



# LEGAL CAPACITY – LEGISLATIVE REFORM WITHOUT IMPLEMENTATION

STUDY REPORT

2016



[www.ombudsman.ge](http://www.ombudsman.ge)



THIS PROJECT IS FUNDED BY THE  
EUROPEAN UNION



PUBLIC DEFENDER  
(OMBUDSMAN) OF GEORGIA

The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views of the European Union.

## **FOREWORD**

Everyone has the right to be recognized as a person before the law, which means not only holding of the rights by a person, but also an opportunity to exercise these rights. No one shall be considered as legally incapable due to his/her disability. However, at the same time, a person may need support in the decision-making process. In such cases, the State must ensure adequate mechanisms in order to protect their rights and interests.

For a long time plenary guardianship had been applied in Georgia for persons with psycho-social needs, which provided for the transition of all rights to the guardian's competence after full deprivation of a person of his/her legal capacity. The authorized guardian used to make decisions instead of the person under his/her guardianship, without the necessity to justify that the decision served the true interests and wishes of the person under guardianship. In fact, recognition of a person as legally incapable was the same as "civil death". In 2015, more than 3 500 such people lived in our country.

We welcome the fact that after the 8 October 2014 decision of the Constitutional Court of Georgia and the entry into force of the 2006 UN Convention on the Rights of Persons with Disabilities , the Parliament of Georgia adopted a package of legislative amendments aiming at establishing an institution for rendering support in decision-making process, contrary to the plenary guardianship. However, the practice analysis shows that the implementation of the legislation by the governmental branches is faulty, and this make us think that the reform could not be effectively implemented in practice and could not improve the life of persons with disabilities.

This report represents results of a study conducted by the Public Defender for assessing the implementation of the reform of legal capacity institution in Georgia. We hope that the deficiencies identified in the document and the relevant recommendations will help appropriate state agencies to improve and effectively implement existent legislative regulations.

*Ucha Nanuashvili*

*Public Defender of Georgia*

# CONTENTS

<b>INTRODUCTION .....</b>	5
<b>1. STUDY METHODOLOGY .....</b>	6
<b>2. RESEARCH GOALS AND LIMITS .....</b>	8
<b>3. KEY FINDINGS.....</b>	9
<b>4. REPORT OF THE RESEARCH.....</b>	11
4.1. CONSTITUTIONAL COURT AND UN CRPD STANDARD AND THE LEGAL 11FRAMEWORK FOLLOWING THE REFORM .....	11
4.2. ENTRY INTO FORCE OF THE CONSTITUTIONAL COURT JUDGMENT .....	12
4.2.1. THE CONSTITUTIONAL COURT STANDARD.....	12
4.2.2. AMENDMENTS TO THE LEGISLATION .....	13
4.3. TERMINOLOG .....	13
4.4 THE GENERAL STATISTICS ON THE RECOGNITION OF PERSONS AS SUPPORT RECIPIENTS.....	14
4.5 THE RECOGNITION OF A PERSON AS A SUPPORT RECIPIENT BY THE COMMON COURTS AND THE RATIONALE OF THE RELEVANT JUDGMENT.....	16
4.6. THE LACK OF THE MOTIVATIONAL PART .....	16
4.7. THE TEMPLATE OF SUBSTANTIATED COURT JUDGMENTS .....	18
4.8. THE FRAMEWORK FOR LIMITING THE LEGAL CAPACITY.....	19
4.8.1. FROM THE PERSPECTIVE OF THE CONSTITUTIONAL COURT .....	19
4.8.2. LEGISLATIVE REFORM.....	20
4.8.2.1. THE SUPPORT INSTITUTION.....	20
4.8.3. THE OBLIGATIONS OF A SUPPORTER.....	22
4.8.4. COMMON COURTS' PRACTICE.....	23
4.8.4.1. THE BLANKET CHARACTER AND THE RESTRICTION OF THE FULL RANGE OF RIGHTS.....	24
4.8.4.2. SUBSTITUTION OF A WILL.....	28
4.8.4.3 THE FUNCTION OF A SUPPORTER IN REALIZATION OF CERTAIN RIGHTS .....	28
4.9. WHAT MUST BE INCLUDED IN THE COURT JUDGMENT? .....	29
4.9.1. LEGISLATION .....	29
4.9.2. COURT'S PRACTICE .....	30
4.10. RIGHT TO MARRIAGE.....	32
4.10.1. CONSTITUTIONAL COURT STANDARD .....	32
4.10.2. LEGISLATION .....	32
4.11. CERTAIN RIGHTS .....	33
4.11.1 THE JUDGMENT OF THE CONSTITUTIONAL COURT.....	33
4.11.2 LEGISLATION.....	33
4.11.2.1. PARENTAL RIGHTS.....	34
4.11.2.2. THE RIGHT TO HOLD THE POSITION IN PUBLIC SERVICE.....	35
4.11.2.3. AN OBJECT OF THE MEDICAL RESEARCH .....	35
4.12. THE RIGHT TO PARTICIPATE IN THE COURT PROCEEDINGS, TO REVISE, TO ANNUL AND TO APPEAL THE SUPPORT .....	36
4.12.1. COURT STANDARD.....	36
4.12.2. LEGISLATION .....	36
<b>5. PROCEDURAL TERMS .....</b>	38
<b>RECOMMENDATIONS.....</b>	38

## INTRODUCTION

On 10 July 2009 Georgia's Permanent Representative to the United Nations signed the Convention on the Rights of Persons with Disabilities (hereinafter UN CRPD) and its Optional Protocol. The first document was ratified by the Parliament of Georgia on December 26, 2013, though the country has not yet joined the second document. The convention has been obligatory for Georgia since April of 2014.

Notably, Georgia declared about article 12 of the document, which concerns exactly the issue of legal capacity.<sup>1</sup> According to the declaration, Georgia will define the issues regulated by the mentioned article under the standards of international human rights. Mentioned declaration is different from reservation with its content and it does not limit legal capacity in any way.

Persuant to article 33 of this International treaty, States are obliged to name one or more independent mechanisms for the monitoring of the promotion, protection and implementation of the Convention. On October 27, 2014, by the decision made at the sixth session of the Prime Minister's Coordinating Council working on the issues of persons with disabilities, the Public Defender was named to be such mechanism. The monitoring mechanism includes the Department of Persons with Disabilities, the Consultative Council for Monitoring the Protection, Promotion and Implementation of the Convention on the Rights of Persons with Disabilities and the Monitoring Group. The present study is the result of their joint cooperation.

The study report (hereinafter report) reviews the reform of legal capacity in Georgia, which is regulated by Article 12 of the Convention and which is based on the precedentially important judgment of the Constitutional Court of Georgia of 8 October 2014 in the case of "Citizens of Georgia - Irakli Qemoklidze and David Kharadze v. Parliament of Georgia". By that decision, the part of the legislation concerning the legal capacity of persons with psycho-social needs was canceled as soon as the decision was published, while for amending the second part, the court gave the Parliament a 6-month period. The Parliament, 10 days before the expiration of the term, on March 20, 2015, approved a legislative package, which regulates the rights of persons with psycho-social needs differently.

---

<sup>1</sup> Resolution of the Parliament of Georgia on ratification of the United Nations' Convention on the Rights of Persons with Disabilities by taking into view its attached declaration.

## 1. STUDY METHODOLOGY

This report presents a document describing the human rights situation and was created as a result of the study conducted by the Public Defender. The methodology used during writing the report is adequate to the challenges related to human rights documentation.

During the monitoring the Public Defender has analyzed:

- Common and Constitutional courts' judgments
- United Nations Convention on the Rights of Persons with Disabilities and General Comments of the United Nations' Committee on the Rights of Persons with Disabilities
- Normative base of Georgia
- Reports on legal capacity that existed before the publication of the present report
- Information requested from the monitoring subjects or about them
- Results of meetings held with the involvement of representatives of institutions working in this field

The monitoring covered the period from 1 April 2015 to 1 February 2016.

The following sources were used as a standard for evaluation of the legal capacity reform by the Public Defender's Office:

- Standards established by the United Nations Convention on the Rights of Persons with Disabilities and the General Comments of the United Nations' Committee on the Rights of Persons with Disabilities
- The Constitution of Georgia and the Constitutional Court of Georgia (hereinafter Constitutional Court) standards
- Other legal acts of Georgia on legal capacity

The targets of the study were:

- UN CRPD and the judgment of the Constitutional Court of Georgia

The Public Defender studied the Constitutional Court's decision of 8 October 2014 in the case of "Citizens of Georgia - Irakli Qemoklidze and David Kharadze v Parliament of Georgia", as well as the standards defined by the UN CRPD and the Committee of the Rights of Persons with Disabilities. The study uses these two sources for evaluation of Georgian legislation and its implementation.

- Amendments to Georgian legislation

On March 20, 2015, the Parliament of Georgia approved a legislative package, which concerned the reform of the legal capacity system. Based on that, the executive government approved a number of bylaws. Support system was established, according to which, a person's supporter was appointed according to the needs identified by individual assessment. Analysis of the implementation tendency of the legislative changes is one of the objectives of the study.

- Common Courts' Practice

A person is recognized as a support recipient and the limits of the support are defined by the Common Court. The Public Defender requested relevant acts received by courts from April 1, 2015 to January 31, 2016, concerning the definition of individuals' psycho-social needs and assignment of support, from every court of the Common Court System. During this period, 341 judgements on recognition of a person as a support recipient were adopted by common courts. This study is a result of a detailed analysis of each of the decision by the Public Defender and it has revealed numbers of problems existing in the field. The problems are related to the gaps existing in the legislation on the one hand and to the process of implementation on the other.

