

**Analysis of the Russian
legal capacity system
for persons with mental
disabilities:
Towards implementation
of Article 12 of the UN
CRPD**

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Executive summary

This policy paper is developed by the Mental Disability Advocacy Center (MDAC) with the purpose of assisting Russian policy-makers to reform outdated laws in the field of legal capacity and guardianship of persons with disabilities. These recommendations are based on MDAC's advocacy and litigation work promoting the reform of legal capacity and guardianship laws in Central and Eastern Europe and Russia.

The policy paper provides, in section 1.2, a general overview of recent international jurisprudence which has focused on the Russian legal capacity system under criticism: the 2008 judgment of the European Court of Human Rights in *Shtukaturov v. Russia*; the 2009 judgment of the Russian Constitutional Court; and recommendations issued by the UN Human Rights Committee in 2009. This line of decisions has identified major systemic shortcomings in the existing guardianship model in Russia because of its oppressive nature and lack of effective control procedures. In order to better understand the extent of unjustified restrictions that take place under this mode – which include, *inter alia*, complete removal of fundamental human rights and as abusive practices enshrined in the existing legal framework – section 3 of the policy paper explains how guardianship legislation affects the human rights of persons stripped of their legal capacity.



In order to comply with international human rights law and to improve the quality of life of thousands of people with disabilities in Russia, legal capacity law reform must be aligned with the provisions of the UN Convention on the Rights of People with Disabilities (CRPD), in particular Article 12 which requires a fundamental rethinking of the Russian legal landscape in the field of guardianship. The approach to legal capacity contained within the CRPD is summarized in section 1.3.

This policy paper further explains, in section 1.4, the difference between legal capacity which is a formal status, and functional capacity, which is a *de facto* ability to make decisions. Functional capacity may fluctuate across time, and is dependent on the type of decision which needs to be made by the person whose legal capacity is called into question. Such a distinction is reflected in the corpus of international human rights law which requires any measures such as guardianship to be tailored to each person's individual needs, and to extend only to those areas in which their functional capacity justifies very serious restrictions of their rights, and that guardianship is regularly reviewed and removed as soon as practicable.

Based on the principles reflected in the CRPD and other international documents MDAC presents recommendations regarding legal reform which need to be carried out in the field of legal capacity and guardianship:

- a. New legislation must be introduced to abolish plenary guardianship and provide for alternatives which are less restrictive.
- b. The legal criteria for depriving a person of legal capacity must be made clearer in order to protect against arbitrariness in the application of such measures. The procedural guarantees in the Code of Civil Procedure must be strengthened to ensure that a person whose legal capacity is at issue is reviewable by court at all times, and the person in question has the right to fully participate in these proceedings.
- c. Law reform should require courts to apply measures of protection only in those areas where persons need assistance, i.e. where the person's functional capacity is diminished.
- d. Legislation should enable a person who has had their legal capacity restricted must be able to appeal directly to a court to alter or restore their legal capacity. Law must ensure that all measures of restricting legal capacity are applied only for a finite period of time, and such measures always subject to periodic review.
- e. New legislation must establish meaningful and substantive supervision of guardians' acts and omissions.
- f. New legislation must cut the intimate link between the deprivation of legal capacity and long-term institutionalisation: guardians should not be allowed to decide to place the person under guardianship into a social care institution ("internat").

1. Context

1.1. Interest and expertise of MDAC

This Policy Paper is one in a series which have been developed by the Mental Disability Advocacy Center (MDAC), an independent, international human rights organisation headquartered in Budapest. The purpose of this series of Policy Papers is to assist Russian policy-makers to undertake law reform in the field of legal capacity of persons with disabilities. MDAC makes these recommendations on the basis of its advocacy and litigation work promoting the reform of legal capacity and guardianship laws in Central and Eastern Europe and Russia. Our organisation has published a series of reports analysing guardianship laws and practices in several countries of the region, including a 2007 report on Russia. In 2006-2007, we conducted a number of human rights training sessions for the local guardianship authorities of St Petersburg which provided us with additional insights into the shortcomings of the existing guardianship system in Russia. Furthermore, since 2004 MDAC's contracted attorney has provided legal representation in a number of legal capacity cases in Russia as well as Bulgaria, Czech Republic, Estonia and Hungary.

