Non-Official Translation

IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF PART 3 OF ARTICLE 7, PARTS 3 AND 4 OF ARTICLE 8, PART 2 OF ARTICLE 17, CLAUSE 4 OF PART 1 OF ARTICLE 19.3 OF THE LAW OF THE REPUBLIC OF ARMENIA ON MEDICAL ASSISTANCE AND SERVICE TO THE POPULATION, PART 10 OF ARTICLE 6, PARTS 1 AND 2 OF ARTICLE 9, ARTICLES 15 AND 16, PARTS 2, 3 AND 4 OF ARTICLE 19, PART 1 OF ARTICLE 22, AND THE SECOND PARAGRAPH OF CLAUSE 4 OF SECTION VI OF THE APPENDIX TO THE SAME LAW, AS WELL AS PART 2 OF ARTICLE 32 OF THE LAW OF THE REPUBLIC OF ARMENIA ON THE RIGHTS OF A CHILD WITH THE CONSTITUTION ON THE BASIS OF THE APPLICATION OF THE HUMAN RIGHTS DEFENDER

Yerevan 30 January 2020

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Dilanyan, F. Tokhyan, F. Tokhyan, A. Tunyan, A. Khachatryan (Rapporteur), A. Petrosyan,

with the participation of (in the framework of the written procedure):

Applicant: A. Tatoyan, Human Rights Defender,

Respondent: K. Movsisyan, A. Kocharyan, official representative of the National Assembly of the Republic of Armenia, Chief of the Legal Expertise Division of the Legal Expertise Department at the Staff of the National Assembly of the Republic of Armenia,

pursuant to Clause 1 of Article 168, Clause 10 of Part 10 of Article 169 of the Constitution, as well as Part 1 of Article 22 and article 68 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of Part 3 of Article 7, Parts 3 and 4 of Article 8, Part 2 of Article 17, Clause 4 of Part 1 of Article 19.3 of the Law of the Republic of Armenia on Medical Assistance and Service to the Population, Part 10 of Article 6, Parts 1 and 2 of Article 9, Articles 15 and 16, Parts 2, 3 and 4 of Article 19, Part 1 of Article 22, and the second paragraph of Clause 4 of Section VI of the Appendix to the same Law, as well as Part 2 of Article 32 of the Law of the Republic of Armenia on the Rights of a Child with the Constitution on the basis of the application of the Human Rights Defender.

The Law of the Republic of Armenia HO-42 **on Medical Assistance and Services to the Population** was adopted by the National Assembly on March 4, 1996, signed by the President of the Republic on April 4, 1996, and entered into force on May 16, 1996.

The content of the challenged norms of the Law reads as follows:

“Article 7. Right of a person to receive health related information

(...)

Health related information of patients under 18 years of age, or patients who have been declared incapable, are provided to their legal representatives in accordance with the procedure established by law ”.

“Article 8. Consent to medical intervention

(...)

Consent to medical intervention for a patient under 18 years of age, or a patient recognized as legally incompetent, as well as in cases where the patient's condition does not allow expressing his will, is given by his legal representative.

In the absence of a legal representative, if medical intervention is urgent, the decision on medical intervention, based on the interests of the patient, is made by a meeting of doctors (council), and if this is not possible, by a physician."

“Article 17. Refusal of medical intervention

(...)

The fact of refusal of medical intervention with an indication of its possible consequences is recorded in medical documents and certified by the patient or his legal representative ”.

“Article 19.3. Obligations of healthcare professionals

1. Medical workers are obliged to:

(...)

4) inform the patient and (or) his legal representative about the results of health research, diagnosis and methods of treating the disease, the associated risks, possible options for medical intervention, the consequences and results of treatment.

(…).”

The Law of the Republic of Armenia HO-80-N on Psychiatric Care was adopted by the National Assembly on May 25, 2004, signed by the President of the Republic on June 19, 2004 and entered into force on August 30, 2004.

The content of the challenged norms of the Law reads as follows:

“Article 6. Rights of Persons with Mental Disorders

(...)

10. The right to apply to a psychiatric institution for treatment, examination and discharge, as well as the rights provided for in clauses 12-13 and 18 of part 3 of this article, shall be exercised by the legal representative of a child with a mental disorder.”

"Article 9. Outpatient psychiatric care and dispensary observation

1. Based on medical indications, psychiatric institutions, in the event of a request from a person suffering from a mental disorder, or his legal representative, provide the person with an outpatient medical consultation, conduct an examination or diagnosis or treatment.

2. A person with chronic mental disorders, on the basis of his application or the application of his legal representative, shall be provided with dispensary outpatient psychiatric care, which includes registration and continuous observation and treatment or social rehabilitation or psychiatric examination.

(…).”

“Article 15. Consent to treatment

1. Treatment of a person with a mental disorder is carried out on the basis of his written application or a written application of his legal representative, with the exception of the cases provided for in part 3 of this article.

2. The physician is obliged to provide the person suffering from a mental disorder, or his legal representative, with information about the nature of the mental disorder, the purpose of the proposed

treatment, methodology, duration, as well as side effects and expected results. A record is made about this in the medical documentation (in the outpatient card or in the medical history).

3. Treatment of a person suffering from a mental disorder may be carried out without his consent or the consent of his legal representative only with the application of compulsory medical measures prescribed by law, as well as with involuntary hospitalization."

"Article 16. Refusal of treatment

1. A person suffering from a mental disorder or his legal representative has the right to refuse the proposed treatment or terminate it, except for the cases provided for in Part 3 of Article 15 of this Law.

2. The person refusing treatment or his legal representative shall be explained the possible consequences of termination of treatment.

3. Refusal of treatment with indication of information about the possible consequences of termination of treatment shall be formalized by an entry in the medical documentation signed by the person who refused the treatment or his legal representative and a psychiatrist."

"Article 19. Psychiatric examination

(...)

2. The doctor conducting the psychiatric examination is obliged to introduce himself to the examined person or his legal representative as a psychiatrist and to inform about the nature and consequences of the examination.

3. Psychiatric examination is carried out with the consent of the subject or his legal representative after providing them with full information about the patient's condition and the nature of the examination.

4. Psychiatric examination may be carried out without the consent of the subject or his legal representative only in cases where the subject, based on his mental state, cannot freely express his will and does not have a legal representative."

"Article 22. Procedure for involuntary hospitalization

1. A person suffering from a mental disorder may be hospitalized without his consent or without the consent of his legal representative after a mandatory examination by a psychiatric commission, if:

1) poses a danger to himself or to those around him, or

2) failure to carry out or termination of treatment may lead to a deterioration in the patient's health.

(…).”

APPENDIX

VI. NOTIFICATION OF PERSONS WITH MENTAL DISORDERS ABOUT THEIR RIGHTS IN PSYCHIATRIC INSTITUTIONS

4. (…)

The attending physician or the doctor of the admission department or the head of the department in the medical record of a person suffering from a mental disorder makes a record with his signature or the signature of his legal representative (if the person is recognized as incapacitated or partially capable, or if the person is a minor).”

The Law of the Republic of Armenia HO-59 on the Rights of a Child was adopted by the National Assembly on May 29, 1996, signed by the President of the Republic on May 31, 1996, and entered into force on June 27, 1996.

The content of the challenged norms of the Law reads as follows:

“Article 32. Protection of the rights of the child in special educational or psychiatric institutions

(...)

A child can be hospitalized in a psychiatric institution without the consent of a legal representative only by a court decision in cases and in the manner prescribed by law.

(…).”

The reason for the consideration of the case was the appeal of the Human Rights Defender registered with the Constitutional Court on May 30, 2019.

Having examined the application, the written explanation of the respondent, as well as having analyzed the relevant norms of the Code and the Law, other norms interrelated with the latter and other documents of the case, the Constitutional Court **FOUND:**

1. Applicant’s arguments

The Applicant holds that the imperfection of the challenged legal regulations jeopardizes a number of fundamental constitutional rights of children and disabled persons with disabilities, due to their personal characteristics.

According to the applicant, the legislative provisions under consideration regarding the failure to take into account the opinion of incapacitated adults on the implementation of medical intervention

or their treatment actually provide for the possibility, without the consent of the person, on the basis of the application of his legal representative, to subject the person to medical intervention, to provide medical assistance and service, organize and provide treatment for persons with mental health problems, outpatient medical consultation, examination, diagnosis and treatment, as well as dispensary observation and outpatient psychiatric care and psychiatric examination. That is, the term of the person's consent to medical intervention is satisfied with the consent of the legal representative without an actual, conscious expression of the will of the person in respect of whom the medical intervention will be carried out.

The applicant also argues that there is no clear distinction in which cases the treatment is provided with the written consent of a person with a mental disorder, and in which cases - with the written consent of his legal representative.

In addition to the above, the applicant also notes that even at the level of the legislative principle it is not enshrined that it is preferable to obtain the consent of the incapacitated person as a patient directly undergoing medical intervention, there is no mechanism for involving such patients in the medical process in accordance with their understanding and ability to make decisions, meanwhile, according to the applicant, securing at the legislative level, due to the fact of the person's incapacity, the consent of his legal representative as an indirect expression of the will of the person makes it possible to avoid the requirement for the patient to exercise his rights personally and in person express consent or disagreement.

According to the applicant, the challenged regulations regarding the compulsed hospitalization of a person in a psychiatric institution do not ensure the rights guaranteed by Articles 25-29 of the Constitution and Articles 3 and 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The applicant believes that apart from providing the legal representative of the incapacitated patient with information about the patient's health or other medical information, it is also problematic that, according to the current regulations, the fact of refusal of medical intervention with an indication of the possible consequences is recorded in the medical documentation and certified by the patient or his legal representative, as well as the attending physician or doctor of the reception department (ER) or the head of the department, in the medical record of a person suffering from a mental disorder a record is added explaining to this person his rights with his signature or the

signature of his legal representative (if the person is recognized as incapacitated or of limited legal capacity, or if the person is juvenile).

According to the applicant, it turns out that if a person is recognized as incapable or partially capable, then instead of him, his state of health, as well as his rights are introduced to his legal representative, that is, the first element necessary for the patient's consent - awareness - is already ignored by virtue of the law as a result, in all the aforementioned cases, the opinions of persons with mental health problems are not taken into account when deciding on them.

According to the applicant, in respect of an incapacitated adult, a measure of protection can be established only with his full and voluntary consent. In cases where a protective measure is necessary to be established, it should correspond to the degree of incapacity of the person and shall be adapted to the individual circumstances and needs of the person, if possible, it is necessary to determine the previous and actual desires and feelings of the person, which should be taken into account and respected.

Summarizing the above, the applicant considers that the challenged legal regulations:

- in the aspect of compulsory hospitalization, a person in a psychiatric institution does not guarantee the right to personal freedom enshrined in Article 27 of the Constitution;
- are subject to challenge from the point of view of the principle of proportionality established by Article 78 of the Constitution, since the restrictions in the said regulations are not equivalent to the limited fundamental right and do not stem from its objective;

- problematic from the point of view of Article 80 of the Constitution, since for various reasons they completely deprive persons with disabilities of the opportunity to exercise their rights, including do not provide the opportunity to participate in issues related to their deprivation of liberty or medical intervention and treatment;
- being problematic from two points of view, they violate the right to mental inviolability established by Article 25 of the Constitution and one of the fundamental human rights, the essence of which is inviolable, moreover, according to Article 75 of the Constitution, for the exercise of fundamental rights and freedoms, organizational mechanisms and procedures must be enshrined in laws, necessary for their effective implementation;
- problematic from the point of view of Article 81 of the Constitution, since they contradict a number of international legal acts and legal positions of the European Court of Human Rights.

