved.³⁸² In parallel with this practice, a number of studies indicate that it is important for some persons with disabilities to seek support from a professional because of their less paternalistic attitudes.³⁸³ Experience in the functioning of the need-based support services exists in different countries. Among them is a Swedish personal ombudsman who supports people with psychosocial needs and is funded by the state,³⁸⁴ the case of Spain (Catalonia), where a person has the opportunity to choose between family members and state-funded organizations,³⁸⁵ as well as a draft law in Bulgaria which provides for all persons a right to receive appropriate support from an organization registered at the municipal level.³⁸⁶

When implementing a service, it is important to guarantee its quality. Numerous sources point out that the support system must provide adequate empowerment of the supporter

380 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 27.

381 Bizchut, Supported Decision-Making Service for Persons with Disabilities, p. 11.

382 FRA, Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems, 2013, p. 53.

383 Ibid.; Resource Centre for People with Mental Disability – “Zelda”, Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, p. 32.

384 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 46; Finna V.D., Cera R., Palmisano G. (Eds.), The United Nations Convention on the Rights of Persons with Disabilities, A Commentary, 2017, p. 271.

385 European Network of National Human Rights Institutions, Mental Health Europe, Implementing Supported Decision-making: Developments Across Europe and the Role of National Human Rights Institutions, 2020, p. 16.

386 Mental Health Europe, Autonomy, Choices and the Importance of Supported Decision-making for Persons with Psychosocial Disabilities: MHE Position Paper on Article 12 UN CRPD on Legal Capacity, 2017, p. 9.

in order for him / her to be able to perform the functions assigned to them.³⁸⁷ This could include the possibility for the supporter to receive ongoing counseling.³⁸⁸

The quality assurance standard also includes the implementation of person-centered approaches, the development of specific guidelines and establishment of quality criteria for the provision of support services.³⁸⁹ It is essential that the state ensures training for all actors involved in the process, at the national, regional and local levels, including for public servants, social workers, notaries, providers of various services (health, social protection).³⁹⁰ In addition to the trainings, it is essential that state policy includes the development of specific guidelines / principles for all actors involved in the system and the provision of relevant information in an accessible format (including an easy-to-read format).³⁹¹

In addition to trainings, mobilization of sufficient financial and human resources, raising public awareness, as well as conducting research and managing statistical data concerning persons with disabilities, and processing information to identify the needs of different groups and plan effective services are essential for the functioning of the support system.³⁹²

As for the institutional arrangement of the support process, mainly focusing only on pilot projects, countries have little experience. An interesting example of this is the case of Finland, where the National Action Plan for the Implementation of the Convention envisages the commitment

387 The Working Group on Legal Capacity and Supported Decision-making, *A Statutory Framework for the Right to Legal Capacity and Supported Decision-making*, 2014, p. 23; *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, Part 2.

388 Bizchut, *Supported Decision-Making Service for Persons with Disabilities*, p. 29.

389 Report of the Special Rapporteur on the rights of persons with disabilities, *A/HRC/34/58*, 2016, para. 54; Committee on the Rights of persons with Disabilities, *Concluding observations on the initial report of Luxembourg*, CRPD/C/LUX/CO/1, 2017, para. 25; EU and OHCHR project *Bridging the Gap I*, Human Rights indicators for the Convention on the Rights of Persons with Disabilities in support of a disability inclusive 2030 Agenda for Sustainable Development, Art. 12.

390 Committee on the Rights of persons with Disabilities, *Concluding observations on the initial report of Mongolia*, CRPD/C/MNG/CO/1, 2015, para. 21; Committee on the Rights of persons with Disabilities, *Concluding observations on the initial report of Luxembourg*, CRPD/C/LUX/CO/1, 2017, para. 25; EU and OHCHR project *Bridging the Gap I*, Human Rights indicators for the Convention on the Rights of Persons with Disabilities in support of a disability inclusive 2030 Agenda for Sustainable Development, Art. 12; Report of the Special Rapporteur on the rights of persons with disabilities, *A/HRC/37/56*, 2017, para. 76.

391 *Assisted Decision-Making (Capacity) Act 2015*, Ireland; Committee on the Rights of Persons with Disabilities, *General Comment N 1*, Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 2014, para. 37; Committee on the Rights of persons with Disabilities, *Concluding observations on the initial report of Malta*, CRPD/C/MLT/CO/1, 2018, para. 4; Disability Services Division of Victorian Government, *Supporting Decision-making, A Quick Reference Guide for Disability Support Workers*, 2012; Inclusion International, *Position Paper – Key Elements of a System for Supported Decision-making*, 2008, p. 6.

392 Committee on the Rights of persons with Disabilities, *Concluding observations on the initial report of Belgium*, CRPD/C/BEL/CO/1, 2014, para. 24; Committee on the Rights of persons with Disabilities, *Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland*, CRPD/C/GBR/CO/1, 2017, para. 31; Report of the Special Rapporteur on the rights of persons with disabilities, *A/HRC/37/56*, 2017, para. 69-70; *Human Rights: A Reality for All*, Council of Europe Disability Strategy, 2017-2023, pp. 25-26; Inclusion International, *Position Paper – Key Elements of a System for Supported Decision-making*, 2008, p. 7.

of two agencies – the Ministry of Justice and the Ministry of Social Affairs and Health – to research best practices concerning support provision, and develop a support system in the long run, with the active involvement of the community of persons with disabilities.³⁹³ In terms of institutional arrangement, the experience of Ireland is also interesting, where legislation provides for the establishment of a new agency and service.³⁹⁴ This is a decision support service under the Mental Health Commission, and it aims to supervise supporters, maintain a special registry, take into account best practices of support provision, provide information to the public, and etc.³⁹⁵

On the other hand, it is essential to consider decentralization issues in the provision of support. The risks of inefficient implementation of the process in this regard are high because, in many cases, the delegation of authority by the central government to the local government is not accompanied by adequate support for municipalities and this leads to insufficient financial resources for service delivery, service fragmentation and differences between municipalities. To address these challenges, the state must take all measures, including effective coordination and allocation of financial resources.

2.2.2. Place of Support in the Service System

When talking about the support service, it is important to focus on its place in the service system for persons with disabilities. This issue is discussed by the Special Rapporteur, who emphasizes the need for a unified system of support programs for persons with disabilities, which includes various types of support measures, as well as cooperation and coordination between the relevant agencies.³⁹⁶ This system should be based on the human rights paradigm and should take into account the need to support the most marginalized and vulnerable individuals (including those in need of high-intensity support, the elderly, etc.).³⁹⁷ In addition, it is clear that the people employed in this system must be professionals trained in capacity issues and be equipped with relevant skills.³⁹⁸

In addition, it is important that supported decision-making process does not question the person's right to exercise legal capacity. It is necessary to have a number of services in the community in order to enforce the decision made by the person, because the supported decision-making mechanism, in its essence, cannot replace the package of support services

393 The National Action Plan on the UN Convention on the Rights of Persons with Disabilities 2018–2019.

394 Assisted Decision-Making (Capacity) Act 2015, Ireland.

395 Note: According to various reports, due to certain financial challenges, this system has not been introduced yet.

396 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/34/58, 2016, para. 58; Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 66.

397 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 66.

398 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/34/58, 2016, para. 50.

for the person.³⁹⁹ Therefore, the system itself should include the opportunity of a person to access various services, including social security, housing, healthcare, legal, financial and other programs.⁴⁰⁰ Empowering family member supporters is also one of the most important issues in this regard.⁴⁰¹ It is possible to consider provision of financial support, psychosocial assistance services and so-called respite service that allows a family member supporter who is also a carer to take a short break in the process of performing his/her functions.⁴⁰²

2.3. Practical Aspects of Support Provision

Although a number of legislative and institutional frameworks are important for the support system, it still remains a general concept that the various support practices should give substance to. This is why a number of pilot projects are being implemented in the context of different countries.⁴⁰³ Obviously, due to the complexity of the support implementation process, it is impossible to single out all the practical aspects relevant to it, however, it is essential to analyze issues such as communication features between the supporter and the support recipient, provision of information to these individuals, and etc.

This chapter will also examine the relationship between supporters and recipients of support with financial institutions. Since the issue of disposing of income or property by the support recipient is most often on the agenda during the support provision process, and the supporters are most often appointed in this sphere,⁴⁰⁴ this topic will be paid special attention.

2.3.1. Prerequisites for Effective Communication in the Support Process

In order to conduct effective support provision, it is important to have a trust-based communication between the supporter and the recipient.⁴⁰⁵ The process of establishing effective

399 Bizchut, Supported Decision-Making Service for Persons with Disabilities.

400 Australian Supported Decision-making Network, Calling for Development of a National Supported Decision-making Framework, 2016, p. 5; TASH Connections, Supported Decision-making, vol. 42(3), 2017; The Bulgarian Center for Not-for-Profit Law (BCNL), Guidebook for Rights Enforcement, 2014, p. 10; Resource Centre for People with Mental Disability – “Zelda”, Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, pp. 33 – 36; World Health Organization, World Report on Disability, 2011.

401 World Health Organization, World Report on Disability, 2011.

402 Ibid.

403 Committee on the Rights of persons with Disabilities, Concluding observations on the initial report of Latvia, CRP-D/C/LVA/CO/1, 2017, para. 5.

404 Public Defender’s Office, Legal Capacity – legal reform without implementation, 2016.

405 Resource Centre for People with Mental Disability – “Zelda”, Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, p. 47.

communication is essential both at the initial stage of the support provision process⁴⁰⁶ and later.

At the initial stage of support provision, the supporter should identify issues that are important to the support recipient, such as the people they care about and the relationships with them, the activities they want to accomplish, the places they like to go to, their daily routine, and etc.⁴⁰⁷ In some cases, there may be communication challenges when providing support that prevents the supporter from identifying the wishes and choices of the support recipient. Therefore, at the initial stage it is necessary to have an in-depth knowledge of the peculiarities of personal communication, which includes issues related to both verbal and non-verbal communication.⁴⁰⁸ At the initial stage of communication, it is especially important to have external actors, professional facilitators, who, among other areas, work on support planning, as well as the creation and development of a support network.⁴⁰⁹

After the initial stage, it is essential to consider several important practical aspects for effective implementation of support. First and foremost, this is effective communication – in the supported decision-making it is essential to identify whether the person has all the information to make a decision.⁴¹⁰ If not, the supporter should provide all the necessary information to the support recipient. It is important that the provided information relates to the decision being made and that the risks related to making a decision/refraining from it, possible consequences (including the impact on other people), relevant facts, and possible alternatives are provided in a balanced way.⁴¹¹ In the process of providing information or other types of communication, the supporter may involve third parties, including specialists or family members.⁴¹²

In addition to the content of information, it is important that the supporter communicates to the support recipient in the most acceptable and understandable way and to this end, if necessary, ensures the involvement of an appropriate communication expert, uses technology and / or visual material.⁴¹³ It is essential that the supporter uses simple sentences in commu-

406 This stage is especially important for supporters who have no previous relationship experience with the support recipient.

407 IHC Advocacy, *Supporting Decision-making: A Guide for Supporters of People with an Intellectual Disability*, p. 6.

408 *Ibid.*, p. 7.

409 The Bulgarian Center for Not-for-Profit Law (BCNL), *Guidebook for Rights Enforcement*, 2014, p. 26; The Bulgarian Center for Not-for-Profit Law (BCNL), *Guidebook for Rights Enforcement*, 2014, pp. 13, 20, 26 – 27.

410 New South Wales Government, Attorney General's Department, *Capacity Toolkit*, 2009, p. 149.

411 *Ibid.*, pp. 149 – 150.