1.2. Why law reform now?

Law reform is required following the judgment of the European Court of Human Rights in *Shtukaturov v. Russia* (27 March 2008),¹ as well as the judgment of the Russian Constitutional Court (27 February 2009)² and, following this, recommendations of the UN Human Rights Committee (29 October 2009).³ These are positive initiatives which recognise the right of persons with disabilities to make decisions for themselves.

Legal capacity law reform must also give due consideration to the legally binding obligations to which the Russian government has committed itself in signing the UN Convention on the Rights of People with Disabilities (CRPD),⁴ Article 12 of which provides persons with disabilities the right to legal capacity, and which will require a fundamental rethinking of the Russian legal landscape. MDAC encourages the Russian government to ratify this Convention – which it took an active part in negotiating – to demonstrate to the Russian people that the Government is committed to respecting, protecting and fulfilling the rights of some of the most vulnerable children and adults in Russia.

¹ *Shtukaturov v. Russia*, application no. 44009, judgment of 27 March 2008.

² Constitutional Court of the Russian Federation. Judgment no. 4-P of 27 February 2009.

³ UN Doc. CCPR/C/RUS/CO/6 of 24 November 2009.

⁴ UN Doc. A/RES/61/106 of 13 December 2006.

In response to these international legal obligations, it is clear that Russia must introduce more flexible and less restrictive alternatives to the deprivation of legal capacity and subsequent placement of a person under 'total' guardianship.

1.3. The importance of the UN Convention on the Rights of People with Disabilities

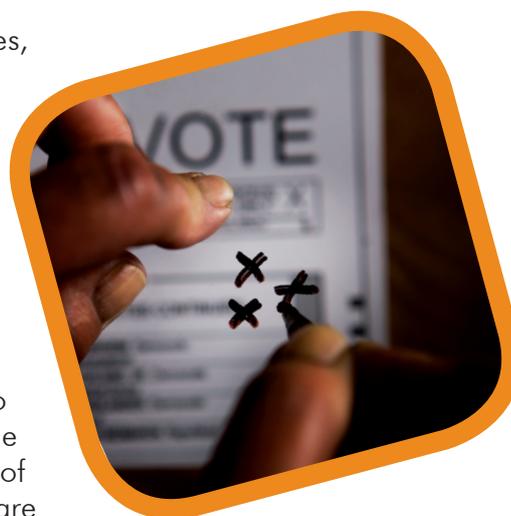
The 'moral heart' of the UN Convention on the Rights of Persons with Disabilities (CRPD) is Article 12, which establishes that persons with disabilities have a right to legal capacity, meaning that they have the capacity for rights, and the capacity to act. Article 12 represents a paradigm shift away from substituted decision making, inherent within guardianship systems, towards support-based alternatives for people with disabilities:

Article 12 – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

The approach in the CRPD is echoed by the 2008 judgment of the European Court of Human Rights in *Shtukaturov v. Russia*. This case constitutes a milestone in the evolution of European human

rights standards in relation to persons with mental disabilities, as it clarifies the relevance of the European Convention on Human Rights to several key aspects of the system of legal capacity and guardianship in Russia. It requires that the Russian Government go well beyond individual measures, such as the restoration of Mr Shtukaturov’s legal capacity, and necessitates amendment of Russia’s legal capacity legislation, including the Civil Code and the Code of Civil Procedure. MDAC acknowledges that the issues raised in the *Shtukaturov* case are technically complex and new to Russian legislators. This Policy Paper, therefore, is designed to assist in the formulation of new legislation that both meets the requirements of international law and ensures that the rights of persons who need support in exercising their legal capacity are protected, respected and fulfilled.



