



RA Legislative Regulations on Recognizing an Adult Legally Incapable and Appointing a Guardian

Contents

Relevance of the matter.....	2
1. Current situation and issues.....	2
General outline of the legal institute of guardianship in the Republic of Armenia.....	2
Limitations on the rights of incapable persons under guardianship.....	4
International Law Provisions.....	8
European Court of Human Rights: Case Law.....	10
Judicial Practice of Other Countries.....	12
2. Summary.....	13
Relevant Issues.....	13
Proposed Solutions.....	16
3. References.....	17



Relevance of the matter

Persons with mental health problems can be recognized legally incapable as prescribed by the RA law and consequently be deprived of the opportunity to enjoy their rights fully and properly, make decisions and act independently on both important issues and daily trivial matters as well as are absolved from the responsibility for their actions.

According to the information provided to the Organization by the RA Judicial Department, throughout the period of January 1, 2010-June 2012, the RA first instance courts of general jurisdiction received 739 applications on recognizing a person incapable, of which 447 applications (i.e. almost 60%) were met.

On September 22, 2010, the Republic of Armenia ratified the UN Convention on the Rights of Persons with Disabilities. Under the Convention, the State undertook *inter alia* to ensure the rights below: full and effective participation and inclusion in society (Article 3(c)) and legal capacity on an equal basis with others in all aspects of life (Article 12(2)).

This study aims to identify the peculiarities of the procedures and consequences of recognizing a person as incapable under the RA legislation and compliance of such procedures with international standards as well as to develop relevant recommendations.

1. Current situation and issues

General outline of the legal institute of guardianship in the Republic of Armenia

According to the RA Civil Code, a citizen unable to realize the significance of his/her actions or control them due to mental disorders may be recognized as incapable by a court of law, as prescribed by the RA Civil Procedure Code. A guardian is appointed for such persons to make transactions on their behalf.

The Criminal Procedure Code stipulates that if a person subject to proceedings on compulsory medical measures is unable to be involved in such proceedings due to his/her mental state, the investigator or the prosecutor shall draft a relevant protocol and submit it to the judge, so that the latter resolves the issue of recognizing the person in question legally incapable (RA Criminal Procedure Code, Article 451(4)). In such cases, the procedure of recognizing the person incapable by the court remains unclear.

After the person is recognized incapable, the guardianship authorities of the place of his/her residence appoint a guardian for him/her within 1 month from the date they learn about such a necessity. Till the guardian is appointed, his/her duties are performed by the guardianship



and trusteeship authority.

Guardians are appointed of their own accord. This being so, their moral and other personal characteristics as well as their abilities to perform their duties, their relationships with the person in need of guardianship, and if possible, the latter's consent are to be taken into account.

The guardians of the persons in need of guardianship and placed in relevant educational, medical, social security or any other similar institutions are these institutions, respectively.

The guardianship and trusteeship duties are performed free of charge, except for the cases envisaged by law.

Legislative guarantees for preserving the ward's property

Guardians and trustees are under obligation to take care for the support of their wards, on ensuring their care and medical treatment, their education and upbringing, protection of their rights and interests (Article 38, RA Civil Code).

The income of the ward, including the income due to the ward from his/her property, with the exception of the income that the ward has the right to dispose independently, is expended by the guardian exclusively in the interests of the ward and with the prior permission of the guardianship and trusteeship agency.

Without such prior permission, the guardians can make necessary living expenses from their ward's income.

Without the prior permission above, the guardian can neither make transactions for the alienation, including the exchange, donation, free use or pledge of property of the ward involving a waiver of rights of the ward, nor divide his/her property or make shares from it, nor make any other transactions involving the reduction of the ward's property. The guardians, their spouses and their close relatives can neither conclude transactions with a ward, except for the purpose to transfer property to him/her as a gift or for free use, nor represent the ward in conclusion of transactions or in legal proceedings between the ward and the spouse of the guardian or their close relatives (Article 39, RA Civil Code).

Termination of Guardianship

The guardianship over adults shall be terminated in case a court of law recognizes the ward as legally capable by application of the guardianship and trusteeship agency (Article 42).

The law stipulates that in cases where the grounds by virtue of which the citizen was found



incompetent are eliminated, the guardian must petition the court to recognize the ward legally capable and take him/her out of custody or guardianship.