412 *Ibid.*, p. 149; The Working Group on Legal Capacity and Supported Decision-making, *A Statutory Framework for the Right to Legal Capacity and Supported Decision-making*, 2014, p. 11.

413 New South Wales Government, Attorney General's Department, *Capacity Toolkit*, 2009, pp. 150 – 151; IHC Advocacy, *Supporting Decision-making: A Guide for Supporters of People with an Intellectual Disability*, p. 7; Committee on the Rights of Persons with Disabilities, General Comment N 1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 2014, para. 17.

nication, chooses the tone and speed of conversation acceptable to the support recipient, and asks open-ended questions about how well the person understood provided information.⁴¹⁴

To ensure effective communication in the support process, it is essential that the supporter chooses a place of communication where the person feels calm and the discussion between the parties is not easily disrupted. It is also important to identify the time period when communication with a person may be most productive.⁴¹⁵

2.3.2. Relevant Ethical Standards

In fulfilling their responsibilities, it is important that the supporter respects the centrality and autonomy of the role of the support recipient. To achieve this goal, it is essential that the relationship between the supporter and the recipient is based on not only legal but also ethical standards.⁴¹⁶ Based on the experience of different countries, including Israel and Czechia, it is possible to identify a number of ethical standards for implementing support:⁴¹⁷

- ▶ Supporter must perform their functions in good faith, comply with existing legal regulations, international standards and court decisions. The will and choice of the support recipient must be an unconditional priority for him / her;
- ▶ The supporter should understand that only the person receiving the support is authorized to make decisions about his or her own life and take responsibility;
- ▶ The supporter should support the recipient in overcoming existing barriers and his / her role should not include elements of care or substitute decision-making;
- ▶ The supporter must provide information to the support recipient only in a format accessible to them;
- ▶ The supporter should not assist the person in committing an unlawful act. Moreover, they should have the opportunity to refuse the support provision in relation to the actions of the person that are absolutely contrary to their worldview;

414 New South Wales Government, Attorney General's Department, Capacity Toolkit, 2009, p. 151.

415 Ibid., p. 151- 152; IHC Advocacy, Supporting Decision-making: A Guide for Supporters of People with an Intellectual Disability, p. 9.

416 Bach M., Kerzner L., A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, 2010, p. 117.

417 Ibid.; Bizchut, Supported Decision-Making Service for Persons with Disabilities, p. 27; Quip, Inclusion Czech Republic, Ethical and Methodological Principles of Support in Decision-Making and exercising legal capacity, 2017.

- ▶ The supporter must protect the confidentiality of the information;
- ▶ The supporter should not exert undue influence on the support recipient. They should rule out acting in a conflict of interest, and should refrain from receiving any kind of benefit from a person with a disability or their family members.

2.3.3. Ensuring Proper Awareness of the Support Recipient and the Supporter

Years of experience that people with disabilities did not make decisions about their own lives and could not lead independent lives has affected not only them but also their families and society at large. Capacity reform and supported decision-making changed this very approach, although transforming well-rooted stereotypes requires appropriate education from an early age and retraining of families and supporters.

When ensuring the support provision, the system should address the issues of strengthening support recipient through training and assistance.⁴¹⁸ Since the provision of support should focus on the will and choice of the person with a disability, it is important to train them and teach them how to identify the need and intensity of support.⁴¹⁹

Good practice, on the other hand, involves mandatory, first-hand training of supporters and subsequent ongoing training, as well as individual coaching and problem-solving sessions.⁴²⁰ It is important that the topics include general training on the essence of support, person-centered approaches, support strategies, human rights-based paradigm, and the content of various relevant support services.⁴²¹ It is also essential that the training covers important practical aspects of the process, including applicable communication standards and ways to address specific challenges.⁴²² Individual or group trainings will make it possible, on the one hand, to develop the skills of supporters and, on the other hand, to better understand their role and responsibilities. Moreover, during such training, there is communication and

418 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/34/58, 2016, para. 54.

419 Committee on the Rights of persons with Disabilities, Concluding observations on the initial report of Norway, CRPD/C/NOR/CO/1, 2019, para. 19; Committee on the Rights of Persons with Disabilities, General Comment N 1, Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 2014, para. 24.

420 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 59; See also Bizchut, Supported Decision-Making Service for Persons with Disabilities; Inclusion International, Position Paper – Key Elements of a System for Supported Decision-making, 2008, p. 7.

421 Report of the Special Rapporteur on the rights of persons with disabilities, A/HRC/37/56, 2017, para. 59.

422 Inclusion International, Position Paper – Key Elements of a System for Supported Decision-making, 2008, p. 7; Bizchut, Supported Decision-Making Service for Persons with Disabilities, p. 29, 56.

exchange of practical information between the supporters, which will significantly improve the further support process.⁴²³

Lastly, the analysis of important legislative, institutional or practical aspects of the support process reveals the complexity and difficulty of this topic. Therefore, establishing a well-functioning system in a short period of time can be associated with significant challenges. However, it is essential that countries understand their obligations and ensure that appropriate mechanisms are in place and developed.

2.3.4. Communication Standards for Support Recipients and Supporters with Financial Institutions

Legal capacity, which relates to principles of autonomy, independence, dignity and freedom, allows each individual to sign contracts, seek medical treatment, enjoy the right to work and marry, and so on. The issue of legal capacity is especially important when dealing with financial institutions. In fact, one of the most important challenges in the process of realization and implementation of Article 12 of the Convention is the sphere of finance. Article 12 is particularly relevant here, as the above challenge is directly related to independent decision-making and participation in all spheres of life and, as a matter of fact, issues of inheritance and financial management were rather problematic under the institution of guardianship. The Convention considers it a direct obligation of the state to establish effective mechanisms that enable all persons with disabilities to enjoy their property, inheritance, finances, and banking products/services.⁴²⁴

In the exercise of rights, the Convention excludes any discrimination in the sphere of finance. The Committee further emphasizes the fact that just as sex cannot be a ground for discrimination in property and financial matters, discrimination on the grounds of disability is also unacceptable.⁴²⁵

The difficulties encountered in the practice of financial management over the years have necessitated discussions on how to conduct a relationship between the support recipient and the financial institution in a way that respects the principles established by the legal capacity reform, and what the legal/ practical framework of the relationship should look like so that the support recipients do not face obstacles in managing the funds in their bank accounts.

423 Bizchut, Supported Decision-Making Service for Persons with Disabilities, p. 56.

424 Convention, Article 12 (5).

425 Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 23.

In this regard, it is important to consider the approaches that are actively used in different countries in the interest of effective implementation of the principles of legal capacity and independent decision-making. For the full realization of the right to legal capacity, those involved in the decision-making process, be they supporters, various state institutions or banking institutions, are first and foremost required to have a full understanding of the primary and starting point of the institution of support provision and legal capacity.⁴²⁶

For many persons with disabilities, being able to make decisions independently is a new challenge. Due to the fact that for most of their life they had to live next to a person who made decisions for them, especially when it comes to managing finances, they lack the experience of acting autonomously.⁴²⁷ In such circumstances, when the individual has limited the opportunity to make their own decisions, they have no chance to learn from their mistakes and have experience that in the future would only help them exercise their right to legal capacity.

People need different kinds of support in the decision-making process. It is this kind of support that creates the conditions for practical implementation of theoretical decision-making, acknowledged by the capacity paradigm. The state has an obligation to offer all persons the support measures such as: communication and interpretive support, representative support, administrative support, independent advocacy, support in conducting social relations. Each of these support services is used in different countries to minimize obstacles for persons in the process of independent decision-making.⁴²⁸

Different Forms of Expressing Will of the Support Recipient

Person's will can be expressed not only directly, but also by their conclusive actions, silence, or through sign language. Civil law and practice allow for different variations for the expression of a will that would be aimed at initiating, changing or terminating a legal relationship.

The will of the support recipient can be expressed using a completely individual, unique language. In such cases, the institution of support and the new paradigm of capacity established by the Convention define the obligation to provide support in communication.

In this regard, it is interesting to note the practice developed under the support model in Canada, according to which a person with a disability has the right to choose the person

426 Shabani N., Alesieva P., Dimitrova M., Challenging the law and policy framework for people with intellectual disabilities and mental health problems to exercise their rights, Bulgarian Center for Not-for-profit law, 2014.

427 Family & Community Services, Ageing, Disability & Home Care, Supported Decision Making, A Handbook for Supporters, p. 17.

428 Quinn G., O'Mahony C., Disability Law and Policy, An Analysis of the UN Convention, 2017.

who will find and explain the information he or she needs.⁴²⁹ Indeed, if a support recipient has a problem communicating with third parties because of their individual, unique form of communication, then it may be necessary to use alternative communication systems so that the person can communicate with third parties. Such an “alternative communication system” could be a sign language, communication through various electronic or non-electronic devices. There are cases when a person, who is familiar with an individual concerned, their wish and life story, assists the individual in the process of them expressing their wishes. This “representative” has knowledge of the values of the “represented person” to the extent that they have relevant experience in dealing with them, enjoy the trust of the “represented person” and, most importantly, are not unfamiliar with the unique language of communication that a person uses.⁴³⁰

Thus, the starting point in any case is that if there is an opportunity for the support recipients to express their wishes, then it is the responsibility of the state, the supporter and third parties to create services that the support recipients can use to express their wishes and make their voice heard.

Standards for Relations with Financial Institutions

In accordance with the above-mentioned general basic principles of the support institute, different models and alternatives for exercising the right to legal capacity for persons with disabilities have been developed in different countries, including in the field of banking and finance.

Making financial decisions and support provision in this area is one of the most important issues in the process of implementing supported decision-making approach, which is primarily due to the fact that financial independence and ability to dispose finances are related to a person’s autonomy and effective exercise of other rights. In addition, this field is even more often stressed because it requires a range of skills and special knowledge, and, at the same time, most frequently interference, violation of rights and the use of substitute decision-making occurs in this field. Many factors need to be taken into account when providing support in the field of finance: a person’s past life and history, the way they managed finances in the past, what works and what does not work for a particular person when they make financial decisions, and so on. Moreover, it is important that supporters’ relationship with support recipients in the field of finance is based on the assumption that individual skills can be improved if appropriate support, tailored to individual needs is provided.⁴³¹

429 Supported Decision Making Pilot: Pilot Program Evaluation Year 2 Report. HSRI. P.11.

430 Bach M., Kerzner L., A New Paradigm for Protecting Autonomy And the Right to Legal Capacity, 2010, p. 77.

431 Good and promising practice guide, Inclusive training about article 12, 2017.

Bulgaria, which effectively implements the supported decision-making model in practice through the relevant pilot programs, considers it necessary to train professionals in the banking sector to ensure financial autonomy of support recipient, so that they manage their finances independently. This includes training of notaries and lawyers so that their decisions and communication with persons with disabilities are based on the requirements of Article 12 of the Convention.⁴³²

In addition to the above requirements in the field of banking and finance, Bulgarian pilot program provides for the provision of support by a specialist in the field who will advise the support recipient on how to manage and administer their finances. The main requirement is that such a specialist possess detailed information on the essence of supported decision-making model and takes into account the individual needs of the person concerned.⁴³³

One interesting approach was developed in Israel. The need to introduce alternative approaches to the institution of guardianship in Israel is linked not only to the standards established by the Convention, but also to the legal and professional obligations of the banking sector itself, including:

1. The obligation of the financial institution to respect the freedom of consumers: The customer of the banking service has the right to carry out any type of financial transaction. The bank has no right to impose any restriction on the management of the customer's money, without a proper legal basis.⁴³⁴

2. Obligation ensure that services are accessible – this obligation exists in order to prevent discrimination. It is the bank's responsibility to provide access to services for persons with disabilities. The Convention establishes a standard for access to services for persons with disabilities. Nevertheless, the specific mechanisms for ensuring accessibility and the types of enforcement measures of the standard established by the Convention vary in different countries and are independently regulated under the domestic law.⁴³⁵

432 Shabani N., Alesieva P., Dimitrova M., Challenging the law and policy framework for people with intellectual disabilities and mental health problems to exercise their rights, Bulgarian Center for Not-for-profit law, 2014.

