



**THE RIGHT OF PERSONS WITH
MENTAL DISORDERS TO LIBERTY,
A FAIR TRIAL AND PRIVATE LIFE IN
THE ARMENIAN LAW AND PRACTICE**

Yerevan 2014

The study was conducted by “Civil Society Institute” NGO in the frames of the project “Prevention of legal violations through awareness and legal initiatives” funded by the Norwegian Helsinki Committee.

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LIST OF ACRONYMS

CC	Constitutional Court
CCP	Code of Civil Procedure
CM	Committee of Ministers
CoE	Council of Europe
CRPD	Convention on the Rights of Persons with Disabilities
CSI	Civil Society Institute
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
PMC	Psychiatric Medical Center
RF	Russian Federation
UN	United Nations
USSR	Union of Soviet Socialist Republics

INTRODUCTION

Psychiatric diagnosis and human rights

On 30 March 2012 at 1:50 p.m. Mr. Yervand Karapetyan was summoned to the police department of Nork-Marash from the courtyard of the Headquarters of the Public Television. He was expressing his protest against the activity of the Public Television by standing alone with a poster in front of the administrative building next to the TV station.

According to the duty police officer at the Police Department of Nork-Marash, an anonymous caller reported to the police that there was a person with “odd behavior” standing in front of the Headquarters of the Public Television. According to the police, Yervand Karapetyan acted strangely by “standing with a poster” and making “irregular movements with his hands”.

At around 3.15 p.m. Yervand Karapetyan was taken from the police department to the Nork psychiatric clinic by an ambulance car. Police filed a motion in writing asking to admit Yervand Karapetyan to the clinic “to undergo treatment”. The commission composed of three doctors concluded that Yervand Karapetyan did not have any symptoms of mental disorder and he was not dangerous to the public.

At around 6 p.m. Yervand Karapetyan was released from the psychiatric institution.¹

There was an attempt to take 73-year old Suren Khachatryan from his flat to a psychiatric institution against his will. This incident was reported to the hotline 116 operated by the Office of the Human Rights Defender. At the Avan psychiatric clinic the staff members of the Rapid Response Team of the Human Rights

¹ See more at www.hra.am [last accessed 11 November 2013].

Defender found out that indeed a few hours earlier the person concerned had been admitted to the psychiatric institution.

They also found out that no records about Mr. Suren Khachatryan had been made in the registry of the psychiatric institution. Moreover, the duty doctor was not able to provide the legal grounds for keeping Mr. Khachatryan at the psychiatric institution as well as any report of the medical commission about his condition.

The staff of the Ombudsman met with Mr. Khachatryan in private. Mr. Khachatryan told them that a police officer accompanied by a district psychiatrist had visited him, asked some questions and concluded that he had mental health problems and presented danger to self and to others. As a result, he was transferred to the Avan psychiatric clinic. He stated that he had been taken to this institution against his will; however, he expressed readiness to visit the clinic voluntarily to undergo all necessary check-ups the following day.

However, as the medical commission which was supposed to give a conclusion about the mental condition of Mr. Khachatryan was to be formed only the following day, he was not allowed to leave the psychiatric clinic and had to stay there overnight.

The next day the representatives of the Ombudsman's Office insisted on being present at the check-ups carried out by the commission. As a result, the commission concluded that S. Khachatryan did not have any mental health problems and was not subject to hospitalization.

The representatives of the Ombudsman's Office accompanied Mr. Khachatryan home and expressed readiness to assist him again if needed.²

In 1973 a famous American psychologist David Rosenhan

² Source www.news.am [last accessed 27 October 2013].

published an article under the title "**On being sane in insane places**"³, where he presented in detail the results of his famous "Rosenhan experiment". The essence of the experiment is the following:

The first part of the experiment involved 8 sane people who had never had any mental health problems in the past. They attempted "to gain admission" to 12 different psychiatric hospitals located in different cities of different states in the United States in order "to undergo treatment" there. All 8 "pseudo patients" who participated in the experiment were admitted to psychiatric institutions where they were diagnosed with schizophrenia and other psychiatric disorders.

After admission they were prescribed to undergo treatment and take antipsychotic drugs. Following that "the pseudo patients" told the staff that they felt fine and would like to be discharged from hospital. All the "patients" were discharged within 7-52 days, having remained in hospital for an average of 19 days, but only after they agreed with their diagnoses.

When the experiment became known, a particularly offended administration of one of the hospitals challenged Rosenhan to repeat the experiment and to send pseudo patients to its facility stating that the staff would then correctly detect them. Rosenhan agreed to conduct the second part of the experiment. This time the staff of the psychiatric institution in question was warned that there were "actors" among the persons who were supposed to be examined for admission purposes. As a result, the staff rejected 83 out of 193 possible patients suspecting them of being "actors" participating in the experiment. In fact, Rosenhan sent no one to the psychiatric hospital that time...

³ For more detail see www.sciencemag.org/content/179/4070/250.abstract [last accessed 31 October 2013].

In his article Rosenhan concluded that the existing methods of diagnosing mental disorders were extremely unreliable and could not distinguish the sane from the insane people. By doing that Rosenhan aimed to illustrate depersonalization and labeling of persons in psychiatric institutions.

This article caused a stir in psychiatric circles. Many people criticized Rosenhan for the methods used but they agreed that the existing methods of diagnosing needed serious improvements.

Being a non-governmental human rights organization dealing with human rights protection and education in Armenia for many years, as well as conducting research in this field, CSI considers it necessary to continuously study the domestic legislation in regard to the rights of persons with mental disorders and its implementation practice. Through media and persons who sought its assistance CSI has already received a number of reports related to serious violations of human rights by psychiatric and other public institutions, or stereotypes in the field of psychiatry common to public officials, psychiatrists and broader public. They are incompatible with the principle enshrined in the Armenian Constitution that human being and human dignity are the highest values, as well as with international obligations of Armenia and international standards.

European and international developments

During the last 10-15 years a number of important European and international developments have been taking place in the field of the rights of people with mental disorders, as well as treatment methods and approaches. Among these developments one should emphasize the adoption of the UN Convention on the Rights of Persons with Disabilities in 2005, a number of Recommendations adopted by the CM of the CoE which establish clearly formulated European standards concerning people with mental disorders, a

number of the ECtHR judgments, in particular related to the former USSR and Eastern European countries.

The most important development in international law in this respect was the adoption of the UN CRPD in 2005. A number of provisions of the CRPD can be considered a turning point in the field of the rights of people who were declared disabled on the ground of having mental impairments. Particularly, Article 12 of the CRPD states that it is the obligation of a state to recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. The states shall also take such appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. By stipulating the right to legal capacity of persons with disabilities, including persons suffering from mental disorders, the abovementioned Article 12 obliges states to ensure that all measures that relate to the exercise of legal capacity provide for safeguards to prevent possible 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 disabled persons, 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.

A legal provision with such content is the first and the only one in international law. It can be considered a revolutionary development in the field of the rights of persons with disability, including persons suffering from mental disorders. It can be expected that this significant development in international law would have its visible impact on domestic law and practice of the

states which ratified the CRPD, including Armenia.

In its judgment in *Stanev v. Bulgaria* case⁴ the ECtHR conducted a comparative study of the domestic law of twenty member States of the CoE. The ECtHR's study demonstrated that in the vast majority of cases the law entitles anyone who had been deprived of legal capacity to apply directly to the courts for discontinuation of the measure.⁵ The ECtHR's study revealed that in around 12 of the studied states the laws had recently been amended while in other states they were in the process of being amended. These legislative reforms were designed to increase the legal protection of persons lacking legal capacity, in particular, by affording them either the right of direct access to court, or other safeguards. On the basis of this study the ECtHR concluded that there was a trend at European level towards granting legally incapable persons direct access to the courts to seek restoration of their capacity.⁶ In spite of the fact that this comparative analysis was not a part of the judgment, it served as a ground for the judgment in *Stanev v. Bulgaria* case as well as for the development of the law in this field. This is a clearly articulated legal milestone and a message by which the ECtHR suggests the CoE states the direction in which they should develop their respective domestic legislation in relation to persons' legal capacity in order it to be compatible with the ECHR provisions.

Some developments took place in domestic legislations of some European states. The constitutional courts of Poland, Latvia, the Russian Federation and a number of other countries ruled unconstitutional the provisions of domestic legislation which allow for the full deprivation of a person's legal capacity. The decisions

⁴ *Stanev v. Bulgaria* (17 January 2012), 36760/06.

⁵ *Ibid.*, paras. 88-95.

⁶ *Ibid.*, para. 243.

were based on the relevant provisions of the respective Constitutions, as well as provisions of the UN CRPD, the ECHR, and the principles laid out in the relevant recommendations of the CM of CoE.

Two judgments of the Constitutional court of Russia of 2009 and 2011⁷ are noteworthy in this regard. They followed the judgment of the ECtHR in *Shtukaturov v. Russia* case where the ECtHR ruled that Russia had violated the applicant's right to liberty and security, the right to a fair trial and the right to private life guaranteed by the ECHR. In the first judgment the applicants, including Mr. Shtukaturov, the applicant in the ECtHR famous case, asked the court to rule unconstitutional and void a number of provisions of the Code of Civil Procedure of Russia and Law on Psychiatric Assistance. CC of Russia found the arguments of the applicants grounded and ruled unconstitutional and void some legal provisions with the following reasoning:

- ✎ To declare Article 284 of the Code of Civil Procedure not to be in conformity with the Constitution of Russia, in particular, with Article 19(1) and (2) (the right to equality before the law and courts as well as prohibition of discrimination), Article 45(2) (the right to protect rights and freedoms by all means not prohibited by law), Article 46(1) (the right to judicial protection), Article 55(3) (proportionality of limitations of human rights and freedoms), Article 60 (the right of a person to exercise his or her rights and duties in full from the age of 18) and Article 123(3) (the principles of equality of arms and adversarial proceedings). This provision stipulates that a person whose legal capacity is being examined by a court is to be summoned to the court hearing unless his/her state of health

⁷ Judgments No. 4-II, 27 February 2009; No. 114-O-II, 19 January 2011.

prohibits him/her from attending it. It was ruled unconstitutional to the extent that, in accordance with interpretation vested on it in legal practice, it allows the court to deprive a person of his/her legal capacity solely on the basis of a forensic psychiatric examination without providing the person concerned with an opportunity to present his/her position to the court in person or through a representative chosen by him/her and in case his/her appearance in person does not present any threat to his/her or others' lives or health;

- To declare a number of interrelated provisions of CCP to be not in conformity with the abovementioned Articles of the Russian Constitution to the extent that in accordance with interpretation vested on them in legal practice formed within the system of applicable legal regulation of cassational and supervisory proceedings, they do not allow a person declared incapable to appeal the judgment in cassational and supervisory proceedings, in cases where the court of first instance failed to provide a person with an opportunity to present his/her position in person or through a representative chosen by him/her provided that the court did not rule that the presence of the person concerned was dangerous to his/her or others' lives or health;
- To declare Article 28 of the Russian Law on Psychiatric Assistance and Safeguards on Persons' Rights During its Provision to be not in conformity with the Russian Constitution, in particular, Article 19(1) and (2) (the right to equality before the law and court as well as prohibition of discrimination), Article 22(1) (the right to liberty and security), Article 46(1) and (2) (the right to judicial protection), Article 55(3) (proportionality of limitations of human rights and freedoms) to the extent that this provision allows to place an incapable person in a psychiatric institution for treatment without a court approval. The provision in question stipulates

that a person declared fully incapable in accordance with the established procedure may be subjected to hospitalization in a psychiatric hospital with the consent or at the request of his/her legal guardian.

Despite the fact that some of the reasoning of the CC of Russia may be controversial from the perspective of the ECtHR case-law (for instance, that a person is present at a court hearing only if his/her appearance in person does not present any threat to his/her life or lives of others or their health), however, overall the abovementioned decision reflects existing international law and serves as an example of an outstanding domestic constitutional development. The analysis of the content of this decision is of particular importance for the Armenian law and practice as the Armenian CCP contains similar provisions to those declared void by the CC of Russia, and which most probably are not in conformity with the respective provisions of the Armenian Constitution as well.

It is noteworthy that in the recently proposed draft of the CCP (the Draft) the shortcomings which are present in the current legislation have not been removed and can serve as a ground for a complaint to the CC of Armenia and the ECtHR. Moreover, the Draft entirely repeats all those controversial norms which are present in the current CCP. Analysis of the relevant parts of the Draft allows us to conclude that when defining legal norms regulating the issues of deprivation of legal capacity and involuntary treatment in a psychiatric institution the authors failed to take into account the most important recent developments in international and European law, the ECtHR case-law as well as constitutional law of other states.

Provisions of Chapter 27 of the Draft regulate the proceedings on declaring a person incapable or partially capable, restoring legal capacity or removing restrictions on legal capacity. According to Article 208(1), suffering from a mental disorder as a result of which

the person concerned cannot understand the meaning of his/her actions or control them is a ground to declare the person concerned incapable. This ambiguous standard literally repeats the same standard used in the current CCP. As it will be argued in detail below, such standard creates legal uncertainty as it is unclear the meaning of what kind of his/her actions a person should not understand or not be able to control as a result of his/her mental disorder so that the court declares him/her incapable. The literal interpretation of this standard leads to a conclusion that a person should not understand the meaning of all his/her actions or not be able to control all of his/her actions in order for the court to declare him/her incapable. This is in practice impossible as in many cases a person suffering from mental disorder understands the meaning of some of his/her actions or controls them.

Article 209 (1) of the Draft entirely repeats the provision of the current CCP according to which the person whose legal capacity is being examined by a court may be summoned to the court hearing unless his/her state of health prohibits him/her from attending it. It should be stressed that both the ECtHR and the CC of Russia criticized such legal regulation and ruled that such provision contradicts the fundamental principle of adversarial proceedings which forms a part of the right to a fair trial.

Justification

Civil legislation of Armenia, both material and procedural, regulates issues related to legal capacity, capability of a person, its restriction and restoration, as well as subjecting a person to involuntary treatment in a psychiatric institution. Issues related to protection of persons with mental disorders and their rights and

duties are regulated by the Armenian Law on Psychiatric Assistance. Application of medical enforcement measures⁸ to persons, including subjecting them to involuntary treatment in psychiatric institutions, is regulated by the Armenian Criminal and Criminal Procedure Codes. The abovementioned domestic legal regulations and their implementation touch upon a number of fundamental rights, such as the right to private life, the right to liberty and security of person, the right to access to justice and the right to a fair trial, which are guaranteed and protected by international human rights law and the Armenian Constitution. Does Armenia fulfill its obligations towards the addressees of these rights to respect, protect and fulfill them, particularly in regard to persons with mental disorders? No answers are available to these questions because research on this issue is lacking in Armenia.

To-date, no research has been published in Armenia addressing legislation and practice related to issues of legal capacity and subjecting people with mental disorders to involuntarily treatment as well as enjoyment of their rights to liberty and security, a fair trial and private life in Armenia. Studies published in the past mostly focus on the material conditions of psychiatric institutions in Armenia, treatment of persons with mental disorders, and some other rights of persons with mental disorders stipulated in international and domestic law.⁹ Therefore, there is a research gap. Consequently, the Armenian public is not aware of practice of Armenia in the area of respect, protection and fulfillment of the rights to liberty and security, to a fair trial and to private life of persons with mental disorders.

⁸ Hereinafter this notion is used to define a situation when a defendant due to mental disorder lacks the capacity to stand trial, and the court commits the defendant to a psychiatric institution.

⁹ See more at www.hcav.am.

Lack of studies published in Armenia on the rights to liberty and security, fair trial and private life of persons with mental disorders is not the only reason for this study. As it was mentioned above, in the recent years the ECtHR has pronounced a number of judgments in regard to the states of Eastern Europe and the former USSR related to the rights to liberty and security, fair trial and private life of persons with mental disorders. It is clear from these judgments as well as other studies that the Armenian legislation in regard to the abovementioned rights of persons with mental disorders is similar and in some cases entirely repeats legal regulations of some Eastern European and the former USSR states, particularly Russia. Implementation of these provisions resulted in a number of the ECtHR judgments where the Court found violations of the rights to private life, fair trial, liberty and security of person. This fact implies that similar legal regulations which are implemented in Armenia, may contradict the requirements of international and European law as well as the Armenian Constitution, thus resulting in regular and systematic violations of the abovementioned rights of persons with mental disorders. Those are in particular:

- The procedure and grounds for depriving a person of legal capacity and its restoration;
- The procedure and grounds for placement of a person in a psychiatric institution and subjecting to involuntary treatment, and discharge from there;
- The procedure and grounds for application and removal of medical enforcement measures to persons committed a crime.

Therefore, the aim of this study is to present for the first time to the attention and judgment of the Armenian and international public, Armenian public authorities, media and NGOs the assessment of the domestic legislation and its implementation practice in regard to

respect, protection and fulfillment of the rights to liberty and security, fair trial and private life of persons with mental disorders in light of international and European standards.

Recommendations presented in the study may serve as a serious impetus and guideline for reforms. This report may be useful for judges, practicing lawyers, the Human Rights Defender and his staff, members of the Armenian Bar, human rights defenders, specialists in the Government and National Assembly of Armenia working on development of legislation or dealing with judicial reforms, as well as psychiatrists and heads of psychiatric institutions. It may also be of interest to specialists working in the field of human rights, researchers, students of law and other specialization.

Methodology

To achieve the abovementioned study objectives we analyzed the domestic legislation of Armenia as well as a number of judgments of national courts related to the issue. We also analyzed domestic legislation and practice of some states, relevant norms of international law and their implementation practice, judgments of international courts and documents establishing European standards. In addition, a sociological survey was carried out to obtain data on implementation practice of international and domestic norms and policy of implementing bodies in Armenia.

For the purposes of the sociological survey interviews were conducted at four out of ten psychiatric institutions operating in Armenia.