Limitations on the rights of incapable persons under guardianship

1. Civil rights

The citizens recognized as incapable are deprived of the opportunity to involve in civil and legal relations.

Thus, transactions on behalf of the persons recognized as lacking dispositive capacity shall be concluded by their guardians (Article 31(2), RA Civil Code). Guardians are representatives of the wards by force of statute and conduct all necessary transactions in their names and in their interests (Article 34(2), RA Civil Code).

2. Labor rights

The citizens recognized as incapable are deprived of their labor rights since under the Code, employee is the **capable** citizen above the age defined by this Code who performs certain work for the benefit of employer by certain specialty, qualification or position (Article 17 (1), RA Labor Code).

3. Electoral rights

The citizens recognized as incapable are deprived of the opportunity to partake in or influence the political life of the country as they lose their right to be involved in the electoral process.

Thus, under the Electoral Code, the citizens recognized as legally incapable by a court ruling cannot elect and be elected (Article 30(3) of the RA Constitution, Article 2(3) of the RA Electoral Code).

4. Right to liberty and security of person

The incapable person may be admitted to a mental health facility to receive out-patient psychiatric treatment by application of his/her guardian. It follows that the person can actually be deprived of his/her liberty as well as undergo medical intervention without his/her consent, upon request of his/her legal representative.

Hence, according to the RA Law on Psychiatric Care, the persons suffering chronic mental disorders receive out-patient psychiatric care, upon their own application or that of their legal representatives, that covers registration, ongoing follow-up and treatment or social



rehabilitation or psychiatric examination (Article 9(2), RA Law on Psychiatric Care).

Patients under 18 years of age or recognized incapable as prescribed by law or in a state of their health that makes it impossible for them to express their will undergo medical intervention by consent of their **legal representative** (Article 8(3), RA Law on Medical Care and Services to the Population).

Persons with mental disorders receive treatment by the written application of their legal representatives, except for cases envisaged by Para. 3 of the Article above (compulsory measures and involuntary (compulsory) hospitalization) and Article 15(1) of the RA Law on Psychiatric Care).

5. Freedom of information

The citizens recognized as incapable are deprived of the right to personally access relevant information on the state of their health.

Information on the state of health of patients under 18 years of age or recognized as incapable as prescribed by law is supplied to their legal representatives (Article 7(3), RA Law on Medical Care and Services to the Population).

According to the RA Law on Psychiatric Care, information on one's mental health is provided to the patient in question and his/her legal representative upon request, as prescribed by law, and in other cases stipulated by law (Article 13, RA Law on Psychiatric Care). While persons with mental disorders are recognized as legal subjects under this Article, the fact that the Article provides access to information on patients' mental health also to their legal representative can lead to the conclusion that the person with mental health problems recognized as incapable enjoys this right indirectly, i.e. with the help of his/her legal representative. The law above also prescribes that the doctor is obliged to inform the persons with mental disorder or their legal representatives with information on the nature of their disorder, recommended treatment goals, methodology, duration, as well as its side effects and expected outcomes (Article 15(2), RA Law on Psychiatric Care). That is to say, the doctor providing the information above to the legal representative of the person with mental health problems is by no means obliged to provide the same information to the person in question as well.

6. Right to respect for private and family life

The RA legislation restricts the marital and family rights of persons recognized as incapable. Thus, it prohibits marriage between couples if even one of them was recognized as incapable



by a court of law (Article 11, RA Family Code), and the marriage may be dissolved by divorce upon application of the guardian of the spouse recognized as incapable in a court of law (Article 13, RA Family Code).

According to the Family Code, persons or couples with one of the spouses recognized as incapable or with limited capacity by a court of law may not foster a child (Article 116 (1)(a) and (b), RA Family Code).

In mental health care facilities, persons recognized as incapable may be deprived of the access to confidential communication with their visitors. Hence, under the RA Law on Psychiatric Care, the persons recognized as incapable or with limited capacity by a court of law, as well as minor patients are accompanied by a ward nurse when seeing their visitors on doctor's instructions for relevant medical reasons (Annex Procedure 2(2), RA Law on Psychiatric Care).

7. Right to access to justice

Apart from being deprived of directly and generally exercising their basic material rights, persons recognized as incapable are also deprived of any opportunity to act independently in civil, administrative and criminal judicial proceedings, as well as to personally protect and restore their own rights.

