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TITLE

ENSURING THE CONSTITUTIONAL RIGHT TO LIBERTY OF PERSONS WITH MENTAL HEALTH PROBLEMS

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LIST OF ABBREVIATIONS

ECHR or Convention	European Convention on the Protection of Human Rights and Fundamental Freedoms (4 November 1950)
ECtHR or Court	European Court of Human Rights
CRPD	Convention on the Rights of Persons with Disabilities
ICCPR	International Covenant on Civil and Political Rights
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
RA	the Republic of Armenia

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INTRODUCTION

The right to liberty of persons with mental health problems is protected by the Article 5 of the European Convention on Human Rights and ensuring the application of this fundamental right is vital.

Persons with mental health problems are one of the most vulnerable groups of society. The issue of ensuring their rights (including right to liberty) and freedoms is a problematic one because there are huge gaps and imperfections in the legislative regulations of the field as well as in the practice in reality.

The problematic legal acts, legislative gaps, international standards, the judicial practice of the ECtHR as well as the practices of the European countries will be discussed in this thesis paper. The origins of the problems will be revealed and the directions for their solution will be proposed.

In the frame of the topic the main acts of the national legislation that will be discussed are: the Constitution of the RA, the Criminal Procedure Code of the RA, the Civil Procedure Code of the RA, and the Law of the RA “On the Psychiatric Aid”.

Besides it, respective provisions of the Draft of Criminal Procedure Code of the RA and the Draft of Law of the RA “On the Psychiatric Aid” will be analyzed.

Actuality of the problem is also reflected in Ad Hoc public report of Human Rights Defender of Armenia on Ensuring Rights of Persons with Mental Health Problems in Psychiatric Organizations, as well as in the annual reports on the activities of 2018 and 2019 of Human Rights Defender of Armenia acting as National Preventive Mechanism. The statistics, result of monitoring visits, raised problems and their solutions and recommendations made in abovementioned reports will also be considered in the paper.

The main problems that will be discussed in paper are related to the application of compulsory medical measures and the non-voluntary treatment of persons with mental health problems.

The right to liberty is one of the oldest and most important human rights norms. It is particularly relevant in the context of involuntary placement, since deprivation of liberty occurs when an individual is placed in an institution against his or her will and cannot leave it at his or her own will.

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The significance of the issue is that it concerns one of the most vulnerable groups of society: persons who can be held in psychiatric organizations against their will and cannot make public the problems they are facing with the cases of violation of their rights because of their state of health.

It is worth mentioning that persons possess rights simply because of their humanity. Thus, persons with mental disabilities need not prove that they deserve certain rights or that they can be trusted to exercise them in socially and culturally acceptable ways. The fundamental nature of human rights can, therefore, serve as a basis to challenge unjust treatment of people with mental disabilities[1].

Therefore, this sphere with its relevant legislative regulations needs a thorough and in-depth study, revelation of the systemic problems and taking concrete steps for their solution.

The significance of the issue is also explained by the study of the judicial practice (both in civil and criminal procedures). There are plenty of problematic cases concerning to the application of compulsory medical measures, periodic review of a security measure in the form of placement in a psychiatric organization, proper supervision over it, non-voluntary treatment of a person with mental health problems without court's judgment, as well as defining concrete terms of compulsory treatment, etc.

The absence of preliminary and further judicial supervision over the appointment and the process of compulsory (non-voluntary) treatment is a huge gap in our legislation, which can lead to violation of the right to liberty of the persons with mental health problems.

The regulations and cases mentioned in this report, as well as the relevant European Standards and the study of the best international practice will have a central and fundamental role in the analysis of the paper.

The analysis of the relevant national legislative regulations as well as legislative gaps will give as an opportunity to answer the question whether the Armenian legislation ensures the realization of the Right to Liberty of Persons with Mental Health Problems.

[1] Lawrence O. Gostin and Lance Gable, The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health, page 22 (2004), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1088&context=facpub&fbclid=IwAR394Dbw45MLR1ArHb6EpBzBa-LvDcDpNG1d0uIecw9b7WmtkuZUcMyrFD4.

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CHAPTER 1. RIGHT TO LIBERTY OF PERSONS WITH MENTAL HEALTH PROBLEMS: INTERNATIONAL STANDARDS

Processes of involuntary placement and involuntary treatment of persons with mental health problems can affect the one of the most fundamental rights of the person – the right to liberty. For this reason, at international level human rights standards have set out strict safeguards to limit undue interference in this right. The right to liberty is the right of all persons to freedom of their person – freedom of movement and freedom from arbitrary detention by others[2].

It should be mentioned that the mental health legislation has changed significantly, starting in Europe and North America, and eventually beginning to globalize from the 1960s onward, with macroscopic exceptions. The focus shifted from explicitly expelling the mentally ill for the protection of society to curing mental illness itself. In the 19th and part of the 20th centuries, mental health laws were forged from the models for criminal procedures. Mental illness was treated as a transgression and hospitalizations resembled prison stays, under worse conditions, considering that the duration of detention for the mentally ill was undetermined[3]

At the international level, the right to liberty and security of the person found its first legal formulation in the Universal Declaration of Human Rights (10 December 1948). Article 3 of UDHR stipulates that *everyone has the right to life, liberty and security of person*. At the same time, according to Article 9 of UDHR *no one shall be subjected to arbitrary arrest, detention or exile.*

The right to liberty of the person, as found in international human rights instruments, does not grant complete freedom from arrest or detention. Deprivation of liberty is a legitimate form of state control over persons within its jurisdiction. Instead, the right to liberty acts as a substantive guarantee that arrest or detention will not be arbitrary or unlawful. In general, any deprivation of liberty is only allowed if it is carried out in accordance with a procedure established by domestic law and with the respect of minimum guarantees[4].

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[2] Right to liberty and freedom of movement.
[3] Testa M, West SG. Civil commitment in the United States. Psychiatry (Edgmont) (2010) .
[4] The Right to Liberty | Icelandic Human Rights Centre.