1. PMC “Nork” Psychiatric Clinic under the Ministry of Health of Armenia (Yerevan)
2. PMC Nubarashen Psychiatric Clinic (Yerevan)

3. Centre for Mental Health of Gyumri
4. Sevan Psychiatric Hospital under the Ministry of Health of Armenia.

Expert interviews were conducted with 5 judges, 2 lawyers, and 9 staff members of psychiatric institutions. In addition, semi-standartized interviews were conducted with 14 persons kept in psychiatric institutions, 5 of whom were subjected to medical enforcement measures, 5 others were undergoing involuntary treatment whereas 4 persons were treated voluntarily (declared incapable).

Summary of the key conclusions

The study resulted in identification of a number of problems in the legal framework regulating the rights to private life, liberty and security and fair trial of persons with mental disorders and its implementation practice. These problems have systemic and implementation causes. The systemic causes in general come from the fact that the Armenian legal framework regulating deprivation of person's legal capacity, subjecting him/her to involuntary treatment in a psychiatric institution and application of medical enforcement measures is not in conformity with the international requirements and modern developments. Existing stereotypes in the field of justice and psychiatry which at times have a crucial impact on decision making should be listed as systemic causes as well. Implementation causes mostly come from the fact that bodies implementing the law are guided by legislation which is controversial from the perspective of human rights and the Constitution, whereas in such cases they are obligated to directly apply relevant norms of international law and the Constitution.

Both systemic and implementation problems can be explained by the fact that recent international and European legal

developments in the field of fundamental rights of persons with mental disorders are not available in Armenian. Hence, they are mainly not accessible both to those in charge of implementation of the law and those developing laws and policies. Development of literature in Armenian, training and experience exchange programs related to new developments in international and European laws as well as developments in other states related to the rights of persons with mental disorders will contribute to tackling the identified problems.

The right to liberty and security of person

The right to liberty and security of persons with mental disorders is often violated in Armenia. One of the main causes for regular violations of this right is of systemic nature. The Armenian law permits a guardian of an incapable person to subject him/her to placement and in-patient treatment in a psychiatric institution irrespective of the latter's consent or any judicial safeguards. In such a case the only ground for depriving an incapable person of liberty is the will or consent of his/her guardian which is impermissible in light of requirements of the Armenian Constitution and international law. Such procedure may lead to serious abuses. In cases when a person is subjected to involuntary treatment in a psychiatric institution on the basis of a court order it is mostly a question of formal application. In particular, as a rule the courts grant motions of psychiatric institutions to authorize subjecting a person to placement and involuntary treatment in a psychiatric institution. When granting the abovementioned motions, the courts limit themselves to quoting phrases used in forensic psychiatric conclusions submitted to the court by means of reflecting the phrases in the analysis and reasoning parts of the judicial act. The courts often accept arguments presented by a representative of the psychiatric institution concerned which are based on stereotypes;

they label a person and are unprofessional. Such judicial acts often raise concerns from the perspective of lawfulness of grounds for deprivation of liberty of a person.

Another main cause for violation of the right to liberty and security of persons with mental disorders is of procedural, systemic nature. Thus, those persons who were subjected to medical enforcement measures in the framework of criminal proceedings, particularly, involuntary in-patient treatment in a psychiatric institution, are deprived by law of the right to directly apply to a court to seek a review of the lawfulness of their detention. Moreover, Armenian law lacks institute of mandatory judicial review of the lawfulness of detention of persons deprived of liberty on such ground at reasonable intervals. Such legal framework does not comply both with the Armenian Constitution and explicit requirements of international law.

The right to a fair trial

It was established in course of the study that the right to a fair trial of persons with mental disorders is often violated by the Armenian courts, whereas in some cases the cause for violation is a legal provision. Particularly, on the basis of the relevant provision of the Code of Civil Procedure the courts often rule to declare a person incapable without providing him/her with an opportunity to be heard in a court hearing. Often the only ground to deprive a person of full legal capacity for indefinite period by a court is a psychiatric conclusion stating that the person concerned suffers from mental illness and as a result he/she does not understand the meaning of his/her actions or does not control them. As a rule, the court proceedings on declaring a person incapable are not adversarial. It is assumed that in such cases there are no parties who are having a dispute to be resolved in adversarial proceedings. However, according to the international standards, in all cases when civil

rights and obligations of a person are reviewed a person has the right to a fair trial in adversarial proceedings, except for the cases when there are well-grounded reasons not to hold an adversary hearing and such restriction is proportionate. In Armenia persons do not have the right to free of charge legal assistance when being deprived of legal capacity, when declared incapable, and when being deprived of liberty in a psychiatric institution. This fact makes people belonging to this social group even more vulnerable. Lack of free of charge and effective legal assistance has its significant share in the practice of violation of the right to a fair trial and accessibility of justice for persons with mental disorders.

The right to private life

The study demonstrated that the main cause for regular violations of the right to private life of persons with mental disorders are legal provisions and their implementation practice which fail to take into account the requirements of international law. Courts “easily” declare persons with mental disorders incapable by applying “does not understand the nature of his/her actions or is not able to control them” ambiguous legal standard. Moreover, when depriving persons of legal capacity the courts do not apply provisions of international law establishing the right to private life. According to these provisions, any intervention into private life must be established by law, and the law must be reasonably understandable and accessible to a person, should pursue one of the legitimate aims set out in the exhaustive list and be proportionate. No legal justifications and analysis deriving from international law have been identified in the analyzed judicial acts declaring a person incapable.

CHAPTER 1. THE RIGHT TO LIBERTY AND SECURITY OF PERSON

A. Domestic legislation

Guarantees of respect of the right to liberty and security of persons suffering from mental disorders, as well as the grounds and procedures for restriction of this right are laid down in the Armenian Constitution, the ECHR, and the Code of Civil Procedure as well as in a number of provisions of Law on Psychiatric Assistance.

The exhaustive list of grounds for restriction and fundamental safeguards of the right to liberty and security of person is set out in Article 16 of the Armenian Constitution. Article 16 permits intervention into enjoyment of this right “... for the purpose of <...> preventing social danger emanating from persons of unsound mind...” According to this Article, every person deprived of liberty has the right to appeal against the lawfulness of, and grounds for, his or her deprivation of liberty in a higher court instance.

The administration of the psychiatric institution where the person concerned is undergoing treatment is entitled to apply to a court to seek authorization for subjecting the person to involuntary treatment in the psychiatric institution. A well-grounded conclusion justifying the need for keeping the person concerned in the psychiatric institution issued by a commission composed of psychiatrists shall be attached to the motion to a court.¹⁰ Such motion shall be submitted to a court within 72 hours after subjecting the person concerned to placement in the psychiatric institution. This is the longest period envisaged in the Constitution for depriving a person of liberty without a court order. The court may prolong the

¹⁰ Code of Civil Procedure, Article 174.

period of keeping the person concerned at the psychiatric institution for the time necessary to examine the case.¹¹ The court is supposed to examine the case within 5 days after the motion is filed.

The person concerned has the right to participate in the court hearing. If according to the information received from the psychiatric institution, mental condition of the person concerned does not allow for his/her participation in the court hearing, the judge examines the motion at the psychiatric institution. Participation of a representative of the psychiatric institution which instituted the proceedings as well as a representative of the person whose treatment issues are being examined is mandatory during the examination of the motion. In case the representative of the person concerned does not participate in the court hearing where the motion is examined for reasons considered by the court as unjustified, or the person concerned does not have a representative, then the presence of a representative of the guardianship authority having territorial jurisdiction over the person's place of residence is mandatory during the examination of the motion. In case the place of residence is unknown, then a representative from the guardianship authority covering the territory of the psychiatric institution has to participate.¹²

Psychiatric examination of a person may be carried out without his/her or legal representative's consent only in case when the person concerned due to his/her mental condition is not able to express his/her free will and does not have a legal representative.¹³

The procedure for subjecting a person to involuntary placement in a psychiatric institution without his/her or legal representative's consent is established by Law on Psychiatric Assistance.

¹¹ Ibid., Article 175.

¹² Ibid., Article 176.

¹³ Ibid., Article 19(4).

Examination by a psychiatric commission is mandatory in case of subjecting a person to involuntary placement, if the commission comes to one of the following conclusions:

- 1) the person concerned presents danger to him/herself or others,
or
- 2) not carrying out treatment or its termination it may worsen the health condition of the patient in question.¹⁴

If the commission comes to such conclusion, whereas the person concerned refuses to undergo treatment or requests to terminate it, then the head of the psychiatric institution within 72 hours after refusal or receiving request to terminate treatment shall apply to a court and seek authorization for subjecting the person concerned to placement and involuntary treatment in the psychiatric institution in accordance with the procedure prescribed by Chapter 30 of the Armenian Code of Civil Procedure.

B. International standards

According to Article 1 of the CRPD¹⁵, “persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” According to the abovementioned definition, given that persons suffering from mental disorders can be considered persons with disabilities, the CRPD is applicable to them.

¹⁴ Ibid., Article 22.

¹⁵ The Republic of Armenia signed the CRPD on 30 March 2007 and ratified it on 22 September 2010.

Articles 13 and 14 of the Convention ensure the rights of people with disabilities to accessibility of justice and to liberty and security of person. State ensures that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily, as well as any deprivation of liberty is in conformity with the law. The existence of a disability shall in no case justify a deprivation of liberty.¹⁶ In any case when a person with disabilities is deprived of his/her liberty through any process, he/she is, on an equal basis with others, entitled to guarantees in accordance with international human rights law.¹⁷

According to Article 5 §1 of the ECHR, everyone has the right to liberty and security of person. No one shall be deprived of his/her liberty save in the exhaustive list of cases set out in the Article in question and in accordance with a procedure prescribed by law. According to Article 5 §1 (e), one of the exceptional cases when detention can be considered lawful is mental disorder. However, according to the case-law of the ECtHR, a person cannot be deprived of liberty solely on the ground that he/she is “a person with mental disorder”, unless the following three minimum conditions are met:

- 1) A person’s mental disorder has been established before the competent national authority on the basis of objective medical expertise;
- 2) The mental disorder must be of a kind or degree warranting compulsory confinement;
- 3) The validity of continued confinement depends upon the persistence of such a disorder.¹⁸

¹⁶ Ibid., Article 14(1)(b).

¹⁷ Ibid., Article 14(2).

¹⁸ *Winterwerp v. the Netherlands* (24 October 1979) 6301/73, para. 39;

Recommendation Rec(2004)10 of the Committee of Ministers of the CoE¹⁹ establishes 5 standards which shall be met all together in order to subject a person to involuntary placement and involuntary treatment in a psychiatric institution:²⁰

- i. the person has a mental disorder;
- ii. the person's condition represents a significant risk of serious harm to his or her health or to other persons;
- iii. the placement includes a therapeutic purpose;
- iv. no less restrictive means of providing appropriate care are available;
- v. the opinion of the person concerned has been taken into consideration.

Involuntary placement or involuntary treatment of a person should be terminated when over time it becomes clear that one or some of the abovementioned standards are no longer met.²¹ Hence, these standards require that previous evaluations of persons undergoing treatment, diagnosis and formed approaches be continuously reviewed and decisions reflecting the most recent evaluations be made.

Varbanov v. Bulgaria no. 31365/96, para. 45 & 47; *Shtukaturvov v. Russia* (27 March 2008) no. 44009/05, para. 114; *Kallweit v. Germany* (13 January 2011) no. 17792/07, para. 45; *Kronfeldner v. Germany* (19 January 2012) no. 21906/09, para. 70.

¹⁹ It is noteworthy that human rights related Recommendations of CM of CoE have high political and legal weight as they reflect the legally binding positions in the field of human rights expressed by the ECtHR.

²⁰ Recommendation Rec(2004)10 of the Committee of Ministers of CoE, Article 17(1).

²¹ *Ibid.*, Article 24(1).

Exceptionally a person may be subject to involuntary placement, in accordance with the law, for the minimum period necessary in order to determine whether he or she represents a significant risk of serious harm to his or her health or to others if:

- i. his or her behavior is strongly suggestive of such a disorder;
- ii. his or her condition appears to represent such a risk;
- iii. there is no appropriate, less restrictive means of making this determination; and
- iv. the opinion of the person concerned has been taken into consideration.²²

The ECtHR reiterated on numerous occasions that Article 5 §4 of the ECHR entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the lawfulness, in Convention terms, of their deprivation of liberty.²³ The right to this remedy is also applicable in cases when a person with mental disorder is deprived of liberty as a result of placement in a psychiatric institution.

Decisions to subject a person to involuntary placement or involuntary treatment should be documented and state the maximum period beyond which they should be formally reviewed.²⁴ A person subjected to involuntary treatment or placement shall have an opportunity to effectively exercise the right to appeal against a decision on subjecting him/her to involuntary treatment or placement, as well as the right to seek the lawfulness of the measure, or its

²² *Ibid.*, Article 17(2)

²³ *Stanev v. Bulgaria*, para. 168

²⁴ Recommendation Rec(2004)10 of the Committee of Ministers of CoE, Article 20(3)

continuing application, be reviewed by a court at reasonable intervals.²⁵

C. Gathered data and its analysis

Involuntary treatment of a person suffering from mental disorders in a psychiatric institution in Armenia can be carried out in the following cases:

- ↘ On the basis of an application of the person suffering from mental disorders;
- ↘ On the basis of a court order on subjecting a person suffering from mental disorders to involuntary treatment;
- ↘ On the basis of consent of the guardian of an incapable person.

In this section only the last two grounds are being analyzed. It should be noted that Armenian law does not treat as detention cases when an incapable person is subjected to treatment in a psychiatric institution upon the consent of his/her guardian. However, as it will be argued below, such approach does not derive from the Armenian Constitution and requirements of the ECHR. Legal acts in relation to deprivation of liberty of a person who committed a crime and was subjected to medical enforcement measures as well as implementation practice of such legal provisions are analyzed below by means of studying the legislation and judicial acts as well as analyzing data gathered in course of interviews.

²⁵ Ibid., Article 25

I. Lawfulness of detention of a person with mental disorders

Detention of the person at the guardian's will

If a person with mental disorder is declared incapable,²⁶ and his/her guardian places him/her in a psychiatric institution for treatment, then according to the domestic legislation this situation is not considered as involuntary placement of a person, detention, and does not require court proceedings and court decision. It also means that domestic legislation does not consider placement of a person in a psychiatric institution by his/her guardian as deprivation of liberty. It follows from the logic of the legislation that the guardian acts in the best interests of the person and his/her decisions are made in favor of the incapable person, therefore, placement of an incapable person in a psychiatric institution by his/her guardian is not considered intervention into his/her rights and comes exclusively from that person's interests. However, it is the requirement of international law, particularly Article 5 of the ECHR that any instance of deprivation of liberty shall meet all the requirements of the abovementioned provision, first of all, the lawfulness of the detention, it should not be arbitrary and should be accompanied by sufficient safeguards, in particular, judicial safeguards. First it is necessary to establish whether placement of an incapable person by his/her guardian in a psychiatric or other institution for treatment is considered deprivation of liberty of the person concerned in the meaning of Article 5 of the ECHR. Then it is necessary to establish whether such detention meets the requirement of the lawfulness

²⁶ According to Article 24 of Civil Code, legal capacity is capacity of a person by his/her actions to acquire and exercise civil rights, to create for him/herself civil law duties and to fulfill them (civil law dispositive capacity). It arises in full with the attainment of majority, i.e. on the attainment of the age of eighteen.

under Article 5 §1 of the ECHR.

At times there could be situations that placement and treatment of a person in a psychiatric institution is considered voluntary from the perspective of the domestic legislation, however from the perspective of the ECHR restriction of liberty takes place, and any instance of restriction of liberty shall be justified under the provisions of Article 5 of the ECHR. To decide whether restriction of liberty of a person took place in the case in question, the ECtHR developed the following rule:

*The ECtHR emphasized that the notion of “deprivation of liberty” within the meaning of Article 5 §1 comprises the objective and subjective elements. Objective element means a person’s objective confinement in a particular restricted space for a not negligible length of time, whereas subjective element means that a person has not validly consented to the confinement in question.*²⁷

In the following cases the ECtHR established that deprivation of liberty had taken place:

- ↘ the applicant who was deprived of legal capacity and was placed in a psychiatric institution upon the request of his guardian, unsuccessfully tried to leave the hospital;²⁸
- ↘ the applicant had earlier expressed his consent to be placed in a psychiatric institution, however later he tried to escape from there;²⁹

²⁷ *Storck v. Germany*, para. 74.

²⁸ *Shtukaturov v. Russia*, para. 108.

²⁹ *Storck v. Germany*, para. 76.

↳ the applicant who was mature but not capable to give his consent for placement in a psychiatric institution did not try to be released from there.³⁰

Moreover, the ECtHR ruled that when deprivation of liberty is connected to mental disorder of a person, the latter can be considered detained even in cases when he/she is placed at a medical institution of open type, can move freely in different parts of the institution and was allowed to be outside the hospital with no supervision.³¹ The Court pointed out that the right to liberty is too important in a "democratic society" for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention.³²

In *Shtukatorov v. Russia*³³ case one of the issues raised before the ECtHR was to decide whether the applicant had been subjected to involuntary placement in the psychiatric institution. The Government insisted that the applicant had been subjected to placement in the hospital at the request of his official guardian which could not be considered as involuntary placement, and in case of voluntary placement there was no need for a court order, as well as there was no deprivation of liberty.³⁴ The ECtHR did not agree with the respondent. The Court ruled that the applicant had been objectively confined in the hospital and subjectively he had not given his consent, even though he had lacked legal capacity. The Court concluded that the applicant had been deprived of his liberty, hence Article 5 §1 was applicable.³⁵ When drafting relevant changes

³⁰ *H.L. v. the UK*, paras. 89-94.

³¹ *Ashingdane v. the UK*, para. 42.

³² *De Wilde, Ooms and Versyp v. Belgium*, paras. 64-65.

³³ *Shtukatorov v. Russia* (27 March 2008) , no. 44009/05.

³⁴ *Ibid*, para. 98.