Thus, under the RA civil procedure regulations, in a court of law, the rights and legal interests of the citizens recognized as incapable are protected by their guardians (Article 43(1), RA Civil Procedure Code), and if a party to the trial is recognized as incapable, the court is obliged to suspend the case (Article 105(4), RA Civil Procedure Code).

The Administrative Procedure Code prescribes that the rights and freedoms of persons recognized as incapable are protected in a court of law by their legal representatives, i.e. parent, guardian, trustee or other persons entitled to do so by law (Article 4(6), RA Administrative Procedure Code). The rights and freedoms of persons recognized as incapable or with limited capacities are protected in a court of law by their legal representatives (Article 19(4), Administrative Procedure Code).

Also, under the RA Administrative Procedure Code, minors aged 14-18 and persons with limited capacity **have the right to be heard** during the court examination. As for minors under 14 or persons recognized as incapable, the administrative court **can** grant them the right of being heard during the court examination (Article 4(7)).

According to the RA Criminal Procedure Code, the rights of the incapacitated victim/aggrieved party, civil plaintiff, suspect and accused are exercised by their legal representatives on their behalf (Article 59(4), Article 61(6), Article 63(7), Article 65(6), RA



Criminal Procedure Code).

Furthermore, the RA Criminal Procedure Code stipulates that in the event of the death of the acquitted person or his/her recognition by a court of law as incapacitated, the right to claim property damages, as well as the right to seek that the court or the investigating authority informs of his/her acquittal his/her former and current colleagues, educational institution and place of residence and the right to claim that the mass media which had previously published information on the alleged suspicions or charges against him/her publish the final ruling on the case shall pass to his/her **closest heirs** (Article 66(11), RA Criminal Procedure Code). In these terms, the legislation proves to have a gap, since even considering the current legislative regulations, it appears that the right to the above claims of incapable persons might have been passed on to their legal representatives. Whereas this provision shows that such persons, when acquitted, lose the possibility to protect their property rights and to restore their reputation.

According to the Criminal Procedure Code, the rights of the incapacitated victim/aggrieved party, civil plaintiff, suspect and accused are exercised by their legal representatives on their behalf, except for their personal integral rights (Article 77(2), RA Criminal Procedure Code). At the same time, the Code highlights that the legal representatives of the **incapacitated** victim/aggrieved party, civil plaintiff, suspect and accused have no right to take a number of actions during the proceedings on behalf of the **party to trial with limited capacity**. Such actions include as follows: 1) withdrawing a complaint on an action against the incapable victim prohibited by the Criminal Code; 2) declaring the guilt of the accused he/she represents; 3) reconciling with the victim/aggrieved party, suspect or accused, 4) accepting the claim against the accused and dismissing the claim by the civil plaintiff; 5) withdrawing the appeal by the incapable party filed by him/her during the proceedings (Article 77(4), RA Criminal Procedure Code). It remains obscure what meaning the national legislature attached to this phrase: persons recognized incapable or persons with limited capacity and their legal representatives?

Hence, the persons recognized as incapable are deprived of the access to their rights below:

1. make various independent civil and legal transactions on their own behalf;
2. enjoy employment and work opportunities;
3. elect and be elected;
4. enjoy guarantees under the right to liberty and security;
5. access to information;
6. fully enjoy the right to private and family life;
7. access to justice.

Such persons are deprived of access to social integration, full and independent life as well as the possibility to become a useful member of the society ensured by employment, family life and political involvement. If recognized incapable, persons are deprived of the possibility to



make basic civil and legal transactions, such as purchasing essential items from shops, disposing their own property or last but not least partaking in the disposing their own property.

Ultimately, this leads to the social isolation of the individual and even to the regress of his/her mental capacities.

Even considering that such restrictions are applied to protect the rights and legal interests of the persons concerned and other persons, this cannot serve as valid ground for tuning such persons into the so-called 'shadow-members' of the society.

Furthermore, the situation of human rights protection worsens even more due to the fact that all such restrictions to the person's rights and privacy are not tailored to his/her personal needs and, particularly, personal peculiarities, special needs and requirements.

International Law Provisions

Convention on the Rights of Persons with Disabilities ¹

Under Article 12(2) of the Convention, the States Parties recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

It is noteworthy that the Armenian official translation of the Convention applies the term 'competence' for 'legal capacity'.