433 Bulgarian Center for Not-for-Profit Law, Guidebook to rights enforcement, 2014.

434 Bizchut, Alternatives to Guardianship in Financial Affairs, p. 27.

435 Ibid.

3. Supported Decision – Making – Analysis of Georgian Context

In parallel with the review of relevant international experience in the support process, it is important to analyze the Georgian context. As a result of the reform, a number of legislative amendments have brought the legal framework closer to the principles and requirements of the Convention, although there are significant challenges in this area, in addition to institutional or practical aspects, which need to be addressed to establish an effective support system.

This chapter addresses issues such as the regulation of the support process at the national level, as well as functioning of the institutional framework and a number of practical challenges.

3.1. Supported Decision-Making Process – Relevant Legal Framework

In terms of regulating the support process, first of all, the Civil Code of Georgia is noteworthy, which describes the concepts related to support and the content of this system. The Code explicitly states that all persons receiving support have legal capacity. The document defines the circle of support recipients (same as people with psychosocial needs) and includes people with severe mental, intellectual / cognitive impairments whose interaction with various obstacles may prevent them from fully and effectively participating in public life on an equal footing with others.⁴³⁶ It is important to note that these obstacles, without proper advice and assistance, should significantly complicate a person's free expression of will and their informed choice-making in the area defined by the court.⁴³⁷

The Civil Code also regulates issues related to the role of the supporter. The existing legislative framework prioritizes the family members of the support recipient when appointing a support person. In case the court fails to appoint a supporter from the circle of family members, relatives, friends or specialists, the authorized person of the guardianship and custodial body is appointed as a supporter, and in case the support recipient is placed in a specialized institution – a representative of that institution. The law provides for cases when it is not permissible to appoint a person as a supporter – when the person is a minor or recognized by a court as a support recipient, if he / she is deprived or restricted of parental rights due to evasion of parental rights and duties, or is dismissed from the duty of guardian, carer or supporter due to improper performance of his / her duties. It should be noted that the law on support recipients is blanket – it deprives them of the right to be appointed as supporter to another person in areas where they themselves are not recipients of support.⁴³⁸

436 Civil Code of Georgia, Art. 12(4).

437 Ibid.

438 Ibid., Art. 1283.

In addition, the National legislative framework lists the areas in which support can be provided. In particular, support may be provided in relation to labor activities, small business transactions, entrepreneurial activities, real estate management / disposition, resettlement, consent to treatment, prevention of harm to a person, and other court-imposed rights and responsibilities. In these areas, the supporter is obliged to identify the wishes / choices of the support recipient and assist him / her in making the relevant decision, which is reflected in the provision of understandable information necessary for the support recipient to make a decision. At the same time, the legislation covers the obligation of the supporter to monitor the permanent medical care of the support recipient,⁴³⁹ as well as to fulfill the tax obligations on behalf of the support recipient.⁴⁴⁰

The law also regulates two grounds for termination of support provision – if the support recipient has died or the reason for which the support was imposed no longer exists.⁴⁴¹ Given the concepts of legal capacity and support, it is important that existing legislation explicitly addresses the authority of the support recipient and supporter to refuse a support relationship.

Despite the important legislative regulations in the functioning of the support system, it is necessary to point out the legal shortcomings that, instead of taking measures to promote the realization of rights, restrict the ability of beneficiaries to exercise their rights and the concept of legal capacity. In particular, the regulations on the following issues are problematic:

- ▶ **Concluding an agreement** – According to the Civil Code, if the support recipient enters into an agreement without receiving the support in accordance with a court decision, the validity of the agreement is called into question. Its validity depends on whether the supporter approves of it (unless the support recipient benefits from the transaction).⁴⁴² Moreover, the Code equates such cases with an agreement concluded by the minor, which is unequivocally contrary to the standards of the Convention. The Civil Code provides for another provision in this area that is inconsistent with the Convention. In particular, under the existing regulations, the precondition for the validity of a written agreement concluded by the support recipient is the signature of the supporter, thus the supporter confirms the fact of the support provision.⁴⁴³ Failure to comply with the existing regulations is the basis for the invalidation of the contract, which, like the first case, contradicts the concept of legal capacity.
- ▶ **Exercise of the right to work** – The existing regulations are based on the concept rejected by the Committee – the so-called status-based approach, that blanketly restricts support-

439 Ibid., Art. 1289.

440 Tax Code of Georgia, Art. 58.

441 Civil Code of Georgia, Art. 1304¹.

442 Ibid., Art. 58¹.

443 Ibid., Art.69.

ed person's employment in the public service and provides an unconditional basis for the termination of the authority of public officials and those holding individual political positions. For example, such records are provided for in the Law of Georgia on Civil Service, according to which a person receiving support will not be hired as an official unless otherwise determined by a court decision. According to the same law, the fact of recognizing a person as a recipient of support is considered as a mandatory basis for their dismissal. Similar records can be found in relation to agencies and positions, such as, for example, the administrative position of a state-run higher education institution, political positions, positions in municipalities and the judiciary, ombudsperson or business ombudsperson.⁴⁴⁴ It should be noted that these legislative regulations refer to a court decision as a mechanism allowing for the exercise of labor rights, in this case, while the court may not allow or restrict the exercise of a certain right of a person when deciding on their need for support.

- ▶ **Exercising the right to vote** – as with the right to work, the rights of support recipients are blanketly restricted in this area too. The Constitution of Georgia, as well as the Election Code and the Law of Georgia on Mental Health restrict the recipients of support undergoing treatment in an inpatient psychiatric institution from participating in elections.
- ▶ **Exercising the right to health** – Legislation in this regard is problematic in several areas. In particular, the Civil Code provides for a supporter's blanket obligation, regardless of the need for support, to monitor the medical care of support recipient. On the other hand, a particular problem is the fact that, despite the implementation of the capacity law reform, the existing legislation has left in force the possibility of involuntary hospitalization and medical intervention for persons with psychosocial needs, which is a gross violation of the provisions of the Convention. In addition, a significant shortcoming is the provision of the Law of Georgia on Health Care, which does not set the standard for obtaining informed consent from the support recipient for bio-medical research, but indicates a lower standard (the person did not refuse to participate in bio-medical research and received appropriate support),⁴⁴⁵ which is unequivocally contrary to the Convention.
- ▶ **Exercise of private and family life** – The current legal framework regarding this right also includes parts of the blanket regulation. For example, the exercise of the right to marry by a support recipient is subject to a special regulation – the existing legislation prohibits marriage between persons, one of whom is the recipient of support and the marriage con-

444 Law of Georgia on Public Service; Local Self-Government Code; Imprisonment Code; Organic Law on the Public Defender; Organic Law on Common Courts; Law on the protection of personal data; Law on Notaries; Organic Law on the Prosecutor's Office; Law on Higher Education; Law on Legal Aid, Law on Diplomatic Service.

445 Law of Georgia on Health Care, Art. 110.

tract has not been concluded between the spouses.⁴⁴⁶ The existing regulation, on the one hand, contradicts the Convention and, on the other hand, creates an artificial barrier in the process of exercising the right by a person.⁴⁴⁷ In addition to the issue of marriage, the legislation provides for indiscriminate regulation regarding the registration of paternity, as well as the performance of functions of a foster parent.⁴⁴⁸

- ▶ **Issues of Citizenship and Freedom of Movement** – The provision of the Law on the Rules and Procedures for Georgian Citizens Exiting and Entering Georgia, is problematic and contrary to the Convention, as it establishes supporter’s signature as a precondition for the support recipients to exit Georgia and get permission to emigrate, unless otherwise determined by the court.⁴⁴⁹ A similar blanket approach is included in the Law of Georgia On the Procedure for Registering Citizens of Georgia and Aliens Residing in Georgia, for Issuing Identity (Residence) Cards and Passports of a Citizen of Georgia, according to which the support recipients need supporters’ consent for obtaining a passport, and in case of refusal of consent, the passport can be invalidated.⁴⁵⁰ Blanket approach is also established by the Organic Law of Georgia on Citizenship of Georgia, which indicates that the recipient can change citizenship only with the consent of the supporter (except for the loss of Georgian citizenship), unless otherwise provided by a court decision.⁴⁵¹

- ▶ **Exercising the right to social protection** – Problematic records regarding the right to receive a social package can be found in the relevant governmental regulation. In particular, the resolution directly defines the supporter’s right to receive a social package for persons with disabilities, in addition to the support recipient (based on a court decision).⁴⁵²

In addition to existing regulations on specific issues, the Civil Code recognizes cases where it is objectively impossible to determine the will of a support recipient for more than one month, and prohibiting substitute decision-making would cause significant harm to the support recipient.⁴⁵³ In this case, the law provides for the court to authorize the supporter to enter into the necessary agreements on behalf of the support recipient and in his or her best interests. Given the content of this regulation, it is important that the concept of “protection of interests” should

446 Civil Code of Georgia, Art. 1120.

447 For details, see Human Rights Education and Monitoring Center (EMC), Analysis of the capacity reform and its implementation, 2016, pp. 29 – 31.

448 It should be noted that the same law does not prohibit the adoption of a minor by a recipient of support; See Law of Georgia on Civil Acts, Art. 36.

449 Law on the rules and procedures for Georgian citizens exiting and entering Georgia, Art. 8, 20, 24.

450 Law of Georgia On the Procedure for Registering Citizens of Georgia and Aliens Residing in Georgia, for Issuing Identity (Residence) Cards and Passports of a Citizen of Georgia, Art. 20², 20³.

451 Organic Law on Citizenship of Georgia, Art. 6.

452 Resolution N 279 of the Government of Georgia on the Definition of the Social Package, Art. 10.

453 Civil Code, Art. 1293.

be replaced by the “best interpretation of will and preferences” test used by the Convention and the Committee in such cases and it should be made clear that this standard is relevant in exceptional circumstances and not when it is not possible to identify the will and choice of the support recipients, because of not using other tools and means of communication.

3.2. Supported Decision-Making – Institutional and Practical Aspects of the Reform

3.2.1. Challenges regarding the Administering of the Support System

For the effective implementation of support, it is essential, to have, on the one hand, strong and sound institutions, and, on the other hand, a functioning support service. Unfortunately, the legal capacity reform has largely taken into account legislative changes and has not considered the need to create and develop a support system. The lack of an effective regime in this regard is an insurmountable obstacle in the process of implementing the reform.

Existing legislation provides for the role of both central and local governments in the support system. Noteworthy in this regard is the guardianship and custody authority, representative of which, on the one hand, may be appointed as a supporter, and on the other hand, has the obligation to protect and empower the support recipients and assist the supporters in the performance of their duties.⁴⁵⁴ At the same time, the Law of Georgia on Social Work considers support recipients as part of the group at risk of social vulnerability and obliges municipalities to actively identify such persons, determine and assess their needs, identify their problems and provide information to the relevant sectoral institution.⁴⁵⁵ Under the decentralization process, the role of social services at the local level will be crucial in provision of information to the families of children with disabilities, where the need for support may become apparent after them reaching adulthood.