³⁵ *Ibid*, paras. 107-110.

to the Armenian legislation and applying them, it is necessary to follow the legal solutions stipulated in this judgment of the ECtHR.

It follows from the abovementioned standards that placement of an incapable person in a psychiatric or other institution by his guardian to undergo treatment or other purposes is considered deprivation of liberty of this person when the person concerned finds him/herself there against his/her will (subjective criterion of deprivation of liberty) and is not able to leave the institution when he/she so wishes (objective criterion of deprivation of liberty). Therefore, we should conclude that placement of an incapable person in any institution by his/her guardian against that person's will in Armenia is considered deprivation of liberty. Moreover, deprivation of liberty in this way is not accompanied by any judicial or other safeguards which could lead to abuses of various kinds. Does such procedure for deprivation of liberty meet the lawfulness requirement envisaged in Article 5 of the ECHR?

Article 5 §1 of the ECHR requires that deprivation of liberty of a person is carried out in accordance with the procedure prescribed by law. This provision first of all requires that deprivation of liberty of a person is carried out in accordance with the procedure prescribed by the domestic law. However, the ECtHR on numerous occasions in its judgments emphasized that the requirement of “the lawfulness” was broader than simply following provisions of the domestic legislation. It requires that the procedure prescribed by the domestic law is fair and appropriate. That means that the decision to deprive a person of his/her liberty shall be made and implemented by appropriate authority and it shall not be arbitrary.³⁶ In other way, deprivation of liberty of a person cannot be considered “lawful” in the meaning of Article 5 §1, if the procedure prescribed by the domestic law does not contain sufficient safeguards against

³⁶ *D.D. v. Lithuania*, para. 155.

arbitrariness.³⁷

In *Shtukatur* case the ECtHR expressed concerns that the only ground to place the applicant in the psychiatric institution (that is to deprive him of liberty) was the request of his guardian. The Responding Government failed to present supporting documents to prove that the mental condition of the applicant during his placement necessitated his confinement. Hence, the court concluded that there was a violation of the right to liberty and security of person envisaged by Article 5 §1 of the ECHR.³⁸

In light of the abovementioned standards we shall conclude that placement of an incapable person in a closed institution by his/her guardian failing to follow due court proceedings is incompatible with the requirements of the right to liberty and security of person, given the fact that the only ground for deprivation of liberty in such a case is the will of the guardian and the law placed the person concerned into total dependence on the guardian and it does not contain any safeguards against arbitrariness and abuses. That means that the procedure currently in place in Armenia according to which the guardian of an incapable person has the right to place the person concerned in a psychiatric institution against the will of the latter, without any judicial safeguards, is not in compliance with the requirements of international law

Deprivation of liberty of a person authorized by a court order

According to the procedure prescribed by Chapter 30 of the CCP, persons are subjected to involuntary treatment in a psychiatric institution if a substantiated conclusion of the commission composed of psychiatrists-doctors about the need to keep them in

³⁷ *Kedzior v. Poland*, para. 63.

³⁸ *Shtukatur* v. *Russia*, para. 115.

the institution is submitted to the court. The conclusion should contain information on whether the person concerned is danger to him/herself or the others, or in case he/she is not subjected to treatment or treatment is terminated, the medical condition of the patient may deteriorate. Only court is entitled to authorize subjecting a person to involuntary treatment in a hospital by granting the motion of the relevant psychiatric institution. It is beyond doubts that deprivation of liberty takes place when a person is being placed in a psychiatric institution against his/her will and is not able to leave it, therefore provisions of Article 5 of the ECHR and legal positions of the ECtHR are applicable in all such cases.

When speaking about Article 5 §1 (e), the ECtHR reminds that except for emergency situations, three conditions shall be met to deprive a person with mental disorders of liberty:

- ↘ that the person has a mental disorder shall be established before the competent national authority on the basis of objective medical conclusion;
- ↘ the mental disorder must be of a kind or degree warranting compulsory confinement;
- ↘ the validity of continued confinement depends upon the persistence of such a disorder.³⁹

The analysis of a number of judicial acts ordering to subject persons to involuntary treatment in a psychiatric hospital demonstrated the following: the judges first of all check whether there is a forensic psychiatric conclusion where the mental illness of

³⁹ *Winterwerp v. the Netherlands* (24 October 1979) 6301/73, para. 39; *Varbanov v. Bulgaria* no. 31365/96, para. 45 & 47; *Shtukurov v. Russia* (27 March 2008) no. 44009/05, para. 114; *Kallweit v. Germany* (13 January 2011) no. 17792/07, para. 45; *Kronfeldner v. Germany* (19 January 2012) no. 21906/09, para. 70.

the person concerned is specified, as well as a conclusion stating that the person presents danger to him/herself or others or needs to continue undergoing treatment. That means that when examining such cases the courts generally comply with the first one out of the abovementioned three requirements. However, in regard to compliance with the other two requirements a number of issues have been identified in the court case-law which need to be addressed.

The only reason was that he refused from treatment, did not admit that he was ill. He was into the religion, and did not allow his children to attend school. For the entire week he had forced the children to knee naked and to pray. He even threw away the children's clothes saying that they were able to survive with one piece of clothes. He deprived his wife of a lot of things as well.

Psychiatrist, Yerevan

Let's say, if a patient does not want to undergo treatment, and we are not able to convince him, though there is a need for treatment, then in such a case we apply to a court, and subject the person to involuntary treatment.

Head of Psychiatric Institution

In 2013 when examining a motion of the psychiatric institution requesting to authorize subjecting H.A. to involuntary treatment in the psychiatric hospital, the court ruled on the basis of the forensic conclusion that the person concerned had to be subjected to involuntary treatment. The court grounded its decision the following way:

“Having analyzed the illness records of H.A. and conclusion of the medical commission, and having heard the representatives of the clinic, the court finds that the motion shall be granted as H.A. due to his mental state is a danger

to himself and others, and needs to be subjected to placement and involuntary treatment against his will in a psychiatric hospital. In the present case in court proceedings the applicant proved the motion to subject the person to involuntary treatment by means of evidence obtained in accordance with the procedure prescribed by the Code of Civil Procedure and other laws. The court ensured thorough, full and objective evaluation of the evidence during the court proceedings, and found the motion of the applicant grounded on the basis of the applicant's requests. The court has concluded that in fact H.A. suffers from "acute polymorphic psychotic disorder with symptoms of schizophrenia" diagnosis."

When rendering the decision the court took into account the following reasoning of the applicant clinic's stated in the motion:

"...the grandmother, mother and aunt suffer from mental illness, and the patient's sister committed suicide. In 2010 H.A. underwent in-patient treatment in PMC "Nork" psychiatric clinic with "acute polymorphic psychotic disorder with symptoms of schizophrenia" diagnosis. Mental state /consciousness is clear, she is difficult in contact, her expression is grim, her mood is down, she answers questions with a delay, after she was repeated the question several times. She does not mention any complaints and does not consider herself ill. She does not admit the fact of behaving in inadequate manner at home /she refused food, was nervous and tense, she did not obey, participated in religious sect and expressed absurd delirious ideas/. She lacks critical thinking about her disorder. She strongly refuses treatment and food in the clinic. She demands to be discharged. The commission finds that H.A. in her mental

state presents danger to herself and others and she needs to be subjected to involuntary treatment against her will in the psychiatric institution.”

As we can see, the clinic specified the kind of illness of the person as well as the fact that the person concerned was a danger to herself and others and needed to be subjected to involuntary treatment against her will in the psychiatric institution, and the court agreed with it. However, this judicial act lacks referring to any evidence proving that the patient is indeed dangerous. There is no mentioning of any evidence in the court decision proving that in the past or at present the patient showed any aggressive or dangerous behavior, committed or is inclined to commit any violent act. Moreover, the clinic’s statement that the person did not obey, had grim face expression, was tense and nervous or that she participated in the religious sect, is not only insufficient to consider a person inadequate, to subject her to involuntary treatment in a psychiatric hospital and deprive of liberty, but it also attests to the existence of stereotypes in psychiatric and judicial systems as well as their practice of being guided by those stereotypes. Participation in so called “sects” is the constitutional freedom of every person in Armenia and shall not constitute a ground for deprivation of liberty or psychiatric diagnosis.

How come they are not dangerous? Even if they are not aggressive, you go to work in the morning, and suddenly your neighbor with unsound mind stops you, and starts talking complete nonsense, isn’t he dangerous?

Head of Psychiatric Institution

Such practice was observed also in other judgments ordering to subject a person to involuntary treatment in a psychiatric institution. The judges are generally satisfied when the conclusion contains

reference to the name of the illness of the person concerned and one mentioning of the fact that the person concerned is dangerous to himself and others. However, as a rule no evidence is presented by the clinic and evaluated in the court to substantiate statements of the clinic about the person being dangerous as the conclusion is considered evidence by itself. The judicial system assumes that if the person concerned suffers from such illness, he/she is supposed to be dangerous, especially if the experts state so. Such practice is incompatible with the European standards established by the ECHR and CM of CoE as well as legal positions expressed by the ECtHR. The judges do not show due diligence when subjecting a person to deprivation of liberty for an indefinite period, which is incompatible with Article 3 of the Armenian Constitution. Article 3 states that the human being, his or her dignity, fundamental rights and freedoms are the highest values. In light of the judicial policy described above, statements of psychiatrists that their motions to a court requesting the authorization of subjecting a person to involuntary psychiatric treatment are almost never dismissed seem logical.

The patient presented danger due to his mental state that means that the nature of his delusion was dangerous to others. That's why we applied to the court and our motion was not dismissed. So far we have never had any dismissals in the court.

Psychiatrist, Yerevan

Article (1)(e) of the ECHR does not permit detention of a person simply because his/her views or behavior deviate from the norms prevailing in a particular society.⁴⁰ For example, the sole fact that the person was in a deranged state of mind after a night-long

⁴⁰ *Winterwerp v. the Netherlands*, para. 37.

study of the Bible does not suggest that the person urgently needed to be detained in a psychiatric facility.⁴¹ That means that in every case not only a true mental disorder of a person shall be substantiated by an objective medical expertise, but also that such mental disorder by its kind or degree shall warrant compulsory confinement, and the validity of reasons warranting such confinement must be reviewed at reasonable intervals.⁴²

Year	2008	2009	2010	2011	2012
Number of persons subjected to involuntary treatment in psychiatric institutions	17	23	37	41	20
Termination of involuntary treatment of persons in psychiatric institutions	0	0	0	0	0

When needed, the head of the department decides.

Head of Psychiatric Institution

We work with them every day, therefore every day the medical staff is always aware about their state, for example, if I do not come one day (if I am on a business trip or sick and do not come), the medical staff is always aware about their condition. Every morning it is reported what had happened in which case. The nurses spend 24 hours with them. They provide with more information, especially from the perspective of physical examination. There are patients who deny everything, and then you learn that at night they

⁴¹ *Rakevich v. Russia*, para. 29.

⁴² *Winterwerp v. the Netherlands*, para. 39, 55.

wake up and start talking to themselves, walk, expect some lights to come after them from the outside.

Psychiatrist, Yerevan

In interviews some psychiatrists stated that at regular intervals of every 6 months they carry out examination of the mental state of patients subjected to involuntary treatment to establish whether the patients can be discharged. Other interviewed psychiatrists did not mention examination every six months.

It is noteworthy that there is no requirement in law to examine changes in the health condition of the patients, review their degree of danger or legal capacity every six months or at other intervals. This is incompatible with the last one out of the three requirements of the ECHR regarding deprivation of liberty of a person with mental disorder. In practice, the person subjected to medical enforcement measures by the court every six months is presented for a review by the commission in order to decide on the necessity to submit his/her case to the court. However, this procedure is also not in compliance with the requirements of the ECHR as the person concerned cannot directly apply to a court as well as the criteria for evaluation by the commission are not clearly established.

Every six month we present the patient to the commission in order the latter to issue a conclusion. This commission decides whether to submit the case to the court or not. If it decides not to submit the case, then it decides to continue treatment for another six month. Mostly they decide not to do it, prolong the treatment. The case file is not even sent to the court, as they are convinced that the court will dismiss the case. However, there is no clear pattern showing in which case the prosecutor would object or the court would refuse, for example, to release a person. It depends on the diagnosis, mental state, and guarantees.

Head of Psychiatric Institution

The psychiatrists answered the question how they evaluate whether the person concerned still presented danger to himself or others in the following way:

There are criteria but I cannot name them now.

Head of Psychiatric Institution

There are criteria but they are not complete and depend on the interpretation by the doctor. Most common, it's the act committed, progress in mental state, consciousness.

Psychiatrist, Yerevan

There is no special method in the psychiatry. 80% of diagnosing depends on what you see and what you hear. Unfortunately, there are only few instrumental methods; there is no equipment like X-ray to have a look at it and understand whether the person is raving or not. It is what we hear and see. Here expertise of the doctor plays a significant role as there are patients who intentionally conceal their state, particularly those who have already had experience dealing with a psychiatric institution. They are perfectly aware what doctors pay attention to. Even before you ask a question, the patient already says that he does not hear any voices or does not have unnecessary ideas, etc. That means that even before asking a question you already have doubts concerning his/her answers. In a way, a doctor starts to deal with the case like an investigator. There are methods allowing you "to read the patient". Then, the most important thing is that if the patient starts to trust you, then he would start telling and would open himself up.

Psychiatrist, Yerevan

Mostly by means of a conversation, in course of a conversation they express their ideas, share, show behavior and all these allow to confirm their state.

Psychiatrist, Yerevan

If we issue a conclusion stating that there is no need to keep the patient in hospital any longer, he recovered or has been in a very long remission, then the court or the commission states that the grounds are insufficient, if he committed it once, he might do it again. What guarantees do we have that he would not commit it again? The court takes into account Article (of the Penal Code) on the basis of which a person would have been convicted if he were sane, and states that at least half of the term envisaged by this Article the person concerned has to spend in hospital. And as we know that in any case the court would dismiss the case, we do not present the case to the court every time.

Head of Psychiatric Institution

II. The right to judicial review of the lawfulness of detention

In case of incapable persons deprived of liberty

According to the UN CRPD, ECHR as well as other European and international instruments, everyone who is deprived of his/her liberty has the right to judicial review of the lawfulness of detention. Effective enjoyment of the right to judicial review is most important for those persons who are deprived of liberty and at the same time are declared incapable. In the framework of this study incapable persons deprived of their liberty at a psychiatric institution should be

considered the most vulnerable group. According to the Armenian legislation, incapable persons who are subjected to involuntary treatment in a psychiatric institution can apply to the court to ask for judicial review of the lawfulness of their detention only through their guardians. This type of remedy for the protection of the rights is incompatible with the requirements of international law. The ECtHR position in this regard is clear.

According to a number of the ECtHR judgments, any regulation of the domestic law will be incompatible with the right to judicial review of the lawfulness of detention envisaged by Article 5 §4 of the ECHR if:

- ↘ According to the national law, the courts are not involved in deciding on the placement of an incapable person in the care home by his guardian.
- ↘ There is no automatic periodic judicial review of the lawfulness of depriving a person of his liberty;
- ↘ A review of the lawfulness of his/her detention cannot be initiated by the person concerned and there is no legal remedy of a judicial nature where the person can apply independently.⁴³

In *Shtukaturvov case* the Respondent Government stated that the applicant could have initiated legal proceedings for judicial review of the lawfulness of his confinement in the psychiatric institution through his guardian. However, the Court disagreed with this statement. In particular, the ECtHR stated that remedy referred to by the Government was not directly accessible to the applicant: the applicant fully depended on his guardian (mother) who had requested his placement in the psychiatric institution.⁴⁴ On the basis

⁴³ *Kedzior v. Poland* (16 October 2012), 45026/07, para. 77.

⁴⁴ *Shtukaturvov v. Russia*, para. 124.

of the abovementioned facts, the Court found that the right to judicial review of the applicant envisaged by Article 5 §4 of the ECHR was violated.⁴⁵ The right of the person to remedy shall not depend on the will of another person, especially when the latter had active role in restricting the rights of the person concerned. Therefore, in Armenia restriction on the right of an incapable person who is placed for involuntary treatment in a psychiatric institution to seek judicial review of the lawfulness of detention is incompatible with Article 5 §4 of the ECHR, as well as requirements of the Armenian Constitution.

In its judgment in the case of *D.D. v. Lithuania*⁴⁶ the ECtHR grouped and reiterated a number of procedural principles formulated in preceding judgments in regard to “persons of unsound mind who are detained at psychiatric institution:

- (a) a person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings “at reasonable intervals” before a court to put in issue the “lawfulness” – within the meaning of the Convention – of his detention;
- (b) Article 5 § 4 requires that the procedure followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place;

⁴⁵ Ibid, para. 125.

⁴⁶ *D.D. v. Lithuania* (14 February 2012) 13469/06.

- (c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves”.⁴⁷

The abovementioned principles are applicable not only in cases where the original detention was initially authorized by a judicial authority, but it is all the more true in cases where the placement of a person was initiated by a private individual, namely upon the request or consent of the person’s guardian, and decided without any involvement on the part of the courts.⁴⁸

Cases of capable persons subjected to involuntary treatment

Persons with mental disorders undergoing treatment in a psychiatric institution have the right to submit applications requesting discharge from the institution, complaints, in person or through a lawyer or legal representative, to the head of the psychiatric institution, to a higher instance, to the court, the Prosecutor’s Office, the Office of the Human Rights Defender, public and municipal bodies, non-governmental organizations and parties, media, as well as international organizations or bodies

⁴⁷ Ibid, para. 163.

⁴⁸ Ibid, para. 164.

engaged in protection of human rights and freedoms.⁴⁹ However, in order to enjoy the abovementioned rights persons undergoing treatment in psychiatric institutions do not have the right to apply to the Office of Public Defender for free of charge legal assistance. Without having access to effective and accessible legal assistance the abovementioned rights become mostly abstract for persons detained at psychiatric institutions. Despite the fact that according to the Armenian Law on Psychiatric Assistance, there should be a lawyer at a psychiatric institution for the purpose of assisting persons who undergo treatment there, however, as a result of interviews it was established that either there were no lawyers working or they were not accessible for people. The respondents stated that persons undergoing treatment had not benefited from lawyer's assistance.