## 2. RESEARCH GOALS AND LIMITS

The aim of the present report is assessment of the part of the legal capacity system reform, which concerns the recognition of a person as a support recipient and its scales. Issues such as administration, provision of resources for the reform, monitoring and implementation of the support are not considered in the report.

The report does not analyze the correctness of the language used by common and constitutional courts. However, at the same time, it is obvious even by the superficial evaluation that neither the Constitutional Court nor Common Courts can meet the standard, according to which, the terms and connotations used by them should not strengthen the existent stigma concerning the persons with disabilities.

The role of forensic examination is essential in the process of recognition of a person as a support recipient. According to the legislation, the needs of a person are determined by the examination conducted by LEPL Levan Samkharauli National Forensics Bureau (hereinafter Forensic Bureau). However, in this case the Public Defender does not concentrate on the activities of the Bureau, as it mainly includes nonlegal issues in contrast to the previous study.

The practice of application of norms often does not coincide with the intention of legislators; norms have their own social life, which is characterized by dynamism. Different decisions may be made at different times based on the same norms. Thus, in relation to the topics of discussion, even if the applicable law is not changed, the Public Defender does not rule out the possibility of making new or different findings and preparing relevant recommendations.

### 3. KEY FINDINGS

- The legislative reality after the reform mostly takes into account the individual needs of persons with psycho-social needs and except for few exceptions, is in line with the Constitutional Court and UN CRPD requirements
- The legislative reform failed to observe the term determined by the Constitutional Court and the 6-month term of its full-scale enactment was exceeded by 2 months
- The order on the Approval of Rules and Standards of Phsycosocial Expertise, already calls a person, whose phsycosocial expertise is in progress, a person with phsycosocial needs, while the person may not be recognized as such by an expertise itself. In case of the positive conclusion, prepared by the bureau of forensics, the court recognizes a person as a support recipient in almost all cases, but it does not always automatically take into account and consider bureau's recommendations on the limits of the support.
- The large majority of the judgments on recognition of individuals as support recipients include only the resolution part in accordance with the procedural legislation, which makes it impossible to identify the need for support. In addition, some of the courts do not consider a support recipient as a party and publishes the unfounded decision without examining the recipient's attitude towards it.
- Common Court judgments, which contain motivations, are template and unsubstantiated
- The legislation provides for a possibility of Common Courts to appoint support in the part of petty deals in contrast to the Constitutional Court judgment.
- The legislation provides blanket restriction on the support recipient's right to be a supporter of another person in the field where he/she does not need support
- The legislation envisages supporter's obligation to constantly supervise medical service of the support recipient even if no medical support is appointed for the person
- There are still systemic problems of blanket appointment of support, full deprivation of legal capacity and plenary guardianship in the process of reform implementation by Common Courts
- Analysis of the resolution part of the court judgments reveals that there does not exist unified form for the formulation of this part of the judgement
- The civic legislation defines blanket obligation that all support recipients must sign marriage contracts regardless of whether it is provided by the court judgment or not

- The legislation provides for blanket deprivation of some of the rights of support recipients without individual and judicial evaluations. These rights are: the parental and some of the related rights, the right to hold position in public service, the right not to become an object of medical research without informed and clear consent
- Despite the fact that the norms defining the rights to appeal to court and to participate in the court proceedings mostly meet the standards of internationally recognized human rights, there is a problem of vague regulation. Namely, the disabled person's right to appeal to court with the request to revise his/her status during the transitional period is not clearly defined
- Some courts do not observe procedural terms.

## 4. REPORT OF THE RESEARCH

### 4.1. CONSTITUTIONAL COURT AND UN CRPD STANDARD AND THE LEGAL FRAMEWORK FOLLOWING THE REFORM

The Constitutional Court holds that each person's psychosocial needs are unique, that is why „[...]By legislation it is impossible to define completely and accurately the individual needs of the legal incapacity.“<sup>2</sup> However, the lawmaker is obligated to clearly establish the criteria, “[...]for the decision-making bodies, be it the court, Mental facility or other, so that it is possible to determine what quality of [...] the psychosocial needs [...] should lead to a person's [...] legal incapacitation [...] and to what extent.“<sup>3</sup>

The Court imposed on the State three principles when defining the measures to protect the rights of the persons in psychosocial need:<sup>4</sup>

- The principle of the legal regulation flexibility
- The principle of the maximal reservation of the legal capacity
- The principle of the proportionality of the protective measures with the legal capacity quality of a person

Thus, when restricting the rights of a person, the legal framework shall set, on the one hand, clear and unambiguous criteria, and on the other hand, shall meet the abovementioned three principles.

Article 12 of the UN CRPD on the one hand, obliges the states to recognize that persons with disabilities enjoy legal capacity,<sup>5</sup> and on the other hand, take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.<sup>6</sup> The latter implies the shift from the paradigm of the replacement in decision-making to the paradigm of the support in decision-making.<sup>7</sup>

The Law on “Carrying out of the Forensic Examination due to Psychosocial Needs” was the major legislative package approved by the Parliament of Georgia. This act is the main instrument for the implementation of the above mentioned decision of the Con-

2 The decision of the Constitutional Court of Georgia №2/4/532,533 as of October 8, 2014, the case the citizens of Georgia - Irakli Kemoklidze and Davit Kharadze vs. Parliament of Georgia, II.27.

3 Ibid.

4 The mentioned decision of the Constitutional Court of Georgia, II.28.

5 UN CRPD, Art. 12, clause 1.

6 UN CRPD, Art. 12, clause 3.

7 UN CRPD, general comment N1, the committee for the rights of the persons with disabilities C/GC/1, clause.4, EMC report on the reform of the legal capacity institute and the assessment of its implementation process. The legislation and the analysis of the practice, the head of the research: Lina Ghvini-anidze, the author of the research: Lela Gvishiani, 2016, p.9.

stitutional Court. It defines the legal, economic and organizational basis for carrying out a mandatory examination for the recognition as a person in psychosocial need.<sup>8</sup>

The Civil Code of Georgia (hereinafter Civil Code) is also an important instrument. Article 12 of the Civil Code defines the notion of the legal capacity. The clause 4 of the mentioned article deals with persons in psychosocial need. The law singles out some indications that are the reasons for assigning a support recipient status to a person:

- a person's mental / intellectual disorders
- These disorders should be solid – indicating the time criteria and associated with the duration of the disorder
- The solid disorder by itself is not enough; at the same time when interacting with different obstacles it must impede a person's participation in a public life
- An obstacle is considered to be something that without proper advice and assistance greatly complicates a person's free expression of will and making by him/her an informed and well-considered choice in one or another domain of public life
- However, neither just the fact of "complication" is enough by itself; this complication must affect the full and effective participation in public life.

It is important that these indications are cumulative and they should come together at the same time in order to recognize a person as a support recipient.

**The post-reform legislative reality largely involves individual needs of persons in psychosocial needs and except for some cases it is consistent with the requirements of the Constitutional Court and the UN CRPD.**

## 4.2. ENTRY INTO FORCE OF THE CONSTITUTIONAL COURT JUDGMENT

### 4.2.1. THE CONSTITUTIONAL COURT STANDARD

Although the Constitutional Court adjudicated a number of provisions to be unconstitutional, only a part of them was declared invalid from the moment of the publication of the judgment, the second part would cease to exist on April 1, 2015. The legislative body had six months to carry out a reform; in the meantime the old rules would be effective. The court preferred to keep infringing regulations in effect for several months, rather than to leave the area without regulation. Otherwise, there would be the growing risk of the abuse of the vulnerability of these persons. This would be damaging for the persons in psychosocial needs.

---

<sup>8</sup> The Law of Georgia on the expertise due to the psychosocial need, Art. 1.

#### **4.2.2. Amendments to the Legislation**

**The legislative reform failed to be carried out within the period specified by the Constitutional Court and its full-scale enactment was behind schedule by 2 months.**

According to the Law of Georgia on “Carrying out of the Forensic Examination due to Psychosocial Needs”, the enactment of Article 13 of this Law was postponed until June 1, 2015.<sup>9</sup> So far, the Ministry of Labor, Health and Social Affairs had to approve the regulation and the standards for carrying out examination due to psychosocial needs.

The postponed norm is one of the substantial in the law. It defines the process of decision-making by the multidisciplinary group that should be the basis for a person to be recognized as a person in psychosocial need. It would have been impossible to enact the law without this. The mentioned delay froze the process for additional 2 months, but at the same time the decision of the Constitutional Court had already been fully enacted. The legislative space was left without the mechanisms of regulation, which meant that during this time the court was unable to recognize any person either incapable or a supporter recipient. Thus, their rights were left unprotected, the government refused to meet its own positive commitments.

#### **4.3. TERMINOLOGY**

**According to the Order #01-16/б as of May, 29, 2015 of the Minister of Labor, Health and Social Affairs of Georgia on the Regulation and Standards of carrying out examination due to the Psychosocial Needs, a person, whose psychosocial needs are being examined, are already referred to as “a person in psychosocial need”,<sup>10</sup> while the examination may not recognize a person in this way at all.** Such a vision of a legal act is inadmissible. There must not be a preliminary perception that a person under examination will be immediately declared as a person in psychosocial need.

Therefore, the order of the Minister should be amended so that the person, supposed to be passing through the expertise will no longer be referred as “a person in psychosocial need” from the very beginning until the results of the examination is known.

---

<sup>9</sup> The Law of Georgia on the expertise due to the psychosocial need, Art. 15, clause 2.