Regarding not taking into account the opinion of minors in the matters related to medical intervention and treatment, the applicant states that, within the framework of the realization of the right to health care of minors with mental health problems, the Law of the Republic of Armenia on Psychiatric Care provides for the possibility, without obtaining consent of a person, on the basis of an application by his legal representative, to provide treatment, examination, discharge, as well as provide consent and at any stage to refuse the methods and treatments (paragraph 10, Article 6). The current regulations provide for the possibility of subjecting a person under 18 years of age to medical intervention without taking into account his opinion or lack his consent, but based on the consent of his legal representative. If it is impossible to obtain the consent or lack of consent of the legal representative, a deadlock situation may arise.

The applicant states that as a result, the above-mentioned fundamental rights can be exercised by the legal representative of the child without listening to the child and taking into account his/her opinion.

Analyzing the provision enshrined in Part 2 of Article 32 of the Law of the Republic of Armenia on the Rights of the Child, according to which a child can be hospitalized in a psychiatric institution without the consent of a legal representative based only on a court decision in the cases and procedures prescribed by law, the applicant believes that the treatment of minors requires only the consent of the legal representative, and the hospitalization of the minor does not become the subject of judicial control, regardless of his age, his ability to express his opinion and the actions of the legal representative in the interests of the minor, as a result of which only the consent of the legal representative of the minor is sufficient for inpatient examination and treatment.

In addition, the applicant notes that the right to receive information, which is the most important precondition for a child to be heard to, is limited by the Law of the Republic of Armenia on Medical Assistance and Services to the Population, in Part 3 of Article 7 which imperatively envisaged that information about the state of health of patients under the age of 18, are provided to their legal representatives, therefore, the possibility of providing this information to the patients is not provided, as a result of which the constitutional right of the child to be heard to is violated.

In addition to the above, the applicant considers that the issue of the unconstitutionality of regulations restricting the rights of incapacitated adults with the same unlawful logic is enshrined in the case of minors, while, according to the applicant, not only constitutional and international universal guarantees should be applied to children ensuring the rights of the individual, but also the

special principles concerning children - the requirement of the priority of the best interests of the child, the requirement to be heard to and taking into account his developing possibilities.

Summing up his positions, the applicant states that the challenged legislative regulation in the part concerning minors contradicts not only the constitutional rights guaranteed to everyone, but also Article 37 of the Constitution, according to which a child has the right to freely express his opinion, which in accordance with age, and level of maturity the child is taken into account in matters concerning him.

In matters concerning the child, the interests of the child must be of priority.

2. **Respondents arguments**

The respondent believes that this constitutional legal dispute should be considered in the context of constitutional and legal requirements regarding the right to physical and mental integrity, personal freedom, protection of personal data, child rights, the principles of proportionality and certainty.

According to the respondent, the legislator, having established the challenged regulations, first of all took as a basis the human right to personal freedom and inviolability, in which, as a legal basis, he recognized the most important legal element that the right to personal freedom and inviolability is a person's physical freedom - a natural human right with the moment of birth, in a broader sense - the physical, spiritual and moral inviolability of a person.

According to the respondent, the legislator, having established the framework of the relevant powers exercised by a legal representative instead of a person recognized as incapacitated or partially capable (including a child), due to his state of health, in particular, consolidated the principle according to which representatives of persons (including child) with mental health problems are guided solely by the priority of the person's interests and rights.

The respondent states that the legislator has clearly established that a child can be hospitalized in a psychiatric institution without the consent of a legal representative only by a court decision in cases and in the manner prescribed by law.

Consequently, the challenged legal provisions, according to the respondent, are consonant with the legal elements of both the principle of certainty of a legal act and the principles of proportionality and predictability.

Comparing the legal positions expressed in the Decisions DCC-827 and DCC-913 of the Constitutional Court, the respondent considers it obvious that by applying a restriction for the

purpose of his treatment to a person declared incapacitated or partially capable (with the consent of his representative) for the purpose of his treatment, the founder of the Constitution simultaneously left the choice forms of deprivation of liberty for the purposes and on the grounds reflected in it, at the discretion of the legislator, without in any way predetermining which procedural measures are applicable in each specific case or to achieve a specific goal.

Consequently, according to the respondent, the legal provisions that have become the subject of this constitutional legal dispute are consonant with and follow from the constitutional and legal requirements of physical and mental integrity, personal freedom, child rights, the principles of proportionality and certainty.

3. Arguments of the Government of the Republic of Armenia

Turning to the analysis of the challenged legal regulations, the Government stated: "… the issues raised in the appeal are acceptable for the RA Government. In particular, the participation of minors or persons with mental health problems in the exercise of their rights to receive information about their state of health or to give or refuse consent to medical intervention cannot be conditioned by their status, however, based on the characteristics of their status, it is necessary to establish clear regulation."

In the conclusion of the explanation, the Government stated: "... The draft law on amending the RA Law on Medical Assistance and Services to the Population already provides for the right of a child who has reached the age of 16 to the informed consent under certain conditions."

At the same time, the explanation of the Government notes: "The Ministry of Health has now circulated a draft law on amending the Law of the Republic of Armenia "On Psychiatric Care", and the issue of envisaged mechanisms of judicial control in the said draft law in the case of hospitalization in a psychiatric institution and treatment of incapacitated persons and minors taking into account their opinion and with the consent of their legal representative."