The imposition of broad functions on the guardianship and custodial authority, as well as the lack of support services and inadequate strengthening of actors involved in the system are indicators of state inaction in establishing an effective institutional framework. In the absence of support services, guardianship and custody authority faces significant challenges when a social worker or a family member becomes a supporter. Due to the extreme overwork of social workers, their inadequate training and lack of tools at their disposal and the fact that providing support can be associated with a significant amount of work, even a basic support provision from their side is questionable. Due to lack of time, in many cases, the

⁴⁵⁴ Ibid., Art. 1278, 1280.

⁴⁵⁵ Law of Georgia on Social Work, Art. 56 (1).

social worker only assists a person with disability in receiving a social package, however, they can no longer provide support in terms of the management of the social package. Hence, the social workers themselves believe that it is impossible for them to perform the functions of a supporter.⁴⁵⁶

Clearly, having the right knowledge, tools and skills are essential for effective support provision, however, no relevant training has been provided to existing supporters as well as support recipients. They do not have detailed information about the concept of legal capacity, the difference between guardianship and support systems, and the social workers' functions and responsibilities. Guidelines were also not developed for supporters on the theoretical and practical aspects of implementing the support process. Supporters consider their main activity to be meeting the basic needs of the person being supported and not assisting the person in making a decision. It is also found that the supporters are not informed about the functions and responsibilities of the social worker (referring a person to different services, monitoring).⁴⁵⁷ According to social workers themselves, they only provide information to support recipients and supporters about existing services, which is very scarce and insignificant.⁴⁵⁸

Under the given circumstances, social workers find the goal of empowering the supporters practically unattainable.⁴⁵⁹ The main reason for this is their overwork and lack of appropriate tools – they formally make only two scheduled visits for monitoring purposes and, due to the lack of time, are unable to work on empowering the supporters.⁴⁶⁰ Moreover, the challenge is to support and empower the social workers themselves in the process. Their lack of training, in addition to a lack of supervision and relevant guidelines, among other things, is a challenge in terms of working and communicating with a support recipient.⁴⁶¹

In addition to all of the above, the challenge is the fact that the existing system outside of support process is not sufficient and is not focused on increasing the independence of the support recipient. For example, the size of a social package is not enough to meet the persons' needs, while they and their family are facing a serious vulnerability and providing them with basic necessities, food or medicine is a serious challenge.⁴⁶² On the other hand, it is problematic for the supporters to fulfill their obligations on a regular basis – in the absence of services they are in fact constantly present with the support recipients and there are no

456 Research carried out with social workers.

457 Jgharkava N., Reform of the Institute of Capacity in Georgia – Challenges from the Perspective of Social Work.

458 Research carried out with social workers.

459 Ibid.

460 Ibid.

461 Ibid.

462 Ibid.

supporting resources to temporarily replace and strengthen them. Additionally, a serious challenge is when, due to the absence or death of a relevant support person and the lack of services (including day care centers, various types of support, employment) living of a person in the community is questioned.⁴⁶³

To address the above issues, it is essential that the state should create a support service that will replace the role of social workers in this direction and give support recipients the opportunity to choose between family members and professional supporters when receiving support. It should be noted that the Law of Georgia on the Rights of Persons with Disabilities has taken into account the obligation to introduce a personal assistant service at the municipal level, similarly, piloting and developing the support services by municipalities is also possible. However, it should also be taken into account that, unlike a personal assistant, this law does not mention the legal capacity reform and support in decision-making, which creates the need for changes in the law.

In addition, in order to provide effective support, it is important to allocate specialized social workers in the guardianship and custody body and provide them with the appropriate knowledge, resources and tools so that they can comprehensively work on each case. At the same time, it is essential to develop social protection services, including services aimed at empowering supporters, which will enable them to effectively perform the functions assigned to them.⁴⁶⁴ In the process of establishing a support system, it is also essential to consider introducing certain monetary and / or non-monetary benefits to the supporters, which will compensate them for their hard work and lighten their heavy burden.⁴⁶⁵

3.2.2. Communication between Supported Persons and Supporters with the Financial Institutions

General Context

Exercise of the right to autonomy and independent living guaranteed by the Convention is significantly challenged in the process of managing financial affairs, and given the Georgian reality, in some cases, the possibility of an individual to act independently is questioned. Persons, whose legal capacity is recognized by the Convention and the domestic law of the country, face obstacles in their daily lives when it comes to receiving and managing their own finances,

463 Ibid.

464 Ibid.; Human Rights Education and Monitoring Center (EMC), Assessment of Capacity Reform and its Implementation 2016, p. 51.

465 Human Rights Education and Monitoring Center (EMC), Assessment of Capacity Reform and its Implementation 2016, p. 52

including social benefits. For example, in the exercise of the right to legal capacity, in the field of finance, obstacles arise when: a) a supporter is awarded a full representative authority by the court; b) the court decision does not specify the scope of support; c) the banking institution has difficulty in interpreting the scope of support defined by the court, etc.⁴⁶⁶

One of the major problems associated with managing and disposing of finances is the lack of information available in the banking sector about the supported decision-making model, while international practice and standards consider the awareness of persons working in the financial sector and their use of appropriate communication tools as one of the preconditions for support recipients to be able to manage their finances. It is important to note that Article 10(1) of the Order of the President of the National Bank of Georgia of December 23, 2016 (151/04) (Code of Ethics for Consumer Relations) defines the obligation of a financial organization: “When dealing with customers, follow the norms developed by the best practices of ethics and business relations and act in accordance with the principles of good faith, transparency and fairness, in order to promote the reputation of a financial sector as a trusted partner for consumers.” The first paragraph of Article 3 of the same Order (Obligation of a Financial Organization to Provide Consumers with Information on a Financial Products) reads as follows: “The financial institution must ensure that consumers are provided with true and complete information on the terms of the financial product that is accurate, understandable and necessary for decision-making, including when offering the product through any channel before concluding a contract, and does not push the customer to make a decision that they would not have made otherwise, if they had accurate and complete information.”⁴⁶⁷

Acting in accordance with the principles of good faith, transparency and fairness, as well as providing consumers with information on the terms of a financial product that is “accurate, understandable and necessary for decision-making” is the direct responsibility of the financial organization. Which should be undertaken without any discriminatory legal segregation and artificial “categorization” of citizens. This regulation may be incomplete, but it responds to the principles and legal framework of the banking institutions that exist in Israel. Under this regulation, financial institutions have an obligation to provide accessibility and care for the interests of their consumers. The commitment of banking institutions in Israel to ensure the autonomy of consumers, protection of their interests and access to services necessitates the use of alternative models to the institution of guardianship in relation to financial institutions; By the order of the President of the National Bank of Georgia, the obligation for financial organizations to provide the necessary information about a financial product, in good faith, can be said to be only an additional argument. In all relevant cases, the banking

⁴⁶⁶ Analysis of the case law carried out in the framework of the research.

⁴⁶⁷ Order # 151/04 of the President of the National Bank of Georgia of December 23, 2016 on the Approval of the Rules for the Protection of Consumers Rights when Providing Services by Financial Organizations.

institution should pay particular attention to the right of persons with intellectual disabilities or psychosocial needs to make independent decisions in the exercise of their financial capacity. If needed, they should get the necessary support, even in terms of providing them with important information for decision-making.

A person to be recognized as a support recipient is appointed a supporter by the court, who in certain cases is given the opportunity by the court to act on behalf of the recipient support when conducting banking operations. Unfortunately, such cases are quite common in practice. In such a case, the will of the supporter completely replaces the will of the support recipient, which in itself limits the right of the support recipient to the legal capacity in the field of finance; The supporter, in such a situation, in fact, appears to be synonymous with the “guardian”. Support, which implies an obligation to provide the necessary information in the appropriate form and means, is sometimes equated with such “representation” by the supporter when the recipient’s wishes and will are ignored because the supporter has exclusive authority to manage the financial affairs. According to Georgian law, such full representative authority in relation to adults was applicable only under the institution of guardianship. The will of the person under guardianship was completely replaced by the will of the guardian. Consequently, such a practice makes the reform irrelevant and can be equated to the institution of guardianship, which was deemed unconstitutional.

It is important to highlight the exceptional cases where, under Georgian law, court is empowered to delegate full representative authority to the supporter⁴⁶⁸ – “In exceptional cases, if the court finds that the will of the support recipient cannot be identified by the supporter for more than one month and the prohibition to make substitute decision will cause significant harm to the support recipient, the court gives the supporter the right to conclude the necessary agreements on *behalf of the support recipient, based on their interests.*” The mentioned rule of delegation of decision-making right is, indeed, the only and exceptional case when the court can grant the supporter the right to make a decision and enter into an agreement on their own. However, the problem is that such an “exceptional rule” is used in cases where the support recipients are able to express their will if they are provided support and information in an appropriate form⁴⁶⁹.

Support reform and a new standard of legal capacity recognizes the support recipient as a decisionmaker. Consequently, in all cases where the will of the support recipient can be expressed in the proper provision of support, granting full representative authority to the supporter cannot be in accordance with the principles of the Convention and the essence of the institution of support. Therefore, a change of practice is necessary.

468 Civil Code of Georgia, Art. 1293(4).

469 Analysis of the case law carried out in the framework of the research.

Delay in provision of social package by a banking institution in the presence of several supporters

In practice, the relationship between the support recipients / supporters and JSC Liberty Bank in receiving / withdrawing the pension funds in the form of social support is problematic.⁴⁷⁰ There are cases when the recipients of support are not able to receive the pension funds provided by law from JSC “Liberty Bank”, which happens due to the following reasons:

JSC Liberty Bank, for the most part, prevents the disbursement of social security funds to beneficiaries if the beneficiaries are appointed by a court decision, not one but several supporters. A clear illustration of this problem is when a person, who had two supporters appointed, was not given access to funds.⁴⁷¹ According to JSC Liberty Bank, when there are several supporters, it is difficult for the Bank to determine in whose name the plastic card should be opened (on the card where the state pension funds will be credited) and therefore, they offered two alternatives to the support recipient: a) one of the appointed supporters have to decline their status as a legally recognized supporter, so that the banking institution can open a debit card under the name of one supporter b) or, a different court decision should be issued, appointing only one supporter to the support recipient, as it is “more comfortable” for the bank to communicate with one supporter.

The position of JSC Liberty Bank regarding the request for the supporter to renounce their legal status of a supporter cannot be considered to be in the line with support system and regulations provided by the legislation of Georgia. First of all, it should be noted that according to the first part of Article 1280 of the Civil Code of Georgia, the court has full authority to decide on the appointment of several supporters. Moreover, as the practice of foreign countries shows, the implementation of support is more complete, taking into account all the possible wishes and choices of the support recipient, when several supporters are assigned to a person (taking into account their individual characteristics and competencies).⁴⁷²

The second major problem identified in this case is the misrepresentation of the legal capacity reform by the banking sector. According to the approach established in Georgia since 2015, the recipient of support is the bearer of all rights, including the owner and manager of his / her own social security and other property. Therefore, in order to use banking products, the plastic card must be opened in their name and not in the name of the supporter. This rule should be applied even under the exception rule defined by the Civil Code of Georgia, when the will of the person is represented by the supporter.

⁴⁷⁰ Ibid.

⁴⁷¹ Resolution of January 29, 2018 on the appointment of a temporary supporter, and their scope of authority, Case # 2 / 199-17.

⁴⁷² See, Research, Part III, Chapter 1.2.5.

