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**HelpAge International submission on the normative elements of the rights of older persons to autonomy and independence**

10th Working Session of the Open-ended Working Group on Ageing, 2019

**Question 2. What are the key normative elements of the rights to autonomy and independence? Please provide references to existing laws and standards where applicable.**

**1. Normative elements of the right of older persons to autonomy and independence**

1. Older persons have the right to personal autonomy and independence over all aspects of their lives in line with their will and preferences and on an equal basis with others.

1.1 Older persons have the right to enjoy legal capacity, to make decisions, to determine life plans and to lead autonomous and independent lives in line with their will and preferences and on an equal basis with others.

1.2 Older persons have the right to have their decisions respected.

1.3 Older persons have the right to support to enable them to exercise their right to autonomy and independence. This includes the right to designate one or more trusted persons to assist them to make decisions based on their instructions, will and preferences and the right to make legally binding documents to express their will and preferences in advance.

1.4 Older persons have the right to support to enable their independent living and full inclusion in the community.

1.5 Older persons have the right to safeguards to enable them to exercise their right to autonomy and independence.

1.6 Older persons have the right to full, effective and meaningful participation in family, social, cultural, economic, public and political life and educational and training activities.

2. States Parties shall take appropriate and effective measures:

2.1 To ensure older persons have access to services, including support to exercise legal capacity, which enable them to exercise their right to autonomy and independence including support necessary for them to make, communicate and participate in decisions.

2.2 To ensure mechanisms designed to enable the exercise of older persons’ right to autonomy and independence recognise older persons’ right to legal capacity on an equal basis with others in all aspects of life.

2.3 To ensure older persons have access to a range of support services in order to support independent living and inclusion in the community, and to prevent isolation or segregation from the community. Such support should be available on an equal basis in home, community and residential settings to ensure older persons’ enjoyment of their right to choose where and with whom they live.

2.4 To ensure older persons living in shared residential settings are provided with specific and tailored support services to exercise their right to autonomy and independence in order to accommodate any cultural, spiritual, professional and environmental challenges of these facilities.

2.5 To ensure older persons have access to appropriate and effective safeguards to enable them to exercise their right to autonomy and independence, and to respect their will and preferences in accordance with international human rights law, including the right to legal counsel; and which are free of conflict of interest and undue influence and are tailored to the older person’s circumstances.

2.6 To ensure the full, effective and meaningful participation of older persons in family, social, cultural, economic, public and political life and educational and training activities.

**2. Normative elements of the right of older persons to equal recognition before the law**

1. Older persons everywhere and at all times have legal capacity and the right to equal recognition before the law on an equal basis with others.

1.1 Older persons have legal capacity on an equal basis with others in all aspects of life.

1.2 Older persons have the right to support to enable them to exercise their legal capacity. This includes the right to designate one or more trusted persons to assist them to make decisions based on their instructions, will and preferences and the right to make legally binding documents to express their will and preferences in advance.

1.3 Older persons have the right to participate in, and challenge, any decisions that interfere with the exercise of their legal capacity, including decisions that seek to substitute, or offers or requests to support, their decision-making.

1.4 Older persons have the right to safeguards to enable them to exercise their legal capacity.

2. State Parties shall take appropriate and effective measures:

2.1 To ensure older persons have access to the mechanisms and support they may require to exercise their legal capacity in accordance with their will and preferences, and on an equal basis with others.

2.2 To ensure older persons have access to appropriate and effective safeguards to enable them to exercise their legal capacity, and to respect their will and preferences in accordance with international human rights law, including the right to legal counsel; and which are free of conflict of interest and undue influence and are tailored to the older person’s circumstances.

2.3 To ensure effective access to justice and redress for older persons including through provision of procedural accommodations and special measures to prevent unnecessary delay in the legal process.

2.4 To ensure appropriate training in this area for support and trusted persons, support and other service providers, including but not limited to notaries and medical personnel, and those working in the administration of justice, including police and prison staff.

**Annex 1: Normative basis of the right of older persons to autonomy and independence**

**International**

**Universal Declaration of Human Rights, 1948**

Article 6: Everyone has the right to recognition everywhere as a person before the law.

Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks.

**International Covenant on Political and Civil Rights, 1966**

Article 16: Everyone has the right to recognition everywhere as a person before the law.

Article 17: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks upon his honour and reputation.

2. Everyone has the right to protection of the law against such interference or attacks.

**Convention on the Rights of Persons with Disabilities, 2006**

Article 5.1: States Parties recognize that all persons are equal before the law and under the law and are entitled without discrimination to the equal protection and equal benefit of the law.

Article 12:Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 22.1: No person with disabilities, regardless of place of residence or living arrangement, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communications or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to protection of the law against such interference or attacks.

Article 23.1: States Parties shall take effective and appropriate measures to eliminate discrimination against person with disabilities in all matters relating to marriage, family, parenthood and relationships on an equal basis with others…

**Regional**

**Inter-American Convention on Protecting the Human Rights of Older Persons, 2015**

Article 7: Right to independence and autonomy
State Parties to this Convention recognize the right of older persons to make decisions, to determine their life plans, to lead an autonomous and independent life in keeping with their traditions and beliefs on an equal basis, and to be afforded access to mechanisms enabling them to exercise their rights.

States Parties shall adopt programs, policies, or actions to facilitate and promote full enjoyment of those rights by older persons, facilitating their self-fulfilment, the strengthening of all families, their family and social ties, and their affective relationships. In particular, they shall ensure:
a) Respect for the autonomy of older persons in making their decisions, and for their independence in the actions they undertake.
b) That older persons have the opportunity, on an equal basis with others, to choose their place of residence and where and with whom they live, and are not obliged to live in a particular living arrangement.
c) That older persons progressively have access to a range of in-home, residential, and other community-support services, including personal assistance necessary to support living and inclusion in the community and to prevent their isolation or segregation from the community.

Article 11: Right to give free and informed consent on health matters
Older persons have the inalienable right to express their free and informed consent on health matters. Denial of that right constitutes a form of violation of the human rights of older persons.

**Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa, 2016**

Article 5: Right to Make Decisions

1. Ensure that appropriate legislation exists that recognises the rights of Older Persons to make decisions regarding their own well-being without undue interference from any person or entity, and that Older Persons have the right to appoint a party of their choice to carry out their wishes and instructions;
2. Ensure that, in the event of incapacity, Older Persons shall be provided with legal and social assistance in order to make decisions that are in their best interests and wellbeing; and
3. Enact legislation and take other measures that protect the right of Older Persons to express opinions and participate in social and political life.

**The EU Charter of Fundamental Rights, 2000**

Article 25: The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

**Council of Europe recommendation CM/Rec(2014)2**

III.        Autonomy and participation

9.         Older persons have the right to respect for their inherent dignity. They are entitled to lead their lives independently, in a self-determined and autonomous manner. This encompasses, *inter alia*, the taking of independent decisions with regard to all issues which concern them, including those regarding their property, income, finances, place of residence, health, medical treatment or care, as well as funeral arrangements. Any limitations should be proportionate to the specific situation, and provided with appropriate and effective safeguards to prevent abuse and discrimination.

10.       Older persons should have the possibility to interact with others and to fully participate in social, cultural and education and training activities, as well as in public life.

11.       Older persons have the right to dignity and respect for their private and family life, including respect for their sexual intimacy, to the fullest extent.

12.       Older persons enjoy legal capacity on an equal basis with others.

13.       Older persons have the right to receive appropriate support in taking their decisions and exercising their legal capacity when they feel the need for it, including by appointing a trusted third party of their own choice to help with their decisions. This appointed party should support the older person on his or her request and in conformity with his or her will and preferences.

14.       Member States should provide for legislation which allows older persons to regulate their affairs in the event that they are unable to express their instructions at a later stage.

15.       Member States should ensure that all measures that relate to decision making and the exercise of legal capacity of older persons, including possible restrictions which may be required for protection purposes, provide for appropriate and effective safeguards to prevent abuse. The safeguards should be proportionate to the degree to which such measures affect the older person’s rights and interests.

*B. Consent to medical care*

36.       Older persons should receive medical care only upon their free and informed consent, and may freely withdraw consent at any time.

**Annex 2: Normative basis of the right of older persons to equal recognition before the law**

**International**

**Universal Declaration of Human Rights, 1948**

Article 6: Everyone has the right to recognition everywhere as a person before the law.

**International Covenant on Political and Civil Rights, 1966**

Article 16: Everyone has the right to recognition everywhere as a person before the law.

**Convention on the Elimination of All Forms of Discrimination Against Women, 1979**

Article 15: States Parties shall accord to women equality with men before the law.

**Convention on the Rights of Persons with Disabilities, 2006**

Article 5.1: States Parties recognize that all persons are equal before the law and under the law and are entitled without discrimination to the equal protection and equal benefit of the law.

Article 12:Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

**Regional**

**Inter-American Convention on Protecting the Human Rights of Older Persons, 2015**

Article 30: Equal recognition before the law

States Parties reaffirm that older persons have the right to recognition as persons before the law.

States Parties shall recognize that older persons enjoy legal capacity on an equal basis with others in all aspects of life.

States Parties shall take appropriate measures to provide access by older persons to the support they may require in exercising their legal capacity.

States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will, and preferences of older persons, are free of conflict of interest and undue influence, are proportional and tailored to older persons’ circumstances, apply for the shortest time possible, and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect older persons’ rights and interests.

Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of older persons to own or inherit property, to control their own financial affairs, and to have equal access to bank loans, mortgages, and other forms of financial credit, and shall ensure that older persons are not arbitrarily deprived of their property.

**Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa, 2016**

Article 4: Access to Justice and Equal protection before the law

States Parties shall:

1. Develop and review existing legislation to ensure that Older Persons receive equal treatment and protection;
2. Ensure the provision of legal assistance to Older Persons in order to protect their rights; and
3. Ensure that law enforcement organs at all levels are trained to effectively interpret and enforce policies and legislation to protect the rights of Older Persons.

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