In the conclusion of the explanation, the Government stated: "... The bill on amending the RA Law on Medical Assistance and Services to the Population already provides for the right of a child who has reached the age of 16 to informed consent under certain conditions."

4. Circumstances to be established in the framework of the case

The Constitutional Court notes that the challenged norms directly relate to the fundamental rights enshrined in Articles 25 and 37 of the Constitution - the legality of restricting the right to physical and mental integrity and the proper exercise of the child's right to express freely their opinion.

In this regard, within the framework of the present case, the Constitutional Court, assessing the constitutionality of the challenged norms, considers it necessary, in particular, to clarify the following issue:

Do the challenged legal regulations, in terms of Articles 25 and 37 of the Constitution, guarantee the right to physical and mental integrity and the right of a child to freely express their opinion?

4.1. The Constitutional Court considers it necessary to refer to Part 3 of Article 7, Parts 3 and 4 of Article 8, Part 2 of Article 17, Clause 4 of Part 1 of Article 19.3 of the Law of the Republic of Armenia on Medical Assistance and Services to the Population and Part 10 of Article 6, Parts 1 and 2 Articles 9, Articles 15 and 16, Parts 2, 3 and 4 of Article 19, Part 1 of Article 22 of the Law of the Republic of Armenia on Psychiatric Care, the second paragraph of paragraph 4 of Section 6 of the Appendix to the same Law and to Part 2 of Article 32 of the Law of the Republic Armenia on the Rights of a Child within the framework of the content analysis of legal regulations established by parts 1 and 2 of Article 25 and part 1 of Article 37 of the Constitution, based on the general logic of the implementation of a person's rights to medical intervention in relation to him and with his consent and to receive information about the state of their health, compliance with the requirements for ensuring informed voluntary consent for minors and persons recognized as incapacitated and proper participation in medical interventions carried out in relation to them, as well as the requirement to properly guarantee the rights of a child with a mental disorder, provided that the age and level of maturity of the child, the nature of his mental disorder, as well as the nature of the mental disorder of the person declared incapable, allow these persons to express their will and understand the nature and the consequences of medical intervention carried out against them.

According to Parts 1 and 2 of Article 25 of the Constitution, “1. Everyone shall have the right to physical and mental integrity. 2. The right to physical and mental integrity may be restricted only by law, for the purpose of state security, preventing or disclosing crimes, protecting public order, health and morals or the basic rights and freedoms of others.”

Thus, any interference with this right can take place exclusively on the grounds provided for in Part 2 of Article 25 of the Constitution, subject to the requirement of proportionality of such

interference. In all other cases, medical intervention can only be carried out with the consent of the person undergoing such an intervention.

The constitutional requirement for medical intervention in the right to physical and mental integrity only with the consent of the person subject to such intervention refers to cases when the person is aware of his or her mental health, clearly understands and foresees the possible consequences for his mental health in the event of medical intervention or non-intervention.

The situation changes when a person, due to certain mental health problems, is completely or to some extent unable to realize his mental state, clearly understand and foresee the possible consequences for his mental integrity in the event of medical intervention or non-intervention. In such situations, a person cannot independently and fully exercise his fundamental rights, and instead of him, these rights are exercised by a legal representative. However, the full exercise by the legal representative of the rights of a person with mental health problems cannot be considered justified in all cases where the person is not completely deprived of the ability to be aware of his mental health, clearly understand and foresee the possible consequences of medical intervention or non-intervention in his mental health. That is, in the event of a need for medical intervention and infringement of mental integrity, **the task of the legal representative should be to assist the person with mental health problems, to the extent that the latter is not able to realize the state of his mental health, clearly understand and foresee the possible consequences of medical intervention or lack of intervention in his mental health.**

4.2. According to Part 1 of Article 37, "1. A child shall have the right to freely express his or her opinion which, in accordance with the age and maturity of the child, shall be taken into consideration in matters concerning him or her." The founder of the Constitution set a clear requirement that the legal possibility of a child's free expression of his opinion on any issue should be guaranteed. However, this opinion, in accordance with the age and level of maturity of the child, must be taken into account only in cases where the issue concerns the child.

That is, it follows from the constitutional wording "in accordance with the age and level of maturity of the child" that the degree to which the child's opinion is decisive depends on specific circumstances: on the age and level of maturity of the child, which may differ from person to person. Therefore, in each specific case, it is necessary to assess the age and level of maturity of the child so that it is possible to assess his ability to be aware of his mental health, clearly understand and foresee

the possible consequences in the event of medical intervention or non-intervention with his mental integrity.

When regulating the right to mental integrity of persons who are legally incompetent or under 18 years of age, laws should establish the organizational mechanisms and procedures necessary for the effective exercise of this right, taking into account that the requirement, which is part of the principle of proportionality, is not violated the **necessity** of the measures chosen for limitation in order to achieve the goal established by the Constitution.

All of the above requirements must be implemented in the context of realizing both the right of a person to be subjected to medical intervention with his consent, and the right of a person to receive information about his state of health.

4.3. Importance of the peculiarities of the legal protection of persons with mental health problems recognized as incapacitated, including children, is also noted in a number of international legal documents.

Thus, the Annex to the UN General Assembly Resolution No. 46/119 of December 17, 1991 "The protection of persons with mental illness and the improvement of mental health care" establishes the principles of the protection of the mentally ill and the improvement of mental health care, which directly relate to the main issues of the subject of consideration.

The latter, in particular, state as follows:

(a) There shall be no discrimination on the grounds of mental illness. "Discrimination" means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights. Special measures solely to protect the rights, or secure the advancement, of persons with mental illness shall not be deemed to be discriminatory (Principle 1);

b) The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff (Principle 9);

c) The treatment of every patient shall be directed towards preserving and enhancing personal autonomy (Principle 9);

d) No treatment shall be given to a patient without his or her informed consent, except for the specific cases (Principle 11);

e) Every patient in a mental health facility shall, in particular, have the right to full respect for his or her recognition everywhere as a person before the law (Principle 13);

f) The patient and the patient's personal representative and counsel shall be entitled to attend, participate and be heard personally in any hearing (Principle 18);

g) Every patient and former patient shall have the right to make a complaint through procedures as specified by domestic law (Principle 21);

At the same time, it should be considered that, in accordance with Principle 23 of the said Resolution, states should implement these Principles through appropriate legislative, judicial, administrative, educational and other measures, which they review periodically.

The UN Convention of 13 December 2006 "On the Rights of Persons with Disabilities" is based on these fundamental approaches. In particular, Article 25 (d) of the Convention requires health professionals to provide care to persons with disabilities, including on the basis of free and informed consent.

The implementation of the requirements of the above and other norms of the Convention implies that states, within the framework of the provision of mental health services, are obliged, through legislative reforms, to ensure that persons with disabilities can make decisions based on their free and informed consent.

Certain regulations on the international legal protection of the rights of persons recognized as incapacitated with mental health problems, including children, are enshrined in acts of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe. In particular, according to paragraph 17 of the Recommendation of the Parliamentary Assembly of the Council of Europe of October 8, 1977, No. 818 (1977) "On the situation of the mentally ill", a person undergoing treatment for mental illness has the right to be heard.

In the Recommendation of the Committee of Ministers of the Council of Europe of February 23, 1999 number R(99)4 On Principles Concerning the Legal Protection of Incapable Adults, the principles of legal protection of incapacitated adults are established. According to the mentioned principles, in particular:

1) a measure of protection should not automatically deprive the person concerned of the right to vote or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so (Principle 3);

2) a measure of protection may be established, however, with the full and free consent of the person concerned (Principle 5);

3) where a measure of protection is necessary it should be proportional to the degree of the capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned (Principle 6);

4) in establishing or implementing a measure of protection for an incapable adult the past and present wishes and feelings of the adult should be ascertained as far as possible, and should be taken into account and given due respect;

5) a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in particular concerning any major decision affecting him or her, so that he or she may express a view (Principle 9);

6) where an adult, even if subject to a measure of protection, is in fact capable of giving free and informed consent to a given intervention in the health field, the intervention may only be carried out with his or her consent. The consent should be solicited by the person empowered to intervene (Principle 22);

7) where an adult is not in fact capable of giving free and informed consent to a given intervention, the intervention may, nonetheless, be carried out provided that it is for his or her direct benefit and authorisation has been given by his or her representative or by an authority or a person or a body provided for by a law (Principle 22);

8) if the government of a member state does not apply the rules contained in Principle 22, the consent of the adult should nonetheless be sought if he or she has the capacity to give it (Principle 23).

In addition, according to the Recommendation Number R(83)2 of the Committee of Ministers of the Council of Europe on February 22, 1983 on Legal Protection of Persons suffering from Mental Disorder Placed as Involuntary Patients, the approach was put forward that these persons have the right to be immediately informed about their rights. In particular: a) where a decision for placement is taken by a non-judicial body or person, that body or person should be different from that which originally requested or recommended placement. The patient should immediately be informed of his rights and should have the right of appeal to a court which should decide under a simple and speedy procedure. Moreover:

a) a person whose duty it is to assist the patient to decide whether to appeal should be designated by an appropriate authority, without prejudice to the right of appeal of any other interested person. (Paragraph 2 of Article 4);

b) the patient should be informed of his rights and should have the effective opportunity to be heard personally by a judge except where the judge, having regard to the patient's state of health (Paragraph 3 of Article 4);

c) The patient can request that the necessity for placement should be considered by a judicial authority at reasonable intervals. The placement may be terminated at any moment on the decision of a doctor, or of a competent authority, acting on his own initiative or at the request of the patient or any other interested person (Article 8).

Another Recommendation of the Committee of Ministers of the Council of Europe No. R(2004)10 On protection of the human rights and dignity of persons with mental disorders states as follows:

1) person with mental disorder should be entitled to exercise all their civil and political rights. Any restrictions to the exercise of those rights should be in conformity with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and should not be based on the mere fact that a person has a mental disorder (Paragraph 2 of Article 4);

2) in decisions concerning placement and treatment, whether provided involuntarily or not, the opinion of the minor should be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity (Paragraph 2 of Article 29).

Thus, in the context of the challenged legal regulations, the Constitutional Court states that a comparative analysis of the regulations enshrined in the aforementioned international legal documents shows that:

1) normative regulations that guarantee the fundamental right to physical and mental integrity should be aimed at creating the prerequisites for the proper implementation of **a person's right to medical intervention with his consent and the person's right to receive information about his state of health;**

2) on the basis of the effective implementation of the right to access medical information **during medical intervention of minors and persons recognized as incapacitated, their proper participation should be guaranteed, with strict observance of the requirement of their informed consent;**

3) Within the framework of medical intervention, t**he rights of a minor with a mental disorder must be adequately guaranteed by the law if the child's age and the nature of the mental disorder allow him to express his will and understand the nature and consequences of the medical intervention carried out against him.**

Despite the fact that the aforementioned international legal documents note the importance of the right of a person with mental health problems recognized as incapacitated, including a child, to be heard when the person is actually able to express consent to medical intervention, nevertheless, in the context of the mentioned international legal acts, a particular importance is also attached to the right of that person to be heard, the consent of whose on the basis of his actual inability to give consent is not mandatory, but in this case, for the proper exercise of his rights, it is a prerequisite to take into account the wishes and opinions expressed by him earlier.

