



**SHADOW REPORT  
ON THE IMPLEMENTATION OF THE  
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS  
BY THE RUSSIAN FEDERATION**

for consideration by the  
United Nations Human Rights Committee  
at its 97th Session, October 2009

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**mdac** advances the human rights of children and adults with actual or perceived intellectual or psycho-social disabilities. Focusing on Europe and Central Asia, we use a combination of law and advocacy to promote equality and social integration.

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## I. Executive Summary

The Mental Disability Advocacy Center (*hereinafter* “MDAC”), an international non-governmental organisation, based in Budapest, that advances the human rights of children and adults with actual or perceived intellectual disabilities or psycho-social (mental health) disabilities, respectfully submits the following written comments concerning the Russian Federation for consideration by the Human Rights Committee (*hereinafter* “the Committee”) at its 97th Session.

In the present report, MDAC wishes to draw the Committee’s attention to the situation of the most vulnerable and marginalised group of Russian citizens, namely, persons who have been formally stripped of their legal capacity on grounds of mental disability (*hereinafter* “persons deprived of legal capacity”). Whereas mental disability per se leads to a significant degree of social exclusion and discrimination in Russian society, those who are formally deprived of their legal capacity suffer unprecedented levels of arbitrary restriction of their human rights even when compared to other people with psychiatric history.

The Russian system of legal incapacitation has recently come under scrutiny in the judgment of the European Court of Human Rights in *Shtukaturov v. Russia* (judgment of 27 March 2008, application no. 44009/05 – see Appendix 2). The European Court held that deprivation of legal capacity amounted to a disproportionate interference with a person’s private life and led to arbitrary deprivation of liberty, and that persons deprived of legal capacity did not receive a fair trial – all core civil and political rights which are framed in this report as ICCPR concerns. MDAC calls on the Committee to subject this measure to further scrutiny and add the emerging international pressure on Russia to reform its outdated and grossly discriminatory mental disability legislation. The social, economic and political exclusion and stigmatisation cause by legal incapacitation mean that people subjected to this measure are underrepresented in both domestic and international fora. No official data on the total number of legally incapacitated people is made publicly available by the Russian government. However, it can be safely assumed that the total number of persons deprived of legal capacity is considerable and, most certainly, well in excess of 100.000, and that the annual rate of incapacity decisions is on the rise.<sup>1</sup> The increase in the application of the measure is at least in part due to the easy manner in which it can be abused for financial gain. Far from protecting people, the legal capacity system in Russia contributes to corruption, the diminishing of the rule of law, and a decrease in protection of civil and political rights.

Only full (not partial) deprivation of legal capacity is available for people in Russia with intellectual or psycho-social (mental health) disabilities who may need support in making

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<sup>1</sup> These inferences can be made from the data on the annual number of psychiatric capacity assessments which are a mandatory element of incapacitation proceedings. From 1997 to 2007, the annual number of capacity assessments doubled, reaching 34,000 in 2007. An overwhelming majority of these assessments (94%) resulted in a court depriving the assessed person of legal capacity. (see Основные показатели деятельности судебно-психиатрической экспертной службы Российской Федерации в 2007 году: Аналитический обзор/ Под ред. Т.Б.Дмитриевой. - М.: ФГУ «ГНЦ ССП им.В.П.Сербского», Вып.16. - 2008 — 188 с.). On the strength of MDAC’s own research and litigation experience as well as the anecdotal evidence by local NGOs, lawyers and psychiatrists, MDAC asserts that Russian courts are overwhelmingly deferential to the opinion of psychiatric experts and almost without exception make decisions in legal capacity proceedings that are in line with the conclusions of the psychiatric report. It, therefore, can be assumed that the number of people deprived by courts of their legal capacity is not significantly different from the number of psychiatric capacity assessments.

important decisions. While failing to ensure any actual support or assistance in exercising rights, deprivation of legal capacity leads to a sweeping withdrawal of the person's decision-making powers in respect of all important aspects of their life, including such matters as managing their property and finances, consenting to or refusing medical treatment, choosing a place of residence, establishing a family and raising children, taking part in political affairs. Deprivation of legal capacity transfers all these powers to the person's guardian, while the person him/herself has no formal influence on the guardian's decisions, and need not even be consulted on the decisions taken on his/her behalf.