The RA legislation differentiates between the concepts of legal competence and legal capacity. Thus:

1. Legal competence covers the faculty for enjoying civil rights and assuming duties that is equally recognized for all citizens, originates at their birth and terminates at their death.
2. Legal capacity covers the person's faculty for acting so as to gain and exercise civil rights, as well as to generate and fulfill civic duties (civil capacity) that fully develops at one's legal age, i.e. starting from the age of 18. The Civil Code prescribes the cases for considering a person incapable or for restricting his/her capacity.

¹ Adopted by the UN General Assembly on December 13, 2006, Recommendation No. 61/10; ratified by the RA on September 22, 2010; effective since October 22, 2010.



T. Hammarberg, former CoE Commissioner for Human Rights, voiced this issue in the paper on the Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities: “Some jurisdictions make a distinction between capacity to have rights and capacity to act or exercise these rights. Human rights scholars argue convincingly that article 12 of the CRPD vests persons with disabilities with *both* of these aspects of legal capacity. In other words, the capacity to hold rights automatically entails the capacity to exercise them with appropriate supports acceptable to and chosen by each individual.”²

Approaches of the Committee on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities mentioned in its *Concluding Observations: Tunisia*: “The Committee recommends that the State Party review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making. It further recommends that training be provided on this issue for all relevant public officials and other stakeholders.”³

As for Article 29 of the Convention, the Committee recommends the urgent adoption of legislative measures to ensure that persons with disabilities, including persons who are currently under guardianship or trusteeship, can exercise their right to vote and participate in public life, on an equal basis with others.⁴

Also, the Committee made similar recommendations on the situation in Spain and Peru.

CoE Committee of Ministers Recommendation on Principles Concerning the Legal Protection of Incapable Adults⁵

Principle 3 – Maximum preservation of capacity

The legislative framework should, so far as possible, recognize that different degrees of incapacity may exist and that incapacity may vary from time to time.

Accordingly, the protection measures should not result automatically in 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.

²See *Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities*, CommDH/IssuePaper(2012)2, 1.1(3).

³Concluding observations of the Committee on the Rights of Persons with Disabilities/ Tunisia.

⁴Ibid.

⁵Committee of Ministers Recommendation No. R (99)4 of the to the Member states On Principles Concerning the Legal Protection of Incapable Adults, 23 February 1999.



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, or to make other decisions of a personal character at any time when his/her capacity permits him/her to do so.

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.

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

CoE Parliamentary Assembly Resolution on Access to Rights for People with Disabilities and Their Full and Active Participation in Society ⁶

7. Firstly, the Assembly invites member states to guarantee that people with disabilities retain and exercise legal capacity on an equal basis with other members of society by:

7.1. ensuring that their right to make decisions is not limited or substituted by others, that measures concerning them are individually tailored to their needs and that they may be supported in their decision making by a support person;

7.2. taking the necessary measures to ensure that, in accordance with the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol, people placed under guardianship are not deprived of their fundamental rights (not least the rights to own property, to work, to a family life, to marry, to vote, to form and join associations, to bring legal proceedings and to draw up a will), and, where they need external assistance so as to exercise those rights, that they are afforded appropriate support, without their wishes or intentions being superseded;

7.3. providing sufficient safeguards against abuse of people under guardianship notably through establishing mechanisms for periodic review of guardians' actions and ensuring that legislation mandates compulsory, regular and meaningful reviews of guardianship, in which the person concerned is fully involved and has adequate legal representation.

European Court of Human Rights: Case Law

Shtukaturov v. Russia

⁶ Parliamentary Assembly of the Council of Europe, Resolution 1642 (2009) on Access to rights for people with disabilities and their full and active participation in society, 6 January 2009, Para. 7



In the judgment on this case, the Court held unanimously that there had been a violation of Article 6(1) since the applicant was deprived of sufficient legal capacity to appear before the court.⁷

The Court also detected a violation of Article 8 of the Convention for the reasons below.

- The applicant's participation in the decision-making process was reduced to zero⁸ since along with the fact that the person did not take part in the court proceedings and was not examined by the judge in person, he was even unable to challenge the judgment as the Court refused to examine his appeal.
- The Russian Civil Code distinguishes between full capacity and full incapacity, but it does not provide for any "borderline" situation.⁹ Thus, the Russian legislation did not provide for a "tailor-made response".