<sup>10</sup> The order №01-16/б of the Minister of Labor, Health and Social Affairs of Georgia as of May 29, 2015 on the approval of the regulation and the standards of the expertise due to the psychosocial need, Art. 6.

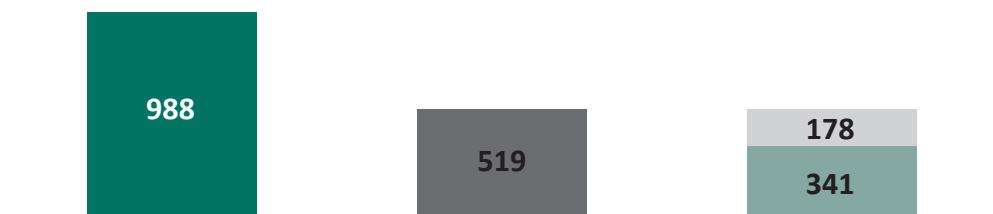
#### 4.4 THE GENERAL STATISTICS ON THE RECOGNITION OF PERSONS AS SUPPORT RECIPIENTS

In case of a positive conclusion of the forensics, the court almost always recognizes a person as a support recipient, though not taking into consideration automatically it's recommendation about the framework of the support scope.

During the reporting period, 988 applications on the recognition of a person as a support recipient were filed to the Common Courts. Relevant resulting acts were issued on 519 applications, 341 out of which were acts concerning the recognition of a person as a support recipient and 178 acts represented rulings issued on different reasons.

**Chart #1 - The general statistics on the recognition of persons as support recipients**

- The rulings passed by various motives under the final act of the court
- Recognized as support recipient under the final act of the court
- The court passed a final act
- appeals to the court with the request of the recognition as a support recipient



Out of the overall court rulings:

- 92 rulings represent the decisions on the refusal to accept an application for processing. The acceptance of the mentioned decisions is mainly due to the fact that applicants do not take into consideration new regulations. In some cases the refusal to accept a case for processing is due to the jurisdiction or the failure to correct different gaps within the period set by the court. The gaps are mainly related to the documentation confirming the blood relations between a support recipient and a supporter and the failure to submit a medical documentation, on which is based a statement to recognize a person as a support recipient.
- 52 decisions – about not considering the statements. The vast majority of the mentioned decisions are made on the basis of the withdrawal of the application and the case materials by an applicant. (Without specification of the reasons for the withdrawal).

- 24 decisions – about the termination of the proceeding. In most cases, the proceedings are terminated before the court's final decision due to the death of a person to be recognized as a support recipient. Or in case of a negative conclusion from the Forensics Bureau.
- 9 decisions – about the appointment of a temporary supporter. An interim support is mainly instituted during the pension proceedings when restoring, receiving and disposing the pension and other types of the state allowance), as well as for the purposes of giving one's consent to medical treatment and to manage and to dispose the funds and the bank accounts of a person to be recognized as a support recipient.<sup>11</sup>
- 1 decision – about the acceptance of a case for processing. The court found that the statement met the eligibility criteria and made the mentioned decision.

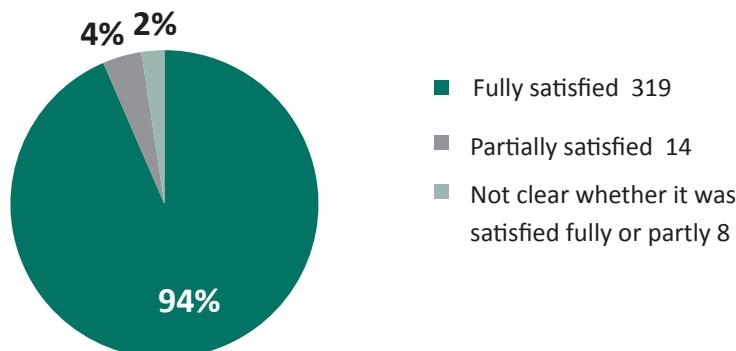
In the end, it turns out that in 344 cases the court had to consider the issue of the recognition of a person as a support recipient, of which 341 cases were positive and a person was provided with a supporter, and those 3 cases with a negative decision, the court took into consideration the law requirement, which in case of a negative conclusion by the Forensics Bureau, does not give to the court a discretion and obligates the court to terminate the proceedings. It turns out that in case of a positive conclusion by the Forensics Bureau, the court always recognizes a person as a support recipient. As for the scope of the support, of those 28 cases, on which there are descriptive and motivation parts of the judgment and it is possible to analyze them, in 19 cases the court instituted the support in a more narrow scope than it was stipulated by the conclusion of the Forensic Bureau.

In addition, the court fully satisfied 319 (95%) applications out of 341 on the recognition of a person as a support recipient, and partly – 14 (4.1%) applications, while in 8 judgments it is not clear whether the application was satisfied fully or partly.

---

11 The court rulings on the temporal support expire in three cases: when passing a judgment on the recognition of a person as a support recipient, on the basis of a negative conclusion made by LEPL Levan Samkharauli National Forensic Bureau or withdrawal of a statement by an applicant and the termination of a case. The statistics about the rulings on the provisional support (9 rulings) include only those rulings which were effective in the reporting period of the present report (from April 1, 2015 to January 31, 2015). It should be noted that the majority of the court rulings on the support recipient recognition does not reveal if a person was assigned with a provisional support earlier, though the analysis of the provisional support rulings show that in most cases a provisional support was assigned. Taking into account the domains where a provisional support is assigned, we can draw the conclusion that mainly the persons, who were driven by the need of the disposal of the social package or/and the income of a support recipient person, addressed the court with the statement about the recognition as a support recipient.

### Judgements of the Court (total 341)



## 4.5 THE RECOGNITION OF A PERSON AS A SUPPORT RECIPIENT BY THE COMMON COURTS AND THE RATIONALE OF THE RELEVANT JUDGMENT

First of all, it is important to say that the right to a substantiated decision is protected both by the Constitution of Georgia and UN CRPD and other international acts.

The motivational part, which is an integral part of the judgment, makes the right to appeal the decision in a higher court viable, which is also protected by the abovementioned acts. The appeal is impossible without it, as a particular person is not familiar with the argumentation on his/her case's judgment that excludes invoking arguments and opposing to the judgment of the lower court in a legal way. Thus, it is important that the judgment on the recognition of a person as a support recipient is substantiated, indicating that the court takes this decision proceeding from the individual needs of a person.

## 4.6. THE LACK OF THE MOTIVATIONAL PART

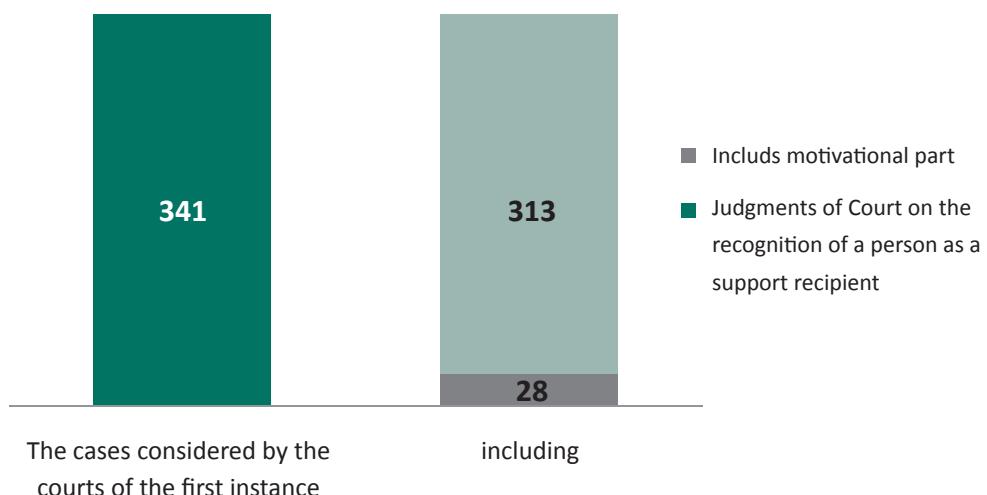
**According to the procedural legislation, the vast majority of the judgments on the recognition of a person as a support recipient are accompanied only by an operative part that makes it impossible to find out the necessity of the appointment of a supporter. In addition, part of the courts does not consider a support recipient as a party and publishes an unfounded judgment not studying its stance on the mentioned issue.**

The assessment of a person's psychosocial needs and the appointment of a supporter take place under the civil procedure legislation. Following the mentioned judgment of

the Constitutional Court, a new chapter was added to the code, defining the procedure for the recognition as a support recipient. In addition, according to Art. 250 of the Civil Procedure Code, if the parties request a decision without substantiation, the court shall be entitled to issue it without descriptive and motivational parts. The procedure is as follows: a judge asks parties whether they want or not to receive a decision without substantiation and whether they appeal it or not. If the parties refuse to appeal it, they should certify their refusal by signature.

It is obvious that such a regulation is the restriction of the right to the fair trial, though it has a specific purpose – to relieve the court and to enhance the administration. It is possible that this purpose looks adequately within habitual private disputes, but when it comes to defining a person's legal capacity, it looks clearly disproportionate. In any case, the restriction of a person's rights should be accompanied with motivated decision and this interest precedes the interest of relieving the court and enhancing the administration.