1.4. Legal capacity is different from functional capacity

The existence of a diagnosis of a mental disability/disorder, no matter how serious, does not imply that a person has diminished capacity for making independent decisions about their life. In all of our lives – whether we have a mental disability or not – we sometimes need assistance in making decisions: for example, how many of us can make decisions about buying property without consulting others?

A person’s functional capacity fluctuates across time, and is dependent on the type of decision being made. For example, a person may be able to make a decision about his or her everyday health needs, but may not be able to understand information in order to make a decision about a serious, life-threatening operation. Just because a person’s capacity is diminished in respect of one issue, it cannot be assumed that they are unable to decide and act independently in other aspects of their life.

For persons with intellectual disabilities or with psycho-social (mental health) disabilities, functional capacity may fluctuate for a number of different reasons: whether this is connected with the person’s mental illness or not, and whether the person is receiving services and support appropriate to their needs and wishes. As many mental illnesses are cyclical in nature it is a matter of logic that any measures applied to such persons, including guardianship, must be tailored to each person’s individual needs, and extend only to those areas in which their functional capacity justifies very serious restrictions of their rights (such restrictions being clearly outlined in law), and that guardianship is regularly reviewed and removed as soon as practicable.⁵ The system which allows for the total deprivation of the legal capacity of persons with intellectual or psycho-social disabilities mandated by Russian legislation fails to reflect any of the principles which have been established by international human rights jurisprudence at both the United Nations and at the Council of Europe.

⁵ Recommendation No. R(99)4 on “Principles concerning the legal protection of incapable adults”, adopted by the Committee of Ministers of the Council of Europe on 23 February 1999, Principle 2,3,6, and 14 are of particular relevance.

2. A law reform agenda for Russia

This section sets out in broad terms the areas where Russian law must be amended to discharge Russia's human rights obligations.

The Russian Civil Code (Article 21) defines legal capacity as "the ability to acquire and enjoy civil rights, create and fulfil civil obligations by his own acts". Under Article 29 of the Civil Code, a person who "cannot understand or control his or her actions as a result of a mental disease" may be deprived of their legal capacity by a court. Once a person has been deprived of legal capacity, a guardian must be appointed by the guardianship authorities within a period of time defined by the law. The court can restore a person's legal capacity if "the grounds on which they were declared legally incapable cease to exist". Importantly, the person deprived of legal capacity themselves cannot apply to court to have their capacity restored. This right is granted only to a limited number of third parties, none of whom have any legal obligation requiring them to initiate restoration proceedings, even if asked by the person under guardianship.

The only provision in law for people who need support in decision-making is the somewhat self-defeating process of taking away their rights to make any decisions. In other countries there is legislation in place to ensure that the default position is that the law mandates support for persons with intellectual and psycho-social disabilities, rather than removing their rights.

The lack of flexibility in this aspect of Russian law has been criticised by the European Court of Human Rights in *Shtukaturov v. Russia*, and in October 2009 by the UN Human Rights Committee. The European Court pointed out that Russian law "distinguishes between full capacity and full incapacity, but it does not provide for any 'borderline' situation" (para. 95 of the judgment). The system is characterised by a number of fundamental flaws which lead to abuse, discrimination and social exclusion of persons with mental disability. To combat these flaws, MDAC respectfully submits that the following law reform initiatives need to be carried out:

- a. New legislation must abolish the system of plenary/total guardianship. There is never an acceptable reason for instituting plenary guardianship in specific cases. Legislation must provide for alternatives which are less restrictive.
- b. The legal criteria by which persons can be deprived of their legal capacity requires tightening and clarification to protect against arbitrariness in the application of such measures. The procedural guarantees in the Code of Civil Procedure must be strengthened to ensure that a person whose capacity is at issue is heard in court and has the right to fully participate in the proceedings, and is not denied the right of attendance at court by a medical opinion that the person is too "ill". The Code of Civil Procedure should define the issues to be addressed in reports by medical, social work and other experts. It should also define the evidence which require examination by courts. Consequently, law reform must ensure that the mere existence of an intellectual or psycho-social (mental health) disability is not sufficient to strip a person of their legal capacity.