On 30 April 2013 Article 41 (5) of the Law on the Bar of Armenia was amended by para. 13. According to it, the Office of Public Defender under the Armenian Bar provides free of charge legal assistance also to persons with mental disorders undergoing treatment in psychiatric institutions. The amendment to the Law enters into force on 1 January 2014. Adoption of this law is a serious step in ensuring exercise of the rights of persons undergoing involuntary or voluntary treatment in psychiatric institutions, in particular, the right to judicial review of the lawfulness of detention and accessibility of justice. Such persons can apply to a court either directly or starting from 1 January 2014 through a public defender to ask for a review of the lawfulness of detention. The law does not contain any restrictions on frequency of submitting such applications. However, it is clear from the text of the law that only the person who is already undergoing treatment in a psychiatric institution is entitled to benefit from the services of a public

⁴⁹ Law on Psychiatric Assistance, Article 6(3)(18).

defender. Therefore, those persons in whose regard a motion is submitted to the court to declare them incapable or to subject them to placement in a psychiatric institution for involuntary treatment are not entitled to benefit from the free of charge legal assistance. Such legal regulation is not effective. It would be more effective if services of a public defender were accessible to a person from the moment when an application in his/her regard is submitted to the court because at this early stage it might be possible to minimize or prevent human rights violations.

Cases of application of medical enforcement measures

From the ECHR perspective, restriction of the right to liberty of a person will not be considered lawful if it is not based on at least one of the grounds of the exhaustive list stipulated in Article 5 §1 of the ECHR. According to Article 5 §1(a), liberty of a person may be restricted after conviction by a competent court. In the meaning of the ECHR, “conviction” has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence and those cases when the court by finding a person guilty or without that imposes a penalty or other measure involving deprivation of liberty,⁵⁰ for example, placement of a person in a psychiatric institution for involuntary treatment on the ground of being dangerous to himself or others in case of a real risk of causing significant harm. Hence, the person in whose regard the court ordered medical enforcement measures involving deprivation of liberty in the framework of criminal proceedings benefits from all those safeguards envisaged by Article 5 which are provided to persons subjected to involuntary placement and

⁵⁰ *M. v. Germany* (17 December 2009) no. 19359/04, para. 87.

treatment in a psychiatric institution. In particular, the abovementioned persons have the right to judicial review of the lawfulness of their detention at reasonable intervals.

In the framework of criminal proceedings the court can apply medical enforcement measures in relation to the person concerned in the following four cases:

- 1) A person committed a crime when being in the state of insanity;
- 2) A person who after committing the crime starts suffering from a mental disorder which makes imposition or implementation of the punishment impossible;
- 3) A person committed a crime in the state of partial insanity;
- 4) It was declared that a person who committed the crime needs treatment against alcohol or drug addiction.⁵¹

In all four of the listed cases the court orders medical enforcement measures in relation to a person only when the mental disorder he/she suffers from is connected to a possibility of causing significant harm to other persons, as well as he/she is of danger to himself or others.⁵² If the abovementioned persons do not present danger because of their mental state the court can order to send case files to health authorities to decide on the need of subjecting them to treatment or placement in the relevant institution.⁵³

Article 98 (1) of the Criminal Code stipulates the types of medical enforcement measures:

- 1) outpatient supervision by a psychiatrist and involuntary treatment;

⁵¹ Armenian Criminal Code, Article 97(1).

⁵² Ibid., Article 97(2).

⁵³ Ibid., Article 97(4).

- 2) involuntary treatment in psychiatric hospitals of general type;
- 3) involuntary treatment in psychiatric hospitals of special type.

Involuntary treatment in a psychiatric institution is authorized only in cases when the state of the person's mental disorder requires such conditions of treatment, care, maintenance and supervision which can be implemented only at a psychiatric institution. Involuntary treatment in a psychiatric institution of general type can be imposed on a person who due to his/her mental state needs in-patient treatment and supervision. Involuntary treatment in a psychiatric institution of special type can be imposed on a person who due to his/her mental state presents danger to himself or others or requires permanent supervision.⁵⁴ In all the abovementioned cases the right to liberty of a person is restricted; therefore the person concerned has the right to judicial review of the lawfulness of his/her detention.

The court can change the type of medical enforcement measure on the basis of the conclusion of the medical institution. In case the person concerned recovers or his/her illness undergoes such a change in its nature that the need to apply the medical enforcement measures is no longer present, the court orders to terminate the application of these measures.⁵⁵ A motion to terminate the medical enforcement measure or to change it may be submitted by a close relative, legal guardians and other interested parties.⁵⁶ The person in relation to whom the court ordered medical enforcement measure, namely: involuntary treatment in a psychiatric institution, does not

⁵⁴ Ibid., Article 100.

⁵⁵ Ibid., Article 101.

⁵⁶ Code on Criminal Procedure, Article 472(2).

have the right to judicial review of the lawfulness of his/her detention. Armenian law also does not envisage regular review of the lawfulness of detention of such persons. That means that the person in relation to whom the court ordered medical enforcement measure as a result of which the latter was subjected to placement in a psychiatric institution may be kept at the same institution for prolonged periods, even for lifetime, without having access to any effective remedy.

Deprivation of liberty of a person on the ground of having a mental disorder shall not pursue the aim to punish as the ground for deprivation of liberty is not the punishment imposed by the court verdict for committing a crime.

As long as needed, but we do not release them soon, we keep them approximately for as long as the punishment assigned by the court would have been. How can we release a murderer immediately? Even if we decide to release them, the prosecutors come every 2-3 months and supervise.⁵⁷

Deputy Head of Psychiatric Institution

Hence, deprivation of liberty on the ground of mental disorder shall pursue rehabilitation and medical aims. It means that such person shall be kept at a place where his/her rehabilitation and treatment is feasible and efficient. However, confinement may be needed not only in cases when a person needs therapeutic, drug or other type of clinical intervention for the purpose of treatment or relieving his/her condition, but also in cases when the person

⁵⁷ Question: “For how long those persons to whom medical enforcement measures are applied by the court, are being kept at the psychiatric institution”.

concerned requires control and supervision to prevent doing harm to himself or others.⁵⁸ However, even in the latter case subjecting a person to medical enforcement measures cannot pursue punitive aims. However, the study demonstrated that very often the abovementioned persons stay at the psychiatric institution for as long as they would have been spent at a penitentiary institution in case the court had sentenced them to deprivation of liberty. Such approach is not only incompatible with international standards, but also reveals another stereotype common to the field which guides the officials implementing the legal norms.

According to Article 5 §4 of the ECHR, everyone who is deprived of his/her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and his/her release ordered if the detention is not lawful. Therefore, a person with mental disorder compulsorily confined in a psychiatric institution for an indefinite or lengthy period has the right to apply to a court for judicial review of the lawfulness of his/her detention at reasonable intervals, especially when the domestic laws do not establish a procedure for regular automatic judicial review of the lawfulness of confinement.⁵⁹ Detaining a person on the ground of being “dangerous” for indefinite period without judicial review of the lawfulness of detention at regular intervals is not compatible with the requirements of the ECHR.⁶⁰

⁵⁸ *Hutchison Reid v. UK*, para. 52.

⁵⁹ *Stanev v. Bulgaria*, para. 170.

⁶⁰ *M. v. Germany* (17 December 2009) no. 19359/04; *Storck v. Germany* (16 June 2005) no. 61603/00; *O.H. v. Germany* (24 November 2011) no. 4646/08; *Kronfeldner v. Germany* (19 January 2012) no. 21906/09.

D. Conclusions

The results of the study demonstrate that the right to liberty and security of persons with mental disorders is often violated in the following cases:

First, when an incapable person is placed by his/her guardian against the will of the former in a psychiatric institution failing to take judicial proceedings and without any safeguards against arbitrariness and abuses. Despite the fact that according to the domestic legislation placement of an incapable person by his/her guardian in a psychiatric institution is not considered as detention, international law considers it as deprivation of liberty and ensures the lawfulness, judicial control and a number of other safeguards which the Armenian law and practice are lacking.

Secondly, often when subjecting a capable person to placement and involuntary treatment in a psychiatric institution on the basis of a court order and thus depriving him/her of liberty, not all the requirements of international law related to deprivation of liberty are complied with. The scale of danger of the person concerned, the need to deprive him/her of liberty are not duly analyzed and substantiated during the court hearing. As a result, the courts in their decisions validate all the findings of the conclusion of the psychiatric examination. Consequently, persons find themselves in detention for unlimited period often being deprived of the right to apply to a court in the future.

Thirdly, according to the legislation in force during the research, irrespective of the fact how the persons concerned were detained at a psychiatric institution, namely upon at the will of the guardian or court order in the framework of civil or criminal proceedings, they are deprived of the effective remedy. A capable person detained at a psychiatric institution on the basis of a court order theoretically has the right to apply to the court to request to terminate involuntary treatment. However, in reality such practice is lacking for a number of reasons. First of all, these persons do not

have sufficient financial means in order to benefit from lawyer's services. Secondly, in spite of the fact that according to the Armenian Law on Psychiatric Assistance, it is mandatory to have lawyers at psychiatric institutions who are supposed to provide legal counseling to persons undergoing treatment there, often there are no lawyers working or they are not accessible for the detained persons.

CHAPTER 2. THE RIGHT TO A FAIR TRIAL

A. Domestic legislation

According to Article 19 of the Armenian Constitution, everyone is entitled in full equality to a public hearing of his or her case by an independent and impartial court within a reasonable time, satisfying all the demands of justice, for restoring his or her violated rights. When dealing with some rights of persons with mental disorders this fundamental right is exercised in the framework of civil judicial proceedings.

The family members of the person concerned, guardianship authority or administration of the psychiatric institution have the right to initiate a case by submitting a motion to a court requesting to declare the person concerned incapable. In case of declaring a person partially incapable only family members and the guardianship authority have such right.⁶¹ The person who submitted a motion requesting to declare another person incapable has to state all those circumstances which prove mental disorder of the person concerned as a result of which the person is not able to understand the meaning of his/her actions or control them.⁶² In case of any

⁶¹ Code of Civil Procedure, Article 168(1) and (2).

⁶² Ibid., Article 169(1).

reasonable doubts about person's mental disorder the judge assigns forensic examination to assess the person's mental state. In case the person concerned tries to evade it, the judge orders to subject him/her to involuntary examination.⁶³

The court examines the incapacitation request in the presence of a representative from the guardianship office, whereas the person concerned may be summoned to the court to participate in the court hearing, unless his/her health condition does not permit to attend it.⁶⁴ The presence of the person concerned as well as a representative of the guardianship authority in the court hearing is mandatory in case of declaring the person partially incapable.⁶⁵ In the framework of civil judicial proceedings the rights and interests of incapable or partially incapable persons are protected by their parents, guardians or tutors who have to present to the court documents proving their status.⁶⁶

At the request of the guardian, a member of the family or the administration of the psychiatric institution the court restores legal capacity of the recovered person on the basis of the conclusion of the forensic psychiatric examination. In such a case the court terminates the established guardianship.⁶⁷

B. International standards

In its first judgments regarding the rights of persons with mental disorders the ECtHR stated and reiterated in the following judgments that in every case the person concerned should have the

⁶³ Ibid., Article 170.

⁶⁴ Ibid., Article 171(1).

⁶⁵ Ibid., Article 171(2).

⁶⁶ Code of Civil Procedure, Article 44.

⁶⁷ Ibid., Article 173(1).

right to a court and the opportunity to be heard either in person or, where necessary, through some form of representation.⁶⁸ The Court emphasized as a general principle that the right of access to justice and the right to a fair trial are also applicable in the judicial proceedings where the issues of deprivation of legal capacity of the person,⁶⁹ as well as placement and involuntary treatment of the person concerned in a psychiatric institution are examined. The ECtHR emphasized that in case of detention on the ground of mental illness, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.⁷⁰

In its judgment in *Stanev v. Bulgaria* case⁷¹ the ECtHR reiterated that partially incapable persons should in principle enjoy direct access to the courts. The ECtHR stated that the State remained free to determine the procedure by which such direct access was to be realized.⁷² In Court's opinion, restrictions on access to the courts in this sphere, with the sole aim of ensuring that the courts are not overburdened with excessive and manifestly ill-founded applications would not be incompatible with Article 6 of the ECHR *per se*. However, the problem may be solved by other, less restrictive means than automatic denial of direct access, for example by limiting the frequency with which applications may be made or introducing a system for prior examination of their admissibility on the basis of the file.⁷³

A number of procedural rights of incapable persons suffering from mental disorders may also be found in a number of CoE

⁶⁸ *Winterwerp v. the Netherlands*, para. 60; *Stanev v. Bulgaria*, para. 229

⁶⁹ *Ibid.*, para 73; *Stanev v. Bulgaria*, para. 241

⁷⁰ *Stanev v. Bulgaria*, para. 170

⁷¹ *Ibid.*, Article 241

⁷² *Stanev v. Bulgaria*, *Ibid.*, para. 242

⁷³ *Stanev v. Bulgaria*, *ibid.*

documents. Principle 13 of the Recommendation R(99)4 of CM of CoE stipulates that the person concerned should have the right to be heard in person in any proceedings which could affect his/her legal capacity. According to Principle 14(3) of the same document, the abovementioned persons should have adequate rights of appeal against measures applied to them.

C. Gathered information and analysis

Violations of the rights of access to justice and to a fair trial of incapable persons mostly have systemic nature. Despite the fact that the Armenian Constitution recognizes the right of everyone to a fair trial and to effective remedy, the Armenian civil procedure law restricts these rights for incapable persons. By doing so, it raises an issue of compatibility of a number of provisions of the Armenian civil procedure law with the Constitution. Given that such restrictions are prescribed by law and there are no alternatives, the judge simply applies them as no option of applying less restrictive means is available. Moreover, when examining cases on subjecting a person to placement and involuntary treatment or declaring him/her incapable, the courts do not directly apply the provisions of the Constitution and international law related to access to justice and fair trial. In case of direct application of the provisions of the Constitution and international law the courts are entitled to and in some cases are obligated to ensure to the incapable person the right to challenge the court decision declaring him/her incapable in a court of higher instance.

I. The right to a court

The right to a court is one of the elements of the fundamental right to a fair trial. According to Article 6 of the ECHR, in the

determination of his civil rights and obligations, everyone is entitled to a fair trial, including the right to a court. It is noteworthy that the right to a fair trial and, subsequently, the right to a court envisaged by Article 6 of the ECHR are applicable to the judicial proceedings related to declaring a person incapable. The ECtHR expressed such position in 1979 in its judgment in *Winterwerp v. Netherlands* case.⁷⁴ In particular, the ECtHR found that the capacity to deal personally with one's property involves the exercise of private rights and hence declaration of incapacity affects "civil rights and obligations". In case when civil rights and obligations are determined, the right to a fair trial envisaged in Article 6 is applicable. Hence, the ECtHR concluded that the right to a fair trial, including the right to a court, is applicable to persons who are deprived of civil capacity.⁷⁵

Does the Armenian civil procedure law and its implementation practice envisage and in practice guarantee the fairness of the proceedings related to examination of a motion to declare a person incapable, access to justice in the process of and after being declared incapable, as well as exercise of the rights to adversarial proceedings and legal representation?

In the follow-up of the positions expressed in *Shtukaturov and Stanev* cases, on 30 May 2013 the ECtHR ruled in *Natalya Mikhailenko v. Russia* case⁷⁶, and reaffirmed the abovementioned European trend in its judgment. The ECtHR reminded that in 17 out of 20 states the legislation provides incapable persons with the right to apply to a court in person and directly to seek restoration of their legal capacity. According to the circumstances of the case, the guardian of the incapable person applied to a court with a request to

⁷⁴ *Winterwerp v. the Netherlands*.

⁷⁵ *Winterwerp v. the Netherlands*, para. 73.

⁷⁶ *Nataliya Mikhaylenko v. Ukraine* (30 May 2013) no. 49069/11.

restore the legal capacity of the incapable person as the latter had recovered from the illness. However, the motion was dismissed without being considered on the merits owing to the guardian's failure to appear in court. Later, the applicant applied on her own to the court seeking restoration of her legal capacity. However, the court returned the motion to the applicant without considering it on the merits, noting that according to the domestic legislation incapable persons do not have the right to lodge an application seeking restoration of their legal capacity. First of all, the ECtHR noted that according to Article 6 of the ECHR everyone has the "right to a court". However, the Court reminded that the right of access to the courts is not absolute but may be subject to proportional limitations if the legitimate aims for such limitations exist.⁷⁷ The Court acknowledged that restrictions on the procedural rights of a person who had been deprived of legal capacity might be justified for that person's own protection, the protection of the interests of others and the proper administration of justice.⁷⁸ In regard to the permissible limitations the court reminded that the right to ask a court to review a declaration of incapacity was one of the most important rights for the person concerned since such a procedure, once initiated, would be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity.⁷⁹ The ECtHR concluded that it amounted to a denial of justice which was not compatible with the provisions of Article 6 of the ECHR. In its reasoning the Court emphasized that the limitations on the right to access to a court of the applicant could not be justified by the legitimate aims mentioned by the Respondent. The court also specified the following three grounds:

⁷⁷ Ibid., paras. 30-31.

⁷⁸ Ibid., para. 35.

⁷⁹ Ibid., para. 37.