*Sykora v. The Czech Republic*¹⁰

In the judgment on this case, the Court found a violation of Article 8 of the ECHR, i.e. an excessive interference with the applicant's private life.

The Court found that:

- Any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on.¹¹
- The judge had no direct communication with the applicant¹² and failed to ensure his adequate legal protection, since the applicant's representative never met him, did not make any submissions on his behalf and did not even attend the hearings. She effectively took no part in the proceedings.¹³

*Alajos Kiss v. Hungary*¹⁴

⁷ European Court of Human Rights judgment on *Shtukaturov v. Russia*, March 27, 2008, Para. 75 and 76.

⁸ Ibid. Para. 91.

⁹ Ibid. Para. 95.

¹⁰ European Court of Human Rights judgment on *Sykora v. The Czech Republic*, November 22, 2012.

¹¹ Ibid. para 103.

¹² Ibid. para 108.

¹³ Ibid. para 109.

¹⁴ European Court of Human Rights judgment on *Alajos Kiss v. Hungary*, May 20, 2010.



The Court found a violation of the right to free elections of a person under partial guardianship as prescribed by Article 3 of Protocol No. 1 to the ECHR.

The Court stated that this is an area in which, generally, a wide margin of appreciation should be granted to the national legislature in determining whether restrictions on the right to vote can be justified in modern times and, if so, how a fair balance is to be struck.¹⁵ However, the Court mentioned that it cannot accept that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation.¹⁶ Further, the Court also noted that the restriction in question does not distinguish between those under total and those under partial guardianship.¹⁷

Judicial practice of other countries

Russian Federation

On 27 June 2012, the Constitutional Court of the Russian Federation made a judgment on the review of constitutionality of Article 29(1, 2), Article 31(2) and Article 32 of the Civil Code of the Russian Federation in connection with the complaint of the citizen I. B. Delova. In its judgment, the Constitutional Court of the RF highlighted the necessity to develop an optimal system for determining the level of legal capacity that will call for a need to take into account the person's ability to understand the significance of his/her actions and manage them in specific areas of life and at the same time not to allow disgracing his/her human dignity or excessive invasion into his/her privacy.¹⁸

The Czech Republic

On 18 August 2009, the Constitutional Court of the Czech Republic found violations of the right to be recognized as a person before the law, the right to family and private life of a person with mental health problems since the previous courts failed to duly justify their ruling to recognize the person as legally incapable, and their rulings were virtually based on expert opinions only. Neither the person recognized as incapable, nor her relatives were heard in the court of law.¹⁹ It is also noteworthy that the Constitutional Court of the Czech

¹⁵ Ibid. Para. 41.

¹⁶ Ibid. Para. 42.

¹⁷ Ibid. Para. 39.

¹⁸ See the judgment of the RF Constitutional Court of 27 June 2012 № 15-P on the review of constitutionality of Article 29(1, 2), Article 31(2) and Article 32 of the Civil Code of the Russian Federation in connection with the complaint of the citizen I. B. Delova.

¹⁹ <http://www.mdac.info/en/czech-republic-constitutional-court-finds-deprivat>



Republic denied the provisions of the Civil Code allowing for recognizing the person completely incapable as unconstitutional.²⁰

In 2012, the Czech Republic adopted a new civil code that no longer allowed for depriving a person of his/her legal capacity. The Code provides for the mechanism of supported decision-making as a means to substitute the system of guardianship, i.e. the strict requirement for the court to hear the person concerned. The amended Civil Code will be effective since January 1, 2014.

2. Summary

Relevant Issues

1. Unlawful nature of recognizing a person incapable

The very institute of recognizing a person as legally incapable fails to meet the international standards and, in particular, the requirements of Article 12 of the Convention on the Rights of Persons with Disabilities.

Also, the Criminal Code provides that if a person subject to proceedings on compulsory medical measures is unable to be involved in such proceedings due to his/her mental state, the investigator or the prosecutor shall draft a relevant protocol and submit it to the judge, so that the latter resolves the issue of recognizing the person in question as legally incapable.²¹

Yet, the court procedure applied to resolve the issue on recognizing the person as incapable and the procedural safeguards available for such person remain quite unclear. If the issue is resolved under the special procedure of the Civil Procedure Code, Article 168 of the Code specifies a detailed list of the entities that can file an application on recognizing a person incapable, and the list includes neither the investigator nor the prosecutor.