Referring to the national experience in ensuring the proper participation of minors and persons declared incapacitated in the implementation of medical intervention against them with their informed consent, the Constitutional Court highlights the following criteria established by the European Court of Human Rights:

a) the fact of incapacity does not necessarily mean that he is not able to really perceive his condition (Judgment of June 27, 2008 in the case of Shtukaturov v. Russia, application no. 44009/05, §108);

b) any protective measure should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will as a rule require careful scrutiny (Judgment of 17 January 2012 in the Stanev v. Bulgaria case, application no. 36760/06, § 153);

c) there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned. (Judgment of 17 January 2012 in the case of Stanev v. Bulgaria, application 36760/06, § 130);

d) the applicant could have initiated legal proceedings through her guardians and the applicant fully depended on her legal guardian (Judgment of 14 February 2012 in the case of D.D. v. Lithuania, application no. 13469/06, § 166);

e) a person capable of expressing a view, despite having been deprived of legal capacity, is deprived of his liberty at the request of his guardian, he must be accorded an opportunity of contesting that confinement before a court, with separate legal representation (Judgment of February 14, 2012 on the case DD v. Lithuania, application no. 13469/06, § 166);

f) for the deprivation of freedom of a person with mental health problems to be lawful, it is necessary to fulfill three basic requirements: a) the deprivation of liberty of persons with mental disorders is allowed only if the mental disorder is established on the basis of objective criteria related to health; b) if the patient, depending on the nature or severity of the mental disorder, poses a serious danger to other people or there is a threat to himself; c) the deprivation of freedom can only continue as long as the underlying mental disorder persists (Judgment of 24 October 1979, Winterwerp v. The Netherlands, no. 6301/73);

g) In the light of the vulnerability of individuals suffering from mental disorders and the need to adduce very weighty reasons to justify any restriction of their rights, the proceedings leading to the involuntary placement of an individual to a psychiatric facility must necessarily provide clearly effective guarantees against arbitrariness (Judgment of May 2, 2013 in the case of Zagidulina v. Russia, application No. 11737 / 06).

4.4.From a comprehensive analysis of the challenged provisions and the laws enshrining them, it follows:

1) the legislative wording applies to minors and children under the age of 18 who are recognized as legally incompetent in the manner prescribed by law, as well as persons with mental disorders who are entitled personally or through a legal representative to receive information about their health status and treatment, apply for medical intervention, agree to or refuse medical intervention;

2) information on the state of health of patients under 18 years of age, or patients recognized as incapacitated in accordance with the procedure established by law, is provided exclusively to their legal representatives (Part 3 of Article 7 of the Law of the Republic of Armenia on Medical Assistance and Service to the Population);

3) consent to medical intervention for a patient under 18 years of age, or a patient recognized as incapable in accordance with the procedure established by law, as well as in cases where the patient's condition does not allow expressing his will, is given by his legal representative (Part 3 of

Article 8 of the Law of the Republic of Armenia on Medical Assistance and Service to the Population);

4) in the absence of a legal representative of a minor or a person recognized as incapacitated, the decision on medical intervention, based on the interests of the patient, is taken by a meeting of physicians (council), and if this is not possible, by a physician (Part 4 of Article 8 of the Law of the Republic of Armenia on Medical Assistance and Service to the Population);

5) the fact of refusal of medical intervention is registered in medical documents and certified by the patient or his legal representative (Part 2 of Article 17 of the Law of the Republic of Armenia on Medical Assistance and Service to the Population);

6) medical staff shall inform the patient and (or) his legal representative about his health or about medical intervention and the course of treatment (Clause 4 of Part 1 of Article 19.3 of the Law of the Republic of Armenia on Medical Assistance and Service to the Population);

7) the right to treatment, examination of a child with a mental disorder and an appeal to a psychiatric institution are granted to his legal representative, and issues related to treatment or refusal of treatment must be agreed with the child or his legal representative (Part 10 of Article 6, Parts 1-2 of Article 9, Articles 15, 16 of the Law of the Republic of Armenia on Psychiatric Care);

8) psychiatric examination or notification of the rights of the subject may be carried out without the consent of the subject or with the consent of the subject or his legal representative (parts 3-4 of Article 19 of the Law of the Republic of Armenia on Psychiatric Care, second paragraph of Clause 4 of Section VI of the Appendix);

9) a person suffering from a mental disorder may be hospitalized by a psychiatric commission without his consent or the consent of his legal representative, if he endangers himself or other persons, or failure to provide treatment or termination of treatment may worsen the patient's health (Part 1 of Article 22 of the Law of the Republic of Armenia on Psychiatric Care);

10) The child may be hospitalized in a psychiatric hospital without the consent of the legal representative only after the decision of the court in cases and in the manner prescribed by law (Part 2 of Articles 32 of the Law of the Republic of Armenia on the Rights of a Child).

Analyzing the relevant provisions of the laws regulating the relations related to the determination of the conditions of consent to medical care and services provided to minors or persons recognized as incapacitated, as well as regulating their expression of will in the process of providing psychiatric care or consent to medical intervention, the Constitutional Court notes that within the

framework of the relevant legislation, **patients under the age of 18 or recognized as legally incapacitated in the manner prescribed by law, in terms of medical intervention, are equated to patients whose condition does not allow them to express their will, and their legal representatives give their consent instead.**

On the other hand, it should be emphasized that the legislator does not consider persons under the age of 18, or persons recognized as incapacitated in accordance with the procedure established by law, as patients whose condition does not allow them to express their will. That is, according to this logic, **although the state of the person may allow him/her to express his/her will, however, due to the fact that s/he is under 18 years old or that s/he is recognized as legally declared as incompetent, the person is deprived of the possibility to express his/her will.** Meanwhile, such a mechanical approach cannot be consonant with the aforementioned constitutional requirements.