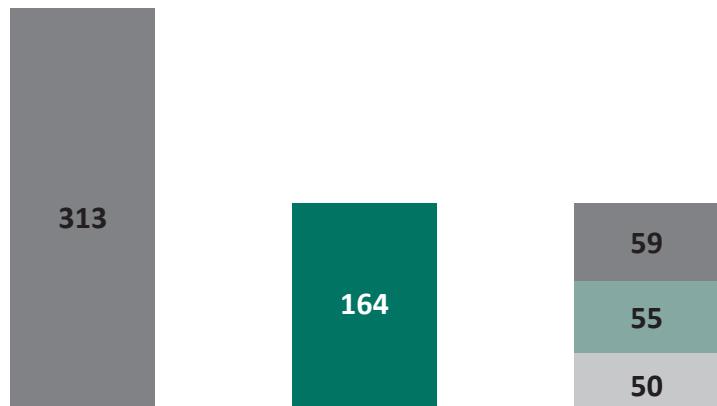
The statistics is important when analyzing the issue, according to which, the courts of the first instance did not use the mentioned discretion in 28 cases out of 341, and other 313<sup>12</sup> judgments were substantiated only in the form of an operative part. Thus, the rights of 95.48% of persons were flagrantly breached without any substantiation.



At the same time, the court's vision, as who is a "party" entitled to request a decision on the appointment of a supporter without a motivational part, is essential. Only 164 judgments out of the mentioned 313, indicate the procedure according to which the court is authorized to act so and on the basis of whose consent is such a decision made. In 50 cases out of these 164 judgments a support recipient is indicated as a "party", in 55 cases – only an applicant, and in 59 cases an applicant and an interested person, but the status of the latter is not disclosed.

12 Out of 313 operative rulings 1 deals with expanding the support scope.

■ support recipient      ■ interested person      ■ applicant



The rulings with operative part passed by the courts of the first instance

The rulings show why the court uses the respective power

Indicated as a party

This statistics clearly show there is the possibility of ambiguous interpretation<sup>13</sup> of the legislation, according to one version of which, the consent of a support recipient is not considered to be indispensable for the rejection of the court's substantiated judgment.

In this light, Art. 250 of the Civil Procedure Code should not apply to the decision on the recognition of a person as being in psychosocial need, which provides the complete publication of the decision (including the motivational part).

#### 4.7. THE TEMPLATE OF SUBSTANTIATED COURT JUDGMENTS

**The judgments of the Common Courts, which contain the motivational part, are template and ungrounded.**

4.52% of the judgments of the first instance courts contain the motivational part. However, these judgments are extremely problematic in terms of substantiation. The arguments in these court judgments contain only the quote of the forensic Bureau conclusion, which in its turn is absolutely template.

The assertions in the court judgments, which is a basis for the recognition of a person as a support recipient, loose its credibility due to its repetitive feature. It is natural that there is doubt about the reasonableness of the determination of the actually identical needs of those persons to be recognized as a support recipient, which is indicated in the motivational part. Since the document does not contain a convincing reasoning about the recognition of a person as a support recipient, it creates a feeling that the court

<sup>13</sup> The same conclusion in the mentioned report of EMC, p.46.

takes this decision based only on the medical diagnosis and the stigma about the mental health existing in the society. Thus, the current practice is contrary to the standard established by UN CRPD and the Constitutional Court and violates the rights of persons with disabilities.

It is necessary that the court payed more attention to the issue of the substantiation of the decision on the recognition of a person as a support recipient and elaborated a training program for judges.

## 4.8. THE FRAMEWORK FOR LIMITING THE LEGAL CAPACITY

### 4.8.1. From the Perspective of the Constitutional Court

According to the judgment of the Constitutional Court, a person's right to the legal capacity is protected by Art. 16 of the Constitution, which says that "everyone shall have the right to his/her free development", as well as there is a right to equality, protected by Art. 14 of the Constitution, which protects a person's right to reveal his/her unlimited capacity like others on an equal basis. It is important that the court discussed such an aspect of the capacity that applies to the civil law relations.<sup>14</sup> The court considered the capacity in relation to certain aspects of the civil law rights (e.g. high-risk deals), which means that there are two categories of a person's capacity; the first – the complete capacity of the right in relation to a specific aspect; the second – the complete incapacity of the right in relation to a specific aspect.<sup>15</sup> It should be noted that when completely depriving of the legal capacity by the court, it means not a person's complete inability to make a decision, but the inability to make a decision independently,<sup>16</sup> that excludes the substitution of a will by a guardian and considers it possible to have only the support or a joint decision. At the same time, under the court's view, it is impossible that a person be considered completely incapable in relation to all aspects of the civil law rights (e.g. small domestic transactions).<sup>17</sup> For the court "complete restriction of legal capacity" is limitation of making decisions independently over the specific aspect/aspects of the certain rights. Limitation of the "right to make decisions independently" does not mean blanket deprivation of all the rights from a person, but restriction of his/her freedom in the respective frames, which is defined by the Common Court based on the persons' individual assessment and pursuant to the general comment of the Committee, "a genuine content of Art. 12 of the Convention is contrary to discriminatory approaches when recognizing legal personality, condemns the use of the mechanisms to substitute a will and holds that the status of a disabled person or the existence of any kind of disorder

14 The mentioned decision of the Constitutional Court of Georgia, II.10.

15 The mentioned decision of the Constitutional Court of Georgia, II.30.

16 The mentioned decision of the Constitutional Court of Georgia, II.42.

17 The mentioned decision of the Constitutional Court of Georgia, II.30.

(whether physical or sensitive) should never become the basis to refuse the legal capacity or any other right.”<sup>18</sup>

## 4.8.2. Legislative Reform

### 4.8.2.1. The Support Institution

**In contrast with the decision of the Constitutional Court, the legislation provides possibility for a common court to appoint a support in the part of a minor transaction;**

The Civil Code, in order to implement the decision of the Constitutional Court, defined the notions of a support recipient and a supporter, which is used in case of persons in psychosocial need. According to the novation, as distinct from the model of the plenary guardianship, where a guardian absolutely replaced the will of a person under custody, a supporter shall be obliged to assist a support recipient in making a choice and decision,<sup>19</sup> when making a transaction to assist him/her in accurately comprehending the terms and the legal consequences of a transaction.<sup>20</sup> This follows from the spirit of the Constitutional Court decision, according to which, the purpose of the law should be to assist persons in psychosocial need in making decisions related to the social functioning rather than to replace their will.<sup>21</sup> The power<sup>22</sup> “*of a supporter must be strictly limited to those issues, in which a person is not able to form a will, and incapable persons should have the possibility to make decisions within the framework of their unlimited capacity, including, in case of necessity, with the consent of a guardian*”<sup>23</sup>. As it turned out, this compliance exists at the level of the Civil Code.

According to the general rule, such a transaction made by a support recipient, which needs a support, shall be valid only if a supporter approves it.<sup>24</sup> The Civil Code imposes an additional rule on the transaction made in writing, according to which, the transaction made in the framework of providing a support for a support recipient should be signed not only by the parties to a transaction, but also by a supporter.<sup>25</sup> It should be noted that the supporter’s consent both to an oral and writing agreement is binding only when it is defined under the court’s judgment. This regulation is in absolute conformity with the Constitutional Court’s judgment, where the court focused on absolute and blanket deprivation of legal capacity, which is the interference in the rights and “should

18 The mentioned general comment N1, the committee for the rights of persons with disabilities C/GC/1, 3.9, EMC report, p.10.

19 The Civil Code of Georgia, Art. 1278, the 3<sup>rd</sup> part.

20 The Civil Code of Georgia, Art. 1293, the 3<sup>rd</sup> part.

21 The mentioned decision of the Constitutional Court of Georgia, II.40.

22 The court uses the then existing terminology, but based on the correctness the present report uses the current terminology. Guardian - supporter, mentally retarded, mentally ill – a person in psychosocial need.

23 The mentioned decision of the Constitutional Court of Georgia, II.40.

24 The Civil Code of Georgia, Art. 58<sup>1</sup>, the 1<sup>st</sup> part.

25 The Civil Code of Georgia, Art. 69, the part 3<sup>1</sup>.

*be due to highly important legitimate purpose and should the least restrictive instrument to attain this objective*".<sup>26</sup> Though, the court held that such an instrument included the protection of the interests of a person in psychosocial need,<sup>27</sup> but it considered that this objective may be attained with much more easy instruments. For example, it could be not automatically annulling a transaction, but the ability of a guardian/supporter to adjust it to a person's interests post factum.<sup>28</sup>

According to the law, the transactions, where a support recipient derives benefit, do not need to be approved by a supporter.<sup>29</sup> The above statement is consistent with the spirit of the decision of the Constitutional Court, as there is no legitimate objective that would justify the restriction of a person's legal capacity in a transaction, under which, he/she does not suffer damage.

Despite these positive novations, the civil law does not fully reflect the decision of the Constitutional Court and makes it possible to limit a person's right to enter into a minor, domestic transactions. The Civil Procedure Code expressly says that the court may provide a support even in the part of a minor transaction,<sup>30</sup> when the decision says: "*the regulation that applies unconditionally to all the types, including, minor civil transactions, is the disproportionate interference in the right*"<sup>31</sup>

To solve these problems it is necessary to make amendments to the legislation and to abolish the restriction of a support recipient person's right to enter into a minor transaction.