2. Fair trial

In the Republic of Armenia, a person is recognized incapable by a court of law. The court can start proceedings on declaring a person incapable based on a relevant application by his/her family, guardianship and trusteeship authority or managers of mental health institutions. The

²⁰ <http://www.mdac.info/en/news/czech-republic-enacts-legal-capacity-law-reform>

²¹ See Article 451(4), RA Criminal Procedure Code.



court trial on recognizing a person incapable must be attended by a representative of the guardianship and trusteeship authority. At the same time, the RA law does not strictly require the person concerned to attend the trial. Under the RA Civil Procedure Code, the person can be summoned to court if his health permits him/her to do so. In such cases, the court decides on whether to summon the person concerned to the court at its own discretion and is under no obligation to hear his/her opinion. The reviewed court cases show that the person concerned is not usually heard during the trial, and the court ruling is based on the psychiatric screening results and evidence of the trusteeship authority. Actually, the participation of the person concerned is necessary not only to enable the judge to form his/her personal opinion about the concerned person's mental capacity, but also to present his/her own case as he/she is both the interested party, and, at the same time, the main object of the court's examination.²²

The RA Civil Procedure Law does not provide for any mechanisms for notifying the person to be recognized as incapable of their court proceedings and hearings. Assumingly, as the person undergoes mental forensic examination, he/she can anyway learn about the court proceedings on depriving him/her of legal capacity. However, it remains unclear to what extent the person learns that the case under investigations concerns his/her legal capacity. By not informing the person of the time and venue of the trial, and not clarifying his/her procedural rights, the court violates his/her right to be heard by the court.

3. Appeal and consideration

According to the RA civil law, a person may be declared capable by a court judgment. Such judgment takes the person out of custody. The court makes such judgments based on the results of mental forensic examination. This being so, according to the RA law, to be declared capable, the person must recover first.

The court can start proceedings on restoring a person's legal capacity upon a relevant application by his/her family, guardianship and trusteeship authority or managers of mental health institutions. In fact, such persons are deprived of their procedural rights to restore their capacity and unable to apply to the court of law to this effect. This reduces to zero their access to decision-making and protection of their rights as well as violates their right to a fair trial.²³

4. Other rights

²² European Court of Human Rights judgment on *Shtukaturov v. Russia*, March 27, 2008, para. 72.

²³ European Court of Human Rights judgment on *Shtukaturov v. Russia*, March 27, 2008, para. 90 and 91.



According to the law, the person may be considered incapable regardless of the degree of mental disorder if it is proven that he/she is unable to understand the significance of his/her actions due to such disorder. If recognized incapable, the person concerned is placed under guardianship, and his/her rights are exercised by his/her guardian. At the same time, such persons are deprived of some labor, election, marital and family rights and the possibility to personally protect their rights, freedoms and legitimate interests before the court as well as public and other institutions. They are deprived of the access to decision-making and independent acting on both vital issues and their daily trivial matters. This results in violation of both international human rights provisions and Article 3, Article 14, Article 14.1, Article 18, Article 20, Article 31, Article 48(7) of the RA Constitution.²⁴

²⁴ Article 3

The human being, his/her dignity and the fundamental human rights and freedoms are an ultimate value. The state shall ensure the protection of fundamental human and civil rights in conformity with the principles and norms of the international law.

The state shall be limited by fundamental human and civil rights as a directly applicable right.

Article 14

Human dignity shall be respected and protected by the state as an inviolable foundation of human rights and freedoms.

Article 14.1

Everyone shall be equal before the law.

Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or other personal or social circumstances shall be prohibited.

Article 18

Everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies.

Everyone shall have a right to protect his/her rights and freedoms by any means not prohibited by the law.

Everyone shall be entitled to have the support of the Human Rights Defender for the protection of his/her rights and freedoms on the grounds and in conformity with the procedure prescribed by law.

Everyone shall in conformity with the international treaties of the Republic of Armenia be entitled to apply to the international entities protecting human rights and freedoms with a request to protect his/her rights and freedoms.

Article 20

Everyone shall be entitled to legal assistance. In cases prescribed by law, the legal assistance shall be provided at the expense of the state.