The support regime recognizes the legal capacity of all persons with disabilities, on an equal footing with others and, in accordance with the law, determines that a person, him/herself is authorized to make decisions. The supporter is responsible for providing only the necessary assistance that the support recipient may need to act autonomously. This principle of the institution of support naturally applies to the exercise of legal capacity in the sphere of finance, including the receipt of funds provided by the social package. Thus, in order to ensure the exercise of the right of legal capacity in the banking sector and in accordance with established practice, banks, especially JSC Liberty Bank, should open plastic cards in the name of the support recipient and not in the name of temporary supporters.

When discussing the obstacles that arise in the relationship between the support recipients, the supporters and the banking institutions, it has already been mentioned that the plastic card of the support recipient's bank account must be affixed in the name of the support recipient him/herself. It is also important to emphasize that when operating in the banking and financial sector, service providers equate the support recipient with the person under guardianship, which creates barriers. Without a thorough understanding of the universal paradigm by which support recipients, on equal footing with others, enjoy the right to legal capacity and the ability to act independently, it may still be problematic to establish support services that are functioning and adapted to the contemporary standards. In this regard, the National Bank can play a potentially important role, to develop guidelines and / or codes of best practice in banking matters, which in turn will help to establish uniform practices in accordance with the Convention.

Conclusion

The process of providing support is a central step in the capacity system and essentially ensures a change in the legal status of persons with disabilities on psychosocial and intellectual grounds. Evidently, this process is characterized by complexity and difficulty, and limited experience of countries creates significant barriers to identifying common standards in this area; However, analysis of the available sources shows the basic principles and approaches that states should take into account in the implementation of the reform process. *Inter alia*, it is essential to regulate all levels of support provision, establish an effective institutional framework, introduce support services, and properly empower the actors involved in the process.

On the other hand, the analysis of the current system in Georgia shows that the legal capacity reform process was mainly concerned with legislation and the government did not ensure the establishment of an effective institutional system, which was reflected in the lack of support services, in some cases delegation of support provision process to social workers, inadequate empowerment of guardianship and custody authority and etc. Existing challenges are insurmountable obstacles to the effective implementation of the reform. Given the current situation, it is

important for the state to realize the complexity of its responsibilities, to create a concrete vision for the establishment of a support system and start implementing this vision.

Recommendations

Given the challenges, the state should consider the following recommendations:

- ▶ 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.

Part IV. Monitoring of the Supported Decision-Making Process

Introduction

Legal capacity is a difficult and complex concept in terms of content. It is inherently linked to all rights and freedoms and forms the essential basis for their equal, unhindered enjoyment. One of the main responsibilities of states in the process of implementing the institution of legal capacity is to establish a supported decision-making system and to ensure its effective functioning.⁴⁷³

The Convention is very general and does not contain detailed guidelines for the implementation of the national support system. However, due to its content, various relevant sources unequivocally emphasize one of the main obligations of the state in this direction, to create a support service and to ensure its unimpeded and full accessibility for all persons in need.⁴⁷⁴ To fulfill this obligation – in order for the support service to comply with all the principles set out in the Convention and to ensure the prevention of abuse of rights of the support recipient – it is essential to establish an effective oversight mechanism.⁴⁷⁵ Clearly, one of the relevant ways to achieve this goal is the creation of a legally and institutionally sound monitoring mechanism.

This chapter reviews the issues that are essential for the effective functioning of the support process monitoring system. The chapter is divided into four main parts. The first part deals with the essence and scope of support system monitoring, the second part reviews the good practice of countries in relation to the functioning of the monitoring system, the third part analyzes the situation in Georgia in this regard, and the last part summarizes and formulates recommendations for government agencies.

1. The Essence and Scope of Monitoring

When studying the monitoring mechanism of the support system, first of all, it is important to analyze the importance of monitoring and the principles which this process should be based on. When introducing a monitoring system, states are required to establish

473 See Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the Law, CRPD/C/GC/1, 2014, para. 16.

474 See, Research, Part III.

475 Convention, Art. 12 (4).

clear accountability mechanisms and indicators within national legislative and policy frameworks.⁴⁷⁶

When considering the concept of accountability, it is essential to focus, on the one hand, on the responsibility of the state, to ensure unimpeded access for persons with disabilities to the support system, and, on the other hand, on the responsibility of the supporter, to provide adequate support to the person in need. In the first case, according to the international standards, the monitoring, implementation and coordination bodies established under Article 33 of the Convention are considered to be an important monitoring and accountability mechanism. In that regard, providing access to a court and other means of protection for persons with disabilities also becomes essential.⁴⁷⁷

On the other hand, in order to prevent undue interference and abuse of rights in the process of exercising legal capacity by persons with disabilities, it is important that the state provides independent monitoring of any program / service that supports persons with disabilities.⁴⁷⁸

Considering the research topics, this part will focus on the second case and analyze the relevant international standards, on the one hand, to identify the need and importance of the monitoring process, and, on the other hand, to provide an overview of the principles and ideological framework of its implementation.

1.1. The Need for Conducting Monitoring

The normative consideration of the right to legal capacity for persons with disabilities is an important, albeit insufficient, step towards the introduction of a human rights-based approach. It is essential to introduce and implement the notion effectively in practice. Given the past structural discrimination against persons with disabilities and the existing stereotypes in society, the state should oversee the exercise of the legal capacity and implementation of an appropriate model of support for persons with disabilities. This is unachievable without an effective monitoring system at the national level.

Exercise of the legal capacity is a problematic issue in many countries, which are caused by various barriers, including a weak monitoring system.⁴⁷⁹ It is clear that although the role of

476 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 73.

477 Ibid., para. 73 – 74.

478 Ibid.

479 National Association of Community legal Centers, Disability Discrimination legal Center, Article 12 of the CRPD – The right to equal recognition before the law, p. 7.

persons with disabilities is central to the support process and they should be able to make decisions about their involvement, intensity or duration of the support service, this does not weaken the state's commitment in relation to the functioning of the support system. On the contrary, its role in coordinating and monitoring of the supported decision-making model is essential.⁴⁸⁰

Monitoring the support process has several important purposes. International standards in this field⁴⁸¹ and documents developed by various organizations (including community organizations) distinguish two main areas: quality control of support services and prevention of conflicts of interest, violence or abuse of rights in the support process.⁴⁸²

In the service provision, quality assurance should be one of the main state objectives.⁴⁸³ Clearly, a variety of measures are needed to achieve this – including the introduction of human- and human rights-oriented approaches, development of guidelines for service delivery⁴⁸⁴ and establishment of monitoring mechanisms to assess the adequacy and effectiveness of support services.⁴⁸⁵

In addition, it is clear that one of the main founding principles of the support system is for the supporter to respect the rights, wishes and will of the person receiving the support. In the supported decision-making, even the unconditional centralization and prioritization of the will of a person with disability by the legislation or policy framework, alone, may often not protect the individual from conflict of interest and abuse of power by the supporters. Such cases are especially common when a person with a disability makes or implements a decision, which, in the opinion of a supporter, is against the “best interest” of the decision-maker.⁴⁸⁶ Therefore, it is essential that one of the main directions of the functioning of the support system should be the prevention of conflicts of interest⁴⁸⁷ and the abuse of rights. Moreover, the state should develop effective mechanisms for overseeing the process and safeguards should be introduced in the support model and reflected in the legal accountability of the supporter.⁴⁸⁸

480 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 56.

481 E.g. General Comments and Concluding Observations of the Committee, reports of the Special Rapporteur.

482 e.g., see Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 54; Australian Law Reform Commission, Equality, Capacity and Disability in the Commonwealth Laws, Final Report, 2014.

483 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 54.

484 Note: Decision-making support may also take the form of a service, and there are some important international recommendations in this regard, however, there is no such practice in Georgia at this stage, which creates an additional barrier in terms of setting standards in this area and monitoring of their implementation.

485 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 54.

486 Inclusion Europe, Key Elements of a System for Supported Decision-Making (Position Paper), 2008.

487 Minkowitz T., Recommendations for adoption of the CRPD on article 12, Center for the Human Rights of Users and Survivors of Psychiatry, Rec. 4.

488 Ibid., Rec. 5.

Lastly, considering the significant social and legal barriers to the exercise of legal capacity by the persons with disabilities, effective monitoring system is crucial for the practical implementation of the support model. Functioning oversight leads, on the one hand, to the development of a support system in general and to refining the ongoing processes in specific support cases (including through active work with a supporter) by ensuring their quality, and, on the other hand, to the prevention of conflict of interest and abuse of rights by the supporters or other persons.

1.2. Principles of the Monitoring Process

Before reviewing individual aspects of the monitoring process or its regulation, it is important to identify the ideological scope of the process. In this case, too, the primary role is played by the Convention and the international standards on the subject of legal capacity, which share the vision and the principles established by the Convention. It is clear that the monitoring process should fully take into account the ideas on which the supported decision-making system is based,⁴⁸⁹ however, given its specificity, it is also important to distinguish the relevant areas in this direction:

- ▶ **Central role of the support recipient** – It is essential that at any stage of support provision the medical model is completely ruled out and the process is based on the social paradigm of disability. To this end, in addition to the proper functioning of the capacity and support systems in place, monitors need to have a clear vision of what a human rights-based approach means in relation to persons with disabilities and what constitute impeding factors in this regard.

Due to the content of the principle, such important aspects should be taken into account in the monitoring process, as the centrality of the role of the support recipient in the support process and the prioritization of their wishes and desires, as well as the inadmissibility of adopting the concept of “best interest” in the support system.⁴⁹⁰ To ensure the enforcement of these values, the monitoring process should focus on the autonomy, will and choice of the support recipient; check whether the support is available and is adequate; through active communication with the person concerned, identify what types of modifications are needed to improve the existing relationship, etc.⁴⁹¹

489 See, Research, Part I.

490 Gooding P., Navigating the ‘Flashing Amber Lights’ of the Right of Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns, “Human Rights Law Review”, 2015, vol. 15(1).

491 EU and OHCHR project Bridging the Gap I, Human Rights indicators for the Convention on the Rights of Persons with Disabilities in support of a disability inclusive 2030 Agenda for Sustainable Development, Art. 12.

- ▶ **Due diligence and Independence** – Although the nature of service providers varies from country to country (services are provided by both the state and non-state actors), government has an obligation to ensure the quality of support mechanisms and/or service delivery. To this end, international standards should focus on adopting comprehensive regulatory and monitoring framework that involves a due diligence obligation.⁴⁹² The expression of this obligation relates to the function of the monitor, to thoroughly and extensively investigate a specific case, as well as to protect personal data, which became known to them in the process of exercising their authority.⁴⁹³

The independence of the monitoring mechanism and the monitors is essentially related to the principle of due diligence. This principle must be unconditionally implemented in the process of overseeing any program of support to persons with disabilities (whether provided by the state or by the private actor).⁴⁹⁴ Only with the independence of the monitoring mechanism and distancing it from the parties will it be possible to achieve one of the main goals of the process – the effective prevention of exploitation and violence against the support recipient, as well as conflict of interest or abuse of rights.⁴⁹⁵ In this regard, the World Health Organization (WHO) holds an important position, according to which, in order to prevent the conflict of interest, the monitor cannot be a person employed in the service, they must be completely independent and they must be appointed by the state.⁴⁹⁶

- ▶ **Regularity of the monitoring and qualified oversight** – One of the most important issues highlighted in the recommendations or opinions of various organizations is the obligation to conduct regular monitoring.⁴⁹⁷ It is important that state oversight of the support system should not be sporadic or unsystematic. Clearly, the regularity test may be different for each case, although the practice of different countries shows that such formal monitoring should take place at least once a year.⁴⁹⁸ It is also of paramount importance that the supervision is carried out competently. To this end, the person responsible for the process must be trained on an ongoing basis.⁴⁹⁹

492 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 60.

493 e.g., see Representation Agreement Act [RSBC 1996] Chapter 2015, Sec. 22.

494 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 91.

495 The Office of Public Advocate, Supported Decision-making (Background and Discussion Paper), 2009, p. 25.

496 Funk M., Drew N., Realizing Supported Decision Making and Advance Planning, 2017, p. 56 – 57.

497 Special Rapporteur on the Rights of Persons with Disabilities, Communication No. OL BRA 13/2019 on Bill PL 11091/2018 which amends the Statute of Persons with Disabilities, as well as provisions in the Civil Code and Code of Civil Procedures, 2019, p. 5; Inclusion International, Position Paper – Key Elements of a System for Supported Decision-making, 2008, p. 6.

498 Inclusion Europe, Safeguards in Measures Relating to the Exercise of Legal Capacity, 2018, p. 14.

499 Funk M., Drew N., Realizing Supported Decision Making and Advance Planning, 2017, p. 56; Human Rights: A Reality for All, Council of Europe Disability Strategy 2017-2023, p. 64.

Along with other relevant standards, implementation of the above principles in legislation and practice will significantly contribute to the introduction and operation of an effective oversight mechanism. It is in the context of such an approach that shall make it possible to minimize the essential challenge for many countries – legal capacity reform that is left unimplemented.

2. Support System Monitoring – Legislative and Practical Aspects

The institution of support is not yet widely established around the world, therefore identifying uniform legislative or institutional safeguards for monitoring this system is associated with significant challenges. Nevertheless, from the practice of individual countries, as well as from thematic pilot projects, key issues can be identified, that are relevant, on the one hand, in terms of the regulation of the monitoring process and, on the other hand, in relation to the practical aspects of its implementation.

The evaluation of reforms or projects implemented in different countries clearly shows the importance and necessity of overseeing the support process. In addition, monitoring can take many forms, including formal monitoring, so-called coaching/mentoring, various types of assessment and etc.⁵⁰⁰ The monitoring process, in some cases, also involves the use of certain conflict resolution mechanisms.⁵⁰¹

The purpose of the above part is to review the legal, institutional or practical aspects of monitoring the support system, taking into account the limited practical experience globally, and to analyze the main functions that should be performed by the monitor.

2.1 Legal Aspects of Monitoring

The need to regulate the monitoring process, as well as the functions and responsibilities of the monitor at the legislative level, is primarily dictated by the need to protect decision-making rights of persons with disabilities and to ensure that the supporter's actions are in line with the guiding principles of the support model.⁵⁰² Hence, its importance is emphasized by many organizations.⁵⁰³

500 Resource Centre for People with Mental Disability “Zelda”, Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, p. 40.

501 Ibid.

502 Bach M., Kerzner L., A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, 2010, p. 118.

503 Inclusion Europe, Safeguards in Measures Relating to the Exercise of Legal Capacity, 2018, p. 15.

From the study of the relevant legislation,⁵⁰⁴ it is clear that the main areas of legal regulation are the powers and responsibilities of the monitor, the issues of changing the monitor and terminating their authority.⁵⁰⁵ In this regard, the views expressed by the Canada Working Group on the functioning of the capacity and support systems, including the selection / appointment procedures for monitors, are important. As suggested by the Working Group, the legislation should regulate issues such as: 1) the independence of the monitor – they should not be designated as a supporter – to avoid conflict of interest, they should be able to act independently; 2) the ability of the monitor to perform the functions and obligations imposed on them by law; 3) special trainings, important for conducting the monitoring (e.g. through certification).⁵⁰⁶ In addition, the Working Group further defined the obligation of good faith of monitors, respect for the institution of support and the established relations, as well as respect for the values, wishes, views and traditions of the support recipient and etc.⁵⁰⁷

In addition, it is important that the regulatory framework for the monitoring process defines the monitor's authority to visit and interview a person with disability at any reasonable time. It is essential that the legislation provides for the prohibition of interference with the monitor's performance of the above function.⁵⁰⁸

It should be noted that the legal regulation also refers to the functions and powers of the monitors in case of certain misconduct / violations. For example, if a monitor suspects that a representative of a person with a disability is not performing his or her duties, they should notify the persons involved in the supported decision-making process.⁵⁰⁹ The procedure should also include the monitor's authority to request additional information / reports from the supporter. If the monitor still suspects that the person's activities do not comply with the requirements of the law, they have an obligation to immediately inform the relevant authority (e.g., the guardianship and custody authority).⁵¹⁰

504 Given the scarcity of the introduction of a support institution on the global level, when defining the support monitoring framework, some experts point out that it is possible to adopt parts of the legislation governing the monitoring of the substitute decision-making process in different countries; Bach M., Kerzner L., *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, 2010, p. 118; Pathare S., Shields L., *Supported Decision-making for Persons with Mental Illness: A Review*, "Public Health Reviews", Vol. 43(2), 2012, p. 10.

505 E.g. *British Columbia Law on Representative Agreement, Irish Law on Assistance in Decision Making, and Legislative Proposal of the Canadian Working Group on Capacity and Support Issues*; Bach M., Kerzner L., *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, 2010, p. 118.

506 *The Working Group on Legal Capacity and Supported Decision Making, A Statutory Framework for the Right to Legal Capacity and Supported Decision Making For Application in Provincial/Territorial Jurisdictions in Canada*, 2014.

507 *Ibid.*

508 e.g. see *Representation Agreement Act [RSBC 1996]*.

509 *The Working Group on Legal Capacity and Supported Decision Making, A Statutory Framework for the Right to Legal Capacity and Supported Decision Making For Application in Provincial/Territorial Jurisdictions in Canada*, 2014.

510 *Representation Agreement Act [RSBC 1996] Chapter 2015, Sec. 20; The Working Group on Legal Capacity and Supported Decision Making, A Statutory Framework for the Right to Legal Capacity and Supported Decision Making For Application in Provincial/Territorial Jurisdictions in Canada*, 2014.

2.2. Institutional Framework for Exercising Oversight

Given the challenges of implementing a support system, it is important that the institutional framework for monitoring is based, on the one hand, on the principles of legal capacity and, on the other hand, substantially address the challenges that have existed and still exist with regard to the guardianship model. These include the indiscriminate monitoring process, disregard for the individual needs and the lack of resources, which precludes effective oversight of cases (including making it impossible to process reports submitted by a guardian, failing to verify the condition of persons with disabilities, etc.).⁵¹¹

Regarding establishing the institutional mechanisms, it is important to mention the experience of different countries. Among them is Ireland – under a special Law passed in 2015, the Mental Health Commission is responsible for monitoring various forms of supported and substitute decision-making. To this end, general or special visitors are appointed, who directly observe the progress of the support provision, on site, and send a report to the Director of the Commission.⁵¹²

In the context of other countries, in the process of monitoring the guardianship or support systems, the role and functions of the central government, including the guardianship and custodial authorities, are essential. Executive bodies exercise monitoring functions in the following countries: the United Kingdom, Denmark, Estonia, and Sweden.⁵¹³ In these systems, social workers oversee the decision-making process and gather information about existing challenges.⁵¹⁴ It is important that the standards that monitors should consider when overseeing the implementation of the support model are defined in normative terms.

Given the existing and / or ongoing decentralization processes in different countries, the role of local government is particularly active in the monitoring process. For example, in Bulgaria, the City Hall or a person designated by the City Hall constitutes a monitoring body,⁵¹⁵ in Norway there is a public servant designated who oversees the support provision for the person concerned,⁵¹⁶ and the Lithuanian Civil Code envisages the authority of the municipal

511 Diller R., Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making, "Fordham Urban Law Journal", Vol. 43, 2016.

512 Assisted Decision-Making (Capacity) Act, Sec. 95.

513 FRA, Legal capacity of persons with intellectual disabilities and persons with mental health problems, 2013, p. 34.

514 The Bulgarian Center for Not-for-Profit Law (BCNL), Supported Decision-Making: Guidebook to Rights Enforcement, 2014, p. 66.

515 Bulgaria, Family Code, Art. 154, 170.

516 Norway 2016: Decision making and legal capacity in dementia <https://www.alzheimer-europe.org/Policy/Country-comparisons/2016-Decision-making-and-legal-capacity-in-dementia/Norway>.

guardianship authorities to monitor the support process.⁵¹⁷ Despite the benefits, in many cases decentralization creates additional barriers and challenges in providing support services to people with disabilities.⁵¹⁸ Due to the specific problems, including insufficient financial or human resources for the local government, support services are fragmented, regional differences become evident, and these lead to unequal coverage of people in need across the country.⁵¹⁹ Poorly implemented decentralization process ultimately has a negative impact on the quality of independent living of persons with disabilities.

2.3. Practical Aspects of Monitoring

As mentioned above, the monitoring process must respond to the complex commitment to implement the concept of legal capacity. Evidently, unlike the guardianship system, which provides only a formal examination of the incapacitated person's condition,⁵²⁰ the support oversight process consists of many important aspects, the non-implementation of which, in practice, can ultimately lead to the weakness of the monitoring system. As a result of the review of different countries, including pilot projects, the functions of monitoring practitioners can be divided into two main areas.

Overseeing the support process in accordance with the principles established by the Convention

One of the main functions of those responsible for the monitoring process is to monitor the progress of support. The monitor supervises the extent to which support is provided in accordance with the principles set out in the Convention, including whether the decision is made by the support recipient and not the supporter. The oversight function not only ensures that significant violations in the process are prevented, but can also bring other types of practical benefits, including helping the supporter understand their role and better conduct their duties.⁵²¹

On the other hand, one of the purposes of monitoring is to prevent undue influence, abuse of power, exploitation and violence in the support process. Having regular communication with the support recipient and overseeing the activities of the supporter, the monitor per-

517 Civil Code of the Republic of Lithuania, 2000, Art. 3.241, 3.278.

518 Report of the Special Rapporteur on the Rights of Persons with Disabilities, A/HRC/34/58, 2016, para. 59.

519 Ibid.

520 Council of Europe Commissioner for Human Rights, *Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, 2012, p. 15.

521 Black and White Project, *Ethical and Methodological Principles of Support in Decision-making and Exercising Legal Capacity*, 2017, p. 5.

forms relevant interventions as needed (if they consider that the will and wishes⁵²² of a person with disability have been ignored).⁵²³ In order to prevent undue influence and abuse of power, the function of the monitor becomes even more important in relation to those decisions that increase the risk of exploitation or other violation of the dignity of the person with disability – e.g. decisions on surgery, abortion, sterilization.⁵²⁴ In this case, the function of the monitor is to examine whether the will of the person with disability was central and whether their wishes were correctly interpreted.⁵²⁵

Clearly, in order to achieve the above goals, the monitor must be informed about the decisions made in the cases under supervision and the support provided in making those decisions.⁵²⁶ On the other hand, in order to prevent abuse of rights or violence, the World Health Organization (WHO) emphasizes the need to conduct training for monitors to identify strategies for preventing the above-mentioned risks.⁵²⁷ The 2017-2023 Strategy of the Council of Europe on Persons with Disabilities also speaks about the importance of conducting trainings.⁵²⁸

Strengthening the parties involved in the support process and resolving any difficulties that may arise

One of the primary tasks of the monitoring persons is to strengthen the supporter and the support recipient, to resolve the difficulties in the support provision process and act as a mediator.⁵²⁹ Their role is further enhanced when there are significant communication challenges in relation to support recipients.⁵³⁰

Analysis of different types of international experience revealed a Latvian model, which in turn is based on the experience of Australia.⁵³¹ In this model, the so-called facilitators

522 For the assessment methodology, see Inclusion Europe, Safeguards in measures relating to the exercise of legal capacity, 2018, p. 14.

523 Inclusion Europe, Safeguards in measures relating to the exercise of legal capacity, 2018, pp. 13 – 14.

524 Bach M., Kerzner L., A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, 2010, pp. 129 – 130.

525 Ibid.

526 Office of the Public Advocate, South Australia, Developing a Model of Practice for Supported Decision Making, 2011, p. 22; Resource Centre for People with Mental Disability “Zelda”, Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, p. 62.

527 Funk M., Drew N., Realizing Supported Decision Making and Advance Planning, 2017, p. 56.

528 Human Rights: A Reality for All, Council of Europe Disability Strategy 2017-2023, para. 64.

529 Office of the Public Advocate, South Australia, Developing a Model of Practice for Supported Decision Making, 2011, p. 22; Bach M., Kerzner L., A New Paradigm for Protecting Autonomy and the Right to Legal Capacity, 2010, p. 118.

530 Inclusion Europe, Safeguards in measures relating to the exercise of legal capacity, 2018, p. 13.

531 Resource Centre for People with Mental Disability “Zelda”, Handbook: First Steps in Implementation of Supported Decision Making in Latvia, 2016, pp. 61 – 62.

provide case oversight and ensure conflict management. Their function is not to involve themselves in the decision-making process or to strengthen or weaken the position of either party. The degree of their participation in the support process is determined on a case-by-case basis⁵³² and along with many important areas, includes the following key issues:

- ▶ Explaining the content of the supported decision-making model, conducting trainings as needed and / or modeling the support process for supporters (for example, demonstrating active listening skills, demonstrating person-centered thinking);
- ▶ Assisting parties in the decision-making process and motivating those involved in the process;
- ▶ Empowering supporters to distinguish their functions from other functions (e.g., family members) and ensuring that supporters do not make decisions arbitrarily or unduly influence support recipients;
- ▶ Ensuring that the communication needs of the support recipient are addressed to the maximum degree;
- ▶ Assisting supporters in resolving ethical dilemmas. This may include “balancing supporter’s duty of care” when support recipient is making risky decisions, or resolving conflict of interest; It should be noted that in the latter case, the function of the facilitator may not be to resolve the conflict directly, but to refer the parties to a special service to this end;
- ▶ In case of abuse of rights by the supporter, informing parties to the relationship about their rights and existing procedures, and in case of serious violations, applying to the relevant authorities.

Clearly, important practical issues need to be considered in order to perform the functions noted in the above subsections. In this regard, the most relevant are still the Australian and Latvian models of support, as well as the proposals of the Canadian Working Group on the system of capacity and supported decision-making.⁵³³ As a result of processing this information, it is possible to identify the main issues that significantly affect the effectiveness of the monitoring process.

532 Ibid.

533 The Working Group on Legal Capacity and Supported Decision Making, A Statutory Framework for the Right to Legal Capacity and Supported Decision Making For Application in Provincial/Territorial Jurisdictions in Canada, 2014.

First of all, it is important to emphasize on the qualification of the monitors. Unlike supporters, who may in fact be family members of persons with disabilities, monitors are expected to be professionals in the field of legal capacity and the rights of persons with disabilities – they need to understand the essence of the human rights-based model as well as the human-centered approach.

In addition, it is clear that the monitoring function should be carried out in full compliance with the law and in accordance with the principle of due diligence, solely for the benefit of the person receiving the support. It is important that primary guiding principles for the monitor when implementing their functions should be the wishes, choices and values of the person with a disability.⁵³⁴

Another important issue that the monitor should prioritize is establishing and developing a relationship based on trust with the support recipient. In addition, it is essential that the monitor establishes relationship with family members and / or friends of a person with disability in order to facilitate the establishment of a strong community support network.⁵³⁵ Both, at the initial stage of building a relationship and during the monitoring process, it is important that the monitor communicates with the supporter and the support recipient in the format of personal meetings. Relevant studies indicate that this type of communication is the most effective (it cannot be replaced by written manuals or other types of written communication).⁵³⁶ This recommendation can be said to become even more compelling when the supporter is a family member or friend, which usually means a long history of the relationship and the increased risks of a paternalistic attitude on the part of the supporter.⁵³⁷

In short, the analysis of the practice of different countries shows the complexity and heterogeneity of the monitoring process. It is important that this process is clearly regulated by the law, and that solid guarantees are created for the effective practical implementation of supervision. Otherwise, the state inaction may even lead to the failure of the functioning of the entire system.

534 The Working Group on Legal Capacity and Supported Decision Making, *A Statutory Framework for the Right to Legal Capacity and Supported Decision Making For Application in Provincial/Territorial Jurisdictions in Canada*, 2014.

535 Ibid.

536 Resource Centre for People with Mental Disability “Zelda”, *Handbook: First Steps in Implementation of Supported Decision Making in Latvia*, 2016, p. 61.

537 Ibid., pp. 61-62.

3. Monitoring of the Support System in Georgia

After reviewing the international experience in monitoring the support system, it is important to analyze the context of Georgia. Nationwide challenge is both the coordination and the implementation of general support policies,⁵³⁸ as well as the monitoring of specific cases, which poses a significant obstacle to the functioning of the capacity system. Despite the problems in this area, the Law of Georgia on the Rights of Persons with Disabilities, adopted by the Parliament in July 2020, does not cover the issues related to the introduction or enforcement of the support system.

This chapter discusses the legislation governing the monitoring process, as well as existing policies, practices and challenges in these areas, which significantly hinder the implementation of the reform process.

3.1. Support Monitoring – Analysis of National Legislation

Procedures for monitoring of the support cases are regulated by relevant legislative acts and by-laws. The Civil Code of Georgia defines the general scope of monitoring the activities of the supporter,⁵³⁹ and the Order of the Director of the LEPL Agency For State Care and Assistance For the (Statutory) Victims of Human Trafficking regulates in more detail the oversight process.⁵⁴⁰

According to the existing regulations, monitoring is the responsibility of the guardianship and custody authority.⁵⁴¹ The purpose of oversight is to monitor the performance of the responsibilities assigned to the supporter, as well as to assess the development of the support recipient's skills and provision of responsive actions. By law, the guardianship and custody authority also has an obligation, on the one hand, to protect and strengthen the support recipient, and, on the other hand, to assist supporters in the performance of their duties.⁵⁴² According to the legislation of Georgia, Agency for State Care and Assistance For the (Statutory) Victims of Human Trafficking takes on this function.⁵⁴³

538 The country does not yet have a body to implement and coordinate the Convention, which, among other things, would be involved in the implementation and evaluation of capacity reform.

539 Civil Code of Georgia, Art. 1305¹ – 1305⁶.

540 Order N 07 – 98 / o of the Director of the LEPL Agency For State Care And Assistance For the (Statutory) Victims of Human trafficking of July 14, 2020 on specific measures related to the administration of the issues provided for in Order N01-16/N of the Minister of Labor, Health and Social Affairs of May 29, 2015 “On Approval of the Rules and Standards for Expert Examination of Psychosocial Needs”.

541 Civil Code of Georgia, Art. 1305¹.

542 Ibid., Art. 1278 (4).

543 Law of Georgia on Social Work, Art. 51 (2).

Prior to the changes made in December 2019, this function was performed by the LEPL – Social Service Agency.

Under the current Law, the relevant territorial office of the guardianship and custody authority (according to the place of residence of the support recipient) can carry out three different types of supervision: planned supervision; selective supervision (initiated by a local authority); necessity-based supervision (when there is information about the necessity of such an intervention).⁵⁴⁴ Planned supervision is usually carried out once every 6 months or at intervals determined by the court. As for the unscheduled inspection, it is conducted by the guardianship and custodial authority on its own initiative, based on the identified need.⁵⁴⁵ The law also obliges the supporter to submit the report on the activities carried out by him / her within the timeframe set by the guardianship and custody authority, but no later than every 6 months.⁵⁴⁶

A separate form has been developed for monitoring purposes, where the support process is evaluated according to predefined areas. The monitoring evaluation results in a positive or negative conclusion. If the social worker assesses that the supporter is improperly or not at all performing his / her duties, they have an obligation to take action. Depending on the severity of the case, three types of consequences may arise: 1) administrative or criminal liability of the supporter;⁵⁴⁷ 2) social worker may provide assistance to the supporter so that he / she better understands and performs his / her duties; 3) social worker addresses the court to relieve the supporter of the imposed duties.⁵⁴⁸

Results of the monitoring are reflected in the electronic database, which contains information on the set-up of the support system, on the supporter and support recipient, the support provision and monitoring process.⁵⁴⁹

544 Order N 07 – 98 / o of the Director of the LEPL Agency For State Care And Assistance For the (Statutory) Victims of Human trafficking of July 14, 2020 on specific measures related to the administration of the issues provided for in Order N01-16/N of the Minister of Labor, Health and Social Affairs of May 29, 2015 “On Approval of the Rules and Standards for Expert Examination of Psychosocial Needs”, Art. 4.

545 Civil Code of Georgia, Art. 1305³.

546 Ibid., Art. 1289 (2).

547 See Code of Administrative Offenses of Georgia, Art. 172⁷, Criminal Code of Georgia, Art. 11¹.

548 Civil Code of Georgia, Art. 1305⁵.

549 Ibid., Art. 1305⁴.

The analysis of the relevant legislation reveals several important challenges:

- ▶ Established rules for monitoring do not apply to certain cases.⁵⁵⁰ In particular, the monitoring regime does not apply to cases where the guardianship and custody authority itself is the designated supporter,⁵⁵¹ or when the support recipient is in a penitentiary institution, resides abroad or in the occupied territories.⁵⁵² Clearly, apart from cases where the support monitoring cannot take place for objective reasons, failure to supervise individual cases (e.g. when a social worker is designated as a supporter) makes it impossible to assess the support process or measure progress with respect to the recipient. At the same time, risks of rights violation, undue influence or abuse of rights by third parties increases significantly, which is contrary to international standards;
- ▶ The legislation lacks the primary principle on which not only the monitoring process but also the support system as a whole should be based – that is, the centrality of the role of the support recipient. An important example in this regard is the monitoring process – the existing regulations do not directly provide for the mandatory rules for the monitor to conduct on-site visits, as well as to receive information from the support recipient, listen to and prioritize their opinions.⁵⁵³
- ▶ In addition, a record in the monitoring report that addresses the issue of protection of the overriding interests of support recipient is important to note. The wording itself, in the legislation, is problematic, which indicates that these interests should be “paid attention to.”⁵⁵⁴ While the will and choice of the person concerned should unconditionally be a priority in any taken action, such wording in the legislation weakens the idea of the centrality of the support recipient.

550 Order N 07 – 98 / o of the Director of the LEPL Agency For State Care And Assistance For the (Statutory) Victims of Human trafficking of July 14, 2020 on specific measures related to the administration of the issues provided for in Order N01-16/N of the Minister of Labor, Health and Social Affairs of May 29, 2015 “On Approval of the Rules and Standards for Expert Examination of Psychosocial Needs” Art. 1-2.

551 In the database of supporters, in cases 96 representatives of the guardianship and custody body are registered as supporters; Correspondence of the Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia N 01/5094, 13.05.2020.

552 Order N 07 – 98 / o of the Director of the LEPL Agency For State Care And Assistance For the (Statutory) Victims of Human trafficking of July 14, 2020 on specific measures related to the administration of the issues provided for in Order N01-16/N of the Minister of Labor, Health and Social Affairs of May 29, 2015 “On Approval of the Rules and Standards for Expert Examination of Psychosocial Needs” Art. 2.