- c. Law reform should require courts to assess a person’s functional capacity only in those areas where persons need assistance. Law should never prohibit a person from doing things and making decisions if there is no specific and rigorous justification for this: in this respect, the CRPD is clear that there can never be an acceptable justification for denying persons with intellectual or psycho-social disabilities from voting, this being a non-derogable right. At present, various pieces of Russian legislation currently in force provide for the unconditional and automatic withdrawal of certain fundamental rights of persons with intellectual or psycho-social disabilities. As a result, current Russian legislation needlessly, unduly and unlawfully restricts the rights of such persons.
- d. Legislation should enable a person who has been restricted of their legal capacity to be able to appeal directly – and without requiring any form of ‘permission’ – to a court to have his or her legal capacity altered or restored. Legislation must ensure that all measures used in the restriction of a person’s legal capacity are only applied for a finite period of time, and that periodic reviews of such decisions take place annually, at a minimum.
- e. New legislation must establish meaningful and substantive supervision and regulation of guardians’ acts and omissions. Formal regulations must oblige guardians to take into account and act on the wishes and opinions of the person under their guardianship. If the guardian acts contrary to the wishes or opinions of the person under guardianship then legislation must establish an effective procedure for the resolution of such conflicts by an independent body. Legislation must guarantee the person under guardianship effective recourse against the actions of their guardian. These changes will contribute to ensuring that safeguards exist to prevent serious and systematic abuse of person’s rights, particularly for financial gain by unscrupulous family members or local authority officials.
- f. New legislation must cut the intimate link that has been forged between the deprivation of legal capacity and long-term institutionalisation of persons with intellectual or psycho-social disabilities. Guardians should not be allowed to decide to place the person under guardianship into a social care institution (“internat”). Institutionalisation and guardianship often both result in social exclusion, marginalisation, poverty and contribute to the stigma of mental disability. A de-institutionalisation process can, in policy-terms, be properly regarded as a necessary corollary to the reform of legal capacity legislation. MDAC encourages cross-sectoral thinking and multi-level collaboration to deal with these issues.



Hundreds of thousands of people with mental and intellectual disabilities are currently affected by current Russian legislation depriving them of their legal capacity and are subject to total guardianship (no official statistics exist). The UN Human Rights Committee has also expressed concern about the significant numbers of people affected by this system, in particular the apparent lack of adequate procedural and substantive safeguards against disproportionate restrictions of the human rights of persons with intellectual and psycho-social disabilities.

3. Human rights affected by legal capacity legislation

Once a person is deprived of their legal capacity a wide array of fundamental rights are seriously restricted or even denied completely. This section looks provides a detailed analysis of the various human rights areas which are affected by the current legal capacity legislation.

Each of these areas engages issues which fall under the competence of more than one Ministry. As such, MDAC recommends that an holistic approach to legislative reform is undertaken, coordinated by one Ministry (as required by Article 33(1) of the United Nations Convention on the Rights of Persons with Disabilities – CRPD). MDAC also reminds the Russian authorities that any and all such law reform needs to be carried out with the full involvement and participation of persons with disabilities and their respective organisations (as specified in Article 4(3) of the CRPD), and that the implementation of any legislation relating to people with (mental, intellectual or other) disabilities must be monitored by an independent mechanism (Article 33(2) of the CRPD) with the input of civil society into such monitoring process (Article 33(3) of the CRPD).

