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## The need for improving child access to justice in Georgia

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### Introduction

As the United Nations Committee on the Rights of the Child (UNCRC) states, *"For rights to have meaning, effective remedies must be available to redress violations. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives."*<sup>1</sup>

In March 2018, the National Anti-Discrimination Mechanism (Public Defender of Georgia) issued a recommendation to the Georgian government and Georgian parliament: "The neutral rule in the Georgian legislation, which gives everyone an equal right to address to the court, excludes children in some cases".<sup>2</sup> Assessments made by local and international NGOs<sup>3</sup> clearly indicate that children in Georgia lack access to justice, particularly in relation to administrative and civil law matters.

This policy paper explores the dimensions of child access to justice in the country. It focuses on the barriers that children face to receive legal aid, court representation and equitable justice in Georgia. The paper underlines the obligations assumed as part of the EU-Georgia Association Agreement and proposes a path for progress in this direction.

In its Objectives section (Article 1, para. "F"), the EU-Georgia Association Agreement<sup>4</sup> states that an "Association is hereby established between the Union and its member states, on one part, and Georgia, on the other [...] to enhance cooperation in the area of freedom, security and justice with the aim of reinforcing the rule of law and the respect for human rights and fundamental freedoms."

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Furthermore, Article 13 of the Agreement stipulates that: “(2) The Parties will cooperate fully on the effective functioning of institutions in the areas of law enforcement and the administration of justice. (3) Respect for human rights and fundamental freedoms will guide all cooperation on freedom, security and justice.”

Aside from the general provisions on the administration of justice, which requests access to justice for all, the new 2017-2020 EU-Georgia Association Agenda further specifies the aim of providing children with access to justice<sup>5</sup> including continuing juvenile justice reform.

## Juvenile justice reform as a progressive part of child access to justice

The newly adopted Juvenile Justice Code of Georgia is considered one of the most progressive laws in the region guarantying the rights of children who are in contact with criminal law, and it fully complies with UNCRC standards. It integrates the superior legal standard of the best interest of the child; provides free legal aid to child defendants and victims (regardless of whether they are indigent or not) of crimes; pays particular attention to the issues of confidentiality and private lives of children; regulates the sensitive matter of data collection for the purpose of prevention; stimulates relevant stakeholders to create evidence-based policies; and it accentuates the role of child re-socialization and alternatives to traditional sanctions.

However, the progress made in the criminal law regarding child access to justice is not reflected in civil and administrative law, where children still experience age-based discrimination, a matter that will be further discussed below.

## Children’s right to information

According to the Council of Europe regulations and the UNCRC Committee, from the first stage of their involvement in judicial proceedings, and at every step throughout the process, all children should be fully informed of, *inter alia*: their rights and the mechanisms they can use to exercise their rights in practice or to defend them where necessary.<sup>6</sup>

Since the ratification of the UNCRC in 1994, the Georgian government has not engaged in a comprehensive child-friendly information campaign on child access to justice in the areas of civil and administrative law.

The Georgian Law on Civil Procedure does not oblige adults to inform children about their rights in relation to courts proceedings. The Georgian Law on General Education (Article 10) obliges school administrations to inform children about their rights and to provide independent and impartial complaint mechanisms.

However, regulations on complaint procedures are vague; they don’t include concrete information and do not provide consultations for students about how to use the existing complaint procedures.<sup>7</sup>

<sup>1</sup> UN Committee on the Rights of the Child (2003). General Comment #5, general measures of implementation of the convention on the rights of the child (arts. 4,42 and 44, para.6) (2013). p.7 Available at (last seen 07.04.2018): [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11)

<sup>2</sup> Public Defender of Georgia, Recommendation on the age-based discrimination addressed to the Chairman of Georgian of Georgian Parliament, Mr. Irakli Kobakhidze, to the Georgian Prime Minister, Mr. Giorgi Kvirikashvili (2016). P. 20. Available at (last seen 07.04.2018): <http://ombudsman.ge/en/recommendations-Proposal/rekomendaciebi/public-defender-of-georgia-considers-that-legislation-regulating-children-access-to-court-is-discriminatory.page>

