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Master thesis

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**INCORPORATION OF ARTICLE 5, 12 AND 13 OF UN CONVENTION ON
THE RIGHTS OF PERSONS WITH DISABILITIES INTO NOTARIATE LAW
OF THE REPUBLIC OF LATVIA**

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I have written this master's thesis independently. All viewpoints of other authors, literary sources and data from elsewhere used for writing this paper have been referenced.

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ABSTRACT

UN Convention on the rights of persons with disabilities is the first international treaty, which gives the “voice” to persons with disabilities. As the Convention is relatively new treaty, there are not enough scholarly articles, especially on the Notariate law of Latvia in the relationship with the Convention.

The thesis conducts research on two articles of Notariate law of Latvia in the light of the Convention: on the rights of being witnesses in the notarial deed and on the rights to act as the parties in the notarial deed. Additionally respective norms of Estonian and Lithuanian Notariate law are analyzed and compared. Taken into account the historical, systematical, grammatical and theological analyze, it was possible to conclude that Latvian Notariate law does not provide equal attitude (Article 5, the Convention) towards persons with sensor/ mental disabilities regarding the rights to be witnesses and the rights to be parties in the deeds. Moreover Latvian Notariate law does not give the rights to persons with sensor disabilities. It is a minimal possibility to use alternative communication tools in Latvian Notariate law, which contradicts the Convention principles. The same restrictions for persons with mental/sensor disabilities are stipulate also in Civil procedure law of Latvia and Administrative procedure law of Latvia regarding the rights to be witnesses, which contradicts the principle of the Convention (Article 13). Therefore amendments in previous mentioned normative acts of Latvia are necessary.

The most challenging is the situation of persons with mental disabilities (Article 12). Additional research should be conducted on the rights of persons with mental disabilities in various proceedings in Latvia, as stereotypes regarding the persons with mental disabilities still are in sight in proceedings and therefore it cannot be argued that persons with mental disabilities can ensure their rights.

As the main principle of EU is the equality principle, then equality shall be ensured not only in theory, but also in practice.

TABLE OF CONTENTS

Introduction.....	5
Chapter I	
1.1. Critical disability theory.....	8
1.2. UN Convention on the rights of persons with disabilities between the European Union, Member States and Court of Justice of the European	12
Chapter II: Methodology.....	26
Chapter III: Persons with disabilities rights to act as a witness under the Notariate law of the Republic of Latvia	
3.1. Construction and terminology of the Article 86 of the Notariate law of the Republic of Latvia.....	35
3.2. A person with disability as a witness – systemic structure of the Republic of Latvia.....	36
3.3. A person with disability as a witness in the Notariate law of the Republic of Latvia – the aim through historical development.	42
Chapter IV: Persons with disabilities rights to be a under the Notariate law of the Republic of Latvia	
4.1. Construction and terminology of the Article 94 of the Notariate law of the Republic of Latvia.....	49
4.2. A person with disability as a party in a notarial deed – systemic approach.....	51
4.3. The purpose of the Article 94 of the Notariate law of the Republic of Latvia through the historical development.....	54
Chapter V: Comparative analysis of the norms of Notariate law of the Republic of Estonia and the Republic of Lithuania	
5.1. Rights to be a witness in the notarial deed in Estonia and Lithuania.....	57
5.2. Persons with disabilities rights to be a party in the notarial deed in Estonia and Lithuania.....	64
Chapter 6: Possible improvements in Notariate law of the Republic of Latvia in the light of CRPD.....	69
Summary.....	76
List of sources.....	79
Appendix.....	94

Introduction

United Nations (hereinafter – UN) adopted the Convention on the Rights of the Persons with Disabilities (hereinafter – CRPD) on 13 December 2006,¹ and this is the first international human rights treaty which European Union (hereinafter - EU) joined as a party (in 2010),² according to Article 37 of Treaty on European Union.³ 25 EU member states (hereinafter- MS) have ratified CRPD.⁴ Latvia ratified CRPD on March 31, 2010.⁵ The aim of CRPD is to change the attitude towards persons with disabilities, which includes reversing an opinion about persons with disabilities as “objects of charity” to “subjects with rights”.⁶

In 1993 the Supreme Council of the Republic of Latvia restored Notariate law with amendments (hereinafter- Latvian law), which was adopted in 1937.⁷ Mainly two Latvian law articles determine rights and obligations for persons with disabilities in the notarial deeds (hereinafter- Deed) – Article 86 *on rights to be a witness in a notarial deed*⁸ and Article 94 *on rights to make a notarial deed*.⁹ An Article 86 of Latvian law corresponds Article 5 *on equality and non-discrimination*, Article 12 *on legal capacity* and Article 13 *on access to justice* of CRPD; and an Article 94 of Latvian law

¹ United Nations. Convention on the Rights of Persons with Disabilities. Opening for signature. Retrieved from: <<http://www.un.org/disabilities/convention/signature.shtml>> [1 October 2015]

² European Commission. EU ratifies Convention on disability rights. Retrieved from: <http://europa.eu/rapid/press-release_IP-11-4_en.htm> [1 October 2015]

³ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Official Journal of the European Union. Retrieved from: <https://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en.pdf> [29 October 2015]

⁴ European Union Agency for Fundamental rights. Retrieved from: <<http://fra.europa.eu/en/node/4424>> [accessed 1 October 2015]

⁵ Ibid. Retrieved from: <<http://fra.europa.eu/en/node/4424>> [accessed 1 October 2015]

⁶ United Nations. Committee on the Rights of Persons with Disabilities. Convention on the Rights of People with Disabilities. Retrieved from: <<http://www.un.org/disabilities/default.asp?id=150>> [1 October 2015]

⁷ Latvijas Republikas likums „Par Latvijas Republikas 1937. gada Notāru likuma spēka atjaunošanu un un grozījumiem un papildinājumiem tajā. 01.09.1993. Stājās spēkā 01.09.1993., Publicēts „Latvijas Vēstnesis“, 48, 09.07.1993, „Ziņotājs“, 26/27, 05.07.1993. Retrieved from: <http://m.likumi.lv/doc.php?id=59982&version_date=01.09.1993> [1 October 2015]

⁸ Article 86, Latvian law: “The following may not act as witnesses to a notarial deed:

1) illiterates, minors and those who are unable to correctly and completely comprehend and certify the deed due to physical or mental deficiencies, namely those with mental impairments, the deaf, the dumb and the blind;

[...]”

⁹ Article 94, Latvian law: “In making deeds in which the deaf, the dumb or the blind participate, the presence of at least two witnesses shall be required. Provisions of Section 90 shall not be applicable to such deeds.”

corresponds Article 5 and Article 12 of CRPD. No amendments have been made in Article 86 and Article 94 of Latvian law since the CRPD was ratified in Latvia.

As the CRPD is a relatively new international human rights treaty, UN, the EU and national level institutions are the main sources for the interpretation of the CRPD principles. There are not enough scholarly articles, especially on the Latvian law and CRPD. The lack of consistent research results in lack of consistent rights of persons with disabilities. Therefore more researches are needed. This thesis will not only support academic debates, but also will give practical impact to protect persons with disabilities rights and needs. Thus the research on Latvian law and CRPD is important for further debates of implementation and incorporation of CRPD.

The research aim is to investigate do the Articles 86 and 94 of Latvian law fulfill the rights of persons with disabilities set in Articles 5, 12 and 13 of CRPD, and if not, which solutions can be proposed to reduce the gap.

Therefore the thesis includes following tasks:

1. Investigate the role and aim of CRPD (Articles 5, 12 and 13) in the EU level and the EU MS level;
2. Analyze Article 86 and Article 94 of Latvian law;
3. Do the comparative analysis of Notariate laws of Republic of Estonia and the Republic of Lithuania.
4. Explore whether amendments are necessary in Latvian law.
5. Contribute to broaden the academic debate on the topic.

Thesis will consist of six chapters. The first chapter describes the Critical disability theory (hereinafter – CDT) and analyzes the role and aim of CRPD. The second chapter illustrates the methodology used in thesis. The third chapter analyzes the persons with disabilities rights to act as a witness according to Latvian law. The aim of the third chapter is to investigate if and how persons with disabilities can use their rights in Latvia according to the CRPD. The fourth chapter analyzes the persons with disabilities rights to be a party in a Deed in Latvia. The aim of the fourth chapter is to investigate if and how persons with disabilities act as the parties in the Deeds and how Latvian law reflects the principles of CRPD. The fifth chapter investigates the norms of the Notariate law of the Republic of Estonia (hereinafter- Estonian law) and Law on the Notarial Profession of the Republic of Lithuania (hereinafter- Lithuanian law), showing

if persons with disabilities can be a party or a witness in a Deed in other Baltic countries. The aim of the fifth chapter is to show similarities and differences between the norms of the Notariate law in the Baltic countries. The fifth chapter also aims to investigate, if the persons with disabilities related norms from other Baltic countries can be incorporated in the normative acts of the Republic of Latvia. The sixth chapter offers possible solutions to ensure that persons with disabilities can act as “the subjects of rights” in the Deeds and the proceedings.

The qualitative methods only will be used in the thesis: grammatical, theological, systematical, historical method, interviews and comparative approach.

The author will use the UN documents about CRPD, because UN has drafted the CRPD and therefore UN interpretation on CRPD is the most useful. The author will use the articles and the books about CRPD and Latin- type notary system, as well as case-law of Court of Justice of the European Union (hereinafter- CJEU) and national court decisions where CRPD is applied. The materials used in thesis will be in Latvian and English languages.