In addition, in accordance with the legislation of the Republic of Armenia, persons under the age of 18 may have certain rights and obligations. For instance, under the criminal law, criminal liability for some crimes begins from the age of 14, and under civil law, minors under the age of 14 have the right to conclude certain transactions; a minor who has reached the age of 16 may be recognized as fully capable if s/he works under an employment contract or if, with the consent of his/her parents, adoptive parents or guardians, is engaged in entrepreneurial activity, and in cases where the law allows marriage before the age of eighteen, a person, who has reached the age of sixteen may acquire full legal capacity.

At the same time, the Constitutional Court notes that although the requirement to provide medical assistance and services to an adult recognized incapacitated, as well as to taking into account the latter's will in the process of providing him with psychiatric care, is enshrined in law, however, in practice, this is often not taken into account due to the alternative enshrined in legislation. For instance, with the consent of the legal representative of the person, as a sufficient condition, in the case of a minor patient or a patient recognized as legally incompetent, or in cases where the patient's condition does not allow him to express his will.

In addition, in the challenged provisions, the condition of a person's consent to medical intervention is satisfied with the consent of his/her legal representative, without a real, conscious expression of the patient's will. These provisions establish urgent cases in those circumstances when it comes to the treatment of persons recognized as incapacitated, suffering from mental disorders, about medical consultations or medical examination or diagnosis or treatment in non-hospital

psychiatric institutions, about outpatient mental health care at the request of a person or his/her legal representative.

That is, in practice, it is not prescribed in what cases the treatment is provided with the written consent of a person suffering from a mental disorder, and in what cases with the written consent of his/her legal representative.

The challenged provisions do not establish any mechanism for the patient's consent to become a priority and to make him/her a participant in the medical process, and the consent of the legal representative given instead of the person is in itself considered as a sufficient requirement. Although in practice this legal requirement is satisfied, such regulation is problematic from the point of view of guaranteeing the fundamental rights of a person.

The Constitutional Court states that none of the grounds for restricting the fundamental right to mental integrity enshrined in Part 2 of Article 25 of the Constitution can be considered as a sufficient and necessary condition for restricting the fundamental right to mental integrity. Thus, state security, prevention or disclosure of crimes, protection of public order, health and morals or the fundamental rights and freedoms of others can in no way justify the absence of a requirement for the consent of a person and (or) granting an advantage to his legal representative, therefore, there is no constitutional basis for restrictions on the person's fundamental right to mental integrity for the indicated purposes.

With regard to the restriction of a person's right to mental integrity based on considerations of protecting his or her health or the health of others, the Constitutional Court considers that for this purpose the informed consent of a person should not be restricted, but it should be guaranteed in all cases when a person is able to exercise this right on his own. Subjecting of interference in his mental health with this consent does not in itself imply that if, in accordance with paragraph 6 of part 1 of Article 27 of the Constitution, a person has a mental disorder and threat comes from him, then he cannot be deprived of his personal freedom in accordance with the procedure established by law.

In addition, the Constitutional Court considers that the involvement of a legal representative is justified only by the principle of subsidiarity, that is, when the holder of the right to mental health is actually unable to exercise independently his fundamental right to mental integrity. This may also include cases where a person may exercise the said right on his/her own responsibility, but by doing so s/he himself may inevitably cause harm to his/her mental health. The Constitutional Court

considers that in each specific case a proper professional assessment of a person's mental health and his/her ability to independently exercise his fundamental right is necessary.

As for the fundamental right of a child to express freely his or her opinion on issues related to it, enshrined in Part 1 of Article 37 of the Constitution, its implementation is solely determined by the age and level of maturity of the child.

Therefore, in all cases where a child can independently exercise his/her fundamental right to mental integrity, and his/her age and level of maturity allow his/her opinion to be taken into account in the matters concerning him/her, the law must envigate the necessary prerequisites for his/her opinion to be taken into account, and a representative, as in the case of adults, should be carried out on the basis of the principle of subsidiarity.

Thus, the Constitutional Court considers it necessary to state that:

1) Part 3 of Article 7, Parts 3 and 4 of Article 8 of the Law of the Republic of Armenia on Medical Assistance and Services to the Population insofar as from the point of view of the requirement to obtain informed consent does not ensure the proper participation of minors and persons recognized as incapacitated in medical activities carried out in relation to them, does not ensure the right of the aforementioned persons to the availability of medical information about their condition;

2) Part 10 of Article 6 of the Law of the Republic of Armenia on Psychiatric Care does not adequately ensure the fundamental right of children with mental disorders to mental integrity, if the age of the child and the nature of the mental disorder allow him to express his will and realize the nature and consequences of the medical interference;

3) Part 2 of Article 32 of the Law of the Republic of Armenia on the Rights of a Child does not provide for the obligatory consent of the child upon his hospitalization in a psychiatric institution in the case when the age and mental health of the child allow him to express his will.

Consequently, the aforementioned legal provisions contradict the rights enshrined in Parts 1 and 2 of Article 25 and in Part 1 of Article 37 of the Constitution, limiting the fundamental right to mental immunity on grounds not provided for by the Constitution, as well as unreasonably limiting the fundamental right of a child to freedom of expression.

4.5. With regard to the challenged legal regulation, enshrined in Article 17 of the Law of the Republic of Armenia “On Medical Assistance and Services to the Population”, the Constitutional

Court states that within the framework of the said regulation, the patient or his legal representative was provided with a proper opportunity. And according to Article 19.3 of the same Law, the patient and (or) his/her legal representative must be informed about the results of research related to the patient's health, about the diagnosis and methods of treating the disease, the associated risks, possible options for medical intervention, the consequences and results of treatment.