1. The general prohibition on direct access to a court by that category of individuals does not leave any room for exception in Ukraine.
2. At the same time, the domestic law does not provide safeguards to the effect that the matter of restoration of legal capacity is to be reviewed by a court at reasonable intervals.
3. It has not been shown by the facts of the case that the relevant domestic authorities effectively supervised the applicant's situation, including the performance of duties by her guardian, or that they took the requisite steps for the protection of the applicant's interests.⁸⁰

As it was already mentioned, according to the Armenian legislation, incapable persons do not have the right of access to a court in regard to any issue. That means that two out of three grounds mentioned in the judgment in *Natalya Mikhailenko v. Ukraine* case are present. The Armenian legislation does not leave any room for exception for the right of access to a court of incapable persons and the domestic law does not provide a safeguard to the effect that the matter of restoration of legal capacity is to be reviewed by a court at reasonable intervals. Given such legal regulations the judicial practice in Armenia could not be compatible with the requirements of the ECHR, except for cases where the court skips the domestic legislation and applies directly the provisions of the ECHR. Such practice has not been observed as well. Hence, violations of the rights of access to justice and a fair trial of incapable persons are mostly of systemic legislative nature.

When analyzing the domestic legislation regulating the rights to liberty and security of person and its implementation practice *supra*, we found out that those persons in relation to whom medical

⁸⁰ Ibid., paras. 39-40.

enforcement measures were imposed in the framework of criminal proceedings, are by the law deprived of the right to access to a court to request a review of the lawfulness of their detention. Therefore, the right to access to a court is absolutely limited both in case of incapable persons and for all persons detained at psychiatric institutions with no exception as a result of application of medical enforcement measures. Such situation is incompatible with the requirements of Article 6 of the ECHR. The system in place where every six months the commission decides to submit a person's file to the court or not in order to terminate the medical enforcement measure cannot substitute the right of access to a court directly of the person concerned or to automatic judicial review at regular intervals.

II. The right to adversarial proceedings

The right to adversarial proceedings as an integral part of the right to a fair trial is not an absolute right. It can be limited if there is a legitimate aim and limitations are proportionate to the aim pursued.⁸¹ However, according to the relevant provisions of the CCP, as well as to the perception of those applying them, there is no dispute between the parties in cases of declaring a person incapable or subjecting him/her to involuntary treatment in a psychiatric institution to be resolved in adversarial proceedings. Interviewed judges and lawyers emphasized one of the peculiarities of the CCP. According to the CCP, motions to declare a person incapable are examined by court in so called special proceedings, and not in accordance with the regular proceedings. That is why there is no need to ensure adversarial proceedings.

⁸¹ *Shtukaturov v. Russia*, para. 68.

Such proceedings are not adversarial as they are not regular proceedings but are considered special proceedings. As we know, only proceedings when a motion is submitted against someone are considered adversarial, when there is a need to defend, whereas these cases relate to special proceedings. Here the point is to declare someone incapable, to limit the rights.

Judge, Yerevan

Here it is only about the issue of the interested person, a matter of examining relevant medical documentation and the conclusion obtained as a result of the court order. There is no issue of adversarial proceedings, as there is no one to bring counterclaims.

Judge, Gyumri

“It is not adversarial at all as in such a case there is no dispute per se.

Lawyer, Yerevan

According to the circumstances in *Shtukurov v. Russia* case, prior to declaring the applicant incapable the court failed to summon him to the court hearing, did not notify him about the hearing, did not hear his argumentation. However, as a result the applicant was declared incapable. Following that he lost standing to lodge an appeal before a higher instance. The prosecutor and a representative of the psychiatric institution participated in the hearing. In relation to these facts, the ECtHR in its judgment found that the decision of the judge to rule on the case solely on the basis of documentary evidence, without seeing or hearing the applicant, was unreasonable and in breach of the principle of adversarial proceedings enshrined

in Article 6 §1.⁸² The ECtHR concluded that the trial which lasted ten minutes where the applicant was declared incapable was not fair, hence, there was a violation of Article 6 of the ECHR.

For example, if it is acute schizophrenia, then as a rule such patients are incapable. Even this consent that the patients write is in violation of the law. If a person comes and describes clear delusion, hallucination, then how it is possible to take into accounts that person's signature. It seems that it is an insignificant detail; however, if one day someone decides to pay attention to it, then it might provoke a huge scandal. They might say how come you took into account what this person had written. We can speak about lack of consent in the same vein. In case of lack of consent it is even better as it is regulated by court, whereas in case of consent one day a 'lost relative' would show up and say: "Why would you do this or that at his will, on the basis of his signature, don't you know that..." Can you imagine what could happen? It is a paradox. That is why to a certain degree we have to change the nature of this correspondence. If you write that a patient lacks critical thinking about his illness, in such a case whatever he writes is of no use.

Head of Department at Psychiatric Institution

Thus, the information gathered in course of the study as well as analysis of the provisions of the CCP allow us to conclude that the proceedings of declaring a person incapable are not carried out in accordance with the requirements of the international law principle of adversarial proceedings. Moreover, those who apply these norms

⁸² *Shtukaturvov v. Russia*, para. 73.

believe that there is no need to compete, to defend, as there is no dispute *per se*. Such approach is not in conformity with the requirements of international law. In particular, in *Shtukatur* case the ECtHR found that there was a violation of the right to a fair trial on the ground that the proceedings were not of adversarial nature. That means that according to the requirement of international law, it is not permissible to make exception to the right to adversarial proceedings only on the ground that the issue of declaring a person incapable or subjecting him/her to involuntary treatment in a psychiatric institution is examined and there is no dispute according to the domestic law. Moreover, the analysis of the case-law of the domestic courts and the ECtHR showed that there were numerous instances when the person in relation to whom the court examined the matter of declaring him/her incapable or subjecting him to involuntary treatment disagreed with the request to declare him/her incapable or subject to involuntary treatment respectively. In such a case it is evident that there is a dispute between the person who submitted a motion and the one whose legal capacity is challenged or who is supposed to be subjected to involuntary treatment in a psychiatric institution. There is also a need for effective protection of the rights of the abovementioned persons which implies proper legal representation and adversarial proceedings, as well as judicial dispute over evidence and applicability of a legal norm to the facts.

In addition to the abovementioned justifications, in *Shtukatur* case the ECtHR substantiated its finding that there was a violation of the right to a fair trial also by the fact that the person concerned had not been notified and had not been heard in the court, the domestic court made a decision on limiting his rights for unlimited period in course of a hearing which lasted for ten minutes, on the basis of solely one document, namely the conclusion of the psychiatric examination which had been made several months before the trial. The ECtHR emphasized that the domestic court in such circumstances was supposed to have a visual contact with the

person concerned, as well as to question him and made its own opinion about the existence or absence of the need to deprive him of capacity.

III. Legal assistance and participation in the hearing

Participation of the applicant and a representative of the guardianship authority is mandatory in the hearing on declaring a person incapable. Participation of witnesses or the person whose legal capacity is being challenged is not mandatory. Moreover, in the opinion of the judges, there is no need for the presence of a person whose legal capacity is being challenged in the court.

If a patient is a child or if he does not understand all this, then there is no point to notify that person. A person may be summoned to a hearing if his health condition permits but in general he is not present at the hearing. This is not considered a violation of the law.

Lawyer, Yerevan

For example, if I present the documentation about the illness of the person, and if the court has any doubts, then the court is obligated to summon the person concerned. Such doubts may arise out of medical documentation which could have been falsified. It is also possible that the doubts of the judge may lead to commissioning additional expertise.

Lawyer, Yerevan

The court sends a written summons to the applicant and the guardianship authority where the date and time of the hearing are clearly indicated. However, very often no summons is sent to the

person in relation to whom the matter of legal capacity is examined in the court hearing as it is assumed that there is no need to do so.

Non-participation of this person is conditioned by the fact that he does not understand his actions and their meaning as a result of his mental illness. In a way his participation makes no sense.

Judge, Gegharkunik marz, Sevan

As it was mentioned above, free of charge legal assistance provided by the Office of Public Defender will be accessible to persons undergoing treatment in psychiatric institutions as of 1 January 2014. However, unless the domestic legislation regarding legal capacity is not reviewed, incapable persons are not able to benefit from this service as the law prohibits them from applying to the court directly or through a representative, except for their guardian.

It was already mentioned that a comparative study of the domestic law of twenty Council of Europe member States conducted by the ECtHR indicates that in the vast majority of cases the law entitles anyone who has been deprived of legal capacity to apply directly to the courts for discontinuation of the measure.⁸³ The Court concluded that there is now a trend at European level towards granting legally incapable persons direct access to the courts to seek restoration of their capacity.⁸⁴ Despite the fact that this comparative analysis was not a part of the judgment, it served as a basis for the judgment in favour of the applicant in *Stanev v. Bulgaria* case. This is a clearly articulated legal milestone and a message by which the ECtHR suggests the CoE states the direction they should develop

⁸³ *Stanev v. Bulgaria*, *ibid.*, para. 88.

⁸⁴ *Ibid.*, para. 243.

their respective domestic legislation in relation to persons' legal capacity in order it to be compatible with the ECHR provisions. Unfortunately, as it was presented in more detail *supra*, in the draft law on changes to the current Code on Civil Procedure of Armenia available at the website of the Ministry of Justice these developments have not been taken into account.

D. Conclusions

In cases of declaration of incapacity of persons with mental disorders as well as subjecting them to in-patient involuntary treatment the right to a fair trial, in particular, the rights of access to justice and to adversarial proceedings, are often violated. There is a perception in the justice system that examination of the matter of declaring a person incapable as well as subjecting him/her to involuntary treatment shall not be adversarial as there are no conflicting parties, there is no dispute, therefore there is no need to reveal the truth under adversarial conditions. Such perception and the relevant practice are formed because the abovementioned proceedings are considered special proceedings. Such perception and practice is not in compliance with the requirements of international law, particularly, the principles laid out in the ECtHR case-law. The latter reiterated on numerous occasions that in cases where the civil rights and obligations of a person were determined, it was necessary to ensure a fair trial by adhering to the principles of the equality of arms and adversarial proceedings. This principle may be limited on exceptional basis, when the intervention pursues legitimate aims and is proportionate. It is not acceptable to justify the general prohibition on adversarial proceedings in the abovementioned cases by the fact that the domestic law envisages it that way. The legislation shall be brought in compliance with the mandatory requirements of international law. Unfortunately, the

draft law on the amended Code of Civil Procedure contains all those provisions which impede exercise of the right to a fair trial under conditions of adversarial proceedings and equality.

Incapable persons or persons who are subjected to involuntary treatment in a psychiatric institution as a result of application of medical enforcement measures are deprived of the right to a court. The right to a court is not an absolute right in international law and it may be restricted when there are legitimate aims and restrictions is proportionate. However, in case of the Armenian legislation, restriction is of permanent nature and relates to all abovementioned persons. The trend of providing incapable persons with the right to directly (in person or through a representative) apply to the court is clear both in the case-law of the ECtHR and the UN CRPD as well as domestic legislation of numerous states.

Taking into account the high level of vulnerability of incapable persons who are detained at a psychiatric institution for unlimited period and possibility of abuses towards them, the right of access to justice – the right to a court – plays more important role for them. According to the Armenian Law on the Bar, persons detained at psychiatric institutions did not have the right for free of charge legal assistance. That was a serious obstacle for the abovementioned persons to apply to the court seeking restoration of their violated rights, asking for discharge from the institution and other purposes. As many of the persons undergoing treatment at psychiatric institutions do not have sufficient financial means to benefit from the services of lawyers, it is safe to conclude that the justice system and the judiciary has not been accessible for such persons for years and it remains to be so.

CHAPTER 3. THE RIGHT TO PRIVATE LIFE

The fact of declaration of person's incapacity affects all areas of his/her life. He no longer has the right to make decisions on his/her own on a number of issues of importance. A person is legally deprived of the opportunity to exercise a number of important rights, such as to vote and be elected, to make a family and get married, to access justice, to conclude agreements, to administer and manage his/her private property and other rights. A person in Armenia is declared incapable for indefinite period of time and a number of important decisions for his/her life are made by his/her guardian. That is why declaration of incapacity constitutes a serious intervention into the right to private life. It should be examined in depth by the judge and be justified in light of the all international and domestic legal standards. In every case when a person is declared incapable, the judges in Armenia are obligated to follow the provisions of Article 8 of the ECHR.

A. Domestic legislation

The Armenian Constitution recognizes the right to respect for everyone's private life. Legal capacity is the capacity of a person to obtain rights by his/her actions and exercise them, to create obligations for him/herself and fulfill them.⁸⁵ In Armenia a person is considered having full legal capacity when he/she turns 18 years old, that is from the moment of attaining the age of majority. The Armenian Civil Code envisages instances when a person may acquire legal capacity before attaining the age of majority.⁸⁶ In cases envisaged by the Civil Code a person may be declared incapable or

⁸⁵ Civil Code, Article 24(1).

⁸⁶ Ibid, Article 24(2) and (3).

having partial legal capacity in accordance with the procedure prescribed by the Code of Civil Procedure of Armenia.

A person may be declared incapable if he/she is not able to understand the meaning of his/her actions or control them as a result of mental disorder.⁸⁷ His/her guardian arranges deals on behalf of the person concerned.⁸⁸ In case the grounds for declaring a person incapable cease to exist, the person's legal capacity is restored by the court order as well as the guardianship established over him/her shall be terminated.⁸⁹

B. International standards

Article 12 of the UN CRPD reiterates that persons with disabilities have the right to recognition everywhere as persons before the law, as well as enjoy legal capacity on an equal basis with others in all aspects of life.⁹⁰ In order to prevent abuses when implementing protection measures⁹¹ relating to legal capacity of a person with disabilities the UN CRPD obligates the member States to develop appropriate and effective safeguards 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;

⁸⁷ Ibid, Article 31(1).

⁸⁸ Ibid, Article 31(2).

⁸⁹ Ibid, Article 31(3).

⁹⁰ Ibid, Article 12(1) and (2).

⁹¹ In the Armenian law such measure is guardianship. By means of a guardian a person who is declared incapable arranges deals which he/she would have concluded personally if he/she were fully capable.

- 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.⁹²

According to the UN CRPD, 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. States Parties shall also ensure that persons with disabilities are not arbitrarily deprived of their property.⁹³ There is a body of international case-law in relation to the right to private life of persons with mental disorders and the content of the obligations of the states related to this right, as well as documents establishing European standards.

Recommendations Rec(99)4, Rec(2009)3 and Rec(2004)10 of the CM of CoE lay out a number of important principles, which are aimed at ensuring effective protection of the rights and dignity of persons with mental disorders, provision of necessary assistance to them and creation of necessary safeguards against abuses, etc. The abovementioned principles are the following:

- Respect for human rights of incapable persons;
- Flexibility of legal response offered to an incapable person;
- Maximum preservation of capacity of a person;
- Necessity, proportionality and publicity of measures of protection;
- Procedural fairness of the procedures limiting capacity, the

⁹² Article 12(4), UN CRPD.

⁹³ Ibid.

right of the person concerned to participate in them and to be heard;

↳ Liability of representatives, etc.

Overall, these three documents contain numerous solutions related to legal capacity, procedure of declaring a person incapable and the rights of incapable persons, assistance to them, subjecting to involuntary treatment in hospital and other relevant issues. These principles contain solutions which can serve as a solid ground for the development of domestic law as well as implementation practice.

C. Gathered information and analysis

The analysis of the domestic judicial acts, legislation and results of interviews showed that the Armenian courts do not substantiate every case of declaration of incapacity of a person in accordance with the provisions of Article 8 of the ECHR which they are obligated to do on the basis of the abovementioned provision. Such gap has two main reasons. First, civil procedure legislation of Armenia as well as legislation of a number of the former USSR states, in particular Russia, does not permit the court to employ flexibility when deciding on capacity of a person, to choose and to adjust to the person's individual condition protection measures applied towards the person's right. In the proceedings on declaring a person incapable the judge either declares a person fully incapable or dismisses the motion. The ECtHR found that such legislation and practice deriving from it amounted to a violation of the right to private life. Secondly, courts do not apply directly provisions of the ECHR and the UN CRPD in cases on declaring persons incapable. They prefer to apply the relevant provision of domestic law even in case where it is clearly not in compliance with the international norm.

I. *Legal ground for declaring a person incapable and the actual reasons*

In Armenia proceedings on declaring a person incapable are generally initiated by members of the person's family, or at times by a psychiatric institution. In order to understand the motivation of these persons a group of researchers conducted interviews, compiled relevant court decisions and found out the following:

All the reasons are connected to activities related to selling the real estate

Lawyer, Yerevan

A problem arises mostly in case when the relatives have a problem of sharing some property or if they feel a threat

Judge, Yerevan

In case a person has partial restriction, that is if he is able to do shopping, then no restrictions are envisaged in such a case. However, at times in relation to more global issues, let's say, related to deals, selling real estate, at times the court ... in order to ensure supervision so that others do not take advantage of the person's condition, do not exploit

Judge, Gyumri

They apply to the court in order to declare a person incapable for a number of reasons. There are instances when a relative of a disobedient patient applies. They (persons with mental disorder) may take some stuff from home and give it to anyone. Very often it happens in flat related issues as patients do not understand. We had a lot of cases when they applied to the court to recognize a deal

concluded at the notary to be void. I had a case when a 25 year old man got married with an 80 year old woman for the sake of having a three-room apartment. Her daughter applied to the court in order us to recognize it void. We declared the old lady incapable, and then the deal was recognized void. Or persons of unsound mind sell their apartments, then it is necessary to recognize it void; they take care. There were a lot of refugees who would register marriage with persons of unsound mind, and then the house was gone. Status of incapacity is necessary so that they (the guardians) have the right to solve social issues. A simple thing, to bring to hospital, placement in hospital; plan of treatment, as if a patient does not sign it we cannot treat him/her. And if the relative agrees, we do not take into account the patient's opinion.