Chapter I

1.1. Critical disability theory

Any critical theory is “explanatory, practical and normative, all at the same time. That is, it must explain what is wrong with current social reality, identify actors to change it, and provide both clear norms for criticism and achievable practical goals for social transformation.”¹⁰ The main aim of the critical theory is to explain exclusion, obstacles and inform how the society can become more accepting to particular groups of people.¹¹ Critical theory was not used in the legal field until the 1970s, when legal realism was combined with critical theory.¹² Critical theorists believe that the law is not separate and independent part of society. Law should be analyzed together with other processes in society.¹³

Later, in 1980s and 1990s, other theories were developed from critical legal theory, for example, critical race theory, feminist legal theory, and CDT was developed as well.¹⁴ It should be mentioned that CDT is more political theory, as the main goal is to initiate the attitude change in society towards persons with disabilities, therefore issues relating persons with disabilities should be included into all policy levels.¹⁵

Disability among the feminism and race has been the criterion of discrimination. There have been some similarities and differences in development of critical race, critical feminism and critical disability theory. For example, critical race theorists argue that “historically excluded groups will not achieve total inclusion, even if the school and

¹⁰ Hosking L.David (2008) Critical disability theory. Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf> [accessed 1 October 2015]

¹¹ Ibid., Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf> [1 October 2015]

¹² Ibid., Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf> [1 October 2015]

¹³ Ibid., Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf> [1 October 2015]

¹⁴ Ibid., Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf> [1 October 2015]

¹⁵ Ibid., Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf> [1 October 2015]

employment environment will be integrated.”¹⁶ It can be applied both to people with different race and people with disability.¹⁷ This work is in line that particular elements or interpretation can be applied from one discrimination criteria to another.

The development of race, feminism/ gender and disability legislation has been different, for example, “gender legislation has been influenced primarily by EU law. Race laws, on the other hand, have developed primarily in response to domestic events. [...] Disability has always been viewed as distinct from gender and race discrimination law, [...] disability has been largely seen as falling within the terrain of social welfare law with the isolated exception of the scarcely used quota system.”¹⁸

Although gender and race legislation developed differently, both maintained that “the perspectives of the discriminated –against, oppressed, individual or group must be better understood by the larger society, and that the law should look not to wrongs of perpetrators but to helping those who have been victims of discrimination.”¹⁹ The author believes that the abovementioned approach should apply to CDT as well, giving the persons with disabilities more possibilities to be included in society.

CTD as an intersectional discipline consists of several elements, for example “the social model of disability, multidimensionality, valuing diversity, rights, voices of disability, language, and transformative politics.”²⁰ The author would like to analyze several of them more detailed.

Firstly, the language used describing persons with disabilities. The advocates of CDT actively have discussed on terminology used for persons with disability, as persons with disability have been named differently, for example, as: “disabled persons, persons with impairments, people who have experience “activity limitations” and people who live with impairments. [...] In early discussions the terms “handicapped” and “disabled persons” were common, but they generated criticism on the basis that it is inappropriate

¹⁶ Asch, A, (2001) *Critical race theory, feminism, and disability: Reflections on social justice and personal identity*. Ohio State Law Journal, 62(1), 391-423 p.

¹⁷ Ibid., 391-423 p.

¹⁸ Fredman, S. (2005) *Disability Equality: A Challenge to the Existing Anti- Discrimination Paradigm? Disability rights in Europe from theory to practice*. (Ed. Lawson A & Gooding C. Oxford and Portland, Oregon) 200 p.

¹⁹ Asch A, (2001) *Critical race theory, feminism, and disability: Reflections on social justice and personal identity*. Ohio State Law Journal, 62(1), 391-423 p.

²⁰ Hosking, D.L. (2008) *Critical disability theory*. Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf>[1 October 2015]

to convey the idea that the entire person is disabled because of a specific impairment. This led to adoption [...] the term “persons with disabilities” instead, while strongly discouraging the use of “disabled persons.”²¹

Secondly, models of disability. Disability can be understood in various ways, for example, “the biological, economic, socio-political and equality models – and that each approach generates not just different understanding but distinct policy, political responses, ranging from charity, empathy and pity to surgery, to rights and entitlements.”²² However advocates of CDT argue that disability is “socially constructed,”²³ “that what disables is the environment, rejecting the objectification of people with disabilities and their portrayal as victims.”²⁴

According to CDT “any person now living could, without any change in his or her physical, cognitive, sensory, and emotional make-up, be considered impaired by some employer, government service provider, place of public accommodation, or educational institution if the individual failed to meet particular standards for acceptance into a program or activity that the organization had established.”²⁵

CDT encourages shifting the understanding of persons with disabilities from the medical model to social model. The medical model explains the persons with disabilities as incapable, limited by their own disability, and thus excluded from “mainstream culture.”²⁶ The social model argues that the attitude towards the persons with disabilities form “disability.”²⁷ Thus “other members of society decide what persons with disabilities are capable or not capable to do, the same as in some cultures societies believe that men are more capable than women.”²⁸

²¹ Pothier, D., Devlin, R., ed., (2006) *Critical disability theory: Essays in Philosophy, Politics, Policy and Law*. Vancouver. Toronto, Publisher: UBC Press. 9p.

²² Ibid.,7p.

²³ Asch, A, (2001) *Critical race theory, feminism, and disability: Reflections on social justice and personal identity*. Ohio State Law Journal, 62(1), 391-423 p.

²⁴ Rocco T., S., The invisible people: disability, diversity, and issues of power in adult education. Retrieved from: <<https://scholarworks.iupui.edu/handle/1805/414>>[3 March 2016]

²⁵ Asch, A, (2001) *Critical race theory, feminism, and disability: Reflections on social justice and personal identity*. Ohio State Law Journal, 62(1), 391-423 p.

²⁶Stein, A.M., (February 2007)Disability Human Rights [article] California Law Review, Vol. 95, Issue 1, pp. 75-122 Stein, Michael Ashley (Cited 631 times) 95 Cal. L. Rev. 75 (February 2007)

²⁷ Ibid., pp75-122.

²⁸ Stein, A.M., (February 2007) Disability Human Rights [article] California Law Review, Vol. 95, Issue 1, pp. 75-122 Stein, Michael Ashley (Cited 631 times) 95 Cal. L. Rev. 75 (February 2007).

Disabled environment can lead and leads to situations when “discrimination against people with disabilities is so ordinary that it is invisible.”²⁹ This approach comes from the medical model of disability which additionally means functional testing and functional limitations of persons with disability which is set by the society, as society believes that people with disability are incapable.³⁰

Thirdly, the voice of persons with disabilities or as CDT claims: “power (less-ness) and context. [...] issues of disability are not just question of impairment, functional limitations, or enfeeblement; they are questions of power: of who and what gets marginalized. [...] This is why context is so important to CDT, because it is theory that emerges from the bottom up, from the lived experiences of persons with disabilities, rather than from the top down.”³¹

Fourthly, the rights of persons with disabilities. CDT claims that “the rights are the indispensable tool to advance the equality claims of disabled people and to promote their full integration into all aspects of their society while at the same time valuing and welcoming the diversity that disabled people bring to their communities.”³²

Most researches claim that “rights are ethical norms with a legal content that requires that they should be honored and enforced by public institution.”³³ Therefore if a particular group of society is denied their rights in the law, it can be considered unethical or ethical based on understanding of particular society. “Some rights, it is generally conceded, may be temporarily bridged by the state because of exigent circumstances, but others may never be violated no matter the context or the purported justification. [...] The rights to equal treatment, meaning, that a person’s race, religion, nationality, gender, sex preference or disability should not be a basis for denying a person the same opportunities and benefits as others.”³⁴ Therefore the norms denying the rights of persons with disabilities should not be the part of the normative acts.

²⁹ Rocco, T., S., *The invisible people: disability, diversity, and issues of power in adult education*. Retrieved from: <<https://scholarworks.iupui.edu/handle/1805/414>>[3 March 2016]

³⁰ Ibid., Retrieved from: <<https://scholarworks.iupui.edu/handle/1805/414>>[3 March 2016]

³¹ Pothier D., Devlin R., (2006) *Critical disability theory: Essays in Philosophy, Politics, Policy and Law*. Vancouver. Toronto. Publisher: UBC Press. 9p.

³² Hosking, D.L., (2008) *Critical disability theory*. Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf>[1 October 2015]

³³ Aryeh, N.(2012) *The international human rights movement*. Princeton, Oxford: Princeton University Press. 57.p.

³⁴ Aryeh, N.(2012) *The international human rights movement*. Princeton, Oxford: Princeton University Press. 77.p.

However rights of persons with disabilities and the law has specific relationships. The law reflecting the elements of disability, can be divided into two categories: the law denying the rights of persons with disabilities and institutions responsible of it, and reversing the inequality;³⁵ or “identifying the potential positive role of law and seeks to create law, use existing law and enlist legal institutions in the struggle for the emancipation of disabled people which is the rationale for CDT itself.”³⁶

Another aspect which should be taken into consideration when discussing the rights and law is: “despite domestic laws, including disability discrimination law, human rights law and administrative law, laws have rarely been applied in ways which fully benefit people with disabilities and the application of these rights often fails to reflect lived experiences.”³⁷ Therefore even if the persons with disabilities can benefit from the norm, enforcement of the norm depends on the attitude of the society.

Nevertheless CDT claims that “legal rights are embraced as in indispensable tool to advance the equality claims of disabled people and to promote their full integration into all aspects of their society while at the same time valuing and welcoming the diversity that disabled people bring to their communities.”³⁸ Therefore the author believes that legal norms are the first step towards positive change of attitude to persons with disabilities.

1.2.UN Convention on the Rights of persons with disability between the European Union, Member States and Court of Justice of the European Union

According to UN data (in 2011)³⁹ persons with disabilities were about 15% (more than 1 billion people) of world’s total population, and the disability rate continuous to

³⁵ Hosking, D.L., (2008) Critical disability theory. Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf>[1 October 2015]

³⁶ Ibid., Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf>[1 October 2015]

³⁷ Rioux, H.M., Basser L.A., (2011) *Critical Perspectives on Human Rights and Disability Law*. Leiden, Boston: Ed.by; Martinus Nijhoff publishers; 3.p.

³⁸ Hosking L. David, (2008) Critical disability theory. Retrieved from: <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf>[1 October 2015]

³⁹ Vētra A. (2012)World Report on Disability. (Pasaules ziņojums par invaliditāti). Invalīdu Nacionālo lietu padome. Retrieved from: <<http://www.lm.gov.lv/upload/petijumi/worldreportdisab.pdf>>[1 October 2015]

grow,⁴⁰ thus creating the biggest minority group.⁴¹ In EU 14,1 % (or 45 million) of total population between age of 15 and 65 was reported as persons with disabilities (year 2011).⁴² Eurostat data from later years is not available, however disability rate does not change rapidly every year.⁴³ In Latvia 8,31% of total population were considered as persons with disabilities (in 2014).⁴⁴

Although persons with disabilities are the largest minority in the world, they tend to have social barriers in every-day life. According to UN data, persons with disabilities has lower level of education, as due the disability they have limited access to schools, thus persons with disabilities are also limited to get jobs and can be in the poverty risk.⁴⁵ Another important aspect is stereotypes, prejudice about persons with disabilities and attitude towards them, which can lead to violations of dignity⁴⁶ and discrimination. The society believes that disability related discrimination is widespread (in the EU 46%, in Latvia 50%), while 47% of society (in the EU) believes it is rare (in Latvia accordingly-36%).⁴⁷

Despite the previously mentioned, UN did not protect rights of persons with disabilities in the first three decades of the UN existence.⁴⁸ For example, Universal Declaration of Human rights (1948) does not determine disability as the criteria of discrimination, only starting from 1970s disability was mentioned in the first international human rights

⁴⁰ World Health organization. (2011) World report on disability. 261, 262.p.

⁴¹ United Nations.Factsheet on Persons with Disabilities. Retrieved from: <<http://www.un.org/disabilities/default.asp?id=18>> [1 October 2015]

⁴² Eurostat. Disability statistics – prevalence and demographics. Retrieved from: <http://ec.europa.eu/eurostat/statistics-explained/index.php/Disability_statistics_-_prevalence_and_demographics> [1 October 2015]

⁴³ Eurostat. Disability statistics – prevalence and demographics. Retrieved from: <http://ec.europa.eu/eurostat/statistics-explained/index.php/Disability_statistics_-_prevalence_and_demographics>[1 October 2015]

⁴⁴ Pirmreizējo un atkārtoto invalīdu kopējais skaits un to īpatsvars pilsētu un novadu iedzīvotāju vidū, bērnu invalīdu iedalījums pēc funkcionāliem traucējumiem 2014.gadā. 1.pielikums. Pieejams: <http://www.vdeavk.gov.lv/wp-content/uploads/2014/09/Parskats_2014_3dala.pdf>[1 October 2015]

⁴⁵ United Nations.Factsheet on Persons with Disabilities. Retrieved from: <<http://www.un.org/disabilities/default.asp?id=18>>[1 October 2015]

⁴⁶ World Health organization. (2011) World report on disability., 9.p.

⁴⁷ Eurobarometer. European Commission. (2012) Discrimination in the EU 2012. Available from: <http://ec.europa.eu/public_opinion/archives/ebs/ebs_393_fact_lv_en.pdf>[1 October 2015]

⁴⁸ Degener, T. (2003) Disability as a Subject of International Human Rights Law and Comparative Discrimination law. *The Human Rights of persons with intellectual disabilities*. S.S.Herr, L.O.Gostin, H.H.Koh. Oxford University Press. 155.p.

documents (Declaration on the Rights of Persons with Disabilities (1975)).⁴⁹ UN decided that special attention is needed to persons with disabilities only in 2000.⁵⁰

Thus CRPD was adopted on 13 December of 2006 as a legally binding international human rights treaty to protect rights of persons with disabilities,⁵¹ and it entered into force on 3 May 2008.⁵² CRPD includes new principles and concepts, for example, “nothing about us without us,”⁵³ thus giving the power and rights to persons with disabilities. CRPD shifts medical understanding of disability towards the human rights understanding of disability.⁵⁴ Thus, three concepts of CDT – power (less-less), medical vs human rights understanding and rights of persons with disabilities – are portrayed in CRPD. CRPD uses the term “persons with disabilities,” thus referring that disability is not the characteristics describing the person and also using the term which accepted by CDT.

CRPD designates several aspects regarding the term “disability”:

1. The term “disability” is “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁵⁵
2. CRPD evolves four disability categories: “physical, mental, intellectual and sensory impairments.”⁵⁶ CRPD separates mental and intellectual impairments as various forms of disability. Intellectual disability means “a significantly reduced ability to understand new or complex information and to learn and apply new skills (impaired

⁴⁹ Ibid., 155.p.

⁵⁰United Nations. Economic and Social Council (2000). Commission on Human rights Report on the fifty-sixth session. 20 March-28 April 2000. E/2000/23, E/CN.4/2000/167 Retrieved from: <http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/2000/167>[15May 2016]

⁵¹ United Nations. Convention on the Rights of Persons with disabilities. Why a Convention? Retrieved from: <<http://www.un.org/disabilities/convention/questions.shtml>>[1 October 2015]

⁵² United Nations Enable. Convention on the Rights of Persons with Disabilities. Retrieved from: <<http://www.un.org/disabilities/default.asp?id=150>> [20February 2016]

⁵³ Inclusion Europe. The UN Convention on the Rights of persons with disabilities. Retrieved from: <http://inclusion-europe.eu/?page_id=150>[17 March 2016]

⁵⁴United Nations. Convention on the Rights of Persons with disabilities. Retrieved from: <<http://www.un.org/disabilities/default.asp?id=150>>[3 March 2016]

⁵⁵ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3. Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>Article 1. Retrieved from: <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>>[1 October 2015]

⁵⁶ Ibid. Article 1. Retrieved from: <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>>[1 October 2015]

intelligence). [...] [It] begins before adulthood, with a lasting effect on development.”⁵⁷ Intellectual disability can be caused by sicknesses like autism and Down syndrome. Mental illnesses „refer to disorders generally characterized by dysregulation of mood, thought.”⁵⁸ Mental disability can be caused by a depression or schizophrenia. The difference between intellectual disability and mental illness is that mental illness can be curable, while intellectual disability is not. The rights and obligations for the persons with mental or intellectual disabilities usually are the same, thus the term “mental disability” will be used further in the text when referring to mental disability and intellectual disability, unless the different terms will be specifically pointed out in thesis.

The term “sensory impairment” means “visual loss (including blindness and partial sight), hearing loss (including the whole range) and multisensory impairment (which means having a diagnosed visual and hearing impairment with at least a mild loss in each modality or deaf blindness),”⁵⁹ as well as loss of other senses, like speech.

3. The term “the disability is evolving concept,”⁶⁰ which CJEU evolved, when obesity of worker was considered as the disability,⁶¹ while CJEU decided in case C-363/12 infertility “does not constitute a ‘disability’ within the meaning of Directive 2000/78.”⁶²

4. “The disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective

⁵⁷ World Health organization. Regional office for Europe. Definition: intellectual disability.” Retrieved from: <<http://www.euro.who.int/en/health-topics/noncommunicable-diseases/mental-health/news/news/2010/15/childrens-right-to-family-life/definition-intellectual-disability>>[1 October 2015]

⁵⁸ Centers for Disease Control and Prevention. Mental Illness. Retrieved from: <<http://www.cdc.gov/mentalhealth/basics/mental-illness.htm>>[1 October 2015]

⁵⁹ Sensory impairments. Complex learning difficulties and disabilities research project. Retrieved from: <<http://complexld.ssatrust.org.uk/uploads/sensory-briefing.pdf>>[1 October 2015]

⁶⁰ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3.Preamble (e). Retrieved from: <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>>[1 October 2015]

⁶¹ Court of Justice of the European Union. Judgement 18 December 2014. Retrieved from: <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d58c203022969243bcb5d9dd9ac4cf25b0.e34KaxiLc3qMb40Rch0SaxuSbhb0?text=&docid=160935&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1273212>>[20 February 2016]

⁶² Court of Justice of the European Union. Judgement 18 March 2014. Case C-363/12. Article 82. Retrieved from: <<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5bb994f101af44e109204f1be7e84220d.e34KaxiLc3qMb40Rch0SaxuSbNr0?text=&docid=149388&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1188181>>[12 April 2016]

participation in society on an equal basis with others.⁶³ Therefore attitudinal and environmental barriers create disability.

The main aim of CRPD is to provide the possibility for persons with disabilities equally with others enjoy all the human rights and fundamental freedoms, thus CRPD identifies the areas which should be ensured by the State: awareness-raising, accessibility (physical, information), right to life, protection in situations of risk and humanitarian emergencies, equal recognition before the law, access to justice, inhuman or degrading treatment or punishment, freedom from exploitation, violence and abuse, protecting the integrity of the person, liberty of movement and nationality, living independently and being included in the community, personal mobility, freedom of expression and opinion, and access to information, respect for privacy etc.⁶⁴ As CRPD include many areas, they all not will be analyzed in thesis.

Mainly two articles of Latvian law determine rights and obligations for people with disability in the Deeds – Article 86 *on rights to be a witness in a notarial deed*⁶⁵ and Article 94 *on rights to make a notarial deed*.⁶⁶ An Article 86 of Latvian law corresponds to Article 5 *on equality and non-discrimination*, Article 12 *on legal capacity* and Article 13 *on access to justice* of CRPD; and an Article 94 of Latvian law corresponds to Article 5 and Article 12 of CRPD. Therefore the thesis will analyze more detailed Article 5, 12 and 13 of CRPD.

Article 5 of CRPD provides that States shall prohibit all discrimination based on disability, and equality principle shall be abided.⁶⁷ Equality and non-discrimination

⁶³ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3. Preamble (e). Retrieved from: <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>>[1 October 2015]

⁶⁴ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3. Retrieved from: <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>>[1 October 2015]

⁶⁵ Article 86, Latvian law: “*The following may not act as witnesses to a notarial deed:*

1) illiterates, minors and those who are unable to correctly and completely comprehend and certify the deed due to physical or mental deficiencies, namely those with mental impairments, the deaf, the dumb and the blind;

[...]”

⁶⁶Note: *Notariate law of the Republic of Latvia, Article 94. “In making deeds in which the deaf, the dumb or the blind participate, the presence of at least two witnesses shall be required. Provisions of Section 90 shall not be applicable to such deeds.”*

⁶⁷ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008.

principles are the primary principles, which “can be found in various parts of the Convention, including in the preamble,⁶⁸ purpose,⁶⁹ general principles⁷⁰ and general obligation⁷¹ of the State.”⁷² The Article 5 of CRPD sets the obligation for the State to adopt the norms, where the disability is not the criterion to limit the rights and obligations for people with disability.⁷³ Both abovementioned principles should be included in the normative acts, which should apply both – to private and public entities, as well as to all areas, for example, education, transport, employment, access to justice.⁷⁴

Article 12 of CRPD determines the equal recognition before the law for all people with disabilities,⁷⁵ setting several obligations for the State:

- a) ensure that all persons with disabilities can receive support, when needed, to exercise their legal capacity;⁷⁶
- b) analyze all laws to ensure that equality before the law for persons with disabilities will be provided;⁷⁷ „Norms of laws disqualifying a person from office or performing a

UN Treaty series, vol.2515, p.3. , Article 5, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

⁶⁸ Ibid, preambular paras. (a), (b), (c), (e), (f), (h), (p), (r) and (x). Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

⁶⁹ Ibid, Article 1 Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

⁷⁰ Ibid, Article 3, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

⁷¹ Ibid., Article 4, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

⁷² United Nations. General Assembly. (26 January 2009) Tematic Study by the Office of United Nations High Commissioner for Human rights on enhancing awareness and understanding of the Convention on the Rights of Persons with disabilities. A/HRC/10/48, Retrieved from: <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>>[1 October 2015]

⁷³ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3. Article 5, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

⁷⁴ United Nations. General Assembly. (26 January 2009) Tematic Study by the Office of United Nations High Commissioner for Human rights on enhancing awareness and understanding of the Convention on the Rights of Persons with disabilities. A/HRC/10/48, Retrieved from: <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session>>[1 October 2015]

⁷⁵ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3. Article 12, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

⁷⁶ Ibid, Article 12, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

⁷⁷ United Nations. Convention on the Rights of Persons with Disabilities. General comment No 1 (2014), Article 12: Equal recognition before the law. Retrieved from: <<http://daccess-dds.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>> [1 October 2015]

function on the basis of their disability also need to be abolished. These include norms disqualifying persons with disabilities from running for political positions, or from participating in juries or as witnesses to legal acts.”⁷⁸

c),[...] when the State denies legal capacity, it must be on the same basis for all persons. Denial of legal capacity must not be based on a personal trait such as gender, race, or disability, or have the purpose or effect of treating the person differently.”⁷⁹

UN additionally has mentioned the need to provide equality regarding the legal capacity,⁸⁰ pointing out that „legal capacity means that all people, including persons with disabilities, have legal standing and legal agency simply by virtue of being human. Therefore, both strands of legal capacity must be recognized for the right to legal capacity to be fulfilled; they cannot be separated.”⁸¹ The rights of persons with disabilities should be provided in all aspects of life,⁸² thus also in the notary system.

However the Article 12 of CRPD is “the greatest challenge of implementation in all State Parties,”⁸³ for example, France, Germany and Denmark believe that CRPD “allows for restrictions of legal capacity in certain circumstances.”⁸⁴ UN on other hand interprets Article 12 of CRPD as:

⁷⁸ United Nations. General Assembly. (26 January 2009.) Tematic Study by the Office of United Nations High Commissioner for Human rights on enhancing awareness and understanding of the Convention on the Rights of People with disabilities. A/HRC/10/48, Retrieved from: <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>>[1 October 2015]

⁷⁹ United Nations. Convention on the Rights of Persons with Disabilities. General comment No 1 (2014), Article 12: Equal recognition before the law. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>>[1 October 2015]