### **The legislation restricts the right of a support recipient person to be a supporter of another person in the fields where he/she was not provided with support.**

4 categories of the persons may be appointed as supporters. They are a support recipient person's<sup>32</sup>:

- Family members
- Relatives
- Close persons
- Specialist who meets the requirements under the Civil Code

If a supporter could not be selected from the abovementioned persons, an authorized person from the guardianship and custody agency shall be appointed in this capacity,

---

26 The mentioned decision of the Constitutional Court of Georgia, II.13.

27 The mentioned decision of the Constitutional Court of Georgia, II.14.

28 The mentioned decision of the Constitutional Court of Georgia, II.21.

29 The Civil Code of Georgia, Art. 58<sup>1</sup>, the 1<sup>st</sup> part.

30 The Civil Procedure Code of Georgia, Art. 363<sup>15</sup>, the 3<sup>rd</sup> part.

31 The mentioned decision of the Constitutional Court of Georgia, II.30.

32 The Civil Code of Georgia, Art. 1280, the 2<sup>nd</sup> part.

and if a support recipient person is placed in a specialized institution – the representative of this institution.<sup>33</sup>

The Civil Code prohibits appointment of a person as a guardian, tutor or supporter if the court recognized him/her as a support recipient.<sup>34</sup> It happens when the guardianship, tutorship or support may not concern that part of the social life, where a specific person has been recognized as a support recipient. This kind of prohibition, which does not provide individual data of a specific person, is a disproportionate interference in the right.

Legislative norm, which restricts a support recipient person's right to be a supporter of another person in the sphere where he/she was not provided with support, shall be abolished.

#### **4.8.3. The Obligations of a Supporter**

**Even when a person is not provided with support in medical service the legislation stipulates the obligation of a supporter to follow-up a constant medical service of a support recipient.**

According to the Civil Code, blanket obligations are defined for a supporter<sup>35</sup>:

- to follow up a constant medical service of a support recipient;
- to establish his/her wishes/choice and to assist him/her in making the respective decision that includes providing a support recipient with the information necessary to make a decision in an understandable communication way;
- To immediately address the court concerning the alteration of the support scope/ the termination of the support, if there is no more or changed basis, due to which, the support was imposed on a support recipient, except in cases, when a support recipient or the guardianship and custody agency have already addressed the court<sup>36</sup>;
- Within the period of time (not exceeding 6 months) set by the guardianship and custody body the supporter is also obliged to provide them with the information on carrying out by him/her the obligation determined by the court. This information should include the features related to providing support by him/her;
- In addition, in appropriate cases, the supporter is obliged, if it is determined by the court's judgment, to assist a support recipient in comprehending the terms and the legal consequences of a transaction when such a transaction is made by a support recipient.

---

33 The Civil Code of Georgia, Art. 1280, the 5<sup>th</sup> part.

34 The Civil Code of Georgia, Art. 1283, clause "B".

35 The Civil Code of Georgia, Art. 1289, the 2<sup>nd</sup> part.

36 The Civil Code of Georgia, Art. 1292.

The first obligation, which at the same time means the interference in a personal life of a support recipient, is blanket and it is impossible that it always proceeded from the needs of a support recipient. The mentioned interference should be determined only when the court grants a supporter with such a power.

As for the second obligation, it must imply defining the wishes and the choice of a support recipient by the supporter and assisting him/her in decision making in that sphere, which is directly determined by the court. The Wording of the Civil Code may be understood in a way that the mentioned obligation concerns all the aspects of the social and private life that would be contrary to the spirit of the Judgments of the Constitutional Court. That's why this wording needs to be specified.

It is indispensable that the legislation grants a supporter with the right to follow-up a constant medical service of a support recipient only in the case when he/she is appointed as a supporter in the relevant sphere of support recipient's life. It is also important that the supporter's obligation be specified – to establish the wishes and the choice of a support recipient and to assist him/her in decision-making only in the field, within which, he/she was appointed as a supporter.

#### **4.8.4. Common Courts' Practice**

**The issues of the blanket character of the support appointment, complete legal incapacity and plenary guardianship are still urgent in the process of the reform implementation by the Common Courts.**

Alarming conclusions may be drawn from the analysis of the Common Courts' practice. After becoming familiar with the court judgments, one is under the impression that the term "legally incapable" is mechanically replaced by the term "support recipient", as the restriction of the rights for persons in psychosocial need, in most cases, happens under the old regulation and, there was no substantial change for persons with disabilities. To clearly show this problem, the discussion shall include several directions.

In the case mentioned above, the Constitutional Court considered the institute for the legal incapacity of persons with disabilities to be unconstitutional, including, as alternative reasons for this: the blanket character, complete legal incapacitation and the substitution of a will by a guardian. According to the Constitutional Court, the former institute of legal capacity was contrary to the right to free development and equality guaranteed by the Constitution.

In order to eliminate this, the Common Court should base its own decisions on the individual needs of a person, the support should be provided in relation to those rights that proceed from the interests of a person, should reject the full substitution of a will and should emphasize the role of a supporter as an assistant, and finally, the support

should be provided in relation to such rights or aspects that do not require a person's direct activity.

#### **4.8.4.1 The Blanket Character and the Restriction of the Full Range of Rights**

The analysis of the Common Court's judgments shows that the court does not mainly use an individual approach. Even in those rare cases when it tries to proceed from the circumstances of a specific case, this effort never pursues to establish a person's unique psychosocial needs. The court's ruling, as well as the expertise conclusions are not based on a fundamental study of a specific person's needs. In the majority of the conclusions the expertise considers that a person should be provided with a supporter "in all the sphere of life". It is impossible that there are impartial reasons for one conclusion taking into account a great number of cases. This indifference and the blanket character call in question the integrity of the decisions by the court and the forensic bureau.

When determining the scope of the support, in 81 judgments (23.75% of the cases) the court does not actually list those rights, under which, the support is established. In such cases, the court uses the following wording: "and in the part of the determination of other rights and the obligations", "and in all other sphere", "and in the part of all other rights".

Other 260 judgments mostly provide quite a wide circle of the rights that is also concerning. When analyzing the court's judgments, there was a list of those rights that the common courts used in all specific cases in relation to a person. In the mentioned 260 cases the rate of the rights restriction (several rights restricted in each judgment) is as follows:

<b>The Frequency of the Restriction of the Right</b>	<b>260</b>
Freedom of speech, Freedom of thought, Freedom of conscience, Freedom of expression	25
Right to privacy	29
Right to marriage	5
Right to free movement	27
Right of assembly	16
Right to participate in public associations	18
Right of driving and disposing vehicles	6
Right to education	31
Right to participate in elections, referendum and plebiscite	7
Labor activities	35
Entrepreneurial activities	43
Right to property	40

Right to register the property rights	55
Transactions (minor transactions - 98, and except for the real estate disposal - 6)	195
Real estate management / disposal	77
Real estate management / use / disposal (agreed with the guardianship and the curatorship body - 8);	44
Real estate management (except for mortgage and alienation - 6);	24
Movable Property management / disposal	8
Right of legacy (inheritance - 55);	106
Purchase of medicines (under prescription - 37);	55
Determination of the residence place	197
Consent to a medical treatment	243
Avoiding damage	129
Pension proceedings / receiving pension or other state and local government allowances	260
Right to receive/use/dispose the funds on the bank account of a support recipient	181
Support in the sphere of the representation	757

757 cases of the support were determined by the court in the sphere of the representative right. The point is that the courts tend to determine separately the support in relation to separate aspects of the representative power:

support in the sphere of the representation	Total 757
Both in state and non-state institutions and organizations	144
Representation in the banking and credit institutions	175
Representation in relations with private persons	20
Representation to address a competent body to receive pension or other state allowances and to collect documents	227
Representation in court, administrative authority or other institution	176
Representation to take ID card	7
Representation to the Social Service Agency to become a beneficiary of the state sub-program providing persons with mental disorders with housing	48

In 8 cases we see records that recommend the guardianship and the custody body to restrict a support recipient's other rights and obligations besides those set by the court.

From the analysis of the court's judgments under the monitoring, 3 types of the judgments can be singled out. The judgments where:

- The court restricts routinely a full range of rights of a support recipient persons;

- The court restricts routinely one part of the rights of a support recipient persons;
- The court restricts only those rights that must be urgent to a supporter.<sup>37</sup>

The first case is in 23.75% of the judgments. All the rights are restricted for persons in this part. It does not mean that those who need a supporter in relation to all the rights are recognized as support recipients, but that everyone is recognized as a support recipient in relation to all the rights despite whether a person really needs or not.

During the second case, the situation is dependent on the taste of the judges or the court and the judges' style, some of them mostly restrict the property rights, some, except the issues relating to the real estate, connect the realization of all other rights with the support,<sup>38</sup> some, as it was mentioned, restrict all the rights.<sup>39</sup> Despite that the restriction of a full range of the rights happens in about ¼ of the cases, the analysis of the remaining rulings show that a routine approach is urgent even in this case. For example, the table below shows that each court of the first instance has an individual approach and differs from other court, but within this court all the judges take identical decisions; there is also another alternative, when a judge takes a different decision, but his/her decisions are identical despite the different cases:

<b>Identical judgments made by courts</b>	<b>Number of judgments</b>	<b>Number of judges</b>
<b>Ambrolauri District Court</b>	10	1
<b>Akhaltsikhe District Court</b>	15	3
<b>Batumi City Court</b>	14	3
<b>Bolnisi District Court</b>	10	2
<b>Gurjaani District Court</b>	14	1
<b>Zestaponi District Court</b>	33	3
<b>Zugdidi District Court</b>	21	3
<b>Rustavi City Court</b>	13	3
<b>Sachkhere District Court</b>	28	1
<b>Senaki District Court</b>	21	2
<b>Sighnaghi District Court</b>	18	2
<b>Kutaisi City Court</b>	15	1

37 Tbilisi City Court ruling as of December 22, 2015, N2/13304-05, Sachkhere District Court ruling as of October 13, 2015, N2/80-15, Samtredia District Court ruling as of August 25, 2015, N2/235-2015, Mtskheta District Court ruling as of December 28, 2015, N2/570-15.