553 Unlike in this case, the supporter is obliged to submit a periodic report to the guardianship and custodianship authority.

554 Order N 07 – 98 / o of the Director of the LEPL Agency For State Care And Assistance For the (Statutory) Victims of Human trafficking of July 14, 2020 on specific measures related to the administration of the issues provided for in Order N01-16/N of the Minister of Labor, Health and Social Affairs of May 29, 2015 “On Approval of the Rules and Standards for Expert Examination of Psychosocial Needs”, Art. 7 (2).

- ▶ Strengthening the support recipient and supporter is not identified as one of the monitoring objectives.

Finally, it can be noted that the legislative framework regulating the monitoring process describes its progress in more or less detailed manner, outlines the oversight body and the response mechanisms at its disposal. However, on the other hand, the omission of individual support cases from the monitoring process, as well as the improper consideration of the principle of centrality of the support recipient, distances the relevant legal regulations from the conventional understanding of the institutions of capacity and support.

3.2. Institutional and Practical Challenges in the Field of Monitoring

At the national level, there are a number of institutional and practical barriers that ultimately contribute to the inefficiency of the support system. In the research process the challenges were identified in several key areas.

Institutional Weakness of Monitoring Body

One of the main preconditions for the effectiveness of the monitoring process is the institutional strength of the responsible body, which is reflected in the adequacy of the financial and human resources of this institution, as well as in the empowerment of its staff with knowledge or tools.

Observations on the implementation of the reform process show that the state has not made adequate efforts to establish and strengthen the institutional framework necessary for the proper functioning of the support system, including in the field of monitoring. For example, in the post-reform period, social workers did not receive the necessary training, which would provide an objective basis for the adequate performance of the new responsibilities.⁵⁵⁵ Social workers cannot resort to self-informing, which is further exacerbated by the problem of overwork (overload of tasks) and the lack of a proper mechanism for overseeing the monitoring process (including professional supervision).

In view of the above, especially in situations where special education is not required to work as a social worker, public authorities need to further plan the reform process and, through appropriate supervision, training or other retraining tools, ensure that the authority of the social workers is in line with their qualifications.⁵⁵⁶

⁵⁵⁵ Working Conditions and Challenges of Social Workers of the Social Service Agency, Human Rights Education and Monitoring Center (EMC), 2017, p. 13.

⁵⁵⁶ Ibid.

Another institutional challenge that exists in the monitoring process is the scarcity of human resources of the monitoring body. As of September 2020, the implementation of the support policy is provided by 246 social workers and 19 lawyers employed at the territorial units of the LEPL Agency For State Care And Assistance For the (Statutory) Victims of Human trafficking.⁵⁵⁷ Given the number of support recipients in the country (6116 persons) and the fact that social workers work in more than twenty directions in addition to support cases, it can be said that the system is experiencing a severe shortage of human resources.⁵⁵⁸ According to social workers, they manage on average 30-50 cases of support provision, and considering such workload and lack of transportation, they often fail to visit a support recipient even twice a year. If they know the family situation and are sure that the rights of support recipient are protected, they conduct monitoring over the phone.⁵⁵⁹ All of the above evidently precludes the possibility of in-depth and effective oversight of support cases.

A separate issue is the oversight of such cases where the social worker himself/herself is appointed as a supporter. As mentioned above, by law, monitoring rules do not apply to such cases, however, the situation is different in practice. When a social worker is registered in the database as a supporter, he / she is still assigned a fellow social worker as a monitor.⁵⁶⁰ This is problematic for two reasons. On the one hand, according to the social workers, this type of supervision is merely formal,⁵⁶¹ on the other hand, such an arrangement leads to conflict of interest. In fact, in this case the guardianship and custodial body acts as both, a supporter and the support provision supervisor.⁵⁶² Therefore, the existing system fails to meet the requirements set out in the international standards, including the independence of monitoring, which should be an effective guarantee of the protection of the rights of persons with disabilities in the support provision process.

Tools to be used in the supervision process

The order of the Director of LEPL Agency For State Care And Assistance For the (Statutory) Victims of Human Trafficking approved a separate form of the support process monitoring

557 Correspondence of the Ministry of Internally Displaced Persons from the Occupied Territories, Labor, Health and Social Affairs of Georgia N 01/10439, 1.09.2020.

558 See, Working Conditions and Challenges of Social Workers of the Social Service Agency, Human Rights Education and Monitoring Center (EMC), 2017.

559 Research carried out with social workers.

560 Ibid.

561 Ibid.

562 Human Rights Education and Monitoring Center (EMC), Evaluation of the capacity reform and its implementation process, analysis of legislation and practice 2016, p. 52.

as well as another form to be filled out regularly by the supporter.⁵⁶³ The monitoring form includes demographic data, allows to identify the actors involved in the monitoring (support recipient, supporter or other third party) and the setting in which the monitoring took place (monitoring can be carried out at home, in the office or by telephone).

During the monitoring process, the social worker assesses the 6 main spheres (basic needs, living conditions, family / household activities, health status, protection of rights and property status) in the following two areas: 1) To what extent the needs of the support recipient, listed in the form, are satisfied; 2) To what extent the supporter is involved in meeting the needs of the support recipient. When filling in each field, the social worker not only answers the close-ended questions, but also fills in the narrative report. The last part of the monitoring form provides a conclusion / recommendation box for the social worker, where they indicate the expediency of continuing the support and describes in the narrative form how well the supporter is fulfilling his / her duties. The monitoring form is uploaded to the official program (so-called DES program). Monitoring results are also entered by social workers in the electronic database.

There are a number of challenges in relation to the monitoring form. First of all, it should be emphasized that cases of support, guardianship and custody are monitored through a single instrument. Given the sharp differences in these regimes, it is virtually impossible to monitor these three types of cases based on common principles. In addition, the very first part of the monitoring form requires the monitor to indicate the diagnosis (rather than individual need) of the support recipient, which is a reflection of the medical paradigm for people with disabilities. Social workers point out that the monitoring form is mostly a formality and instead of updating the information, they simply copy the information contained in the previous monitoring form.⁵⁶⁴ Due to the overload of work, filling out the supervision form is extra workload for them, therefore are unable to fill the forms in time and experience delays.

The list of assessment areas in the monitoring form is problematic. This document mainly checks the living and hygienic conditions, identifies the health condition of the support recipients and notes whether the supporter lives with the support recipient. The monitoring form mainly deals with the protection of the right to life and health and does not assess issues such as improving the social skills of the support recipient in various areas, as well as the relationship between the supporter and the support recipient.⁵⁶⁵

⁵⁶³ Order N 07 – 98 / o of the Director of the LEPL Agency For State Care And Assistance For the (Statutory) Victims of Human trafficking of July 14, 2020 on specific measures related to the administration of the issues provided for in Order N01-16/N of the Minister of Labor, Health and Social Affairs of May 29, 2015 “On Approval of the Rules and Standards for Expert Examination of Psychosocial Needs” Annex N 2 and Annex N 5.

⁵⁶⁴ Research carried out with social workers.

⁵⁶⁵ Ibid.

In addition to the shortcomings of the monitoring form, a significant challenge is the general scope of the areas of support identified by the court decision. In particular, the ruling in these cases is often vague, does not indicate the need to empower the person concerned and the nature of needed support (forms of support, specific areas or intensity of support), which deprives the body of guardianship and custody the ability to oversee support cases effectively.⁵⁶⁶

It is important that social workers are given a real opportunity to exercise effective oversight over support provision cases, which evidently is related to ongoing training, availability of tools to work with support recipients and adequate time resources. It is clear that this goal cannot be achieved in the current situation – on the one hand, through monitoring only twice a year, and often only formally, and, on the other hand, without refining the monitoring process and relevant forms.

Given the existing situation, the monitoring process should go beyond its formal nature and take the systemic form when supervising the cases. To this end, it is important that the monitoring tool is separated from the guardianship and custody oversight tool and that non-essential issues related to support matters (mainly related to personal care) are removed from the scope of its regulation. Instead, the support monitoring process and forms should provide an opportunity to assess progress, including what difficulties / problems the support recipient had / has, what skills have been improved and what needs to be further improved, how to assist the supporter in achieving effectiveness in their work, and etc.⁵⁶⁷ In addition, it is important to involve experts in other professions in the monitoring or subsequent process in cases where the issue falls outside the competence of a social worker.⁵⁶⁸

However, even such a change in the form of monitoring will not lead to results in the absence of social workers adopting tools for empowering support recipients and their families. Beneficiaries in the monitoring process have expectations of support towards social workers, while in reality there are no effective mechanisms in place. Because there are no services in the system and the social worker cannot support those involved in the process even at the minimum level, supporters often have to be with support recipients 24 hours a day, and it is difficult for them to even visit the Social Service Center to fill out a supporter form.⁵⁶⁹ This situation causes frustration and dissatisfaction of the persons subjected to monitoring. Social workers unanimously point out that if there were real mechanisms for support and empowerment, it would be much easier for them to oversee the existing cases.⁵⁷⁰

566 Human Rights Education and Monitoring Center (EMC), Evaluation of the capacity reform and its implementation process, analysis of legislation and practice 2016, p. 52.

567 Research carried out with social workers.

568 Jgharkava, N., Reform of the Capacity Institute in Georgia – Challenges from the Perspective of Social Work, 2018.

569 Research carried out with social workers.

570 Ibid.

Finally, the study of the monitoring process over support system showed that the challenge is not only the existing legislation in this area, but also the number of institutional and practical barriers. These include overwork of social workers, inconsistency of monitoring forms with the goals of the support system, ambiguity of court decisions and more. Due to the variety of challenges, the monitoring system can only be maintained as a result of systemic reform, otherwise the existing oversight mechanism will remain a formal tool. Without fundamental changes, it will not be able to meet its obligations under the concept of legal capacity – to effectively monitor support provision and protect recipients from undue influence or abuse of power, as well as to properly empower the parties involved in the support process

Conclusion

The concept of legal capacity is a difficult and complex one. To achieve the multifaceted goals, it is essential to create and properly implement a system of supported decision-making at the national level. Analysis of international standards and country practices reveals that the support model consists of important interrelated steps, and inefficiency in one of the steps can even lead to the failure of the entire system. One of the elements of the support system is the monitoring mechanism.

Given that the institution of support is not widely established globally, it is a challenge to review relevant international standards or country practices in this area. However, analysis of available scarce resources provides an opportunity to outline the basic principles and characteristics of the implementation of the monitoring process. According to international standards, this process should be based on the following core values: centrality of the support recipient, due diligence and independence of the monitor, regularity and qualification of monitoring. In addition, oversight should aim not only to monitor the authority of the supporter, but also ensure the rights of the support recipient and prevent undue influence, as well as empower the persons involved in the support process.

In parallel with international standards or countries' experience, the current situation in Georgia is important to review. At the national level, both, the overall coordination of existing support policies and the effective oversight of specific cases is a challenge. Research has shown that there are practical as well as institutional and legislative barriers in this direction. Significant challenges in this regard include legislation not covering monitoring of specific cases of support provision, lack of human resources in the guardianship and custody authority, lack of expertise on capacity issues, inconsistency of the monitoring instrument with the notion of capacity and lack of tangible mechanisms to empower the support recipient and his / her family. Effective implementation of capacity reform without overcoming existing barriers is practically an unattainable goal.

Recommendations

Given the challenges, the state should consider the following recommendations:

- ▶ 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.