Psychiatrist, Yerevan

Takinbg into account the respondents answers and demonstrated practice it is safe to conclude that persons are often declared incapable not only because of diagnosed mental disorder, dangerous consequences deriving from it and for the purpose of protection of their rights and interests, but also for the purpose of solution of various social issues, including real estate, social security and other property and social problems. The respondents mentioned the practice according to which members of the family of the person concerned apply to the court in order to be entitled to perform relevant actions in regard to the property of the incapable person concerned in the future when they become his/her official guardian so that the property is not left out of the civil law turnover. From that perspective it is noteworthy that the UN CRPD explicitly emphasizes the protection of the rights of the person with disability, including on the ground of mental disorder, to administer his/her property and funds, as well as to equally benefit from bank loans

and mortgages. Probably, this emphasis is based on the previous negative experience, according to which decisions on declaring incapacity were incompatible with the spirit of human rights.⁹⁴

In *Shtukaturov case* examined by the ECtHR, the applicant complained that by depriving him of legal capacity the authorities had violated his right to private life envisaged by Article 8 of the ECHR. The right to private life may be restricted only in accordance with the law and where it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. It follows from this provision that in every case of declaring a person incapable the court has to establish that:

- Intervention is in accordance with the law,
- Law is accessible and predictable,
- It pursues at least one of the legitimate aims mentioned above, and
- Is proportionate to the aim pursued.

Failure to substantiate a judicial act fully depriving a person of legal capacity in light of the abovementioned ECHR requirements may mean that it is by itself incompatible with the requirements of Article 8 of the ECHR. References to the illness of the person concerned or to technical or medical terms borrowed from the conclusion of the forensic psychiatric commission are not sufficient justification for declaring a person incapable. Moreover, according

⁹⁴ Thomas Hammerberg, ‘Persons of unsound mind shall receive assistance but not be deprived of their fundamental rights’ (www.coe.int/t/commissioner/Viewpoints/090921_en.asp, last accessed 16 September 2013).

to the developments of the ECtHR case-law and international law, even existence of a serious illness itself cannot constitute a ground to declare a person fully incapable.

In its judgment in *Shtukaturov case* the ECtHR first emphasized that full incapacitation was applied for an indefinite period and the applicant became fully dependent on his official guardian and that constituted a very serious interference with the applicant's private life in almost all areas of his life.⁹⁵ The ECtHR did not cast doubts on the conclusion of doctors about the mental health condition of the applicant. However, the conclusion was not clear in the court's opinion. **In particular, the Court stressed that the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation.**⁹⁶ In order to justify full incapacitation of a person the mental disorder must be "of a kind or degree" warranting such a measure, however, the questions to the doctors, as formulated by the judge, did not concern "the kind and degree" of the applicant's mental illness, therefore the conclusion did not analyze the degree of the applicant's incapacity in sufficient detail.⁹⁷ In the ECtHR opinion, the abovementioned problem has legislative nature in Russia, as the existing legislative framework did not leave the judge any other choice but to ask the experts the questions envisaged by the law (whether the person in question is able to understand the meaning of his actions or control them). The Russian law as well as the Armenian one does not allow to develop individual measures towards a person with mental disorder: a person either has full capacity or is fully incapable (except for cases of drug or alcohol addiction which does not have anything to do with mental illness). In relation to the abovementioned circumstances the ECtHR

⁹⁵ *Shtukaturov v. Russia*, para. 90.

⁹⁶ *Ibid.*, para. 94.

⁹⁷ *Ibid.*

decided that declaration of full incapacity of Mr. Shtukaturov constituted disproportional intervention into his right to private life which resulted in violation of Article 8 of the ECHR.

II. Lawfulness of intervention into the private life of a person

The legal ground to declare a person incapable is his mental illness as a result of which the person does not understand the nature of his/her actions or is not able to control them. The legal standard for restriction of the right to private life of a person as well as a number of other fundamental rights for indefinite period of time creates uncertainty and has been criticized in the judgments of the ECtHR on numerous occasions. In particular, in *Shtukaturov* case the applicant complained of the fact that the standard established in the domestic law in relation to declaration of incapacity did not comply with the principle of legal certainty and could lead to various abuses. The ECtHR replied that the Russian legislation in relation to declaring a person incapable did not comply with the principles formulated by Recommendation Rec(99)4E of the CM of CoE,⁹⁸ in particular, pluralism, flexibility and individualization of the protection measures applied to persons with mental disorder.

Taking into account the principle of legal certainty which has solid grounds in the ECtHR case-law it is safe to state that the standard for declaring a person incapable stipulated in the Armenian Code of Civil Procedure, namely ‘**does not understand the nature of his/her actions or does not control them**’ causes legal uncertainty which could lead to abuses. First, such wording does not clarify the nature of what kind of actions a person should not understand or not be able to control so that the court declares

⁹⁸ *Shtukaturov v. Russia*, para. 95.

him/her incapable. Should these actions be only of complex nature or this standard is applicable to all actions of a person, both complex and simple? For example, if a person does understand the nature of some of his/her actions or is able to control some of his/her actions, then the question is whether the courts in Armenia are entitled to declare this person incapable in such a case taking into account that the standard ‘does not understand the nature of his actions or is not able to control them’ does not envisage any exception. That means that the court in every case has to make sure that the person concerned does not understand the nature of **all** his/her actions or is not able to control **any** of his/her actions, which is impossible to prove in practice. If the court declares incapable a person who is able to understand at least some of his/her actions or control them, then such judgment would be considered unlawful and would amount to intervention in the fundamental right of the person concerned. Whereas the analysis of the judgments of the Armenian courts declaring persons incapable shows that the court just made references to medical terminology used in the conclusion of the forensic psychiatric examination or at times mentioned few actions the nature of which the person did not understand. Indeed, in all analyzed judgments the court explicitly stated that the person did not understand any of his/her actions and was not able to control them. Such approach, in addition to violations of the principle of legal certainty, leads to disproportional and unlawful intervention into the private life of a person and shall be considered a serious violation of Article 8 of the ECHR.

III. Proportionality and flexibility of the protection measures

The European and international developments are moving in the direction of providing relevant assistance instead of declaring full incapacity which would be adjusted to the individual

circumstances of the person concerned, degree of his/her disorder and needs. Such approach implies that the law should envisage a broad framework of protection measures which would have sufficient flexibility. One of such measures applied in many European countries is declaring a person partially capable. However, there are many other measures which are less restrictive than declaration of person's full incapacity. The requirements to define sufficient range of measures and their flexibility are formulated in a number of international and European documents. Those in charge of developing new policy and legislation shall study the abovementioned requirements of international law, practice of developed countries and introduce a new system of protection measures for persons with mental disorder which derives from the requirements of the ECHR and UN CRPD.

Principle 6 of the Recommendation Rec(99)4 of the CM of CoE lays out one of the most important principles stipulated in public law of European states as well as the ECtHR case-law, namely the principle of proportionality. According to this principle, in those cases where a measure of protection is necessary [to be applied to a person with mental disorder] it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to a lesser extent sufficient for achieving the purpose of intervention.

It is clear from a number of requirements of this principle that domestic legislation related to application of measures of protection and other intervention measures to persons with mental disorders shall be more flexible and contain more than two measures. As a result, the implementing authority would decide which measure intervenes to a lesser extent in the rights of the person concerned under the current circumstances and which one is most suited to his/her individual circumstances and needs. Having outdated legal

framework in Armenia where there is only one measure available, namely to declare a person fully incapable, this fundamental principle as well as fundamental rights of the person concerned are regularly violated.

“I believe that declaration of partial capacity both from legal perspective and even more so from the medical perspective would be rather difficult to examine and determine. I do not know. For example, in such a case how would a doctor decide that this person shall be prohibited from administering property but another thing is permitted? How should they decide which part of the brain is “responsible” for this or that phenomenon, for action? I believe that it is undoable in practice”.

Judge, Yerevan

According to Principle 2 of the Recommendation Rec(99)4, the measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations.

The same principle defines that the range of measures of protection for persons with mental disorder should include also those which do not restrict the legal capacity of the person concerned.

According to Principle 3 of the same document,

- ↘ The legislative framework should recognize that different degrees of incapacity may exist;
- ↘ Incapacity may vary from time to time.

Therefore application of measures of protection shall not

automatically lead to declaration of full incapacity of the person concerned. These two European principles adopted yet in 1999 so far have been reflected neither in the Armenian legislation and practice, nor in the Draft Code of Civil Procedure.

The Armenian law does not provide a possibility to declare persons partially capable on the ground of their mental disorder as well as no measures of protection and other means of intervention into their rights other than declaration of full incapacity are available. It means that according to the logic of the Armenian lawmaker, a person either has capacity or does not, hence there could not be different degrees of capacity. Therefore, those implementing this law are not entitled by the domestic legislation to show flexibility and to apply such measures of protection which are most suited to the condition of the person with mental disorder. It appears that judges who are supposed to decide on the matter of capacity of a person with mental disorder have either to violate the latter's right to private life by applying disproportional intervention or to refuse to apply any measure and dismiss the application justifying it by the requirements of the fundamental right.

It is evident that lack of flexibility and sufficiency of measures envisaged for the protection of the rights of persons with mental disorders is not in line with the latest trends in international law and legislation of other states. Where only one measure of protection for the rights of persons with mental disorders is envisaged by the law, namely declaration of full incapacity and appointment of a guardian, then it is not only incompatible with the requirements of international law and latest developments in this field but they are not efficient from the perspective of protection and enjoyment of the rights and property interests of persons with mental disorder or other persons.

IV. Restoration of legal capacity: grounds and practice

The Civil Code of the Republic of Armenia stipulates that the court may issue a ruling on declaring a recovered person legally capable. However, a motion of the guardian as well as relevant conclusion of the forensic psychiatric examination must be presented as grounds of such declaration. Consequently, by virtue of a court order the imposed guardianship over the person concerned is removed.

Year	2008	2009	2010	2011	2012⁹⁹
Number of persons declared legally incapable	154	174	192	213	42
Number of persons declared legally capable	1	0	0	0	0

According to the abovementioned data, from 2008 till 25 May 2012 775 persons were declared incapable by court in Armenia. And restriction on legal capacity of only one person was terminated during the same period of time. Such situation may be conditioned by the following:

- 1) Mental disorders of all 774 persons could not be cured in Armenia to a degree when these persons are capable to understand the nature of their actions or control them.
- 2) In all 774 cases the persons and institutions eligible to submit a motion to a court requesting to remove restrictions

⁹⁹ Statistics was kindly provided by the Judicial Department (Letter № ՌԴ-2 Ե2554) and reflects the situation in the period of 2008-May 2012.

on one's legal capacity either did not present such motion or presented it but it was dismissed. No compulsory review of the degree of mental capacity at regular intervals is conducted in Armenia.

- 3) In the given period 744 persons declared incapable indeed received effective medical treatment and support; however they were not cured to the extent that their legal capacity may be restored.

Such statistics may be disappointing, but it reflects both the existing laws, the practice of their application and the attitude of those who introduce such practice towards the right to private life and other fundamental rights of persons with mental disorders. Thus, persons interviewed by CSI were not able to recall any instance of restoration of one's legal capacity in their practice, and the professional experience of some respondents covered longer period than the abovementioned statistics. The interviewed experts and officials also stressed that they did not have any idea how and in which circumstances legal capacity might be restored.

In my professional practice there was no instance of restoration of legal capacity. I have no idea to what degree a person has to recover to be referred to the court with the aim of restoration of his/her legal capacity.

Judge, Sevan

In my professional practice there was no instance of restoration of legal capacity.

Lawyer, Yerevan

No, I haven't encountered such examples.

Lawyer, Yerevan

The law provides for it but I don't recall such a case.

Psychiatrist, Yerevan

As in any other medical field treatment leads to the improvement of health condition but not to full recovery. The best desired effect is when the remission is long-lasting, and possibly may last for years.

Psychiatrist, Gyumri

If the ground for deprivation of one's legal capacity is his/her inability to understand the nature of his/her actions or to control them because of a mental disorder, the ground for restoration of his/her legal capacity by a court is the person's recovery which is certified by the conclusion of the forensic psychiatric examination.

The motion may be submitted by a family member, guardianship office, or psychiatric institution but not by the interested person. Such regulation deprives the person concerned of any opportunity to seek effective remedy and to access justice¹⁰⁰, as well as to remove the restrictions imposed for indefinite period on his/her private life and a number of other fundamental rights and freedoms, which is incompatible with international law as well as the requirements of the Constitution of Armenia.

"When needed. We have patients who stay here for years; they have no place to go if they are discharged. We have about one hundred of such persons. It would be very good if one can help us with this issue of discharging them from the hospital".¹⁰¹

Head of Psychiatric Institution

¹⁰⁰ See *supra* the analysis concerning these rights.

¹⁰¹ Question: What is the longest period of in-hospital treatment for incapable patients

Given such logic of the law, even if the person concerned has recovered from his/her illness, understands the nature of his/her actions or controls them, still he/she will remain legally incapable until one of the abovementioned persons/institutions lodges an application with the court requesting to restore legal capacity of the person concerned on the ground of his/her recovery. The legally incapable person has no right to lodge such application with the court. The Armenian law does not provide for the requirement to review changes in the legal capacity of the person at regular intervals, to register and to react at them, whereas this is required by international standards, case law of the ECtHR, as well as current developments in other countries.

There are a lot of lacunas [in the procedure of depriving a person of legal capacity]. There is a need for a reform, introduction of an institute of social guardianship or a community.

Then, it makes sense to only limit one's capacity to make deals but not fully, otherwise they "turn a human being into a piece of furniture", deprive him of all rights, how is that possible!

This [deprivation of legal capacity] should be a legally reversible status; a person cannot be turned into "a piece of furniture" without any rights.

The only problem is that families do not want to take them back. We have no place to send them. If only there were special social institutions so that they could stay there. And now irrespective of the will of relatives we discharge them from the hospital, send them home by taxi until they are brought back again

Head of Psychiatric Institution

In its judgment in *Shtukatur* case the ECtHR paid special attention to the point that Russian law did not sufficiently reflect the fact that a person's capacity could change over time. Moreover, the domestic legislation did not require compulsory periodic review of the capacity status, nor was there a possibility for the person to request such a review¹⁰². As a result, the person who had been declared legally incapable and was subjected to involuntary treatment in a medical facility was deprived of the fundamental rights provided by the Convention, including the right to private life.

D. Conclusion

At the moment full deprivation of legal capacity of a person constitutes “a lifetime deprivation of the person’s rights” as the person concerned is deprived of his/her fundamental rights for an indefinite period, namely the right to choose a place of residence, to marry, to arrange deals and to administer his/her own property and estate, to participate in elections and at times the rights to liberty and security of person and fair trial. Moreover, a legally incapable person is totally dependent on his/her guardian in all aspects of his/her life whereas there is no effective supervision over the latter’s activity. A legally incapable person is deprived by law of the right to apply to the court to request restoration of his/her legal capacity which is incompatible with international law and the requirements of the Constitution of Armenia.

Results of the analysis of judicial acts, interviews, relevant legislation and gathered statistical data showed that the Armenian courts when depriving a person of his/her legal capacity regularly violate the right to private life of the person concerned. One of the

¹⁰² *Shtukatur* v. *Russia*, para. 103

main causes is the provisions of the domestic laws as well as the fact that judges do not directly apply the relevant provisions of the Constitution of Armenia and international law. However, often the main cause of the violation of the right to private life of a person suffering from mental disorder are the stereotypes existing in the Armenian society which are also common for the judiciary. Many of the interviewed experts stated that deprivation of legal capacity of the person and his/her placement in a psychiatric institution often pursues the aim of not assisting, ensuring medical treatment of the person concerned but rather social, material and selfish ends, which presupposes unrevealed abuses of various nature.

Analysis of international and European developments shows that there is a trend of going away from the practice of full deprivation of one's legal capacity. The developments are mostly moving towards the following direction: when a person is in need of support because of his/her mental disorder, the person concerned receives individualized assistance while not losing his/her legal capacity. There have been no discussions organized; research undertaken, training sessions delivered or publications produced in Armenia regarding this kind of approaches and developments. Such situation in its turn contributes to the fact that the Armenian legislation in this field is stuck in the XX century.

RECOMMENDATIONS

I. To policy and law-makers

1. To study the decisions of international bodies related to the rights to liberty and security, a fair trial and private life of persons suffering from mental disorders, including the case-law of the ECtHR, provisions of the UN CRPD as well as latest developments in the constitutional and domestic laws of other states, and to take them into account when drafting laws and policies.
2. To make changes in the CCP and Civil Code of Armenia to ensure the right to judicial review of the lawfulness of detention of persons deprived of liberty at psychiatric institutions and its effective enjoyment. The right in question may be ensured by securing the right of such persons to directly apply to the court or by envisaging by law the obligation to carry out compulsory review by a court at reasonable intervals.
3. To make changes in the CCP to ensure by law that any possibility to deprive of liberty a person declared incapable in a psychiatric institution without judicial safeguards solely at the request or consent of the guardian is banned.
4. To make relevant changes in the current legislation to ensure that every person declared incapable has the right to apply to the court directly or through a representative selected by him/her (or an appointed public defender) to seek restoration of his/her capacity as well as to protect other rights, including to challenge actions of the guardian.
5. To make changes in the CCP to ensure enjoyment of the fundamental right to a fair trial of a person in adversarial proceedings and in equal conditions when examining applications regarding subjecting the person concerned to

involuntary treatment in a psychiatric institution as well as depriving the person of legal capacity, including the right to be present at the court hearing and to orally present his/her position.

6. To make changes in the Law on the Bar to ensure the right of everyone to benefit from the effective and free of charge legal assistance through the Office of Public Defender from the moment when the person concerned is notified about the following:
 - a. About the proceedings instituted in the court by the relevant authority on subjecting the person concerned to involuntary treatment in a psychiatric institution. To ensure this right for as long as the person concerned is subjected to involuntary treatment in a psychiatric institution.
 - b. About the proceedings instituted in the court on the basis of the motion submitted by the relevant authority/person on depriving the person concerned of legal capacity. To ensure this right until the legal capacity of the person concerned is restored by the court.
7. To make changes in the Armenian legislation to exclude any opportunity to fully deprive a person of his/her legal capacity on any ground.
8. In order to protect rights and interests of persons suffering from mental disorder, to envisage a list of measures of protection instead of depriving the person concerned of legal capacity, so that the court would select a measure (measures) most suited to the individual circumstances of the person while complying with the principle of proportionality envisaged by Article 8 of the ECHR.
9. To discuss a possibility of partially depriving of capacity persons suffering from mental disorder or only in certain fields

or in relation to some issues, only when absolutely necessary. For example, only restriction of the right to sign contracts related to real estate, whereas the person concerned would have the right to sign other contracts, to vote, to marry, etc.