38 Tbilisi City Court ruling as of December 17, 2015, N2/16901-15, Poti City Court ruling as of February 4, 2016, N2/338, Khashuri District Court ruling as of October 7, 2015, N2/187-15.

39 Samtredia District Court ruling as of September 8, 2015, N2/183-2015, Samtredia District Court ruling as of October 19, 2015, N2/246-2015, Batumi City Court ruling as of December 25, 2015, N2-3043/15, Akhalkalaki District Court ruling as of September 29, 2015, N2/107-15, Akhalkalaki District Court ruling as of September 29, 2015, N2/106-15, Ambrolauri District Court ruling as of September 22, 2015, N2/36-15, Zugdidi District Court ruling as of January 21, 2016, N020224015001159120 (2/1190-15).

Khashuri District Court	14	3
Khelvachauri District Court	8	2

In addition, there are some courts which are not compatible with the above mentioned trends, but the majority of the decisions taken by them are likely to be similar with the above mentioned cases.

- Akhalkalaki District Court - 5 judgments, taken by one judge;
- Tbilisi City Court - 17 identical judgments, taken by 2 different judges;
- Telavi District Court - 9 judgments, taken by 2 different judges. 7 judgments are absolutely identical, and in 2 of them the support scope differs slightly. The same situation is in Ozurgeti (10 rulings taken by one judge) and Samtredia courts (37 cases considered by 3 judges).

Even in the third case the court is not interested and does not assess individual needs of a person. And it is contrary to the right to a free development as an obstacle is put in enjoying those rights that may not proceed from his/her individual case.

There is also another variation which is fixed in the above mentioned 8 cases. The court fully lists the rights, but additionally defines the right of the guardianship and the custody body to determine additional responsibilities to a supporter. This is contrary to the requirement of the legislation, namely, the Civil Procedure Code of Georgia (hereinafter Civil Procedure Code), according to which, only the court is empowered to restrict a person's rights and to assign a support.<sup>40</sup>

The court's attitude toward a conclusion of the Forensic Bureau is problematic. The court mainly does not substantiate the fact why it shares the expertise's opinions in relation to the scope of the support; it does not assess it,<sup>41</sup> and also does not explain why it does not share the mentioned conclusion<sup>42</sup>. This gives reason to conclude that the court's behavior is arbitrary and is not based on the assessment of the evidence and the circumstances.

This practice, considering the data from the previous and the following sections, suggests that the reform of the legal capacity in Georgia is conditional. Such an interpretation of the legislation, which is common to the courts, is contradicts the Constitution of Georgia and the UN CRPD requirements.

---

40 The Civil Procedure Code of Georgia, Art. 363<sup>13</sup>;

41 Tsageri District Court judgment as of December 24, 2015, N2/23-15, Ozurgeti District Court judgment as of November 6, 2015, N2-216-15, Ozurgeti District Court judgment as of November 6, 2015, N2-218-15.

42 Akhaltsikhe District Court judgment as of September 10, 2015, N1004192-2/262-15, Khelvachauri District Court judgment as of November 2015, N820224015001127359, Senaki District Court judgment as of October 13, 2015, N3/232-15.

#### **4.8.4.2 Substitution of a Will**

The analysis of the court's judgments shows that it is a common practice when a supporter is assigned to a person and the court determines it as a supporter's competence "the full transfer" of the support within the restricted rights,<sup>43</sup> "the realization" of the rights by a supporter<sup>44</sup> and "on behalf of a support recipient"<sup>45</sup>. In case of 85.82% of the court judgments the courts used this wording.

Despite the fact that other clauses of the operative part of the court's judgments indicate the obligation of a supporter to follow-up and to establish a person's wishes and to assist him/her in carrying out it, finally, the judgment is read in such a way that this is the provision regulating the relations of two different kinds. On the one hand, a supporter is obliged to provide an assistance regarding the above mentioned, but on the other hand, he/she is absolutely free to determine the content of the final decision. A support recipient is not even entitled to appeal a decision made by a supporter. The only thing that a support recipient is able to do is to address the court with the request to dismiss his/her supporter. In this case, the court dismisses a supporter that cannot be identified with the determination of the support scope when taking a specific decision. Thus, it is necessary to amend the legislation, giving the right to a support recipient to appeal a supporter's individual decisions in the court.

The mentioned wording leaves no space for interpretation and directly indicates that a supporter is entitled to carry out freely all those rights where he/she was assigned to. In fact, it is such a kind of the substitution of a will that was annulled by the Constitutional Court as it was contrary to the Constitution. These two cases, the norm declared unconstitutional and the current practice are identical, because both of them give the opportunity to a guardian to take a decision excluding a will of a person in psychosocial need. These two practices get even more similar to each other, if we take into account the fact that the courts, as a rule, tend to restrict a full range of the rights and in some cases all the rights of a support recipient person.

#### **4.8.4.3 The Function of a Supporter in Realization of Certain Rights**

Another problem was singled out when analyzing the court's judgments that are due to the assignment of a supporter in the part of some rights. As it was above mentioned, the court often recognizes a person as a support recipient either in relation to a wide

43 Samtredia District Court judgment as of October 29, 2015, N2/258-2015, Poti City Court ruling as of February 4, 2016, N2/338, Poti City Court judgment as of February 4, 2016, N2/330, Bolnisi District Court judgment as of October 23, 2015, N2/367-15.

44 Batumi City Court judgment as of 2015, N2/3285-2015, Tbilisi City Court ruling as of December 17, 2015, N2015, Tbilisi City Court judgment as of October 2, 2015, N2/15666-15, Telavi District Court judgment as of January 22, 2016, N2/339-15.

45 Zestaponi District Court judgment as of December 15, 2015, N2/248-2015, Sachkhere District Court judgment as of October 13, 2015, N2/80-15, Samtredia District Court judgment as of August 25, 2015, N2/233-2015, Bolnisi District Court judgment as of January 11, 2016, N2/394-15.

range of the rights or all the rights, and gives the right to a supporter to fully carry out the rights of a person. The list of the rights, with which a person was granted with a supporter, we see such rights as the right to freedom of expression and belief. This means that the court provides a supporter with the right to profess any religion or none of them, to satisfy his/her religious requirements, to join the manifestation, to state his/her own political stance, etc. instead of a specific person that is logically impossible and opposes to the substance of each of these rights whose main goal is an internal attitude of a person and its share directly by a specific person or rejecting to share it. Therefore, it is impossible to restrict or otherwise limit such rights or appoint a supporter for the implementation of these rights.

The Constitutional Court clearly excluded in its decision the possibility of the similar case. It held that *“the legislation should determine those legal actions, the carrying out of which, due to its particularly individual feature, is inadmissible by a representative. It is also up to the legislation to determine which decisions of a guardian need to be approved specifically by the court or other authorized body”*.<sup>46</sup> The above mentioned cases represent those rights which are impossible to be carried out by other person, even by a supporter. Despite this, the similar practice suggests that the mentioned part of the court’s judgement is not taken into account by the common courts. The legislation also contributes to this which does not pursue the law of practice and does not determine the list of those rights which is inadmissible to be carried out by a third party.

These cases show one more time the inadequacy of the court’s attitude; the superficiality, which the common courts use when recognizing a person as a support recipient, in some cases lead us to the comic consequences. This is of particular concern, because, unfortunately, by these ironic examples the government reveals its attitude towards persons with disabilities.

Therefore, the list of the rights/or aspects of the rights which cannot be restricted or otherwise limited or implemented through the appointment of the supporter, must be determined by law. Before that, the Court must refrain from limiting such rights or appointing supporter for their implementation.

## 4.9. WHAT MUST BE INCLUDED IN THE COURT JUDGMENT?

### 4.9.1. Legislation

The court’s judgment indicates:<sup>47</sup>

- The right, due to the enjoyment of which, a person is provided with the support, as well as the scope of the support

---

46 The mentioned decision of the Constitutional Court of Georgia, II.41.

47 The Civil Procedure Code of Georgia, Art. 363<sup>21</sup>, the 1<sup>st</sup> part.

- The responsibilities of a supporter
- The periodicity of the submission of the report to the guardianship and the custody body by a supporter
- The term of the support and the periodicity of its review that should not exceed 5 years
- Other circumstances necessary for the support of a person

#### **4.9.2. Court's Practice**

**The analysis of operative parts of the court's judgments reveals that there is no common standard.**

The first four issues provided by the legislation in the previous section are indicated in all the judgments. As for the last one, other circumstances necessary for the support of a person are determined in 51 cases.

Below there is a list of issues at which the Courts pay attention in the resolution of the judgment:

- Supporter's obligation to follow-up a constant medical service of a support recipient, to establish his/her wishes/choice and to assist him/her in making the respective decision that includes providing a support recipient with the information necessary to make a decision in an understandable communication way - 204 judgments;
- Supporter's obligation to provide guardianship and the custody bodies with the information concerning carrying out by him/her the duties determined by the court within the period of time (not exceeding 6 months). This information should include the features related to providing support by him/her - 340<sup>48</sup> judgments;
- Supporter's obligation to immediately address the court concerning the alteration of the support scope/the termination of the support, if there is no more or changed basis, due to which, the support was initially imposed on a support recipient, except in cases, when a support recipient or the guardianship or the custody agency have already addressed the court - 322 judgments;
- Supporter's rights to sign necessary deals on behalf of the support recipient in his/her interests- 177 judgments;
- Supporter's rights to carry out the responsibilities determined by the decision on behalf of a support recipient based on his/her interests – 116 judgments;

---

<sup>48</sup> One decision was made concerning the expansion of the support scope, so it was not introduced into the statistics.