3.1. The right to decide where to live

Once an adult has been placed under guardianship, that person’s guardian can, under current provisions, send the person against their will to a social care institution (“internat”). These institutions are often in remote places, have deplorable conditions, force antipsychotic medication upon their residents, and are closed to public scrutiny. Very often people with intellectual or psycho-social disabilities are placed under guardianship by relatives so that they can access their accommodation by sending them to an internat.

The right to decide where to live is an aspect of the right to respect for private and family life under Art. 8 of the European Convention on Human Rights (ECHR). It is also an aspect of Art. 17 of the International Covenant on Civil and Political Rights (ICCPR), as well as Art. 27 of the Russian Constitution. The right of persons with disabilities “to live in the community with choices equal to others” is explicitly recognized in Art. 19 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

3.2. The right to liberty

People deprived of legal capacity are currently excluded from general safeguards against arbitrary detention as provided for in the 1992 Law on Psychiatric Care. Until recently, people deprived of their legal capacity who were placed in psychiatric hospitals against their will were considered to be “voluntary” patients (provided their guardian agreed to their hospitalisation). As a result, procedural requirements, such as court review of the lawfulness of detention and access to a lawyer, envisaged in the Russian Law on Psychiatric Care for cases of involuntary hospitalisation, had no legal effect.

In February 2009, the Russian Constitutional Court in the case of *Shtukaturov and others* annulled the above provision.⁶ However, a new procedure of hospitalisation for persons deprived of legal capacity – irrespective of whether the person protests about their detention – has not yet been adopted. The decision of the Constitutional Court does not affect the legal prohibition denying persons deprived of legal capacity the right to apply to court to review the lawfulness of their *continuous* detention. Nor does the Constitutional Court decision affect the arbitrary detention of people in social care institutions (“internats”), whose detention is decided upon by the guardian, and which is not authorised by any legislation such as the Law on Psychiatric Care.

Consequently, a person deprived of their legal capacity can be detained in these institutions merely upon the request of their guardian and without any independent control or judicial review. Once a person deprived of legal capacity is placed in a social care institution, it becomes their guardian who acquires unchecked power to authorise ongoing and indefinite detention. This leads to an unprecedented and unlawful situation whereby the question of continuing a person’s detention is entirely at the discretion of the institution in which that person is detained – effectively without any external control, and represents, at minimum, a conflict of interests on the part of the institution. This sort of system would be unthinkable in the criminal justice system, for example. An acceptance of such a system for persons with disabilities can only be regarded as institutionalised discrimination on the basis of disability.

The right to liberty is a fundamental human right protected by Art. 5 ECHR, and Art. 9 ICCPR, as well as Art. 22 of the Russian Constitution. Furthermore Art. 14 of the CRPD guarantees that people with disabilities shall not be deprived of their liberty unlawfully or arbitrarily, and that the existence of a disability shall in no case justify a deprivation of liberty.

3.3. The right to correspondence

Although it may seem obvious that people have a right to communicate freely with the outside world, the situation becomes different when it relates to people deprived of their legal capacity in Russia. The importance of this freedom becomes more significant in respect of people placed in mental health or social care institutions. Very often people deprived of their legal capacity are prevented by their

⁶ Constitutional Court of the Russian Federation. Judgment no. 4-P of 27 February 2009.

guardians – be it an actual person carrying out the role of guardian or the mental health or social care institution itself – from receiving visitors of their choice, sending or receiving letters. People are prohibited or restricted from using telephones, including their own mobile phones. Guardians have virtually unrestricted powers to limit enjoyment of the right to correspondence and this arbitrarily restricts a person’s freedom of expression. International law provides effective remedies for a person under guardianship to challenge such violations.

The right to communicate with the outside world is an aspect of the right to private and family life guaranteed by Art. 8 of the ECHR and Art. 22 of the CRPD. Article 22 of the CRPD explicitly states that “no person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence or other types of communication”.

3.4. The right to political participation

According to Art. 32 of the Russian Constitution people deprived of legal capacity are prohibited from voting in local and national elections, and from standing for election. The law also prohibits them from joining political parties and associations. These restrictions are based exclusively on the legal capacity status of a person and do not take account of their actual capacity to make decisions on political matters; neither does the law reflect the reality that some people need assistance in managing their finances, but retain the ability to make a political preference through the ballot box – a non-derogable right.

Russian law does not require any level of understanding of political issues by people who are not formally deprived of their legal capacity as a precondition for them to enjoy their right to vote or participate in political life. This is a clearly discriminatory situation in which restrictions are imposed on a person’s political rights which have no other justification than their legal status, based on a diagnosis.

The right to effectively participate in voting procedures is expressly guaranteed by Art. 29 of the CRPD. As the Council of Europe’s Commissioner for Human Rights has said recently, “I would like to add that persons with mental health and intellectual disabilities should have the right to vote in elections and stand for election. Though this is stated clearly in the CRPD, individuals in a number of European countries are excluded. Being deprived or restricted of their legal capacity they have been denied these rights as well. This has further exacerbated their political invisibility”.⁷ Inherent in the right to engage in public affairs is the right contained in Article 4(3) of the CRPD for persons with disabilities to be consulted and involved in all relevant legal and policy reforms: such involvement will sharpen the relevance of resultant policy and increase the likelihood of its ownership by the very beneficiaries it seeks to affect, and to ensure policy implementation.

⁷ Viewpoint of the Commissioner, “Persons with mental disabilities should be assisted but not deprived of their individual human rights”, 21 September 2009, available at <http://www.commissioner.coe.int>.

3.5. The right to work

Article 37 of the Russian Constitution states that everyone has a right to use his or her abilities to work, choose a profession and specialisation. There are no provisions in the Labour Code that limit an adult's right to work on the basis of his or her legal incapacity. However it has widely been the case that, in practice, people deprived of their legal capacity do not retain their right to work as they cannot enter into any contractual relations. Therefore the position of people under guardianship and the right to work remains unclear with many such people who are able and willing to work being forced to find informal labour arrangements in pursuit of their right to work.

The International Covenant on Economic, Social and Cultural Rights establishes the right to work.⁸ The (Revised) European Social Charter guarantees the right to work specifically in relation to persons with disabilities.⁹ The restrictive effect of Russian legislation in this respect is also contrary to the provisions of the CRPD which guarantees, in Art. 27, "the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities".

In addition, Recommendation No. R(99)4 of the Committee of Ministers of the Council of Europe provides that where a measure of protection (such as guardianship) is necessary, it should be proportionate to the degree of the functional capacity of the adult and tailored to the individual's circumstances and needs. Therefore a blanket prohibition from employment of all people under guardianship, albeit implicit, arbitrarily excludes people with disabilities from participating in and contributing to society without any examination of their desire or ability to do so.

3.6. The right to marry and found a family

The Russian Family Code prohibits people deprived of their legal capacity from marrying (Art. 14). It also contains a prohibition stopping them from exercising parental control over their children or adopting children (Art. 127). When a woman deprived of legal capacity gives birth, or when a mother is deprived of her legal capacity after giving birth, she loses her parental rights automatically. A child may be forcibly removed from the mother, and placed for adoption without parental consent if the parent is under guardianship (Art. 130). Children can be automatically removed by social services and taken into state care without any assessment of the mother's actual abilities to raise the child, without exploring potential support options, and without assessing what is in the child's best interests – a core provision of the UN Convention on the Rights of the Child.¹⁰

⁸ Article 6 of the International Covenant on Economic, Social and Cultural Rights, UN Document A/6316, was ratified by the Russian Federation on 16 October 1973 and entered into force 23 March 1976.

⁹ Article 15(2) of the European Social Charter (revised), Strasbourg, 3 May 1996. The Russian Federation ratified the revised European Social Charter on 16 October 2009.

¹⁰ Article 3 of the Convention of the Rights of the Child, which was ratified by the Russian Federation on 16 August 1990 and entered into force on 2 September 1990.

Furthermore in accordance with Art. 23 of the CRPD the obligation of the state extends beyond refraining from prohibiting people with disabilities establishing their own families and raising children. Indeed, the state is also obliged to render appropriate assistance to persons with disabilities in respect of their child-rearing responsibilities.

3.7. The right to consent to somatic and mental health treatment

Russian law strips the right to consent to or refuse medical treatment from persons deprived of legal capacity. A guardian's consent is all that is required by law, even in cases where the person deprived of legal capacity actually has the functional capacity to understand the situation and decide for him or herself. In many cases, the guardian of a person in a mental health or social care institution is actually the institution itself (represented by the director), creating an absurd situation where the psychiatrist treating the person is the guardian who decides on and authorises medical treatment, creating a clear conflict of interest.

Consent to treatment is one of the key factors in determining whether invasive psychiatric treatment violates Article 7 of ICCPR prohibiting torture and other forms of ill-treatment. In this context, Art. 25 of the CRPD requires the provision of health care of the same quality to persons with disabilities as is provided to others, including on the basis of free and informed consent.

In a recent report, the UN Special Rapporteur on the right to health addressed the issue expressly, emphasising that "the existence of a disability is not a lawful justification for any deprivation of liberty, including denial of informed consent".¹¹ The Special Rapporteur further points out that "legislation sanctioning non-consensual treatments lacking therapeutic purpose or aimed at correcting or alleviating a disability, including sterilizations, abortions, electro-convulsive therapy and unnecessarily invasive psychotropic therapy, violate the right to physical and mental integrity and may constitute torture and ill-treatment."¹² In addition to this the UN Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment noted in his report that "forced and non-consensual administration of psychiatric drugs, and in particular of neuroleptics, for the treatment of a mental condition needs to be closely scrutinized. Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment".¹³

People with mental disabilities living in institutions are arguably the most vulnerable people and, among them, the rights of those deprived of legal capacity have the least protection. Mental health and social care institutions are unlike prisons in that

- a. people are detained in them for indefinite periods of time,
- b. without legal review and

¹¹ Report of Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/64/272, 10 August 2009, para. 72.

¹² Ibid, para. 73.

¹³ UN Doc. A/63/175 of 28 July 2008, paragraph 63.

- c. are forced to receive psychiatric medication against their will, often with unwanted, harmful, and long-lasting side effects which are worse than the possible prevailing psychiatric condition itself.

3.8. The right to access to justice

Under the Russian Code of Civil Procedure, persons deprived of their legal capacity are also deprived of their legal standing to bring cases before courts in any matters related to their rights. This restriction is not limited to civil-law rights only but extends to complaints against abuses committed by public authorities. When institutionalised, they can be fully prevented by the institution from any form of communication and, as a result, can be unable to report abuse to any third party. Moreover even if such people can communicate their complaints, they are prohibited by law from instituting any proceedings against the institution.

Deprivation of legal capacity is a life sentence. Once a person is deprived of their legal capacity, they are also deprived of any independent legal means of having their legal capacity restored at a later stage. Incapacity decisions are made for an indefinite period of time and are not subject to periodic review, in contravention of international human rights law. Legal capacity can only be restored by means of a court decision declaring a person fully legally capable. Only the person's guardian or municipal authorities can lodge an application initiating such proceedings. However, they are under no obligation to file such an application, even if the person's condition has visibly and dramatically improved. The person themselves are legal prohibited from lodging such applications and are further prohibited from challenging the inaction of the above parties by virtue of their legal incapacitation.

Access to justice is fundamental to the effective enjoyment of other rights. In this respect the CRPD states in Art. 13 that States shall ensure effective access to justice for persons with disabilities on an equal basis with others. Coupled with this requirement is the concept of reasonable accommodation, which the Convention defines in Article 2 as the "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". The CRPD makes clear that a denial of reasonable accommodation constitutes discrimination.

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