A person deprived of legal capacity is prevented from accessing effective legal remedies in case their rights are abused by the guardian or any other party. Yet, despite such levels of interference with an individual's autonomy and freedom, the corresponding procedural and substantive safeguards envisaged in Russian law are exceptionally weak. As a result, deprivation of legal capacity leads to deprivation of fundamental rights that has no correlation with the actual state of the person's mental capacity for making decisions and exercising their rights. The existence of a psychiatric history is often the only basis for imposing the measure. Therefore, legal incapacitation in the form it exists in Russia constitutes an egregious form of discrimination on grounds of disability, institutionalised in law.

People deprived of legal capacity suffer disproportionate and objectively unjustifiable interference with the following rights guaranteed in the Covenant:

**Right to an effective remedy (Article 2):** Legally incapacitated people do not have any effective remedy in the Russian law in order to challenge any abuse of their human or to have their legal capacity restored.

**Freedom from cruel, inhuman and degrading treatment (Article 7):** People deprived of legal capacity can be subjected to psychiatric treatment (normally accompanied by compulsory confinement) without their consent. Lacking legal standing before court, they have no effective legal recourse against abusive actions of the staff of institutions they are confined to. When a person deprived of legal capacity is placed under the guardianship of the institution they reside in, the institution gains unlimited control over the life of that person. This situation is aggravated by the lack of a comprehensive, effective and independent inspection mechanism over mental health and social care institutions.

**Right to liberty (Article 9):** Legally incapacitated people can be arbitrarily institutionalised for an indefinite period of time. They have no direct access to court to challenge the lawfulness of their detention. When a person is confined on a long-term basis, the institution itself becomes the person's guardian. In such a case, the question of continuing a person's detention is entirely at the discretion of the institution in which that person is detained.

**Freedom of movement and deciding on place of residence (Article 12):** Persons deprived of legal capacity have no right to decide independently on their place of residence. These decisions are made by their guardians who are not required to take into account the wishes of the person concerned. They are subject to involuntary placement in social care institutions ("internat") solely on the guardian's decision, and are thus stripped of the right to decide on their place of residence in contravention to the Covenant.

**Right to a fair trial (Article 14):** Persons deprived of legal capacity do not have legal standing before courts on any matters arising out of violation of their civil rights or actions of public authorities. Furthermore, the right to a fair trial is not respected in legal incapacitation

proceedings (i.e. proceedings that lead to incapacitation), due to the person not being notified, being prevented from presenting or challenging evidence, being denied legal representation paid for by the State, and being denied appropriate appellate rights.

**Right to equal recognition as a person before the law (Article 16):** Full legal incapacitation strikes at the heart of one's legal personhood, as it deprives a person of their ability to make independent decisions on important aspects of their life and puts this power in the hands of a third party (their guardian) who need have no training, is not selected by the person concerned, and not required to heed their wishes, feelings and opinions.

**Right to marry and found a family (Article 23):** Persons deprived of legal capacity are automatically deprived of their right to marry as well as their parental rights, without any assessment of their capacity to perform their functions as a spouse or/and parent.

**Right to take part in public affairs and to vote (Article 25):** Persons deprived of legal capacity are automatically deprived of the right to vote. As in the case of Article 23, this restriction is based not on a person's actual (functional) capacity but on their formal status of being deprived legal capacity.

**Equality before the law (Article 26):** As the substantive and procedural requirements for deprivation of legal capacity in Russia are weak and poorly defined, the mere existence of a psychiatric diagnosis is used by the courts as a sufficient justification for depriving legal capacity. In consequence, the ensuing restrictions imposed on a person's rights bear no correlation to their actual (functional) ability to exercise those rights and, therefore, cannot serve a legitimate purpose and are not objectively necessary. They amount to a discriminatory treatment on the grounds of disability.

## II. Expertise and Interest of MDAC

MDAC is an international non-governmental organisation that advances the human rights of children and adults with actual or perceived intellectual or psycho-social (mental health) disabilities. Focusing on Europe and central Asia, MDAC uses a combination of law and advocacy to promote equality and social integration. MDAC has participatory status at the Council of Europe.

MDAC has been working extensively in Russia since 2004. In conjunction with local counsel, MDAC has provided legal assistance to individuals who suffered violations of their rights on the grounds of their mental disability. Many of these cases are concerned with legal capacity and guardianship. In November 2007 MDAC published a comprehensive report entitled “Guardianship in Human Rights in Russia”, the first study of its kind<sup>2</sup> (see Appendix 1). MDAC represented the applicant in the landmark case of *Shtukurov v. Russia* which was decided by the European Court of Human Rights in March 2008 (see Appendix 1). In that judgment, the European Court held that the Russian system of full legal incapacitation violated the right to a fair trial, the right to physical liberty and the right to respect for one’s private life. The Court emphasised that the Russian law did not allow for a flexible approach tailored to the individual needs of a person who may need support in their decision-making. MDAC also represented Mr Shtukurov before the Russian Constitutional Court, which followed the ECHR judgment with its own decision in February 2009 (see Appendix 2). MDAC also developed and conducted training for local guardianship authorities which allowed for further information about the situation of persons deprived of legal capacity to be collected, and is now carrying out federal-level advocacy to put in place human rights compliant legal capacity system.