- Support Recipient's right to address the court with the appropriate request in case if he/she wishes to dismiss a supporter – 51 judgments;
- Guardianship and custody body's obligation to protect and to strengthen a support recipient and to assist a supporter in carrying out his/her responsibilities so that a supporter is able to assist a support recipient in making a choice and taking a decision - 51 judgments;
- Guardianship and custody agency's obligation to supervise the activities of a supporter according to the place of residence of a support recipient - 51 judgments;
- Guardianship and the custody body's obligation to carry out in case of necessity, on its own initiative a factual supervision over the activities of a supporter, after a supporter submits the information on his/her responsibilities under the court's judgment, - 51 rulings;
- Guardianship and custody body's obligation to address the court with the request to dismiss a supporter in case of an improper performance of duties by him/her - 51 judgments;
- The support must be terminated if a support recipient deceases or the reason for which the support was assigned doesn't exist any more - 47 judgments;
- Guardianship and the custody body's obligation to revise the compliance of the actions carried out by a supporter with the frameworks, set by the court's judgment under a scheduled inspection - 47 judgments;
- The judgment must be sent to the guardianship and the custody body in no later than days following its entry into force according to the place of resident of a support recipient - 70 judgments;
- The right to appeal a judgment - 286.

The analysis of the operative parts of the court's judgments shows that there is no common standard. The judges regulate various issues in this part of their judgments. Though, it is here where a template approach is necessary. The common standard on what a judge inserts in the operative part should be determined, whether it is the support obligation, the function of the guardianship and the custody body, the right to appeal or other.

It is indispensable to create a template version of the operative part of the judgment which will include all those clauses that should be reflected in the court's judgment.

## 4.10. RIGHT TO MARRIAGE

### 4.10.1. Constitutional Court Standard

The right to marriage is protected by UN CRPD, which says that States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters related to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that: the right of all persons with disabilities who are of marriageable age are able to marry and to found a family on the basis of free and full consent of the intending spouses as recognized.<sup>49</sup>

The Constitutional Court discussed the issue of the blanket prohibition of the marriage for legally incapable person. It held that this kind of restriction was contrary to the human rights standards. Though, the purpose of the regulation is to protect the property rights of legally incapable person, but “*there is a reasonable opportunity of protecting a person’s property rights in a less restrictive way. Including, imposing the approval of a guardian or a competent body, the limitation of the marriage to only social and personal results, an obligatory character of the marriage contract, etc.*”<sup>50</sup>

In addition, a person may need assistance in comprehending a property component of the marriage and be in need of the positive state actions in terms of protecting the property rights, though it does not exclude automatically a person’s deliberate will to create a family.<sup>51</sup> That is why the court held it problematic that “*in the process of the legal incapability a person’s social skills to realize the accompanying social, non-property consequences of the marriage are [not] examined*”<sup>52</sup> Accordingly, under the court’s standard, the legal incapability of a person or his/her recognition as a support recipient in one sphere of life should not cause the restriction of his/her right to marriage in any way.

### 4.10.2. Legislation

**The civil legislation determines a blanket obligation, under which, all the support recipient persons should conclude a marriage contract despite the fact whether it is determined or not by the court’s judgment.**

Under the Civil Code, the marriage contract is a precondition to the marriage between the support recipient persons,<sup>53</sup> which shall concern only the property rights and shall not govern personal and social relations.<sup>54</sup> The marriage contract shall not restrict the property rights of a support recipient person more than it is determined by the court.

49 UN CRPD, Art. 23, clause 1, sub clause “A”.

50 The mentioned decision of the Constitutional Court of Georgia, II.84.

51 The mentioned decision of the Constitutional Court of Georgia, II.91.

52 The mentioned decision of the Constitutional Court of Georgia, II.90.

53 The Civil Code of Georgia, Art. 1120, the 1<sup>st</sup> part, sub clause “E” and Art. 1172, the 2<sup>nd</sup> part.

54 The Civil Code of Georgia, Art. 1172, the 1<sup>st</sup> part.

When concluding the marriage contract the guardianship and the custody body and the supporter (only in the part determined by the court's judgment) should be necessarily involved in this process.<sup>55</sup> If the marriage contract is concluded between a supporter and a support recipient, the guardianship and the custody body assigns an authorized person of the guardianship and the custody body as an interim supporter of a support recipient person.<sup>56</sup> When performing the marriage contract concluded with a support recipient the guardianship and the custody body is responsible for supervising the carrying out of the responsibilities by a supporter.<sup>57</sup>

It is noteworthy that the legislation does not pay attention to the aspect whether a person has restricted the right to marriage or property disposal or not by the court's judgment and sets the obligation of the marriage contract for any support recipient person. This is contrary to the decision of the Constitutional Court, according to which, any restricted right should be preceded by an individual assessment of a person;

Accordingly, it is necessary to specify under the legislation the circle of those support recipient persons who are obliged to conclude a marriage contract. This should be considered by the Common Court in all individual cases.

## 4.11. CERTAIN RIGHTS

### 4.11.1 The Judgment of the Constitutional Court

The purpose of the Constitutional Court's judgment in compliance with the philosophy of UN CRPD, is to eliminate the practice according to which due to psychosocial needs the right is deprived in a blanket way without an individual assessment. This means that by the respective procedure of the court a specific right is limited, it cannot be restricted or limited under the law. This logic applies to all the rights which may be restricted, including the below listed rights.

### 4.11.2 Legislation

**The legislation provides a blanket deprivation of some rights without the court and individual assessment. These rights are: parental and some of the related rights, the right to hold public position, the right not to become an object of the medical research without informed and clear consent.**

---

55 The Civil Code of Georgia, Art. 1172, the 2<sup>nd</sup> part.

56 The Civil Code of Georgia, Art. 1172, the 5<sup>th</sup> part.

57 The Civil Code of Georgia, art. 1172, the 3<sup>rd</sup> part.

This is contrary to the standard set by the judgment of the Constitutional Court, that is why it is necessary to annul the regulations which deprive a person: (1) parental and some related rights, (2) the right to hold public position, (3) the right not to become an object of the medical research without informed and clear consent.

#### **4.11.2.1. Parental Rights**

The version of the Civil Code before the reform of the legal capacity institute excluded a person in psychosocial need from the adopting parties,<sup>58</sup> and after the adoption of the child, recognition of a adopting person as a legally incapable, was the basis for annulling the adoption.<sup>59</sup> Also, in case if one of the spouses was legally incapable, his/her consent was not necessary for other spouse during the adoption.<sup>60</sup> According to another norm, in case of a legal incapacitation of a parent/parents a child was automatically subject to adoption.<sup>61</sup> Thus, the parental rights were violated, which include the biological parent's right to bring up his/her child, a person's right to adopt other person, and also the right to be a foster mother / foster father.

Under the effective legislation, all these regulations are annulled and the Civil Code assigns the definition of the “adopting” to the Law of Georgia “On Adoption and Foster Care”.<sup>62</sup> The normative act mainly resolved all the previous problems, though even according to its provisions, foster mother/foster father can be only in case if it is determined directly by the court’s judgment.<sup>63</sup> The mentioned regulation, especially when persons in psychosocial need were excluded from the adopting subjects, may be a step forward, but it is contrary to the spirit of the Constitutional Court and UN CRPD, according to which, there exists a presumption for benefit of a person’s rights. The proposed version presents an opposite vision. And according to the human rights standards, in such a case, the right of the “adopting” should be deprived only in that case when this right was restricted by the court. Thus, the parental right, protected by the Constitution of Georgia and UN CRPD, is violated, which implies “with regard to guardianship, custody, adoption of children or similar institutions”.<sup>64</sup>

---

58 The Civil Code of Georgia, Art. 1245. The version as of December 11, 2014.

59 The Civil Code of Georgia, Art. 1245, the 1<sup>st</sup> part, sub clause “C”. The version as of December 11, 2014.

60 The Civil Code of Georgia, Art. 1247. The version as of December 11, 2014.

61 The Civil Code of Georgia, Art. 1247, sub clause “A”. The version as of December 11, 2014.

62 The Civil Code of Georgia, Art. 1245.

63 Art.7, sub clause “A” of the Law of Georgia “On Adoption and Foster Care”. The similar regulation is established by the articles 35 and 36 of the Law of Georgia “On Civil Status Acts”. The first law allows establishing paternity of a minor support recipient person, as well as the change of the surname only in the case if it is based on the court’s ruling. And the second law – in case of the recognition of a father as a support recipient, the paternity establishment registration is carried out on the basis of the court’s ruling. Also see the mentioned report of EMC, pp.28-29.

64 UN CRPD, Art. 23, clause 2.

#### ***4.11.2.2. The Right to Hold the Position in Public Service***

The Law of Georgia “On Public Service” excludes the possibility of holding the position by a support recipient person<sup>65</sup>, unless otherwise specified by the court’s judgment.<sup>66</sup> The same situation is in case of the mandatory bases concerning the dismissal.<sup>67</sup> Here we deal with the regulation that is contrary to the decision of the Constitutional Court. According to the human rights standard, there exists the presumption for benefit of legal incapability , while the current legislation restricts in a blanket way a person’s right to hold a specific position that is the violation of Articles 14, 28 and 29 of the Constitution of Georgia, as well as the UN CRPD.