Everyone shall have a right to the assistance of a legal defender chosen by him/her starting from the moment of his/her arrest, subjection to a security measure or indictment.

Every convicted person shall have the right to review the judgment passed on him/her by a higher instance court in conformity with the procedure prescribed by the law.

Every convicted person shall have a right to request pardon or mitigation of the punishment.

All damages incurred by the victim shall be compensated in conformity with the procedure prescribed by law.

Article 31

Everyone shall have the right to freely own, use, dispose of and bequeath the property belonging to him/her. The right to property shall not be exercised to cause damage to the environment or infringe on the rights and lawful interests of other persons, the society and the state.

Article 48

The basic tasks of the state in the economic, social and cultural spheres are:

7) to carry out a policy of preventive care, treatment and integration of persons with disabilities.



Proposed Solutions

The domestic legislation should be approximated to international human rights regulations and the Constitution. Particularly, the actions below should be taken to this effect:

1. Dismantle the system of declaring the persons incapable and of passing their rights to independent decision-making to their guardians;
2. Develop a system that will make it possible to provide persons with psychosocial and mental disabilities with necessary support tailored to their needs and faculties to make their own decisions on any potential issue by providing them with guarantees of being free from abuse and human rights violation by other persons or competent public agencies;
3. Before introducing the new system, a series of reforms should be adopted to enable the persons with limited capacity or their representatives of their own choice to turn to the competent authorities to restore their legal capacity.

Here are some more solutions:

1. Amend the RA Civil Code by stipulating the most flexible system to deprive a person of his/her legal capacity, i.e. mechanisms to limit a person's capacity rather than to deprive him/her of it. At the same time, it should be ensured that any limitation of the person's capacity is tailored to his/her personal abilities and faculties, and the limited capacity should always entail restriction of certain rights. The Civil Code should be amended to include supported decision-making mechanisms for persons with psychosocial or mental disabilities, based on the best practices of other states.

Upon making these amendments, change the legislation below: Labor Code, Election Code, Family Code, Civil Procedure Code, Administrative Procedure Code, Criminal Procedure Code; RA Law on Medical Care and Services to the Population and RA Law on Psychiatric Care. Such changes aim to bring the other legal regulations restricting the rights of a person due to his/her legal incapacity in compliance with the amendments in the Civil Code.

2. Prior to amending the Civil Code, the Civil Procedure Code and the Criminal Procedure Code should be amended. Such amendments aim to prescribe the right of persons with psychosocial or mental disabilities to personally apply to court to restore their legal capacity.



3. At the same time, if possible, the RA Constitution should be amended (see Article 30(3), RA Constitution).

3. References

International law regulations:

1. Convention on the Rights of People with Disabilities;
2. CoE Committee of Ministers Recommendation on Principles Concerning the Legal Protection of Incapable Adults;
3. CoE Parliamentary Assembly Resolution on Access to Rights for People with Disabilities and Their Full and Active Participation in Society;
4. Concluding observations of the Committee on the Rights of Persons with Disabilities. Tunisia;
5. Concluding observations of the Committee on the Rights of Persons with Disabilities. Spain;
6. Concluding observations of the Committee on the Rights of Persons with Disabilities. Peru;
7. Concluding observations of the Committee on the Rights of Persons with Disabilities. Hungary.

European court judgments:

8. European Court of Human Rights judgment on *Shtukaturvov v. Russia*;
9. European Court of Human Rights judgment on *Alajos Kiss v. Hungary*, May 20, 2010;
10. European Court of Human Rights judgment on *Sykora v. The Czech Republic*, November 22, 2012.

Domestic courts judgments:

11. Judgment of the RF Constitutional Court of 27 June 2012 № 15-P on the review of constitutionality of Article 29(1, 2), Article 31(2) and Article 32 of the Civil Code of the Russian Federation in connection with the complaint of the citizen I. B. Delova.

Domestic legislation:

12. RA Civil Code;
13. RA Civil Procedure Code;



14. RA Administrative Procedure Code;
15. RA Criminal Procedure Code;
16. RA Electoral Code;
17. RA Family Code;
18. RA Law on Psychiatric Care;
19. RA Law on Medical Care and Services to the Population.

Surveys:

20. Thomas Hammarberg, Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities.