

Mandate of the Special Rapporteur on the rights of persons with disabilities

REFERENCE: OL MDA 2/2016:

4 July 2016

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights of persons with disabilities, pursuant to a request for advice of the Moldovan Constitutional Court dated 7 June 2016, which has been called upon to deliberate on the constitutionality of the national Civil Code provisions on the matters of incapacitation, adult guardianship, and denial of procedural standing on grounds of disability.

Article 4 of the 1994 Constitution of the Republic of Moldova addresses the place of international human rights treaties in the domestic legal hierarchy, explicitly consecrating the prevalence of international human rights treaties above the national legislation and providing for the interpretation of constitutional rights in light of the Universal Declaration of Human Rights, and international instruments to which Moldova is a State Party. Following directly the norms enshrined in the Constitution and abiding by the principles of the UN Convention on the Rights of Persons with Disabilities, ratified by your Excellency's Government in 2010, I urge you to declare as unconstitutional the relevant Civil Code and Civil Procedure Code provisions which deprive persons with disabilities of their legal capacity and hinder them from the realization of their right to seek justice before courts.

While the UN Convention on the Rights of Persons with Disabilities does not recognize any new human rights for persons with disabilities, it clarifies the application of existing rights to the specific situation of persons with disabilities. The Convention calls out the medical model of disability, which is deeply rooted in stigmatization, exclusion and segregation, and reinforces the human rights-based approach according to which all persons with disabilities are recognized as human beings with equal enjoyment and exercise of rights and entitled to the same standards of protection against discrimination.

Article 12 of the CRPD reaffirms the equal recognition before the law for all people with disabilities and underlines that they have an inalienable right to exercise their legal capacity on an equal basis with others. The human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making, which respects individual autonomy, will and preferences. The Convention explicitly provides that people with disabilities who request assistance in exercising their legal capacity shall be provided upon their consent with a system of support aimed at empowering them to decide and act independently. The concept of supported decision-making is new to most jurisdictions, and should lead to the reform of guardianship systems.

This interpretation is reflected in General Comment no. 1 to article 12 on Equal recognition before law, issued by the CRPD Committee in May 2014 (see CRPD/C/GC/1). Therefore, all persons with disabilities, including persons with psychosocial or intellectual impairments, have their status and capacity recognized in international human rights law and States have a binding obligation to uphold this recognition and to provide access to support in the exercise of their legal capacity in the national legal order.

Exercise of legal capacity equally extends to procedural rights in court. The Committee recognizes that the right to legal capacity is essential for access to justice, to ensure that persons with disabilities have equal standing in courts and are guaranteed to seek enforcement of their rights and obligations on an equal basis with others. The CRPD Committee's jurisprudence consistently calls on States to take immediate measures to repeal laws permitting substituted decision making which restrict access to courts and ensure all persons with disabilities can access justice by amending legislation to enable supported decision making, and to provide procedural accommodations from the outset of legal proceedings.

The CRPD standards on legal capacity have also been adopted by wider international and regional bodies. UN treaty bodies also uphold equal recognition before the law of persons with disabilities. With respect to their latest reviews of Moldova, the Committee on Economic, Social and Cultural Rights (E/C.12/MDA/CO/2) as well as the Committee on the Elimination of Discrimination against Women (CEDAW/C/MDA/CO/4-5) in 2011 and 2013 respectively, expressed concern about the discriminatory guardianship system and deprivation of legal capacity of persons with intellectual and psychosocial disabilities, and hence called for legal reform in alignment with Article 12 of the CRPD. Within the Inter-American system, in 2011, the Inter-American Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities of the Organization of American States (OAS) adopted a resolution calling for re-interpretation of legal capacity in light of Article 12 of the CRPD (Resolution OEA/ Ser.L/XXIV.3.1, CEDDIS/RES.1(I-E/11), 4 May 2011), urging States Parties to take concrete measures to apply the new paradigm inscribed in Article 12, by phasing out declarations of incompetence and fostering the development of supported decision-making. The CRPD standard has also been incorporated into the European Disability Strategy 2010-2020 which ensures that "EU action will support and supplement national policies and programmes to promote equality, for instance by promoting the conformity of Member State legislation on legal capacity with the UN Convention" (COM(2010) 636 final).

I welcome the fact that in 2015 the Constitutional Court has declared unconstitutional the provisions of the 2014 Law on the Public Advocate securing therefore the right of persons with disabilities to lodge petitions with the Ombudsperson for the purposes of defending their rights. Nevertheless, as expressed in earlier communications sent on 6 May 2015, see A/HRC/30/27, case no. OL MDA 4/2015 and on 3 March 2016, case no. OL MDA 1/2016, I am concerned that the State has not given full effect to its international human rights obligations and persons with disabilities

continue to be discriminatorily deprived of their legal capacity and hindered their access to justice. Therefore, I have high expectations that a decision of the Constitutional Court will put an end to the practice of incapacitation and substituted-decision making and restore the recognition of equal rights and respect for the independence and autonomy of persons with disabilities in accordance with the principles enshrined in the Convention and in international human rights law.

Kindly be informed that this communication will be made available in a report presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurance of my highest consideration.

Catalina Devandas Aguilar
Special Rapporteur on the rights of persons with disabilities