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<sup>2</sup> This report can be downloaded from the MDAC website:  
[http://www.mdac.info/documents/Russia%20report\\_comprehensive\\_English.pdf](http://www.mdac.info/documents/Russia%20report_comprehensive_English.pdf)

### **III. Systemic violations of fundamental rights guaranteed in the Covenant which arise out of the system of full legal incapacitation**

#### ***iii.1) Explanation of the Russian system of legal incapacitation***

Generally speaking, the existence of a mental disorder, no matter how serious, does not imply that a person has diminished capacity for making independent decisions about their life. In some cases, however, a person's functional capacity can indeed be affected; even then, one's functional capacity tends to be diminished only in certain areas of decision-making (e.g., property and finance-related issues, medical treatment, etc). Just because a person's mental capacity is diminished in respect of one set of issues, it should not be assumed that they cannot decide and act independently on all other aspects of their life. Furthermore, a person's functional capacity may change, and improve, with time – provided that proper care and support are made available. Many mental illnesses are cyclical in nature. Therefore, it is crucial that any measure of protection applied to persons with diminished functional capacity is tailored to their individual needs, extends only those areas in which their capacity is indeed affected, and is removed as soon as the actual condition of the person no longer justifies it.<sup>3</sup> The system of total deprivation of legal capacity embodied in Russian legislation fails to reflect any of the above principles which have been established by international human rights standards at the United Nations and Council of Europe levels.

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 declared legally incapable by the court. Once a person is declared “legally incapable”, a guardian must be appointed by the guardianship authorities within a period of time defined in the law. There is no legal obligation to take account of the past or present wishes of the person concerned when selecting their guardian. The court can restore a person's legal capacity (by declaring them fully capable) 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 who, however, have no legal obligation to initiate restoration proceedings.

The above system is the *only* solution envisaged in Russian law in respect of adults whose decision-making capacity is adversely affected by mental disability. Russian law's only response to people who need support in decision-making is to take away their rights to make such decisions. In other countries there is legislation in place to ensure support, not to remove rights.

The lack of flexibility of the Russian law has been criticised by the European Court of Human Rights in *Shtukurov v. Russia*. The 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 – see Appendix 1 of this report). This system is characterised by a number of fundamental flaws which lead to abuse, discrimination and social exclusion of persons with mental disability:

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<sup>3</sup> 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.

(a) A lack of less restrictive alternatives leads inevitably to restricting a person's freedoms and rights to a considerably larger extent than strictly necessary. The law is therefore disproportionate to any protection it aims to offer.

(b) The legal criteria for depriving a person of legal capacity are too vague and skeletal to protect against arbitrariness in the application of the measure. The procedural guarantees are equally weak: the Code of Civil Procedure does not ensure that a person whose capacity is at issue is heard by the court and has the right to fully participate in the proceedings, nor does it define the factors to be established by psychiatric experts and the court and what evidence should be examined. As a result, the mere existence of an intellectual disability or a psycho-social (mental health) disability is often deemed sufficient to strip a person of their legal capacity.

(c) The courts are not required to assess a person's functional capacity in different areas of decision making (e.g. property, finances, medical treatment, parental responsibilities, work, voting, etc.). At the same time, different pieces of legislation provide for the unconditional and automatic withdrawal of certain fundamental rights. As a result, Russian legislation enables the restriction of a person's rights without establishing any necessity for such restrictions.

(d) While weak procedural safeguards and vague substantive requirements make it astonishingly easy to deprive a person with any actual or perceived disability of their legal capacity, the restoration of one's legal capacity is almost impossible. Legal incapacitation is always applied only for an indefinite period of time, and there is no periodic review of such decisions. A person deprived of legal capacity is legally prohibited from applying to court to have their capacity restored, and legally prohibited from instructing a third party to do so. Those persons who do have the right to initiate such proceedings (e.g. the guardian) are not required to do so.