The above applies also to Parts 1 and 2 of Article 9, Articles 15 and 16, Parts 2, 3 and 4 of Article 19, Part 1 of Article 22 of the Law of the Republic of Armenia "On Psychiatric Care" and the second Subparagraph of Paragraph 4 of Section 6 of the Appendix to the said Law, so how, by virtue of the aforementioned regulations, the opinion of that person or his legal representative is taken into account in the process of carrying out medical intervention in relation to a person with a mental disorder.

At the same time, the Constitutional Court considers that within the framework of refusal of medical intervention, informing a person about the results of examination concerning his health, about the diagnosis and methods of treating the disease, about the associated risks, possible options for medical intervention, the consequences and results of treatment and the process medical intervention in relation to a person with a mental disorder during the application of Articles 17 and 19.3 of the Law of the Republic of Armenia on Medical Assistance and Services to the Population, as well as parts 1 and 2 of Article 9, Articles 15 and 16, parts 2, 3 and 4 of Article 19 , part 1 of Article 22 of the Law of the Republic of Armenia on Psychiatric Care and the second subparagraph of paragraph 4 of Section 6 of the Appendix to the said Law, it is necessary to ensure that **the consent of a person takes precedence over the consent of his legal representative**.

At the same time, given the fact that preference should be given to the opinion of the minor whose age allows him to express his will, and the priority of providing the minor with information about his health should be ensured, in law enforcement practice it is necessary to exclude problem situations from the point of view of the right to physical and mental integrity of minors. On the basis of the foregoing, the Constitutional Court considers that, pending the establishment by the legislator through appropriate changes of the organizational mechanisms and procedures necessary for the effective exercise of the rights of persons under the age of 18 or persons declared incapacitated in accordance with the procedure established by law, the challenged legal provisions should be applied in such a way that the will of persons under the age of 18 or persons recognized as incapacitated in accordance with the procedure established by law was taken into account**, in accordance with the**

degree of ability to understand and foresee the possible consequences of medical intervention in his mental integrity or its absence, both in the event of the need for medical intervention, and in the event of the need to obtain information about your health.

Based on the review of the case and governed by Paragraph 1 of Article 168, Paragraph 10 of Part 1 of Article 169, and Article 170 of the Constitution, as well as Articles 63, 64 and 68 of the Constitutional Law on the Constitutional Court, the Constitutional Court **HOLDS:**

1. Part 3 of Article 7, Parts 3 and 4 of Article 8 of the Law of the Republic of Armenia on Medical Assistance and Service to the Population shall be declared as contradicting Article 25 of the Constitution insofar as they do not ensure the proper participation of minors and persons recognized as incapacitated in the medical activities regarding them, without establishing the requirement to obtain informed consent, and also do not guarantee the right of the said persons to the availability of medical information about their condition.

2. Part 10 of Article 6 of the Law of the Republic of Armenia on Psychiatric Care shall be declared as contradicting Articles 25 and 37 of the Constitution insofar as it does not adequately ensure the fundamental right of children with mental disorders to mental integrity, when the age of the child and the nature of the mental disorder allow him to express his will and realize the nature and consequences of the medical intervention carried out in relation to him.

3. Part 2 of Article 32 of the Law of the Republic of Armenia on the Rights of a Child shall be recognized as contradicting Articles 25 and 37 of the Constitution insofar as it does not stipulate the obligatory consent of the child during his hospitalization in a psychiatric institution in cases when the age and mental health of the child allow him to express your will.

4. Part 2 of Article 17 and Clause 4 of Part 1 of Article 19.3 of the Law of the Republic of Armenia on Medical Assistance and Service to the Population comply with the Constitution in the interpretation that in terms of certifying the fact of refusal of medical intervention, as well as informing a person about the results of research concerning him health, the diagnosis and treatment of the disease, the associated risks, possible options for medical intervention, the consequences and results of treatment, the consent of the person should be given priority.

5. Parts 1 and 2 of Article 9, Articles 15 and 16, Parts 2, 3 and 4 of Article 19, Part 1 of Article 22 of the Law of the Republic of Armenia on Psychiatric Care and the second paragraph of Clause 4

of Section VI of the Appendix to the said Law correspond to the Constitution in the interpretation that, as part of the medical intervention process, obtaining the consent of a person with a mental disorder should be prioritized.

6. Taking as a basis Part 3 of Article 170 of the Constitution, Clause 4 of Part 9, and Part 19 of Article 68 of the Constitutional Law on the Constitutional Court, and also taking into account the fact that at the time of publication of this Decision declaring Part 3 of Article 7, Parts 3 and 4 Article 8 of the Law of the Republic of Armenia on Medical Assistance and Service to the Population, Part 10 of Article 6 of the Law of the Republic of Armenia on Psychiatric Care, and Part 2 of Article 32 of the Law of the Republic of Armenia on the Rights of a Child as contradicting the Constitution and void would inevitably create such grave consequences that violate the legal security established by the cancellation of this normative legal act at this moment, namely, there will be such a gap in legal regulation that will become an obstacle to the provision of medical care and services to minors and persons recognized as incapacitated, to establish June 1, 2020 as the final period of expiration of the provisions declared contradicting the Constitution, thus providing the National Assembly the opportunity to bring the legal regulations of the Law of the Republic of Armenia on Medical Assistance and Service to the Population, the Law of the Republic of Armenia on Psychiatric Care and the Law of the Republic of Armenia on the Rights of a Child in line with the requirements of this Decision.

7. Pursuant to Part 2 of Article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman **H. Tovmasyan**

30 January 2020
DCC -1504