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The right to liberty of persons with mental health problems is one of the conceptual parts of the fundamental right to liberty, and it is guaranteed by a number of international conventions.

So, Article 5 of the ECHR guarantees the right to liberty and security of the person. According to it (Article 5 (1)) *everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […]*

*(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, **of persons of unsound mind**, alcoholics or drug addicts or vagrants;*

Article 5 (4) of the Convention gives regulations about the lawfulness of a deprivation of liberty. It stipulates that *everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

The ECHR allows liberty of the person to be deprived on grounds of “unsound mind”[5].

The key purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty [6]. The right to liberty and security is of the highest importance in a “democratic society” within the meaning of the Convention[7].

Another important document guaranteeing the right to liberty is the International Covenant on Civil and Political Rights (ICCPR). According to Article 9 (1) of the ICCPR, *everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*.

Article 9 of ICCPR applies to deprivation of liberty of persons with mental health problems. Where deprivation of liberty is sanctioned by law, the conditions stated in Article 9 (4) of the ICCPR apply. It stipulates that *anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention*

[5] “Unsound mind” – a phrase reflecting the terminology of the 1950s when the ECHR was adopted.

[6] *S., V. and A. v. Denmark,* 35553/12, 36678/12 and 36711/12, ECtHR [GC], para. 73 (2018); *McKay v. the United Kingdom,* 543/03, ECtHR [GC], para. 30 (2006).

[7] *Medvedyev and Others v. France,* 3394/03, ECtHR [GC], para. 76 (2010); *Ladent v. Poland,* 11036/03, ECtHR, para. 45 (2008).

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is not lawful. Furthermore, according to Article 2 (3) of the ICCPR *States Parties must ensure that an effective remedy is provided to persons deprived of their liberty.*

Article 14 (1) of CRPD stipulates that *States Parties shall ensure that persons with disabilities, on an equal basis with others:*

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. […]

As we can understand from the abovementioned regulation the CRPD itself does not refer explicitly to involuntary placement. Article 14 (1) of CRPD just states that the deprivation of liberty based on a disability of the person would be discriminatory.

In this regard the Office of High Commissioner of Human Rights (OHCHR) stated in their report that *unlawful detention encompasses situations where the deprivation of liberty is grounded in the combination between a mental or intellectual disability and other elements such as dangerousness, or care and treatment. Since such measures are partly justified by the person's disability, they are to be considered discriminatory and in violation of the prohibition of deprivation of liberty on the grounds of disability, and the right to liberty on an equal basis with others prescribed by Article 14 of the CRPD*[8].

The OHCHR also suggested their own interpretation of Article 14 of CRPD and according to it *legislation authorizing the institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished. This must include the repeal of provisions authorizing institutionalization of persons with disabilities for their care and treatment without their free and informed consent, as well as provisions authorizing the preventive detention of persons with disabilities on grounds such as the likelihood of them posing a danger to themselves or others, in all cases in which such grounds of care, treatment and public security are linked in legislation to an apparent or diagnosed mental illness. This should not be interpreted to say that persons with disabilities cannot be lawfully subject to detention for care and treatment or to preventive detention, but*

[8] Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, para. 48 (2009).

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that the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis[9].

The Right to Liberty of persons with mental health problems have also been thoroughly discussed in the case law of the ECtHR. These cases have established how the ECtHR have defined deprivation of liberty taking into account the type, duration, effects and manner of implementation of the measure. The ECtHR stated that *in order to determine whether circumstances involve deprivation of liberty, the starting point must be the concrete situation of the individual concerned and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The distinction between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance*[10].

There are also several cases which have turned on whether the applicant was detained in terms of Article 5 of the Convention. For example, the ECtHR concluded that *confinement in psychiatric clinic without court order authorizing the applicant's confinement in the private clinic amounted to a breach of the right to liberty as guaranteed by Article 5 (1) of the Convention*[11].

In its case law the ECtHR describes the situations when the person with mental health problems can be detained. The ECtHR states that compulsory confinement of the person with mental health problems may be necessary if the person needs treatment or if the person *needs control and supervision to prevent him, for example, causing harm to himself and other persons*[12].

As for Article 5 (4) of the Convention the need to have regular court-like reviews of the necessity of detention has been discussed in the decisions of the ECtHR[13].

The next question we have to answer is when the liberty of the person may be deprived and at what moment the person's placement in the psychiatric organization would be considered as a deprivation of liberty.

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[9] Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, para. 49 (2009).

[10] *Ashingdane v. the United Kingdom,* 8225/78, ECtHR, para. 41 (1985).

[11] *Storck v. Germany,* 61603/00, ECtHR, para. 112, 113 (2005).

[12] *Hutchison Reid v. the United Kingdom*, 50272/99, ECtHR, para. 52 (2003).

[13] *D.D. v. Lithuania,* 13469/06, ECtHR, para. 165 (2012).

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The protection from arbitrary deprivation of liberty under Article 5 of the ECHR applies when a person is deprived of his or her liberty. The application of Article 5 is triggered not by whether or not a person is in fact restrained or detained, but instead by whether he or she is placed in an institution against his or her will and cannot leave without authorization[14].

According to Article 5 of the ECHR the persons with mental health problems, in principle, could be deprived of their liberty, but that kind of deprivation of liberty is only justified in extreme cases. Either the person is dangerous for himself or herself or for the society because of his or her violent behavior, or the detention is required for medical reasons.

The Court stated that *the deprivation of liberty under Article 5 (1) (e) thus has a dual function: on the one hand, the social function of protection, and on the other a therapeutic function that is related to the individual interest of the person of unsound mind in receiving an appropriate and individualised form of therapy or course of treatment. Appropriate and individualised treatment is an essential part of the notion of "appropriate institution"*[15].