(e) There is no meaningful supervision of guardians and their responsibilities are unregulated. In particular, the law does not oblige the guardian to take into account the wishes and opinions of the person under their guardianship. The guardian has virtually unlimited control over every aspect of the person's life. At the same time, the person under guardianship has no effective recourse against the actions of their guardian. These deficiencies of the system make people deprived of their legal capacity especially vulnerable to serious and systematic abuse of their rights, particularly for financial gain by unscrupulous family members or local authority officials.

(f) There is a strong link between legal incapacitation and life-long/long-term institutionalisation which increases the vulnerability and powerlessness of persons with mental disability. Guardians can legally decide to place the person under guardianship into a social welfare institution ("internat") for the rest of their life. The law provides no procedural safeguards and no recourse to appeal or have the lawfulness of the detention reviewed by a court.

### ***iii.2) Interconnection between legal capacity and institutionalisation: reinforcing vulnerability***

MDAC wishes to draw the Committee's attention to a particularly worrisome aspect of legal incapacitation, namely, the mutually reinforcing link that exists between incapacitation and deprivation of liberty (especially, life-long institutionalisation). As highlighted in a 2008 report by the UN Special Rapporteur on Torture, "persons with disabilities often find themselves in such situations [situations of powerlessness], for instance when they are deprived of their liberty in prisons or other places, or when they are under the control of their caregivers or legal guardians... it is often circumstances external to the individual that render them 'powerless', such as when one's exercise of decision-making and legal capacity is taken away by discriminatory laws or practices and given to others".<sup>4</sup> While psychiatric institutions in Russia exercise an enormous degree of control over their residents, they are subject to no meaningful regular and independent human rights monitoring. Furthermore, people who are placed in institutions involuntarily lose their right to consent to treatment automatically and, therefore, are subjected to forced treatment.

Against this general background, the situation of legally incapacitated patients is particularly alarming. This is so for a number of reasons:

- a) when detained in psychiatric hospitals and social care institutions, people deprived of legal capacity do not enjoy the safeguards (e.g. judicial review) that are normally required by international law and Russian law; there is no legal possibility for such a person to apply to court to challenge their continued detention; consequently such people can be arbitrarily detained in psychiatric institutions for an indefinite period of time;
- b) under Russian law, the consent of a person deprived of legal capacity is not required in matters related to their psychiatric treatment; only their guardian's consent is relevant; furthermore, the doctors are not even required to provide legally incapacitated patients with any information about their treatment, even in cases where it is obvious to doctors that their patient has the functional ability to understand and decide on the course of treatment;
- c) when a person deprived of legal capacity is placed in an institution for a long/indefinite period of time, the institution itself becomes their guardian. This arrangement allows the institution to have total and unchecked control over every aspect of the person's life; it also means that the continuation of the person's detention is completely at the discretion of the institution, creating an obvious conflict of interest, and one which potentially contributes to the corruption within the mental health and social care systems;
- d) a person deprived of legal capacity is legally prevented from access to justice on any matters related to their rights; this deprives such a person of an effective legal remedy against any abuse committed by the institution's staff or by other residents;
- e) when an institution becomes the guardian of a legally incapacitated patient/resident, it has the legal power to restrict or ban any visitors (including the person's lawyer) and any form of communication with the outside world; consequently, detainees deprived of legal capacity are denied any possibility to report the abuse of their rights or to contact authorities (e.g. ombudsman office, NGOs) who might be able to assist them in seeking remedies for rights violations.

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<sup>4</sup> Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, A/63/175, 28 July 2008, para 50

MDAC has provided legal assistance in a number of cases which represent typical patterns of human rights abuses arising out of interplay between legal incapacitation and institutionalisation. The two cases below are highly illustrative:

#### **Case of Ms S.<sup>5</sup>**

*Unbeknown to her, Ms. S was deprived of her legal capacity in April 2004 in court proceedings which she did not know about and in which therefore she did not participate. A copy of the court judgment had not been sent to her, and by the time she accidentally found out about the decision, it had come into force and the ten-day time limit for appealing it had long since passed. A guardian had been appointed without her knowledge.*

*Ms S had for many years a bad relationship with her daughter. Her daughter was the person who instigated the guardianship proceedings, and her daughter then forced Ms S to leave her two-room apartment. Ms S wanted to challenge this, but she could not defend her rights in court as she has no legal standing because of her incapacity status. Her guardian was not willing to act on her behalf and did not provide any other support.*

*While being restricted in her rights in this manner, Ms S continued to demonstrate her actual ability to live and take care of herself independently: she continued working, going to church, and socialising with her friends.*

*In March 2008 Ms S was placed into a psychiatric hospital against her will. However, being legally incapable she was formally considered as a “voluntary patient” and, therefore, there was no judicial review of her detention.*

*At the time of submitting this report to the UN Human Rights Committee (September 2009), Ms S remained detained in the hospital against her will, simply because none of her family members wishes to take her home. The hospital is now her official legal guardian. Ms S has been prevented from meeting with her attorney (an MDAC affiliate) and her right to have visitors has been curtailed by the hospital.*

This case illustrates how a person deprived of legal capacity can be deprived of their liberty for an indefinite period of time without any legal safeguards. It also shows the level of control a psychiatric institution can exercise over a patient deprived of their legal capacity.