II. To the judiciary

1. To comply with the relevant provisions of the Armenian Constitution as well as to apply norms of international law which are obligatory for Armenia, in particular, provisions of the UN CRPD and the ECtHR case-law, when examining applications on declaring a person incapable or subjecting him/her to involuntary treatment in a psychiatric institution, as well as in case of application of medical enforcement measures to the person in criminal judicial proceedings.
2. To show due diligence in reviewing the lawfulness of the grounds for deprivation of liberty of the person as well as to put an end to the practice of following existing social and medical stereotypes when examining applications on subjecting a person to involuntary treatment in a psychiatric institution.
3. To comply with the requirements of Article 8 of the ECHR when examining any application on restricting capacity of a person, in particular the principles of proportionality and lawfulness.
4. Until the relevant changes are made in the law, to accept and examine applications of persons declared incapable related to restoration of their legal capacity, as well as protection and restoration of their violated rights on the basis of the relevant provisions of the Armenian Constitution and international law in the field of access to justice.

III. To all actors who organize professional continuing education in the field of justice and psychiatry

1. To study the decisions of international bodies related to the rights to liberty and security of persons suffering from mental disorder, including the case-law of the ECtHR, provisions of the UN CRPD as well as latest developments in the constitutional and domestic law of other states.
2. To translate into Armenian relevant provisions of international law which are obligatory for Armenia as well as judgments of the ECtHR and to include them in the curricula of the mandatory training courses.

ANNEX 1. Recommendation Rec(2004)10 of the Council of Europe Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder

(Adopted by the Committee of Ministers on 22 September 2004 at the 896th meeting of the Ministers' Deputies)¹⁰³

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members, in particular through harmonising laws on matters of common interest;

Having regard, in particular:

– to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and to its application by the organs established under that Convention;

– to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (“Convention on Human Rights and Biomedicine”) of 4 April 1997;

– to Recommendation No. R (83)2 concerning the legal protection of persons suffering from mental disorder placed as involuntary patients;

– to Recommendation No. R (87)3 on the European Prison Rules;

– to Recommendation No. R (98)7 concerning the ethical and organisational aspects of health care in prison;

¹⁰³ In accordance with Article 10.2c of the Rules of Procedure of the meetings of the Ministers' Deputies, the Permanent Representative of the United Kingdom indicated that she reserved the right of her government to comply or not in certain limited respects with Articles 17, 18, 20, 24, 28 and 37 of the Recommendation.

– to Recommendation 1235 (1994) of the Parliamentary Assembly of the Council of Europe on psychiatry and human rights;

Having regard to the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

Having regard to the public consultation on the protection of the human rights and dignity of persons suffering from mental disorder, initiated by the Steering Committee on Bioethics;

Considering that common action at European level will promote better protection of the human rights and dignity of persons with mental disorder, in particular those subject to involuntary placement or involuntary treatment;

Considering that both mental disorder and certain treatments for such disorder may affect the essence of a person's individuality;

Stressing the need for mental health professionals to be aware of such risks, to act within a regulatory framework and to regularly review their practice;

Stressing the need to ensure that persons with mental disorder are never emotionally, physically, financially or sexually exploited;

Conscious of the responsibility of mental health professionals to guarantee, as far as they are able, the implementation of the principles enshrined in these guidelines;

Recommends that the governments of member states should adapt their laws and practice to the guidelines contained in this Recommendation;

Recommends that the governments of member states should review their allocation of resources to mental health services so that the provisions of these guidelines can be met.

GUIDELINES

CHAPTER I – OBJECT AND SCOPE

Article 1 – Object

1. This Recommendation aims to enhance the protection of the dignity, human rights and fundamental freedoms of persons with mental disorder, in particular those who are subject to involuntary placement or involuntary treatment.

2. The provisions of this Recommendation do not limit or otherwise affect the possibility for a member state to grant persons with mental disorder a wider measure of protection than is stipulated in this Recommendation.

Article 2 – Scope and definitions

Scope

1. This Recommendation applies to persons with mental disorder defined in accordance with internationally accepted medical standards.

2. Lack of adaptation to the moral, social, political or other values of a society, of itself, should not be considered a mental disorder.

Definitions

3. For the purpose of this Recommendation, the term:

– “competent body” means an authority, or a person or body provided for by law which is distinct from the person or body proposing an involuntary measure, and that can make an independent decision;

– “court” includes reference to a court-like body or tribunal;

– “facility” encompasses facilities and units;

– “personal advocate” means a person helping to promote the interests of a person with mental disorder and who can provide moral support to that person in situations in which the person feels

vulnerable;

– “representative” means a person provided for by law to represent the interests of, and take decisions on behalf of, a person who does not have the capacity to consent;

– “therapeutic purposes” includes prevention, diagnosis, control or cure of the disorder, and rehabilitation;

– “treatment” means an intervention (physical or psychological) on a person with mental disorder that, taking into account the person’s social dimension, has a therapeutic purpose in relation to that mental disorder. Treatment may include measures to improve the social dimension of a person’s life.

CHAPTER II – GENERAL PROVISIONS

Article 3 – Non-discrimination

1. Any form of discrimination on grounds of mental disorder should be prohibited.

2. Member states should take appropriate measures to eliminate discrimination on grounds of mental disorder.

Article 4 – Civil and political rights

1. Persons with mental disorder should be entitled to exercise all their civil and political rights.

2. Any restrictions to the exercise of those rights should be in conformity with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and should not be based on the mere fact that a person has a mental disorder.

Article 5 – Promotion of mental health

Member states should promote mental health by encouraging the development of programmes to improve the awareness of the public about the prevention, recognition and treatment of mental disorders.

Article 6 – Information and assistance on patients’ rights

Persons treated or placed in relation to mental disorder should be individually informed of their rights as patients and have access to a competent person or body, independent of the mental health service, that can, if necessary, assist them to understand and exercise such rights.

Article 7 – Protection of vulnerable persons with mental disorders

1. Member states should ensure that there are mechanisms to protect vulnerable persons with mental disorders, in particular those who do not have the capacity to consent or who may not be able to resist infringements of their human rights.

2. The law should provide measures to protect, where appropriate, the economic interests of persons with mental disorder.

Article 8 – Principle of least restriction

Persons with mental disorder should have the right to be cared for in the least restrictive environment available and with the least restrictive or intrusive treatment available, taking into account their health needs and the need to protect the safety of others.

Article 9 – Environment and living conditions

1. Facilities designed for the placement of persons with mental disorder should provide each such person, taking into account his or her state of health and the need to protect the safety of others, with an environment and living conditions as close as possible to those of persons of similar age, gender and culture in the community. Vocational rehabilitation measures to promote the integration of those persons in the community should also be provided.

2. Facilities designed for the involuntary placement of persons with mental disorder should be registered with an appropriate authority.

Article 10 – Health service provision

Member states should, taking into account available resources, take measures:

i. to provide a range of services of appropriate quality to meet the mental health needs of persons with mental disorder, taking into account the differing needs of different groups of such persons, and to ensure equitable access to such services;

ii. to make alternatives to involuntary placement and to involuntary treatment as widely available as possible;

iii. to ensure sufficient provision of hospital facilities with appropriate levels of security and of community-based services to meet the health needs of persons with mental disorder involved with the criminal justice system;

iv. to ensure that the physical health care needs of persons with mental disorder are assessed and that they are provided with equitable access to services of appropriate quality to meet such needs.

Article 11 – Professional standards

1. Professional staff involved in mental health services should have appropriate qualifications and training to enable them to perform their role within the services according to professional obligations and standards.

2. In particular, staff should receive appropriate training on:

i. protecting the dignity, human rights and fundamental freedoms of persons with mental disorder;

ii. understanding, prevention and control of violence;

iii. measures to avoid the use of restraint or seclusion;

iv. the limited circumstances in which different methods of restraint or seclusion may be justified, taking into account the benefits and risks entailed, and the correct application of such measures.

Article 12 – General principles of treatment for mental disorder

1. Persons with mental disorder should receive treatment and care provided by adequately qualified staff and based on an appropriate individually prescribed treatment plan. Whenever possible the treatment plan should be prepared in consultation with the person concerned and his or her opinion should be taken into account. The plan should be regularly reviewed and, if necessary, revised.

2. Subject to the provisions of chapter III and Articles 28 and 34 below, treatment may only be provided to a person with mental disorder with his or her consent if he or she has the capacity to give such consent, or, when the person does not have the capacity to consent, with the authorisation of a representative, authority, person or body provided for by law.

3. When because of an emergency situation the appropriate consent or authorisation cannot be obtained, any treatment for mental disorder that is medically necessary to avoid serious harm to the health of the individual concerned or to protect the safety of others may be carried out immediately.

Article 13 – Confidentiality and record-keeping

1. All personal data relating to a person with mental disorder should be considered to be confidential. Such data may only be collected, processed and communicated according to the rules relating to professional confidentiality and personal data protection.

2. Clear and comprehensive medical and, where appropriate, administrative records should be maintained for all persons with mental disorder placed or treated for such a disorder. The conditions governing access to that information should be clearly specified by law.

Article 14 – Biomedical research

Biomedical research on a person with mental disorder should respect the provisions of this Recommendation and the relevant provisions of the Convention on Human Rights and Biomedicine, its additional Protocol on Biomedical Research and the other legal provisions ensuring the protection of persons in research contexts.

Article 15 – Dependants of a person with mental disorder

The needs of family members, in particular children, who are dependent on a person with mental disorder should be given appropriate consideration.

CHAPTER III – INVOLUNTARY PLACEMENT IN PSYCHIATRIC FACILITIES, AND INVOLUNTARY TREATMENT, FOR MENTAL DISORDER

Article 16 – Scope of chapter III

The provisions of this chapter apply to persons with mental disorder:

- i. who have the capacity to consent and are refusing the placement or treatment concerned; or
- ii. who do not have the capacity to consent and are objecting to the placement or treatment concerned.

Article 17 – Criteria for involuntary placement

1. A person may be subject to involuntary placement only if all the following conditions are met:

- i. the person has a mental disorder;
- ii. the person's condition represents a significant risk of serious harm to his or her health or to other persons;
- iii. the placement includes a therapeutic purpose;
- iv. no less restrictive means of providing appropriate care are available;

v. the opinion of the person concerned has been taken into consideration.

2. The law may provide that exceptionally a person may be subject to involuntary placement, in accordance with the provisions of this chapter, for the minimum period necessary in order to determine whether he or she has a mental disorder that represents a significant risk of serious harm to his or her health or to others if:

i. his or her behaviour is strongly suggestive of such a disorder;

ii. his or her condition appears to represent such a risk;

iii. there is no appropriate, less restrictive means of making this determination; and

iv. the opinion of the person concerned has been taken into consideration.

Article 18 – Criteria for involuntary treatment

A person may be subject to involuntary treatment only if all the following conditions are met:

i. the person has a mental disorder;

ii. the person's condition represents a significant risk of serious harm to his or her health or to other persons;

iii. no less intrusive means of providing appropriate care are available;

iv. the opinion of the person concerned has been taken into consideration.

Article 19 – Principles concerning involuntary treatment

1. Involuntary treatment should:

i. address specific clinical signs and symptoms;

ii. be proportionate to the person's state of health;

iii. form part of a written treatment plan;

iv. be documented;

v. where appropriate, aim to enable the use of treatment

acceptable to the person as soon as possible.

2. In addition to the requirements of Article 12.1 above, the treatment plan should:

i. whenever possible be prepared in consultation with the person concerned and the person's personal advocate or representative, if any;

ii. be reviewed at appropriate intervals and, if necessary, revised, whenever possible in consultation with the person concerned and his or her personal advocate or representative, if any.

3. Member states should ensure that involuntary treatment only takes place in an appropriate environment.

Article 20 – Procedures for taking decisions on involuntary placement and/or involuntary treatment

Decision

1. The decision to subject a person to involuntary placement should be taken by a court or another competent body. The court or other competent body should:

i. take into account the opinion of the person concerned;

ii. act in accordance with procedures provided by law based on the principle that the person concerned should be seen and consulted.

2. The decision to subject a person to involuntary treatment should be taken by a court or another competent body. The court or other competent body should:

i. take into account the opinion of the person concerned;

ii. act in accordance with procedures provided by law based on the principle that the person concerned should be seen and consulted.

However, the law may provide that when a person is subject to involuntary placement the decision to subject that person to involuntary treatment may be taken by a doctor having the requisite competence and experience, after examination of the person

concerned and taking into account his or her opinion.

3. Decisions to subject a person to involuntary placement or to involuntary treatment should be documented and state the maximum period beyond which, according to law, they should be formally reviewed. This is without prejudice to the person's rights to reviews and appeals, in accordance with the provisions of Article 25.

Procedures prior to the decision

4. Involuntary placement, involuntary treatment, or their extension should only take place on the basis of examination by a doctor having the requisite competence and experience, and in accordance with valid and reliable professional standards.

5. That doctor or the competent body should consult those close to the person concerned, unless the person objects, it is impractical to do so, or it is inappropriate for other reasons.

6. Any representative of the person should be informed and consulted.

Article 21 – Procedures for taking decisions on involuntary placement and/or involuntary treatment in emergency situations

1. Procedures for emergency situations should not be used to avoid applying the procedures set out in Article 20.

2. Under emergency procedures:

i. involuntary placement or involuntary treatment should only take place for a short period of time on the basis of a medical assessment appropriate to the measure concerned;

ii. paragraphs 5 and 6 of Article 20 should be complied with as far as possible;

iii. decisions to subject a person to involuntary placement or to involuntary treatment should be documented and state the maximum period beyond which, according to law, they should be formally reviewed. This is without prejudice to the person's rights to reviews and appeals, in accordance with the provisions of Article 25.

3. If the measure is to be continued beyond the emergency situation, a court or another competent body should take decisions on the relevant measure, in accordance with Article 20, as soon as possible.

Article 22 – Right to information

1. Persons subject to involuntary placement or involuntary treatment should be promptly informed, verbally and in writing, of their rights and of the remedies open to them.

2. They should be informed regularly and appropriately of the reasons for the decision and the criteria for its potential extension or termination.

3. The person's representative, if any, should also be given the information.

Article 23 – Right to communication and to visits of persons subject to involuntary placement

The right of persons with mental disorder subject to involuntary placement:

i. to communicate with their lawyers, representatives or any appropriate authority should not be restricted. Their right to communicate with their personal advocates or other persons should not be unreasonably restricted;

ii. to receive visits should not be unreasonably restricted, taking into account the need to protect vulnerable persons or minors placed in or visiting a psychiatric facility.

Article 24 – Termination of involuntary placement and/or involuntary treatment

1. Involuntary placement or involuntary treatment should be terminated if any of the criteria for the measure are no longer met.

2. The doctor in charge of the person's care should be responsible for assessing whether any of the relevant criteria are no

longer met unless a court has reserved the assessment of the risk of serious harm to others to itself or to a specific body.

3. Unless termination of a measure is subject to judicial decision, the doctor, the responsible authority and the competent body should be able to take action on the basis of the above criteria in order to terminate that measure.

4. Member states should aim to minimise, wherever possible, the duration of involuntary placement by the provision of appropriate aftercare services.

Article 25 – Reviews and appeals concerning the lawfulness of involuntary placement and/or involuntary treatment

1. Member states should ensure that persons subject to involuntary placement or involuntary treatment can effectively exercise the right:

- i. to appeal against a decision;
- ii. to have the lawfulness of the measure, or its continuing application, reviewed by a court at reasonable intervals;
- iii. to be heard in person or through a personal advocate or representative at such reviews or appeals.

2. If the person, or that person's personal advocate or representative, if any, does not request such review, the responsible authority should inform the court and ensure that the continuing lawfulness of the measure is reviewed at reasonable and regular intervals.

3. Member states should consider providing the person with a lawyer for all such proceedings before a court. Where the person cannot act for him or herself, the person should have the right to a lawyer and, according to national law, to free legal aid. The lawyer should have access to all the materials, and have the right to challenge the evidence, before the court.

4. If the person has a representative, the representative should have access to all the materials, and have the right to challenge the

evidence, before the court.

5. The person concerned should have access to all the materials before the court subject to the protection of the confidentiality and safety of others according to national law. If the person has no representative, he or she should have access to assistance from a personal advocate in all procedures before a court.

6. The court should deliver its decision promptly. If it identifies any violations of the relevant national legislation it should send these to the relevant body.

7. A procedure to appeal the court's decision should be provided.

CHAPTER IV – PLACEMENT OF PERSONS NOT ABLE TO CONSENT IN THE ABSENCE OF OBJECTION

Article 26 – Placement of persons not able to consent in the absence of objection

Member states should ensure that appropriate provisions exist to protect a person with mental disorder who does not have the capacity to consent and who is considered in need of placement and does not object to the placement.

CHAPTER V – SPECIFIC SITUATIONS

Article 27 – Seclusion and restraint

1. Seclusion or restraint should only be used in appropriate facilities, and in compliance with the principle of least restriction, to prevent imminent harm to the person concerned or others, and in proportion to the risks entailed.

2. Such measures should only be used under medical supervision, and should be appropriately documented.

3. In addition:

i. the person subject to seclusion or restraint should be

regularly monitored;

ii. the reasons for, and duration of, such measures should be recorded in the person's medical records and in a register.

4. This Article does not apply to momentary restraint.

Article 28 – Specific treatments

1. Treatment for mental disorder that is not aimed at producing irreversible physical effects but may be particularly intrusive should be used only if no less intrusive means of providing appropriate care is available. Member states should ensure that the use of such treatment is:

i. subject to appropriate ethical scrutiny;

ii. in accordance with appropriate clinical protocols reflecting international standards and safeguards;

iii. except in emergency situations as referred to in Article 12, with the person's informed, written consent or, in the case of a person who does not have the capacity to consent, the authorisation of a court or competent body;

iv. fully documented and recorded in a register.