<sup>3</sup> Child Rights International Network (CRIN), Access to justice for children: Georgia (2016). P. 3. Available at (last seen 07.04.2018): <https://www.crin.org/en/library/publications/georgia-access-justice-children>

<sup>4</sup> EU-Georgia Association Agreement, available at (last seen 07.04.2018): [https://eeas.europa.eu/sites/eeas/files/association\\_agreement.pdf](https://eeas.europa.eu/sites/eeas/files/association_agreement.pdf)

<sup>5</sup> Association Agenda between the EU and Georgia, 2017-2020, P. 21. Available at (last seen 07.04.2018): [https://eeas.europa.eu/sites/eeas/files/annex\\_ii\\_-\\_eu-georgia\\_association\\_agenda\\_text.pdf](https://eeas.europa.eu/sites/eeas/files/annex_ii_-_eu-georgia_association_agenda_text.pdf)

<sup>6</sup> European Commission, Children’s involvement in criminal, civil and administrative judicial proceedings in the 28 member states of the EU, policy brief, June 2015. P. 9. Available at (last seen 07.04.2018): <https://publications.europa.eu/en/publication-detail/-/publication/c3cd307f-ff03-4010-b322-dcf7063403c5>

<sup>7</sup> UNICEF, with the support of joint EU & UNDP Project “Enhancing access to justice and development of a child-friendly justice system in Georgia” (2017), Child Friendly Justice, Legal Review, P. 33

## Children's right to be heard

Article 12 of the UNCRC states: "a child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".<sup>8</sup>

As stated by the Georgian Law on Civil Procedure,<sup>9</sup> the person obtains full legal capacity<sup>10</sup> at the age of 18. The rights and interests of children until the age 18 are protected by their parents, adoptive parents or other legal representatives. According to the law, the court is obliged to involve children in all legal proceedings, which include honouring the child's right to be heard.

However, as a recent judgment by the European Court of Human Rights on the case of *N.T.S. and others v. Georgia* notes, children's right to be heard is being violated by the state:<sup>11</sup>

*"In the current case, none of the three boys was heard in person by either of the judicial instances... In the view of the Court, the combination of flawed representation and as a consequence the failure to duly present and hear the views of the boys, undermined the procedural fairness of the decision-making process in the instant case. This was exacerbated by inadequate and one-sided consideration of the boys' best interests, in which their emotional state of mind was simply ignored".*

## Children's right to legal counsel and representation

According to the international standards on child friendly-justice, the right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them should be respected. Children should have access to free legal aid, under the same or more lenient conditions as adults.<sup>12</sup>

The Georgian Law on Civil Procedure<sup>13</sup> allows any child above the age of 14 to bring a case to court and start civil proceedings. However, before that age, children are only represented by their parents and legal guardians in the court. The National Anti-Discrimination Mechanism (Public Defender of Georgia) considered this legal provision as discriminatory towards children.<sup>14</sup> As the recommendation notes, the law treats children below and above the age of 14 differently and such a difference in treatment cannot be justified.

The legislator aimed to protect the right to access to court for children below the age of 14 through delegating child representation rights to the respective parents. But this approach creates numerous challenges in practice: *de facto* children are left without access to courts once their parents neglect their needs by protecting their rights through judicial mechanisms, and/or the parents themselves are violating the rights of their children. When parents violate their children's rights, the child protection services (the Social Service Agency) are obligated to file a lawsuit against the parents for ignoring/violating children's needs, though in practice this rarely happens. The inef-

<sup>8</sup> Un Child Rights Convention, Article 12 (2)

<sup>9</sup> Georgian Law of Civil Procedure, Articles 81, 1198

<sup>10</sup> Legal capacity - Lawful capacity for an entity in its own name to enter into binding contracts, to sue and to be sued (Black's Law Dictionary, 2<sup>nd</sup> edition)

<sup>11</sup> ECtHR (2016), #71776/12, Par. 84

<sup>12</sup> Committee of Ministers of the Council of Europe, Guidelines of the committee of ministers of the council of Europe on child friendly justice, 2010, P. 17. Available at (last seen 07.04.2018): <https://rm.coe.int/16804b2cf3>

<sup>13</sup> Code of Civil Procedure of Georgia, Article 81

<sup>14</sup> Public Defender of Georgia (2016), Recommendation on the age-based discrimination addressed to the Chairman of Georgian of Georgian Parliament, Mr. Irakli Kobakhidze, to the Georgian Prime-Minister, Mr. Giorgi Kvirikashvili. P. 20. Available at (last seen 07.04.2018): <http://ombudsman.ge/en/recommendations-Proposal/rekomendaciebi/public-defender-of-georgia-considers-that-legislation-regulating-childrens-access-to-court-is-discriminatory.page>

fectiveness of the Social Service Agency, as well as the lack of due diligence, is often to blame for the small number of lawsuits filed - a situation which undermines the existing legislation as well the corresponding practices.

As for children above the age of 14, as mentioned before, the Georgian Law of Civil Procedure enables them to apply to the court. However, the court only appoints a procedural representative for the child once a complaint is officially lodged. Consequently, the child is deprived of the opportunity to use legal aid in the course of the preparation and substantiation of the complaint as well as the right to make a free choice about who represents them before the court.

## Conflict of interests

According to the international standards on child friendly-justice, children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.<sup>15</sup>

One of the most severe violations of child access to justice occurs in cases that involve children who are cared for by the state. Children deprived of parental care are legally represented by the state, namely by the Social Service Agency. In these cases, when a child complains about the misbehaviour of a social worker and reaches out to existing Human Rights organizations or an independent lawyer in search of legal support, the Social Service Agency is exclusively entitled to deny or accept the third party representation for the child. Consequently, the Social Service Agency is eligible to act on behalf of the child who has accused the same agency of violating his/her rights. That is a clear case of a conflict of interest. In the recent case of *M.T.*, when a 13-year-old child reached out to a local NGO for legal aid, the Social Service Agency not only rejected the request, but also prohibited any communication between the child and the NGO's lawyers. Unsurprisingly, the NGO continued to pursue the case, which is currently being heard in the Common Court.<sup>16</sup> This discriminatory practice and legal provision are also being challenged before the Constitutional Court of Georgia.

## Judicial review of involuntary psychiatric placement and treatment

As the Georgian Law on Psychiatric Assistance stipulates, children below the age of 16 do not have the legal right to appeal a court decision on their involuntary psychiatric treatment and hospitalization, nor can they resist the application of electroshock therapy or physical and chemical restraints if the decision is made by their parent and/or the legal guardian.<sup>17</sup> The law implies consideration of the child's view when making a decision, but the corresponding provisions are rather vague. As a result, this regulation deprives children of equal access to justice for the judicial review of the involuntary psychiatric treatment and placement - a situation that recently caused a local human rights NGO to challenge the law's provisions before the Constitutional Court of Georgia.

<sup>15</sup> Committee of Ministers of the Council of Europe, Guidelines of the committee of ministers of the council of Europe on child friendly justice, 2010, P. 27. Available at (last seen 07.04.2018): <https://rm.coe.int/16804b2cf3>

<sup>16</sup> Tbilisi first instance court, Case #3/1897-16

<sup>17</sup> Georgian Law on Psychiatric Assistance, Article 8

## Recommendations

The restriction of the legal standing for NGOs - in combination with the inaccessibility of the courts for children below the age of 14, restricted access to legal counsel for children, and the clear conflict of interest with the Social Service Agency - collectively constitutes a significant violation of child's fundamental right to access justice in Georgia.

In order to effectively deal with the existing discriminatory legislation and practices that deprive children of their legal right to access justice, the following measures should be taken in full compliance with the requirements of the EU-Georgia Association Agreement and the UNCRC:

- The Parliament of Georgia should initiate a legislative package that would review the laws restricting children's access to justice and allow them to receive legal aid, without any age limits;
- The Georgian Government should organize a large-scale awareness-raising campaign on children's access to justice;
- Children's right to be heard should be promoted and realized in all environments - including schools, kindergartens, courts and other administrative bodies - without any barriers;
- Children's right to access the complaints procedure should be regularly monitored and followed up with regular improvements to address potential flaws.