#### **Case of Katya Timochkina<sup>6</sup>**

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<sup>5</sup> “Ms S” is an actual client of MDAC’s and its affiliated attorney in St. Petersburg, Dmitri Bartenev. The facts have not been changed, but MDAC uses an initial to protect the client’s identity.

<sup>6</sup> Katya Timochkina is an actual client of MDAC’s and its affiliated attorney in St. Petersburg, Dmitri Bartenev. The facts have not been changed, and MDAC uses the client’s name because this case has received extensive coverage in the media, so her name is already in the public domain.

*This case was referred to MDAC by Russian NGO “Down Syndrome Association”. Ms Ekaterina Timochkina lives in Samara, Russia. She has cerebral palsy. She was placed into state care when she was two. She was classified as “non-educable” and has never received any formal education or social rehabilitation.*

*When she reached the age of 18 in May 2008, a local court deprived her of her legal capacity on the recommendation of the social care institution where she lived at the time. Ms Timochkina was not informed about the legal capacity proceedings and consequently did not take part in them.*

*Immediately after she was deprived of her legal capacity she was transferred to a social care institution in a different city. She was then assessed by an independent commission of psychiatric experts which concluded that she had no intellectual disability and her abilities were limited due to a lack of education. Despite these findings, and despite asking a court to restore her legal capacity, the court refused to do so.*

*Ms Timochkina then spent two months in Moscow in a rehabilitation facility and made remarkable progress in her development and demonstrated full intellectual capability. However the social care institution, where Ms Timochkina (now 19) had to return to, does not provide her with sufficient education or rehabilitation and objects to her being transferred to the Moscow rehabilitation facility.*

*Ms Timochkina is therefore prohibited from leaving the social care institution on her own, purely because she does not have the legal capacity to make that decision. Because of her legal incapacity she is prohibited by Russian law from mounting a legal challenge against challenge against the actions of the social care institution.*

This case reveals a somewhat different pattern of abuse from that of Ms S, as it concerns a person who has been institutionalised since childhood and, therefore, lost her legal capacity whilst institutionalised. It is a wide-spread practice for social care institutions to apply to have their disabled residents deprived of their legal capacity on their 18<sup>th</sup> birthday, a practice which demonstrates the link between guardianship and institutionalisation, both of which engage core provisions of the ICCPR and which MDAC asks the Human Rights Committee to include in its Concluding Observations with regard to the Russian Federation.

### ***iii.3) Article 2 – the Right to an Effective Remedy***

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 communication and, therefore, can be unable to report abuse to any third party.

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 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 prohibited from challenging the inaction of the above parties.

#### ***iii.4) Article 7 – Prohibition of Cruel, Inhuman and Degrading Treatment***

People with mental disabilities living in institutions are arguably the most vulnerable people and among them those deprived of legal capacity are the least protected. Psychiatric 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 (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.

Instances of torture, inhuman, cruel and degrading treatment are common in mental health and social care facilities in Russia. The most egregious abuses of their rights reported by Russian NGOs and ombudsmen include forced sterilisation of legally incapable women, forced labour, and various forms of punishment by staff of the institutions.<sup>7</sup>

Consent to treatment is one of the key factors in determining whether invasive psychiatric treatment violates Article 7. In his latest 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”.<sup>8</sup> 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.”<sup>9</sup>

This view is supported by Manfred Novak, the UN Special Rapporteur on Torture, who said in a 2008 report addressing torture and disability that, “whereas a fully justified treatment may lead to severe pain or suffering, medical treatments of an intrusive and irreversible nature, when they lack a therapeutic purpose, or aim at correction or alleviating a disability, may constitute torture and ill-treatment if enforced or administered without the free and informed consent of the person concerned”.<sup>10</sup> These views clearly fall within Article 7 of the ICCPR and MDAC invites the Human Rights Committee to echo the authoritative views of the two Special Rapporteurs.