2. Use of a treatment for mental disorder with the aim of producing irreversible physical effects should be exceptional, and should not be used in the context of involuntary placement. Such a treatment should only be carried out if the person concerned has given free, informed and specific consent in writing. The treatment should be fully documented and recorded in a register, and used only:

i. in accordance with the law;

ii. subject to appropriate ethical scrutiny;

iii. in accordance with the principle of least restriction;

iv. if an independent second medical opinion agrees that it is appropriate; and

v. in accordance with appropriate clinical protocols reflecting international standards and safeguards.

Article 29 – Minors

1. The provisions of this Recommendation should apply to minors unless a wider measure of protection is provided.

2. In decisions concerning placement and treatment, whether provided involuntarily or not, the opinion of the minor should be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity.

3. A minor subject to involuntary placement should have the right to assistance from a representative from the start of the procedure.

4. A minor should not be placed in a facility in which adults are also placed, unless such a placement would benefit the minor.

5. Minors subject to placement should have the right to a free education and to be reintegrated into the general school system as soon as possible. If possible, the minor should be individually evaluated and receive an individualised educational or training programme.

Article 30 – Procreation

The mere fact that a person has a mental disorder should not constitute a justification for permanent infringement of his or her capacity to procreate.

Article 31 – Termination of pregnancy

The mere fact that a person has a mental disorder should not constitute a justification for termination of her pregnancy.

CHAPTER VI – INVOLVEMENT OF THE CRIMINAL JUSTICE SYSTEM

Article 32 – Involvement of the police

1. In the fulfilment of their legal duties, the police should coordinate their interventions with those of medical and social

services, if possible with the consent of the person concerned, if the behaviour of that person is strongly suggestive of mental disorder and represents a significant risk of harm to him or herself or to others.

2. Where other appropriate possibilities are not available the police may be required, in carrying out their duties, to assist in conveying or returning persons subject to involuntary placement to the relevant facility.

3. Members of the police should respect the dignity and human rights of persons with mental disorder. The importance of this duty should be emphasised during training.

4. Members of the police should receive appropriate training in the assessment and management of situations involving persons with mental disorder, which draws attention to the vulnerability of such persons in situations involving the police.

Article 33 – Persons who have been arrested

If a person whose behaviour is strongly suggestive of mental disorder is arrested:

- i. the person should have the right to assistance from a representative or an appropriate personal advocate during the procedure;
- ii. an appropriate medical examination should be conducted promptly at a suitable location to establish:
 - a. the person's need for medical care, including psychiatric care;
 - b. the person's capacity to respond to interrogation;
 - c. whether the person can be safely detained in non-health care facilities.

Article 34 – Involvement of the courts

1. Under criminal law, courts may impose placement or

treatment for mental disorder whether the person concerned consents to the measure or not. Member states should ensure that the person can effectively exercise the right to have the lawfulness of the measure, or its continuing application, reviewed by a court at reasonable intervals. The other provisions of chapter III should be taken into account in such placements or treatments; any non-application of those provisions should be justifiable.

2. Courts should make sentencing decisions concerning placement or treatment for mental disorder on the basis of valid and reliable standards of medical expertise, taking into consideration the need for persons with mental disorder to be treated in a place appropriate to their health needs. This provision is without prejudice to the possibility, according to law, for a court to impose psychiatric assessment and a psychiatric or psychological care programme as an alternative to imprisonment or to the delivery of a final decision.

Article 35 – Penal institutions

1. Persons with mental disorder should not be subject to discrimination in penal institutions. In particular, the principle of equivalence of care with that outside penal institutions should be respected with regard to their health care. They should be transferred between penal institution and hospital if their health needs so require.

2. Appropriate therapeutic options should be available for persons with mental disorder detained in penal institutions.

3. Involuntary treatment for mental disorder should not take place in penal institutions except in hospital units or medical units suitable for the treatment of mental disorder.

4. An independent system should monitor the treatment and care of persons with mental disorder in penal institutions.

CHAPTER VII – QUALITY ASSURANCE AND MONITORING

Article 36 – Monitoring of standards

1. Member states should ensure that compliance with the standards set by this recommendation and by mental health law is subject to appropriate monitoring. That monitoring should cover:

- i. compliance with legal standards;
- ii. compliance with technical and professional standards.

2. The systems for conducting such monitoring should:

- i. have adequate financial and human resources to perform their functions;
- ii. be organisationally independent from the authorities or bodies monitored;
- iii. involve mental health professionals, lay persons, persons with mental disorder and those close to such persons;
- iv. be coordinated, where appropriate, with other relevant audit and quality assurance systems.

Article 37 – Specific requirements for monitoring

1. Monitoring compliance with standards should include:

- i. conducting visits and inspections of mental health facilities, if necessary without prior notice, to ensure:

- a. that persons are only subject to involuntary placement in facilities registered by an appropriate authority, and that such facilities are suitable for that function;

- b. that suitable alternatives to involuntary placement are provided;

- ii. monitoring compliance with professional obligations and standards;

- iii. ensuring powers exist to investigate the death of persons subject to involuntary placement or involuntary treatment, and that any such death is notified to the appropriate authority and is subject to an independent investigation;

iv. reviewing situations in which communication has been restricted;

v. ensuring that complaints procedures are provided and complaints responded to appropriately.

2. Appropriate follow-up of the results of monitoring should be ensured.

3. In respect of persons subject to provisions of mental health law, the persons conducting monitoring should be entitled:

i. to meet privately with such persons, and with their consent or that of their representatives, have access to their medical file at any time;

ii. to receive confidential complaints from such persons;

iii. to obtain from authorities or staff responsible for the treatment or care of such persons any information that may reasonably be considered necessary for the performance of their functions, including anonymised information from medical records.

Article 38 – Statistics, advice and reporting

1. Systematic and reliable anonymised statistical information on the application of mental health law and on complaints should be collected.

2. Those responsible for the care of persons with mental disorder should:

i. receive from those responsible for quality assurance and monitoring:

a. regular reports, and where possible publish those reports;

b. advice on the conditions and facilities appropriate to the care of persons with mental disorder;

ii. respond to questions, advice and reports arising from the quality assurance and monitoring systems.

3. Information on the implementation of mental health law and actions concerning compliance with standards should be made available to the public.

ANNEX 2. Recommendation No. R (99) 4' of the Council of Europe Committee of Ministers to member states on principles concerning the legal protection of incapable adults¹⁰⁴

(Adopted by the Committee of Ministers on 23 February 1999 at the 660th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Bearing in mind the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948;

Bearing in mind the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 16 December 1966;

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950;

Bearing in mind the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine of 4 April 1997;

¹⁰⁴ When adopting this decision, the Representative Of Ireland indicated that, in accordance with Article 10.2e of the Rules of Procedure for the meetings of the Ministers' Deputies, he reserved the right of his Government to comply or not with principles 5 and 6 of the Recommendation.

When adopting this decision, the Representative of France indicated that, in accordance with Article 10.2c of the Rules of Procedure for the meetings of the Ministers' Deputies, the following reservation should be made:

France considers that the application of principle 23, para. 3 should be Subject to a request by the person concerned.

Considering that the aim Of the Council of Europe is to achieve a greater unity between its members, in particular by promoting the adoption of common rules in legal matters;

Noting that demographic and medical changes have resulted in an increased number of people who, although of full age, are incapable of protecting their interests by reason of an impairment or insufficiency of their personal faculties;

Noting also that social changes have resulted in an increased need for adequate legislation to ensure the protection of such people;

Noting that legislative reforms on the protection, by representation or assistance, of incapable adults have been introduced or are under consideration in a number of member states and that these reforms have common features;

Recognising, however, that wide disparities in the legislation of member states in this area still exist;

Convinced of the importance in this context of respect for human rights and for the dignity of each person as a human being,

Recommends the governments of member states to take or reinforce, in their legislation and practice, all measures they consider necessary with a view to the implementation of the following principles:

PRINCIPLES

Part I — Scope of application

1. The following principles apply to the protection of adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests.

2. The incapacity may be due to a mental disability, disease or a

similar reason.

3. The principles apply to measures of protection or other legal arrangements enabling such adults to benefit from representation or assistance in relation to those affairs.

4. In these principles "adult" means a person who is treated as being of full age under the applicable law on capacity in civil matters.

5. In these principles "intervention in the health field" means any act performed professionally on a person for reasons of health. It includes, in particular, interventions for the purposes of preventive care, diagnosis, treatment, rehabilitation or research.

Part II — Governing principles

Principle 1 – Respect for human rights

In relation to the protection of incapable adults the fundamental principle, underlying all the other principles, is respect for the dignity of each person as a human being. The laws, procedures and practices relating to the protection of incapable adults shall be based on respect for their human rights and fundamental freedoms, taking into account any qualifications on those rights contained in the relevant international legal instruments.

Principle 2 – Flexibility in legal response

1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations.

2. Appropriate measures of protection or other legal arrangements should be available in cases of emergency.

3. The law should provide for simple and inexpensive measures of protection or other legal arrangements.

4. The range of measures of protection should include, in

appropriate cases, those which do not restrict the legal capacity of the person concerned.

5. The range of measures of protection should include those which are limited to one specific act without requiring the appointment of a representative or a representative with continuing powers.

6. Consideration should be given to the inclusion of measures under which the appointed person acts jointly with the adult concerned, and of measures involving the appointment of more than one representative.

7. Consideration should be given to the need to provide for, and regulate, legal arrangements which a person who is still capable can take to provide for any subsequent incapacity.

8. Consideration should be given to the need to provide expressly that certain decisions, particularly those of a minor or routine nature relating to health or personal welfare, may be taken for an incapable adult by those deriving their powers from the law rather than from a judicial or administrative measure.

Principle 3 – Maximum preservation of capacity

1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity.

However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.

3. Consideration should be given to legal arrangements whereby, even when representation in a particular area is necessary, the adult may be permitted, with the representative's consent, to undertake specific acts or acts in a specific area.

4. Whenever possible the adult should be enabled to enter into legally effective transactions of an everyday nature.

Principle 4 – Publicity

The disadvantage of automatically giving publicity to measures of protection or similar legal arrangements should be weighed in the balance against any protection which might be afforded to the adult concerned or to third parties.

Principle 5 – Necessity and subsidiarity

1. No measure of protection should be established for an incapable adult unless the measure is necessary, taking into account the individual circumstances and the needs of the person concerned. A measure of protection may be established, however, with the full and free consent of the person concerned.

2. In deciding whether a measure of protection is necessary, account should be taken of any less formal arrangements which might be made, and of any assistance which might be provided by family members or by others.

Principle 6 – Proportionality

1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention.

Principle 7 – Procedural fairness and efficiency

1. There should be fair and efficient procedures for the taking of measures for the protection of incapable adults.
2. There should be adequate procedural safeguards to protect the human rights of the persons concerned and to prevent possible abuses.

Principle 8 – Paramourncy of interests and welfare of the person concerned

1. In establishing or implementing a measure of protection for an incapable adult the interests and welfare of that person should be the paramount consideration.
2. This principle implies, in particular, that the choice of any person to represent or assist an incapable adult should be governed primarily by the suitability of that person to safeguard and promote the adult's interests and welfare.
3. This principle also implies that the property of the incapable adult should be managed and used for the benefit of the person concerned and to secure his or her welfare.

Principle 9 — Respect for wishes and feelings of the person concerned

1. in establishing or implementing a measure of protection for an incapable adult the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect.
2. This principle implies, in particular, that the wishes of the adult as to the choice of any person to represent or assist him or her should be taken into account and, as far as possible, given due respect.
3. It also implies that a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in particular concerning

any major decision affecting him or her, so that he or she may express a view.

Principle 10 — Consultation

In the establishment and implementation of a measure of protection there should be consultation, so far as reasonable and practicable, with those having a close interest in the welfare of the adult concerned, whether as representative, close family member or otherwise.

It is for national law to determine which persons should be consulted and the effects of consultation or its absence.

Part III — Procedural principles

Principle 11 – Institution of proceedings

1. The list of those entitled to institute proceedings for the taking of measures for the protection of incapable adults should be sufficiently wide to ensure that measures of protection can be considered in all cases where they are necessary. It may, in particular, be necessary to provide for proceedings to be initiated by a public official or body, or by the court or other competent authority on its own motion.

2. The person concerned should be informed promptly in a language, or by other means, which he or she understands of the institution of proceedings which could affect his or her legal capacity, the exercise of his or her rights or his or her interests unless such information would be manifestly without meaning to the person concerned or would present a severe danger to the health of the person concerned.

Principle 12 – Investigation and assessment

1. There should be adequate procedures for the investigation and assessment of the adult's personal faculties.

2. No measure of protection which restricts the legal capacity of

an incapable adult should be taken unless the person taking the measure has seen the adult or is personally satisfied as to the adult's condition and an up-to-date report from at least one suitably qualified expert has been submitted. The report should be in writing or recorded in writing.

Principle 13 – Right to be heard in person

The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.

Principle 14 – Duration, review and appeal

1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews.

2. Measures of protection should be reviewed on a change of circumstances and, in particular, on a change in the adult's condition. They should be terminated if the conditions for them are no longer fulfilled.

3. There should be adequate rights of appeal.

Principle 15 - Provisional measures in case of emergency

If a provisional measure is needed in a case of emergency, principles 11 to 14 should be applicable as far as possible according to the circumstances.

Principle 16 Adequate control

There should be adequate control of the operation of measures of protection and of the acts and decisions of representatives.

Principle 17 – Qualified persons

1. Steps should be taken with a view to providing an adequate number of suitably qualified persons for the representation and assistance of incapable adults.

2. Consideration should be given, in particular, to the establishment or support of associations or other bodies with the function of providing and training such people.

Part IV — The role of representatives

Principle 18 – Control of powers arising by operation of law

1. Consideration should be given to the need to ensure that any powers conferred on any person by operation of law, without the intervention of a judicial or administrative authority, to act or take decisions on behalf of an incapable adult are limited and their exercise controlled.

2. The conferment of any such powers should not deprive the adult of legal capacity.

3. Any such powers should be capable of being modified or terminated at any time by a measure of protection taken by a judicial or administrative authority.

4. Principles 8 to 10 apply to the exercise of such powers as they apply to the implementation of measures of protection.

Principle 19 – Limitation of powers of representatives

1. It is for national law to determine which juridical acts are of such a highly personal nature that they can not be done by a representative.

2. It is also for national law to determine whether decisions by a representative on certain serious matters should require the specific approval of a court or other body.

Principle 20 Liability

1. Representatives should be liable, in accordance with national law, for any loss or damage caused by them to incapable adults while exercising their functions.

2. In particular, the laws on liability for wrongful acts,

negligence or maltreatment should apply to representatives and others involved in the affairs of incapable adults.

Principle 21 Remuneration and expenses

1. National law should address the questions of the remuneration and the reimbursement of expenses of those appointed to represent or assist incapable adults.

2. Distinctions may be made between those acting in a professional capacity and those acting in other capacities, and between the management of personal matters of the incapable adult and the management of his or her economic matters.

Part V— Interventions in the health field

Principle 22 – Consent

1. Where an adult, even if subject to a measure of protection, is in fact capable of giving free and informed consent to a given intervention in the health field, the intervention may only be carried out with his or her consent. The consent should be solicited by the person empowered to intervene.

2. Where an adult is not in fact capable of giving free and informed consent to a given intervention, the intervention may, nonetheless, be carried out provided that:

– it is for his or her direct benefit, and authorisation has been given by his or her representative or by an authority or a person or body provided for by law.

3. Consideration should be given to the designation by the law of appropriate authorities, persons or bodies for the purpose of authorising interventions of different types, when adults who are incapable of giving free and informed consent do not have a representative with appropriate powers. Consideration should also be given to the need to provide for the authorisation of a court or other competent body in the case of certain serious types of

intervention.

4. Consideration should be given to the establishment of mechanisms for the resolution of any conflicts between persons or bodies authorised to consent or refuse consent to interventions in the health field in relation to adults who are incapable of giving consent.

Principle 23 – Consent (alternative rules)

If the government of a member state does not apply the rules contained in paragraphs 1 and 2 of Principle 22, the following rules should be applicable:

Where an adult is subject to a measure of protection under which a given intervention in the health field can be carried out only with the authorisation of a body or a person provided for by law. The consent of the adult should nonetheless be sought if he or she has the capacity to give it.

2. Where, according to the law, an adult is not in a position to give free and informed consent to an intervention in the health field, the intervention may nonetheless be carried out if:

- it is for his or her direct benefit, and
- authorisation has been given by his or her representative or by an authority or a person or body provided for by law.

3. The law should provide for remedies allowing the person concerned to be heard by an independent official body before any important medical intervention is carried out.

Principle 24 – Exceptional cases

1. Special rules may be provided by national law, in accordance with relevant international instruments, in relation to interventions which, because of their special nature, require the provision of additional protection for the person concerned.

2. Such rules may involve a limited derogation from the criterion of direct benefit provided that the additional protection is such as to minimise the possibility of any abuse or irregularity.

Principle 25 — Protection of adults with a mental disorder

Subject to protective conditions prescribed by law, including supervisory, control and appeal procedures, an adult who has a mental disorder of a serious nature may be subjected, without his or her consent, to an intervention aimed at treating his or her mental disorder only where. Without such treatment, serious harm is likely to result to his or her health.

Principle 26 — Permissibility of intervention in emergency situation

When, because of an emergency situation, the appropriate consent or authorization cannot be obtained, any medically necessary intervention may be carried out immediately for the benefit of the health of the person concerned.

Principle 27 – Applicability of certain principles applying to measures of protection

1. Principles 8 to 10 apply to any intervention in the health field concerning an incapable adult as they apply to measures of protection.

2. In particular, and in accordance with principle 9, the previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes should be taken into account.

Principle 28 – Permissibility of special rules on certain matters

Special rules may be provided by national law, in accordance with relevant international instruments, in relation to interventions which are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedom of others.