#### ***4.11.2.3. An Object of the Medical Research***

According to the Constitution of Georgia<sup>68</sup> and UN CRPD<sup>69</sup>, the right to decide to take part in medical experimentation on the basis of the informed and clearly expressed consent is protected. According to the Law of Georgia “On Health Care”, a person can be an object of research within the medical-biological research.<sup>70</sup> For the participation in this process a person’s informed writing consent is required.<sup>71</sup> In case of a support recipient two conditions are sufficient: the first, a person is not against, the second, he/she received the respective support.<sup>72</sup> Such regulation contradicts the rights to be protected from medical manipulations without your will and is discriminatory since it makes unjustified distinctions – in an ordinary situation it requires a person’s informed consent, and in case of a support recipient person, it is satisfied with not expressing opposition. In addition, the normative reality does not provide a distinction between support recipient persons, on the one hand, those who are not recognized as support recipient persons in the part of becoming an object of the medical research and on the other hand, those who receive support in this part.

---

65 The legislation also excludes, for example, holding the office of the city hall member, or/and the mayor and the head of the local government (The Local Self-Government Code, Art. 34, the 1<sup>st</sup> part, sub clause “C” and Art. 56, the 2<sup>nd</sup> part, sub clause “E”).

66 The Law of Georgia “On Public Service”, Art. 37, clause 2, sub clause “E”.

67 The Law of Georgia “On Public Service”, Art.107, clause 1, sub clause “C”.

68 The Constitution of Georgia, Art.16 and 17.

69 UN CRPD, Art.15, clause 1.

70 The Law of Georgia “On Health Care, Art.108.

71 The Law of Georgia “On Health Care”, Art.109.

72 The Law of Georgia “On Health Care”, Art.110.

## **4.12. THE RIGHT TO PARTICIPATE IN THE COURT PROCEEDINGS, TO REVISE, TO ANNUL AND TO APPEAL THE SUPPORT**

### **4.12.1. Court Standard**

The Constitutional Court in the judgment on the fair trial emphasized that “*a vital importance is given to that circumstance that a person under the guardianship should be provided with the right to address the court and to be heard by the court in person or in case of necessity, through a representative chosen by him/her*”.<sup>73</sup> Thus, it should be said clearly that the right to fair trial for persons in psychosocial need includes not only that the fact of their support should be determined by the court proceedings, but also that they should participate in the proceedings. UN CRPD says: “*States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages*.”<sup>74</sup>

### **4.12.2. Legislation**

Despite the fact that the norms concerning the participation in the proceedings and the right to address the court mainly satisfy the human rights standards, there is one problem which are caused due to ambiguous regulation. The point is that during the transition period the possibility for a legally incapable person to address the court with the request of revising his/her status is not clearly expressed.

The court may change the frames of the support if there is a respective basis and the conclusion of the Forensic Bureau.<sup>75</sup> The identical procedures are provided for taking a decision to annul the support.<sup>76</sup> The same decision, in case of the proper basis, can be made by the court when periodically revising the decision on the recognition of a person as a support recipient. The decision on the assignment of the support may be appealed in the Court of Appeal.<sup>77</sup> The most important is that a support recipient person is entitled both to request to change the frames of the support and to annul it and to appeal it, which is in compliance with the judgment of the Constitutional Court.

The court proceedings on the recognition of a person as a support recipient are necessarily attended by the person whose case is considered, his/her lawyer and a representative of the guardianship and the custody body.<sup>78</sup> The law provides the case when a person, whose recognition as a support recipient is under consideration, is not able to

---

73 The mentioned decision of the Constitutional Court of Georgia, II.146.

74 UN CRPD, Art.13, clause 1.

75 The Civil Procedure Code of Georgia, Art.363<sup>23</sup>, the 1<sup>st</sup> part.

76 The Civil Procedure Code of Georgia, Art.363<sup>23</sup>, the 2<sup>nd</sup> part.

77 The Civil Procedure Code of Georgia, Art.363<sup>24</sup>.

78 The Civil Procedure Code of Georgia, Art. 363<sup>18</sup>, the 1<sup>st</sup> part.

attend the trial due to health issue, in this case his/her participation is provided through electronic or other means of communication.<sup>79</sup> If a person fails to appear in the court and his/her connection does not succeed, the court is obliged to postpone the proceedings. In this case it is inadmissible to pass a judgment in absentia.<sup>80</sup>

Also, according to the changes, a supporter does not automatically represent the interests of persons in intellectual and psychosocial need in the court. A supporter's participation in the proceedings is mandatory only in the case if a support recipient was assigned with the support under the court's judgment to implement the procedural representation; a support recipient also participates in the proceedings.<sup>81</sup> In the case provided by the Georgian legislation the guardianship and the custody body is also entitled to address the court to protect the rights of a support recipient person.<sup>82</sup>

The legislative reform defined a transition period, within which, persons recognized legally incapable before April, 1, 2015 retained their status for a definite period. Though, they are not deprived of the opportunity to address the court and to request the transition to a support system or to annul the restriction of the rights.

The norms regulating this issue are determined by the Civil Procedure Code, according to which, a person recognized legally incapable by the court before April 1, 2015 is not restricted with the right to address the court before his/her individual assessment,<sup>83</sup> - that is clearly a progressive regulation, however, the same law contains the provision, from which an opposite conclusion can be drawn.<sup>84</sup> It says that "if a person recognized legally incapable by the court before April 1, 2015 whose individual assessment did not take place, filed a lawsuit, the judge will not accept it in 5 days after filing it". Under a reasonable interpretation, the first norm concerns the right to address the court to terminate the legal status and thus, is in compliance with the standard of the Constitutional Court.

Not with standing the foregoing, to avoid double interpretation it is better to specify the norms defining the right to address the court in a transitional period in such a way that a person's right to address the court to revise his/her own status be clearly expressed.

---

79 The Civil Procedure Code of Georgia, Art. 363<sup>18</sup>, the 2<sup>nd</sup> part.

80 The Civil Procedure Code of Georgia, Art. 363<sup>18</sup>, the 3<sup>rd</sup> part.

81 The Civil Procedure Code of Georgia, Art. 81, the part 3<sup>1</sup>.

82 The Civil Procedure Code of Georgia, Art. 81, the 6<sup>th</sup> part.

83 The Civil Procedure Code of Georgia, Art. 451, clause 1.

84 The Civil Procedure Code of Georgia, Art. 451, clause 1.

## 5. PROCEDURAL TERMS

**The research revealed that a part of the courts does not comply with the procedural terms.**

The discussion about the compliance with the procedural terms is possible only in relation to those judgments which are completely established as it was above mentioned several times; there are 28 such judgments, although, in 5 cases, it is impossible to receive a complete picture.

Thus, the assessment of the compliance with the procedural terms is possible based on the data of 23 complete judgements. In 14 cases the procedural terms were met by the court, in 3 cases the terms were breached by Samkharauli Forensics Bureau. As for other 9 cases, it is evident that the terms were breached by the court.

Thereby, it is necessary to ensure that the courts comply with the procedural terms.

## RECOMMENDATIONS

### To the Parliament of Georgia:

- Art. 250 of the Civil Procedure Code should not apply to the judgment on the recognition of a person as one in psychosocial need that implies the complete publication of the decision (including the motivational part)
- It is necessary to make amendments to the legislation and to annul the restriction of a support recipient person's right to enter into minor transactions.
- The legislative norm, which provides that a support recipient person may be other person's supporter in the sphere where he/she was not assigned with the support, should be annulled
- It is necessary that under the legislation a supporter is granted with the right to follow-up a constant medical service of a support recipient person only in the case if he/she is assigned as a supporter in the respective sphere. It is also important to specify a supporter's obligation – to establish the wishes and the choice of a support recipient and to assist him/her in decision-making only in the sphere, within which, he/she was appointed as a supporter

- It is necessary to make an appropriate amendment to the legislation that will provide a support recipient person with the right to appeal supporter's certain decisions in the court
- The legislation should determine the list of rights/certain aspects of rights, limitation of which or implementation of which through the support, is inadmissible.
- It is necessary to specify under the legislation the circle of those support recipient persons who are obliged to conclude a marriage contract. In all the individual cases this should be considered by the Common Court
- It is necessary to annul the regulations which deprives a person of the parental rights in a blanket way, the right to hold the position in public service, the right not to become an object of the medical research without informed and clear consent.
- To avoid double interpretation, it is better to specify the norms defining the right to address the court in a transitional period in such a way that a person's right to address the court to revise his/her own legal status be clearly expressed.

### **To the Common Courts of Georgia:**

- It is necessary that the court payed more attention to the issue of substantiation of the decision on the recognition of a person as a support recipient
- It is also important that the judges' training program be elaborated that will rise their awareness about the principles of UN CRPD and will contribute to changing a stigma based attitude towards persons with disabilities
- The court should base its judgments on the individual needs of a person, the support should be assigned to carry out those rights or/and those aspects that proceed from a person's interests
- The court should reject a complete substitution of a will and focus on the role of a supporter acting as an assistant
- The court should assign support for such rights or/and its aspects which does not require a person's direct activity. Before identification of the list of rights/aspects of rights which cannot be limited and implemented by the supporter on the legislative level, the court must refrain from limiting or appointing supporter in such rights/aspects of rights.
- A template version of an operative part of the judgments should necessarily be created that will include all those clauses to be reflected in the court's judgment

- The courts should provide the compliance with the procedural terms.

#### **To the Minister of Labour, Health and Social Affairs of Georgia**

- The Order of #01-16/5 as of May, 29, 2015 of the Minister of Labor, Health and Social Affairs of Georgia on the Regulation and Standards of Carrying out the Examination due to the Psychosocial needs, should be amended so that the person, supposed to be passing through the expertise was no longer referred as “a person in phsycosocial need” before the relevant conclusion of the Expertise.