In contravention of international human rights law preventing torture and other forms of ill-treatment, Russian law strips the right to consent to or refuse treatment from persons deprived of legal capacity. It is only their guardian's consent that is required by the law, even in cases where the person deprived of legal capacity actually has the functional ability to understand the

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<sup>7</sup> Ombudsman of the Permskiy Krai. Special Report “On the Rights of the Permanent Residents of the Psycho-neurological Social Care Homes in the Permskiy Krai” (2008): [http://ombudsman.perm.ru/\\_res/fs/file772.doc](http://ombudsman.perm.ru/_res/fs/file772.doc)

<sup>8</sup> 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.

<sup>9</sup> Ibid, para. 73.

<sup>10</sup> Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, A/63/175, 28 July 2008, para 47

situation and decide on these matters. In many cases, the guardian is the institution in which the person subjected to treatment is detained, creating an absurd situation where the psychiatrist treating the person is the guardian who decides on treatment.

Furthermore, in order to prevent instances of ill-treatment Russia is obliged to establish appropriate mechanisms for independent and effective monitoring of institutions where personal liberty is restricted. The Law on Psychiatric Care adopted in 1992 requires the state to establish an independent patient advocacy service<sup>11</sup>. However, such a service is yet to be set up. There is no other mechanism in place which would ensure regular and effective monitoring of psychiatric institutions. Russia has not ratified the Optional Protocol to the UN Convention against Torture which obliges States Parties to establish national preventive mechanisms to conduct regular human rights monitoring of places of detention.

### ***iii.5) ICCPR Article 9 – the Right to Liberty***

People deprived of legal capacity are excluded from general safeguards guaranteed by the 1992 Law on Psychiatric Care for cases of detention. Until recently, people deprived of legal capacity who were placed in psychiatric hospitals against their will were considered as “voluntary” patients (provided their guardian agreed to hospitalisation). As a result, the procedural and substantive requirements (e.g. court review of the lawfulness of detention; access to a lawyer, etc.) envisaged in the Russian Law on Psychiatric Care for cases of involuntary hospitalisation did not apply.

In February 2009, the Russian Constitutional Court annulled the above provision (see *Shtukaturov* case, Appendix 2). However, the new procedure of hospitalisation for persons deprived of legal capacity (both protesting and non-protesting) has not been adopted yet. Moreover, the decision of the Constitutional Court does not have any effect of the legal prohibition of persons without legal capacity 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, whose detention is decided upon by the guardian.

Consequently, persons deprived of legal capacity can still be detained in this type of institutions merely on the request of their guardians and without any judicial control. Once a person deprived of legal capacity is placed in a social care institution, it becomes their guardian and thus acquires unchecked power to detain that person for an indefinite period of time. This leads to an unprecedented situation in which 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. 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 viewed as institutionalised discrimination on the basis of disability.

### ***iii.5) Article 12 – Freedom of Movement***

Russian law does not require that the guardians ascertain the wishes of the person deprived of legal capacity before making any decisions, including in matters related to their residence. Moreover, many people deprived of their legal capacity are routinely placed in the institutions

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<sup>11</sup> Law on Psychiatric Care and Citizens’ Rights Guarantees in its Provision, of 2 July 1992, Article 38.

only because they do not have anyone to act as their legal guardian, even though they may retain their actual ability to live independently, run their household and take care of themselves, as the case of Ms S demonstrates (see above).

As illustrated by the case of Katya Timochkina described above, even when a person living a social care institution has the functional capacity, desire and means to change their residence, this decision is taken out of their hands.

### ***iii.6) Article 14 – the Right to a Fair Trial***

Russian law obstructs persons deprived of legal capacity from accessing justice, as legal incapacitation extends fully to procedural capacity, i.e. persons deprived of legal capacity are stripped of their legal standing before authorities and courts on any matters arising out of a violation of their civil rights or actions of public authorities. While legal redress on behalf of a person deprived of legal capacity can be brought by their guardian, Russian law does not establish any formal system of reviewing the guardian's performance, nor is there a mechanism for the person under guardianship him or herself to instigate proceedings when their guardians refuse to act on their behalf.

Therefore, persons deprived of legal capacity are unequal to other citizens in the eyes of the law. Their right to a fair trial is further violated in the *process* of legal incapacitation. Until very recently, the courts could conduct legal incapacitation proceedings without hearing (or even notifying) the person whose legal capacity was at issue: the legislation provided only a very vaguely formulated criterion for excluding such a person from the proceedings which allowed exclusion to become the general practice.

Even though this provision was annulled by the Russian Constitutional Court in February 2009 (see Appendix 1), no new procedure has yet been adopted. As a result, the right of a person to participate in judicial proceedings related to their legal capacity is currently undefined. Moreover, the incapacity decisions which were made by the courts on the basis of the old legislation (i.e. without hearing the persons concerned) remain in force: under Russian law, only the three complainants to the Constitutional Court have the right to apply to court to restore their legal capacity. Therefore, the Constitutional Court decision did not provide redress to thousands of people currently deprived of their legal capacity in violation to their right to fair trial under Article 14 of the ICCPR.

### ***iii.7) Article 16 - the Right to equal recognition as a person before the law***

Deprivation of legal capacity takes away a person's ability to make independent decisions on virtually every important aspect of their life and places the realisation of their rights at the discretion of a third party (their guardian) who is not required to heed the wishes, feelings and opinions of the person concerned. Therefore, this measure strikes at the heart of the legal concept of personhood, to which the general capacity to have and exercise rights is essential. The Human Rights Committee has already established the fact that legal incapacitation interferes with the right under Article 16,<sup>12</sup> and MDAC invites the Committee to find that the Russian Federation is not in compliance with this provision.

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<sup>12</sup> Concluding Observations of the Human Rights Committee on the Czech Republic, CCPR/C/CZE/CO/2, 9 August 2007, para 13.

Moreover, Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD) – which Russia has signed, indicating a willingness to move in the direction which this treaty mandates - recognises expressly that a right to enjoy one’s legal capacity on an equal footing with others is an integral part of the right to equal recognition as a person.

With respect to recognition before the law, the Office of the UN High Commissioner for Human Rights issued in 2009 a thematic study on enhancing awareness and understanding of the CRPD which states, “Article 12 of the Convention requires States parties to recognise persons with disabilities as individuals before the law, possessing legal capacity, **including capacity to act**, on an equal basis with others”.<sup>13</sup> Equal recognition before the law, as set out in the ICCPR, encompasses these notions which the CRPD spells out in detail.

A major flaw in the Russian legal capacity legislation is that the law allows for employees of mental health and social care institutions to be appointed as guardian of one or more persons residing in institutions – a common practice throughout the country. The CRPD seeks to ensure, by way of Article 12(4), state provision of procedural guarantees to protect people who need assistance in exercising their legal capacity. Such guarantees include a provision that “measures relating to the exercise of legal capacity respect the rights, will and preferences of the person”. Specifically however these measures must be “free of conflict of interest and undue influence”.<sup>14</sup>

Russian law does not provide for alternatives to guardianship which, rather than substituting an adult’s decision-making, provide support in decision-making and promote autonomy. The OHCHR study advances that it is equally important that measures that protect and fulfil the right to legal capacity are also adopted, such as “supported decision-making, as the process whereby a person with a disability is enabled to make and communicate decisions with respect to personal or legal matters”.<sup>15</sup> The paradigm shift from substituted decision-making to supported decision-making is far from an aspiration which may be subject to progressive realisation. It is a core civil and political right and one which is of immediate effect and is achievable with political will – until now absent in Russia. In September 2009 the Hungarian Parliament voted in a new Civil Code which prohibits plenary guardianship and introduces supported decision-making. This demonstrates that reforms in legal capacity are possible, even in countries with post-socialist legal traditions such as Russia.

### ***iii.8) Article 23 – the Right to Marry and to found a Family***

The Russian Family Code completely prohibits people deprived of legal capacity from marrying, exercising parental control over their children or adopting children. When a woman deprived of legal capacity gives birth to a child or when a mother is deprived of her legal capacity after giving birth, she loses her parental rights automatically. As such, her child is automatically

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<sup>13</sup> Thematic Study by the OHCHR on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities ,A/HRC/10/48, 26 January 2009, para 43

<sup>14</sup> Convention on the Rights of Persons with Disabilities, adopted by the UN General Assembly on 6 December 2006, ref A/61/611, art. 12(4)

<sup>15</sup> Thematic Study by the OHCHR on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities ,A/HRC/10/48, 26 January 2009, para 45

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.

MDAC invites the UN Human Rights Committee to remind the Russian Federation that family rights are core civil and political rights which must not be interfered with in an arbitrary fashion as is currently the case.

### ***iii.9) Article 25 – the Right to Take Part in Public Affairs and Vote***

According to the Russian Constitution people deprived of legal capacity are completely prohibited from voting.<sup>16</sup> The law also prohibits them from joining political 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. Moreover, the law does not require any understanding of political issues from people who are formally deprived of their legal capacity as a precondition for them to enjoy their right to vote or participate in political associations. This leads to a clearly discriminatory situation in which restrictions imposed on a person's political rights have no other justification than that person's mental disability.