In order to properly ensure the right to liberty of persons with mental health problems in its case law ECtHR requires that *the medical assessment must be based on the actual state of mental health of the person concerned and not solely on past events. A medical opinion cannot be seen as sufficient to justify deprivation of liberty if a significant period of time has elapsed*[16].

The ECtHR stated that *the proceedings leading to the involuntary placement of an individual in a psychiatric facility must thus provide effective guarantees against arbitrariness given the vulnerability of individuals suffering from mental disorders and the need to adduce very weighty reasons to justify any restriction of their rights*[17].

In the case of Winterwerp v. the Netherlands the ECtHR discussed the "lawfulness" of the detention for the purposes of Article 5 (1) (e) of the Convention. The ECtHR noted that *except in emergency cases, the individual concerned should not be deprived of his liberty*

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[14] Involuntary placement and involuntary treatment of persons with mental health problems, page 17 (2012), https://fra.europa.eu/sites/default/files/involuntary-placement-and-involuntary-treatment-of-persons-with-mental-health-problems_en.pdf.

[15] *Rooman v. Belgium,* 18052/11, ECtHR [GC], para. 210 (2019).

[16] *Varbanov v. Bulgaria,* 31365/96, ECtHR, para. 47 (2000).

[17] *M.S. v. Croatia (no. 2),* 75450/12, ECtHR, para. 147 (2015).

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unless he has been reliably shown to be of "unsound mind". The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder[18].

Article 5 (4) of ECHR stipulates that *everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

The ECtHR has also provided interpretation of one of the essential guarantees of the right to liberty and security; that the lawfulness of the deprivation of liberty must be reviewable by a court. ECtHR case law has expanded on the practical implications of this right. In a number of cases (Luberti v. Italy, 9019/80; Musial v. Poland, 24557/94; L.R. v. France, 33395/96; Pereira v. Portugal, 44872/98; etc.), the court emphasized the requirement for a speedy determination of the lawfulness of the detention in situations where people are detained in psychiatric institutions as authorized, in principle, under Article 5 (1) (e) of the ECHR[19].

The ECtHR emphasized that *a key guarantee under Article 5 (4) is that a patient compulsorily detained for psychiatric treatment must have the right to seek judicial review on his or her own motion",* and the abovementioned provision of the Convention *requires, in the first place, an independent legal device by which the detainee may appear before a judge who will determine the lawfulness of the continued detention. The detainee's access to the judge should not depend on the good will of the detaining authority, activated at the discretion of the medical corps or the hospital administration.* The Court also stated that *even a mechanism providing for the automatic appearance of a mental health patient before a judge is not an appropriate substitute for the right to judicial review at the instigation of the individual*[20].

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[18] *Winterwerp v. the Netherlands,* 6301/73, ECtHR, para. 39 (1979).

[19] Involuntary placement and involuntary treatment of persons with mental health problems page 18 (2012), https://fra.europa.eu/sites/default/files/involuntary-placement-and-involuntary-treatment-of-persons-with-mental-health-problems_en.pdf.

[20] *Gorshkov v. Ukraine,* 67531/01, ECtHR, paras. 44-45 (2005).

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Besides the ECtHR case law, there are also other important standards relevant to the topic adopted by the Council of Europe.

In this context the Recommendations of the Council of Europe Committee of Ministers have a unique place. In the Recommendation Rec(2004)10 the Committee of Ministers gives its own interpretation of Article 5 of the ECHR at the same time confirming the abovementioned approach of the ECtHR. The Recommendation Rec(2004)10 gives some conditions that should be met before the involuntary placement of the person to the psychiatric institution. It also provides special safeguards among Member States of the Council of Europe.

So, Article 17 (1) of the Recommendation Rec(2004)10 requires the fulfilment of 5 criteria for involuntary placement of the person. According to it *a person may be subject to involuntary placement only if all the following conditions are met:*

i. the person has a mental disorder;

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

iii. the placement includes a therapeutic purpose;

iv. no less restrictive means of providing appropriate care are available;

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

According to Article 17 (2) of the Recommendation Rec(2004)10, *exceptionally a person may be subject to involuntary placement […]**for the minimum period** necessary in order to determine whether he or she has a mental disorder that represents a significant risk of serious harm to his or her health or to others […].*

Besides abovementioned regulations, another vital and general safeguard is defined by Article 24 of the Recommendation Rec(2004)10. According to it, *if any of the criteria are no longer met, involuntary placement should be terminated. The doctor charged with the person's care is responsible for assessing whether any of the relevant criteria are no longer met, unless a court has reserved the assessment of the risk of serious harm to others to itself or to a specific body.* This provision is a real guarantee for the persons with mental health problems ensuring their right to liberty.

Two more provisions regarding the documentation of the involuntary treatment and the judicial review have found place in the Recommendations of Committee of Ministers.

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Article 20 (3) of the Recommendation Rec(2004)10 stipulates that *decisions to subject a person to involuntary placement or to involuntary treatment should be documented and state the maximum period beyond which, according to law, they should be formally reviewed […].*

Article 25 of the Recommendation Rec(2004)10 requires the Council of Europe Member States *to ensure that persons subject to involuntary placement or involuntary treatment can: appeal against a decision; have the lawfulness of the measure, or its continuing application, reviewed by a court at reasonable interviews; and be heard in person or through a personal advocate or representative at such reviews or appeals.* Moreover, according to the abovementioned Article, *the decision of the court should be delivered promptly, and a procedure to appeal the court's decision must be provided.*

The issue of involuntary placement and involuntary treatment has also found a place in the annual reports of the CPT. In particular, the CPT stated that *a person who is involuntarily placed in a psychiatric establishment by a non-judicial authority must have the right to bring proceedings by which the lawfulness of his detention shall be decided speedily by a court*[21].

According to the standards relating to compulsory treatment developed by the CPT, *patients should, as a matter of principle, be placed in a position to give their free and informed consent to treatment. The admission of a person to a psychiatric establishment on an involuntary basis should not be construed as authorising treatment without his consent. It follows that every competent patient, whether voluntary or involuntary, should be given the opportunity to refuse treatment or any other medical intervention. Any derogation from this fundamental principle should be based upon law and only relate to clearly and strictly defined exceptional circumstances.*

Of course, consent to treatment can only be qualified as free and informed if it is based on full, accurate and comprehensible information about the patient's condition and the treatment proposed; […]. Consequently, all patients should be provided systematically with relevant information about their condition and the treatment which it is proposed to prescribe for them. Relevant information (results, etc.) should also be provided following treatment[22].

[21] 8th General Report on the CPT's activities, para. 52 (1998).

[22] 8th General Report on the CPT's activities, para 41 (1998).

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As we see the CPT standards reaffirm the respective provisions of the Convention as well as the interpretations and approaches of the ECtHR regarding involuntary placement of persons with mental health problems.

To sum up, under the standards of Council of Europe (ECHR, ECtHR case law and CPT standards) the right to liberty of the person with mental health problems can be limited if following conditions are met:

• The decision of placement should be taken by an authority legally vested with competence to place a person in a psychiatric hospital or other establishment, and the decision must be founded on a conclusively proven state of mental health problem, unless there are urgent circumstances. It is not sufficient that the authority be presented with a request for placement of a person suffering from a mental health problem, rather it must be examined whether there are compelling reasons, related to the health of the person concerned or to the rights or interests of others, justifying the placement.

• The procedure leading to the placement decision should ensure that the person concerned has an opportunity to be heard, if necessary through a representative.

• The detention should not be prolonged beyond what is justified by the mental health of the person subjected to the placement measure.

• The regime of the condition should correspond to its therapeutic purpose. Finally, judicial review should at all times be available in order to assess the continued lawfulness of the detention[23].

All the provisions, regulations, standards and analyzes presented in this chapter are related to the guarantees of the right to liberty of persons with mental health problems as well as to their protection in the context of involuntary placement and treatment.

Based on the results of the analyzes we can claim that persons with mental health problems can be deprived of their liberty in certain circumstances set up by the international standards and the lawfulness of their detention should be reviewed regularly by the court.

In the next two chapters of the paper legal framework of the Republic of Armenia regarding involuntary placement and treatment will be presented. Application of the abovementioned international standards in criminal and in civil procedures will be discussed,

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[23] Involuntary placement and involuntary treatment of persons with mental health problems page 20 (2012), https://fra.europa.eu/sites/default/files/involuntary-placement-and-involuntary-treatment-of-persons-with-mental-health-problems_en.pdf.

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issues on compliance of existing regulations with the standards will be raised, and respective solutions will be suggested.

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CHAPTER 2. APPLICATION OF COMPULSORY MEDICAL MEASURES IN CRIMINAL PROCEDURE

Article 27 (1) (6) of the Constitution of the RA stipulates that *everyone shall have the right to personal liberty. No one may be deprived of personal liberty otherwise than in the following cases and as prescribed by law: […] for the purpose of preventing the spread of contagious diseases dangerous for the public, as well as the danger posed by persons with mental disorder, drug addicts and alcoholics.*

According to Article 27 (5) of the Constitution of the RA, *everyone deprived of personal liberty shall have the right to challenge the legitimacy of depriving him or her of liberty, whereon the court shall render a decision within a short time period and shall order his or her release if the deprivation of liberty is non legitimate.*

The provisions of Article 27 (1) of the Constitution are consistent with the provisions of Article 5 (1) of the ECHR, and there is a great amount of the ECtHR case law regarding Article 5. The regulations of the Article 27 of the Constitution go further into the issue than respective provisions of the Convention. It also implements the judicial practice of the ECtHR[24].

It should be noted that all the guarantees provided in the Article 27 of the Constitution are applied to all the persons who are de facto deprived of their personal liberty. Article 27 (5) provides an important guarantee – the judicial review of the lawfulness of a deprivation of liberty. It is also stipulated that the court must make a decision "within a short time period", which is an additional guarantee for the persons deprived of liberty.

After discussing the main regulation of the Constitution regarding personal liberty, it is time to analyze respective provisions of the Criminal Procedure Code of the RA.

So, according to Article 450 (1) of the Criminal Procedure Code of the RA, *compulsory medical measures are applied by the court against persons who have committed an act in a state of insanity that is not permitted by criminal law, if those persons continue to be dangerous to the society.*

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[24] Vardan Poghosyan and Nora Sargsyan, The Constitution of the Republic of Armenia (2015 edit): brief explanations, page 50, http://lawlibrary.info/ar/books/giz2016-ar-Brief_explanations_of_Consitution_2016.pdf

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If a person commits a socially dangerous act not permitted by the Criminal Code of the RA, it becomes necessary to find out if he or she could control his or her actions at the time of the crime. A person who has committed a crime cannot be prosecuted if he or she was not able to realize the danger of his actions or to control them due to mental health problems. That is, he or she committed the crime in a state of insanity. Therefore, the court, as the abovementioned provision stipulates, may impose compulsory medical measures on persons who have committed the crime in a state of insanity.

According to Article 451 (1) of the Criminal Procedure Code of the RA, *the proceedings on application of compulsory medical measures are instituted at the pre-trial stage* and, according to Article 464 (1), *the court decides on the application of compulsory medical measures against the person who committed an act in the state of insanity not permitted by criminal law.*

Article 457 (1) of the Criminal Procedure Code of the RA prohibits the application of precautionary measures against persons who have committed crimes in a state of insanity. In cases when a person needs psychiatric care and is dangerous for himself or the society, before the application of compulsory medical measures security measures provided in Article 457 (2) of the Criminal Procedure Code may be applied: handing the patient to relatives, trustees, guardians and placing in a psychiatric organization.