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 UN Convention [on the Rights of Persons with Disabilities] (Article 29), 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".<sup>17</sup>

MDAC invites the UN Human Rights Committee to remind the Russian Federation that the right to take part in public affairs should not be removed from people with disabilities – indeed people with disabilities should be encouraged to be politically active so as to advocate for their rights and to hold politicians accountable.

### ***iii.10) Article 26 – Equality before the Law***

Although neither disability nor legal capacity are explicitly mentioned in the list of prohibited grounds for discrimination in Article 26 of the Covenant, MDAC believes that these fall under the category of "other status".

Russian law does not recognise different degrees of capacity and therefore people with minor intellectual or mental health problems are routinely placed under guardianship. Although many of such individuals may need support in managing their finances or deciding on other complex issues they may still have capacity to exercise other rights and decide where to live, what

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<sup>16</sup> The Constitution of the Russian Federation, of 12 December 1993. Article 32(3).

<sup>17</sup> 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> (last accessed 1 October 2009).

treatment to take, how to raise children etc. Russian law does not offer any protection to such individuals.

The substantive and procedural requirements for legal incapacitation which are contained in Russian law are so weak and poorly defined that, in practice, the mere existence of a psychiatric diagnosis is used by the courts as a sufficient justification for withdrawing a person's legal capacity. This leads to restrictions imposed on a person's rights which serve no legitimate purpose, are objectively unnecessary, and are based exclusively on the person's disability status.

According to the Committee's views "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant"<sup>18</sup>. This is particularly relevant to persons who may have diminished decision-making capacity. In most cases, if appropriate support were provided, they could realise their legal capacity without any restrictions imposed on it. MDAC therefore invites the UN Human Rights Committee to find that legal incapacitation discriminates against persons with disabilities, in contravention of Article 26 of the Covenant.

#### **IV. Recommendations**

In light of the above, MDAC would like to assist the Committee by suggesting that it makes the following recommendations to the Russian Government to enable the Government to take appropriate measures, in full consultation with people with disabilities and their respective organisations, to bring law, policy and practice in line with the requirements of the International Covenant on Civil and Political Rights. In particular MDAC recommends that the Committee raises in its Concluding Observations the following points.

- Ensure that, regardless of their legal capacity status, patients' fundamental rights are upheld in psychiatric hospitals and social care institutions. Patients deprived of legal capacity must be fully informed about the treatment which is intended to be prescribed, and given the opportunity to consent to or refuse treatment or any other medical intervention.
- Amend the legislation on mental health detention to ensure that persons deprived of legal capacity enjoy the same safeguards when institutionalised without consent as other patients. Provide for automatic and regular court review of detention in social care institutions, which are places of detention.
- Introduce changes to the law governing legal capacity proceedings and the guardianship system as a whole, to ensure that adults retain their legal capacity, including capacity to act, on an equal basis with others. Develop less restrictive alternatives to guardianship in the law which provide support exercising one's autonomy, such as supported decision-making and legally binding advance directives.
- Abolish the automatic deprivation of persons without full legal capacity of the right to family life and marriage, choice of residence, access to courts, association, and voting.

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<sup>18</sup> UN Human Rights Committee General Comment 18: Non-Discrimination. 10/11/1989, para. 10, available at <http://www.unhcr.ch/tbs/doc.nsf>.

- Develop and enhance community-based care services and community living to support the deinstitutionalisation process, and to guarantee that persons with mental disabilities, including those with diminished mental capacity, exercise their right to choose their place of residence and freedom of movement.
- Ensure that guardianship legislation prevents conflicts of interest arising between an adult and their guardian. Abolish the policy of appointing as their guardian the institution (or staff members thereof) where a person deprived of legal capacity lives.
- Provide sufficient guarantees of the right of adults under guardianship to meaningful participation in the guardianship process from the beginning and for as long as the adult is under guardianship; in particular, ensure full and meaningful participation of a person in court proceedings in which their capacity is decided on (including the right to be present at the court hearing, to be heard by the court and to present and challenge evidence), and to be provided with high quality legal representation by an attorney paid for by the state.
- Amend legislation to ensure that a person deprived of legal capacity has the right to apply to court for the restoration of their legal capacity.
- Establish an appropriate inspection mechanism over mental health and social care institutions in accordance with the provisions of Article 38 of the Law on Psychiatric Care of 1992.