Moreover, Article 459 (1) of the Criminal Procedure Code of the RA stipulates that *a person who has committed an act not permitted by Criminal Law and represents danger for the society, once the fact of his or her insanity is confirmed, can be placed in a psychiatric institution.*

So, as we can see from abovementioned regulations, the Criminal Procedure Code of the RA distinguishes two separate regimes of influence on persons who have committed crimes in the state of insanity: security measures and compulsory medical measures. The legislation stipulates more detailed conditions for the application of compulsory medical measures, than in the case of the application of security measures. For example, the Criminal Procedure Code does not address the issue of medical treatment of the person after his placement in a psychiatric organization and before the application of compulsory medical measures by the court.

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Regarding this, we have a very problematic situation in our country. As the Human Rights Defender of the RA mentioned in his reports *psychiatric organizations carry out treatment on people towards whom a security measure has been applied by the court, although there is no indication about treatment in the judicial act. As a result, a person is subjected to compulsory treatment – treatment without his or her informed consent and the relevant act of the court*[25]. In fact, medical security measures are applied during the security measure, without the relevant judicial act, and in practice such situations can cause very serious problems.

Discussing the abovementioned provisions and their respective interpretations we can state that compulsion concerns the placement of a person in a psychiatric organization rather than the treatment of the latter. The aim of the placement of a person in a psychiatric institution should be his or her treatment. So, the consent of the person is needed regarding the treatment. When the court does not mention anything about the compulsory treatment in its judicial act but in fact it is being implemented an issue of person's consent may arise.

Referring to the regulations of the Criminal Procedure Code of the RA we can claim that Article 457 and Article 459 do not regulate the question of treatment of the persons when security measures are applied towards them. The absence of appropriate legislative regulations can cause huge problems in practice.

In this context Article 17 of the Recommendations Rec (2004)10 of the Council of Europe Committee of Ministers should be mentioned, according to which (Article 17 (1) (3)) *a person may be subject to involuntary placement only if the placement includes a therapeutic purpose.* In other words, the placement of a person in a psychiatric organization cannot be an end in itself, and the placement should definitely be followed by respective treatment of a person.

In this regard the regulations on applying security measures of other Council of Europe countries should be discussed. So, according to Article 492 (3) of the Criminal Procedure Act of the Republic of Slovenia, *if the court finds on the basis of evidence taken that the accused has committed a specific criminal offence and that at the time of commission of the criminal offence he was mentally incapable, it shall decide, [...], whether or not to pronounce **the***

[25] Ad Hoc Public report of Human Rights Defender of the Republic of Armenia on Ensuring Rights of Persons with Mental Health Problems in Psychiatric Organizations, page 26 (2018).

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security measure of compulsory <u>psychiatric treatment</u> and custody *in a medical institution or compulsory psychiatric treatment at liberty*[26].

Article 191 (2) of the Criminal Procedure Code of Georgia stipulates that *if it is established that at the moment of committing a crime, the accused was insane, the court shall, upon motion of a party, terminate the criminal prosecution against the accused. In addition, the judge reviewing the case shall, […], decide, with the same ruling and based on the report of a forensic psychiatric examination, to order a compulsory* ***<u>psychiatric treatment</u>*** *of that person*[27].

According to Article 522 of the Criminal Procedure Code of the Republic of Serbia, *if a defendant commits an unlawful act designated by law as a criminal offence in a state of mental incompetency, the public prosecutor shall submit a motion to the court to impose on the defendant a* ***security measure of compulsory <u>psychiatric treatment</u> and confinement in a medical institution***[28].

As we see, the abovementioned regulations clearly define that the purpose of applying a security measure besides confinement of a person also includes psychiatric treatment of the latter.

Coming back to the national legislation we should also note that according to the Draft of Criminal Procedure Code of the RA, one of the types of security measures is a medical control. The definition of a medical control is given in Article 140 (1) according to which, *medical control, is keeping a person representing danger for the society in a psychiatric institution for the aim of providing hospital care or* ***<u>ensuring treatment</u>***[29].

So, unlike the current Criminal Procedure Code, the provisions on security measures of the Draft of Criminal Procedure Code are clear and in compliance with the international standards described above.

Another problem regarding the application of security measures is the absence of the timeframes in the current Criminal Procedure Code. The Criminal Procedure Code does not even define a minimum requirement for a judicial review of the lawfulness of the application

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[26] The Criminal Procedure Act of the Republic of Slovenia, Article 492 (3).
[27] The Criminal Procedure Code of Georgia, Article 191 (2).
[28] The Criminal Procedure Code of the Republic of Serbia, Article 522.
[29] The Draft of Criminal Procedure Code of the RA, Article 140 (1), https://www.e-draft.am/projects/2085/about.

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of the security measures. Accordingly, this may lead to the detention of persons with mental health problems in a psychiatric institution for a long time without proper supervision by the court and may automatically restrict their right to liberty.

For example, Article 475 (1) of the Criminal Procedure Code of Montenegro states that *every nine months, the Court which imposed a security measure shall, by virtue of an office, review whether the treatment and confinement in a medical institution* ***are still necessary***[30]. As we see the requirement for judicial review and respective timeframe are clearly defined in this provision.

It is important to note that according to Article 140 (3) of to the Draft of Criminal Procedure Code of the RA, *the rules on application of detention as a precautionary measure defined by this Code, are applied (mutatis mutandis) with regard to medical control*[31].

Article 119 of the Draft of Criminal Procedure Code stipulates that detention may be applied or may be extended for a period not exceeding two months in each case in pre-trial proceedings and for a period not exceeding three months in each case in judicial proceedings.

Thus, certain timeframes and a judicial review mechanism have been defined in the Draft of Criminal Procedure Code and the issue of a periodic review of the security measure is being solved in this way.

Taking into account discussed regulations we can see that the Draft of Criminal Procedure Code answers many questions, however the absence of mechanisms regarding timeframes and judicial review in current legislation causes serious and systemic problems and respective legislative changes should be done as soon as possible.

The next problem is concerning the application of compulsory medical measures in general. The current Criminal Procedure Code of the RA does not set deadlines for proceedings during which the issue of the application of compulsory medical measures towards the persons with mental health problems is discussed. It is important to mention that in practice these proceedings can last for a long time resulting in many problems.

As a result, a person may be detained for a long time in a psychiatric organization before a court decides to impose or change a measure of compulsory medical treatment. This may easily lead to restriction of the person's right to liberty, also taking into account the

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[30] the Criminal Procedure Code of Montenegro, Article 475 (1).

[31] The Draft of Criminal Procedure Code of the RA, Article 140 (3), https://www.e-draft.am/projects/2085/about.

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already discussed fact that there is no periodic judicial supervision over the lawfulness of applied security measures.

It is worth to mention that the abovementioned issue was also raised in the reports of the Human Rights Defender of the RA in which it is stated that *a person, after receiving treatment, can recover and be of no danger for himself or the society, but continue to be kept in a psychiatric organization, receiving a conservative treatment (without judicial supervision). In such a case, the proceedings on the application of a medical nature compulsory measure by the court may be an outdated and an end in itself process in terms that with the interim measure the aim pursued by the proceedings is already ensured*[32].

The issue of the judicial review has also found place in the CPT report on Armenia, in which the CPT recommended Armenian authorities *to take measures to ensure that all compulsory placements of criminally irresponsible patients are subjected to regular court review*[33].

Provisions regulating the issue of deadlines for proceedings of the application of compulsory medical measures can be found in the Draft of Criminal Procedure Code of the RA, according to which *the pre-trial proceedings of the application of compulsory medical measures shall be carried out within the following timeframes: three months on the charge of a minor crime; five months on charges of a crime of medium gravity; eight months charged with a serious crime; ten months charged with a particularly serious crime*[34]. The definition of certain timeframes in the pre-trial proceedings is an additional guarantee for the persons and it protects them from arbitrary restrictions of the right to liberty.

The last shortcoming in our current legislation is the absence of the mechanisms for the judicial review of the act on applying compulsory medical measures on the initiative of the court. This issue has also taken place in the report of the CPT which recorded that *the placement is ordered by a court for an indefinite period of time, but the hospital's internal psychiatric commission, which performs six-monthly assessments of the patient, can*

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[32] Ad Hoc Public report of Human Rights Defender of the Republic of Armenia on Ensuring Rights of Persons with Mental Health Problems in Psychiatric Organizations, page 27 (2018).

[33] Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), para 131 (2016).

[34] The Draft of Criminal Procedure Code of the RA, Articles 423 (2) and 192 (1), https://www.e-draft.am/projects/2085/about.

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recommend to the court that the patient be discharged[35]. As we can see the issue of the review of the compulsory medical measures is a discretion of the psychiatric organization and the court has no right to review an act of compulsory treatment on its own initiative.

The CPT also stated that *involuntary placement might be for an unspecified period, especially in the case of persons who have been compulsorily admitted to a psychiatric establishment pursuant to criminal proceedings and who are considered to be dangerous. If the period of involuntary placement is unspecified, there should be* ***an automatic review at regular intervals of the need to continue the placement***[36].

It is very important for psychiatric institutions to properly follow the course of treatment of the persons with mental health problems, so that in all cases when they no longer need psychiatric treatment to submit respective recommendations to the court for the review of applied compulsory medical measures. I think this issue has a huge importance and the court should be granted the right to review the respective judicial acts on its own initiative.

Summarizing the analysis of legal regulations done in this Chapter, as well as the experience of other countries and international standards of the field we can state that current regulations of the Criminal Procedure Code of the RA may cause serious problems regarding the right to liberty of persons with mental health problems. The lack of guarantees in our legislation – the absence of certain timeframes and mechanisms for judicial review, can lead to deprivation of liberty of the persons with mental health problems for an unnecessary long period of time.

Thus, to avoid abovementioned problems and to ensure the right to liberty of persons with mental health problems the issue of treatment should be clarified when a security measure is applied against persons committed an act in the state of insanity.

Besides it, there is a need to establish respective mechanisms in the national legislation for a regular judicial review of security measures as well as for the acts applying compulsory treatment. And at last, respective provisions regulating the issue of deadlines for proceedings of the application of compulsory medical measures should be set up in the Criminal Procedure Code of the RA.

[35] Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), para 131 (2016).
[36] 8th General Report on the CPT's activities, para 56 (1998).

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CHAPTER 3. EXPOSING A PERSON TO A VOLUNTARY OR NON-VOLUNTARY TREATMENT IN CIVIL PROCEDURE

Besides, the issues regarding the realization of the rights of the persons with mental health problems in criminal procedure there are plenty of serious problems in civil procedure as well.

In terms of maintaining the mental health of the population, as well as the rights of people with mental health problems, the types of psychiatric medical care, services and their legal grounds are of key importance. Thus, in the case of hospital psychiatric care and services, it is very important to maintain a clear distinction between voluntary and non-voluntary treatment, for each of which there are different and special legal requirements. To understand the issue on the whole the practice regarding hospitalization should be studied.

As the Human Rights Defender of the RA noted in his reports the number of people undergoing non-voluntary treatment in accordance with the Civil Procedure Code of the RA is significantly and considerably lower in the organizations. The Human Rights Defender stated that although the consent on hospitalization and treatment was present, the private talks with the persons with mental health problems showed that practically many of them did not want to be in a psychiatric organization and are unaware of their right to refuse from the treatment at any time[37]. So, we can assume that the consent on voluntary psychiatric treatment has a just formal nature, and, in fact, in many cases persons admitted to the psychiatric organizations do not submit an informed consent for voluntary treatment and are not informed about their rights.

The abovementioned is also recorded in the report of the CPT. Concerning this question the CPT recorded that *[...] although patients had signed that they agreed to voluntary admission, they did not actually wish to remain in the establishments or receive treatment [...],* and stated that *persons admitted to psychiatric establishments should be provided with*

[37] Ad Hoc Public report of Human Rights Defender of the Republic of Armenia on Ensuring Rights of Persons with Mental Health Problems in Psychiatric Organizations, page 31 (2018).
Annual report on the 2018 activities of Human Rights Defender of the Republic of Armenia acting as National Preventive Mechanism, pages 35-36 (2019).
Annual report on the 2019 activities of Human Rights Defender of the Republic of Armenia acting as National Preventive Mechanism, pages 54-55 (2020).

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full, clear and accurate information, including on their right to consent or not to consent to hospitalization, on the possibility to withdraw their consent subsequently and, for as long as they are formally voluntary, their right to leave the establishment at any moment[38].

In this context respective provisions of the Low of the RA "On Psychiatric Aid" should also be discussed. According to Article 15 (3) of the abovementioned law, *the treatment of a person suffering from mental disorder can be carried out without his or her consent or without the consent of his or her legal representative, in cases of application of compulsory medical measures and non-voluntarily (compulsory) hospitalization.*

Article 22 (1) of the same law stipulates that *a person suffering from mental disorders may be hospitalized without his or her consent or the consent of his or her legal representative after a mandatory examination by a psychiatric commission if he poses a danger to himself/herself or to other persons, or failure to perform treatment or discontinuation of treatment may worsen the health of the patient.*

And finally Article 22 (2) of the Law states that *in case of confirmation of the justification of hospitalization by the psychiatric commission the head of the psychiatric organization within 72 hours after the submission of a request from a person with mental disorders to refuse treatment or terminate the treatment, applies to court to expose a person to a non-voluntary treatment in a psychiatric hospital in accordance with the procedure established by the Civil Procedure Code of the RA.*

It is worth to mention that there are also international standards regarding the issue of person's hospitalization and treatment in case of absence of the latter's consent. For example, the CPT stated that *patients should be placed in a position to give their free and informed consent to treatment. The admission of a person to a psychiatric establishment on an involuntary basis should not be construed as authorising treatment without his consent. It follows that every competent patient, whether voluntary or involuntary, should be given the opportunity* ***to refuse treatment or any other medical intervention***[39].

In its report on Czech Republic the CPT claimed that *patients who had initially agreed to their hospitalization should have the possibility to withdraw their consent subsequently at any time and be fully informed about this. For as long as they are formally voluntary, they*

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[38] Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), para 133 (2016).

[39] 8th General Report on the CPT's activities, para 41 (1998).

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should have the right to leave the hospital at any moment. In cases where it is considered necessary to continue in-patient care for a voluntary patient who wishes to leave the hospital, ***the involuntary civil placement procedure should always be applied***[40]. The CPT also stated that *proper involuntary placement procedures* ***be followed and in good time****, whenever genuine informed consent to placement is not, or cannot be obtained, or whenever a patient subsequently revokes his/her consent to placement*[41].

The ECtHR has found a violation of Article 5 of the Convention for keeping the person in a psychiatric organization without his consent and the relevant court decision[42].

Moreover, in its case law the ECtHR stated that *an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder*[43].

Summarizing the abovementioned national regulations and the international standards we come to the conclusion that in cases of refusal or termination of the treatment the person must immediately be discharged from a psychiatric organization, unless there are basis for non-voluntary treatment and appropriate procedure for the hospitalization of the latter has begun. Failure to perform the procedure will result in illegal deprivation of liberty of the person.

The next problematic issue concerns the absence of appropriate timeframes in the Civil Procedure Code of the RA. According to Article 269 (1) of the Civil Procedure Code, *the court of the first instance resolves the case of the involuntary hospitalization of a citizen in a psychiatric organization within one day and appoints court session for the examination of the application within five days from the date of receipt of the application.*

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[40] Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), para 110 (2019).

[41] Report to the Government of "the former Yugoslav Republic of Macedonia" on the visit to "the former Yugoslav Republic of Macedonia" carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), para 160 (2016).

[42] *Storck v. Germany,* 61603/00, ECtHR, paras 109-113 (2005).

[43] *Stanev v Bulgaria,* 36760/06, ECtHR, para 145 (2012), *Varbanov v. Bulgaria,* 6301/73, ECtHR, para 45 (2000), *Winterwerp v. the Netherlands,* 6301/73, ECtHR, para 39 (1979), *Shtukaturov v. Russia,* 44009/05 ECtHR, para 114 (2008).

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However, the Code does not set a time limit for satisfying or denying an application of a psychiatric organization, which may result in an indefinite delay in the trial, leading to an unnecessary and indefinite restriction of the person's right to liberty.

In this context the practice of some of the European countries should be discussed. Thus, the Law "On hospitalization without their consent of persons with mental health problems" of the Grand Duchy of Luxembourg provides that on the sixth day following the admission of the person the attending physician should send the judge a reasoned report in which he expresses his opinion on the advisability of maintaining the observation. Within three days of receiving the report the judge should make a decision about the placement of the person or ask the attending physician for additional information. According to the abovementioned law, if the judge orders the observation to be continued, the person can be kept in a psychiatric organization for a **maximum of 21 days** following the court's decision. If the judge requests additional information from the attending physician, the time between the request and receipt of the information should be **over the period of 21 days**, so that the period of observation **does not exceed 30 days**[44].

Another good example is the Psychiatric Hospitals (Compulsory Admissions) Act of the Kingdom of the Netherlands, according to which in case of the emergency procedure the court may extend the emergency commitment for a period of maximum **3 weeks**. if after 3 weeks the request for a regular involuntary placement is made, the legislation gives an opportunity to the court to extend emergency commitment **for another 3 weeks** in order to have a sufficient time for making a decision on regular involuntary placement of the person[45].

As we see the legislations of the Grand Duchy of Luxembourg and the Kingdom of the Netherlands provide particular timeframes during which the final decision of the court on non-voluntary placement should be made. These kinds of regulations are an additional guarantee ensuring the realization of the person's right to liberty.

At the same time, our Civil Procedure Code does not regulate the judicial review mechanism over the non-voluntary treatment of the person after the verdict. For example, the dates (deadlines) of the non-voluntary treatment as well as the procedures for reviewing the

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[44] The Law "On hospitalization without their consent of persons with mental health problems" of the Grand Duchy of Luxembourg, Articles 12, 13 and 15, 10 December 2009, http://legilux.public.lu/eli/etat/leg/loi/2009/12/10/n1/jo.

[45] Psychiatric Hospitals (Compulsory Admissions) Act of the Kingdom of the Netherlands (1992).

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extension of these deadlines are not fixed in the Civil Procedure Code of the RA. In particular, respective provisions (Article 270 (1) (2)) in the Code stipulate that *following the examination of the application, the court of the first instance shall issue a decision on granting or rejecting the application, which shall enter into force upon publication,* and *the decision on granting the application is a basis for non-voluntary hospitalization of a citizen in a psychiatric organization.*

Regarding this question back in 2016 the CPT stated that the Law of the RA "On Psychiatric Aid" also lacks provisions on the periodic review of involuntary civil hospitalization. The CPT recommended the Armenian authorities *to complete the Low "On Psychiatric Aid" accordingly; periodic review of involuntary civil hospitalization should take place at least once every six months*[46].

It is worth mentioning that according to the Health Act of the Republic of Bulgaria, *with the decision the court shall pronounce on the need of compulsory accommodation, determine the medical establishment as well as the existence or the lack of ability of the person to express informed consent. The court shall determine* ***the term of the accommodation and the treatment*** *as well as the form of the treatment - ambulatory or stationary*[47].

The Law on Mental Health of the Portuguese Republic stipulates that the review of the act on non-voluntary placement is mandatory, regardless of application. It envisages that the periodic review should be done **two months** after the beginning of the hospitalization or after the court's decision to extend the hospitalization[48].

And at last certain periods for judicial review are defined in the Psychiatric Hospitals (Compulsory Admissions) Act of the Kingdom of the Netherlands, according to which, the initial regular involuntary placement has a duration of **maximum 6 months**. This initial period may be followed by renewals with a duration of **maximum 12 months**. It is important to mention that the legislation of the Kingdom of the Netherlands also provides flexible mechanism other non-ordinary cases of hospitalization: for example, if a person has been

[46] Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), para 132 (2016).
[47] Health Act of the Republic of Bulgaria, Article 162, 1 January 2005, https://nacid.bg/sites/qual/att_files/en/LAW_HEALTH.pdf.
[48] The Law on Mental Health of the Portuguese Republic, Article 35, 11 July 2002.

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involuntarily committed to psychiatric hospital without interruption for at least five years renewals for a period of **maximum 24 months** become possible, and if a person has been involuntarily committed to an institution for persons with intellectual disabilities and it is to expected that the latter's situation will not change for the better a renewal for a period of **maximum 60 months** is allowed[49].

As we see all of the abovementioned regulations contain certain terms (whether stipulated by the law or left to the court's consideration). In my opinion the last example (the Kingdom of the Netherlands) is the best as it sets up various timeframes which allow the court to exercise dynamic and effective supervision over non-voluntary placement and treatment of the persons with mental health problems.

It is necessary to add that the issue of the deadlines regarding the non-voluntary treatment is regulated by the Draft of Law of the RA "On the Psychiatric Aid". According to its Article 24 (4), *non-voluntary treatment can last **no longer than six months**. If the grounds for non-voluntary treatment of a person with mental health problems have not been ceased within six months, the executive body of the psychiatric organization applies to the court to expose a person to a non-voluntary treatment […] within 72 hours after the expiration of the six-month period. Before the court's decision on non-voluntary hospitalization enters into force, a person should be provided only with urgent psychiatric care and services without his/her informed consent in a psychiatric organization*[50].

Taking into consideration the abovementioned, we can claim that the regulations of the Draft of Law "On the Psychiatric Aid" are in compliance with the international standards and with the provisions stated in the legislations of the discussed European countries.

Hence, the respective timeframes and mechanisms for an ex officio mandatory judicial review of non-voluntary treatment should be defined in our legislation as soon as possible in order to fully ensure the right to liberty of persons with mental health problems.

[49] Psychiatric Hospitals (Compulsory Admissions) Act of the Kingdom of the Netherlands (1992).
[50] The Draft of Law of the RA "On the Psychiatric Aid", Article 24 (4), https://www.e-draft.am/projects/982/about.

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CONCLUSION

Summarizing the main observations, researches as well as the findings of this paper, we can state that the Armenian legislation does not fully ensure the realization of the Right to Liberty of Persons with Mental Health Problems.

I came to this conclusion after the study and analyzes of respective international standards, legislations of the European countries, judicial practice of the ECtHR as well as the drafts of national codes and laws.

The findings in the thesis paper witness of the urgent need of crucial changes in the national legislation – the Criminal Procedure Code of the RA, the Civil Procedure Code of the RA and Law of the RA "On the Psychiatric Aid". In order to properly ensure the right to liberty of persons with mental health problems I suggest the following:

to clarify the issue of treatment when a security measures are applied against persons committed an act in the state of insanity,

to establish respective mechanisms in the national legislation regarding timeframes and a judicial review of security measures,

to establish mechanisms in the Criminal Procedure Code for a periodic court review of the judicial acts applying compulsory treatment,

to grant the court the respective right to review the judicial acts on its own initiative.

to set up provisions regulating the issue of deadlines for proceedings of the application of compulsory medical measures in the Criminal Procedure Code,

to provide particular timeframes in Civil Procedure during which the final decision of the court on non-voluntary placement and treatment should be made,

to set up appropriate timeframes and mechanisms for an ex officio judicial review in the Civil Procedure Code and in the Law "On Psychiatric Aid" which will allow the court to exercise effective supervision over the process of non-voluntary treatment of persons with mental health problems.

The implementation of the suggested points will give a chance to improve both current laws and codes, it may as well prevent the possible breaches of Article 5 of the Convention

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and ensure the realization of the right to liberty among one of the most vulnerable groups of society – Persons with Mental Health Problems.

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