⁸⁰ United Nations. General Assembly. (26 January 2009) Tematic Study by the Office of United Nations High Commissioner for Human rights on enhancing awareness and understanding of the Convention on the Rights of Persons with disabilities. A/HRC/10/48, Retrieved from: <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.48.pdf>>[1 October 2015]

⁸¹ United Nations. Convention on the Rights of Persons with Disabilities. General comment No 1 (2014), Article 12: Equal recognition before the law. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>> [1 October 2015]

⁸² United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3. Article 12, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

⁸³ Degener T., Member of the CRPD Committee (2014), „The normative requirements of Article 12 of the CRPD“, Speech delivered at 2014 Work Forum on the Implementation of the UNCRPD in the EU“. European Union Agency for Fundamental Rights. *Annual report 2014. Fundamental rights: challenges and achievements in 2014*. Publications Office of the European Union, 2015., 31 p.

⁸⁴ European Union Agency for Fundamental Rights. *Annual report 2014. Fundamental rights: challenges and achievements in 2014*. Publications Office of the European Union, 2015., 31 p.

a) a person with disability should be equally recognized before law in any situation and there are no limitations.⁸⁵

b) all persons with disability have the legal capacity.

c) legal capacity and mental capacity are different terms. “Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.”⁸⁶

d) supported decision-making, if needed.⁸⁷

Although scholars mostly relate Article 12 of CRPD with persons with intellectual and mental disability rights and needs, in practice persons with other types of disability can be considered as incompetent (thus lacking the legal capacity) due the functional testing. “A “functional test” is used by notaries and others in determining whether a person has the legal capacity to perform a particular transaction or legal act, such as making a will or a contract, or consenting or refusing to consent to a medical treatment. It is incorrect to say that a person may have legal capacity but not “functional capacity”. Functional testing for legal capacity constitutes disability-based discrimination.”⁸⁸

Article 13 *on the access to justice* of CRPD determines that persons with disability equally with other persons can directly or indirectly participate in all legal proceedings, including as witnesses.⁸⁹ According to UN comments, Article 13 of CRPD should be analyzed together with Article 5 and 12 of CRPD, additionally States have to ensure that persons with disability can have equal access to justice (Article 13 of CRPD). As UN points out „persons with disability have often been excluded from key roles in

⁸⁵ United Nations. (2014) Convention on the Rights of Persons with Disabilities. General comment No 1, Article 12: Equal recognition before the law. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>> [1 October 2015]

⁸⁶ United Nations. (2014) Convention on the Rights of Persons with Disabilities. General comment No 1, Article 12: Equal recognition before the law. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>> [1 October 2015]

⁸⁷ Ibid. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>> [1 October 2015]

⁸⁸ International disability alliance. General Comment on Article 12 of Convention on the Rights of People with disability. Retrieved from: <<http://www.internationaldisabilityalliance.org/en>> [1 October 2015]

⁸⁹ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3. Article 13, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>> [1 October 2015]

justice system as lawyers, judges, witnesses or members of a jury.” Thus according to Article 5 and 12 of CRPD persons with disabilities should be allowed “to testify in judicial, administrative and other proceedings.”⁹⁰

Although UN does not mention the notary system, the Committee was informed about the discrimination towards persons with disabilities in the notary system already in year 2010, when Spain submitted the report according to Article 35 of CRPD. CERMI’s⁹¹ shadow report on Spain regarding the Article 13 of CRPD “raised concerns regarding notary regulations which exclude persons with mental disabilities and persons who are “blind, deaf and mute” as acting as legal witnesses on official documents.”⁹² However the Committee did not express concerns about it.⁹³

CRPD is the first international human rights treaty which was joined by the EU as a party on 23 December 2010,⁹⁴ according to Article 37 of Treaty on European Union.⁹⁵ CRPD principles are included in the European Disability Strategy 2010-2020 (adopted 2010), which is the main document in the EU which regulates disability issues.⁹⁶ European Disability Strategy does not cover all areas of CRPD, just few: “accessibility, participation, equality, employment, education and training, social protection, health and external action.”⁹⁷ Therefore the access to justice (Article 13 of CRPD) and equal recognition before the law (Article 12 of CRPD) are not in the jurisdiction of the MS. On 2014 the EU reported UN on implementation of CRPD setting that “equal treatment and combating discrimination [*Article 5, the author’s remark*] against persons with

⁹⁰ United Nations. Convention on the Rights of Persons with Disabilities. General comment No 1 (2014), Article 12: Equal recognition before the law. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>>[1 October 2015]

⁹¹ *Spanish Committee of representatives of persons with disabilities*

⁹² Flynn, E. *Disabled Justice?: Access to Justice and the UN Convention on the rights of persons with disabilities*. United Kingdom: Ashgate Publishing Limited, 41.p.

⁹³ *Ibid*, 42.p.

⁹⁴ Fundamental Rights Agency. Has your country accepted the CRPD? Retrieved from: <<http://fra.europa.eu/en/node/4424>>[1 October 2015]

⁹⁵ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Official Journal of the European Union C326, vol.55, 26 October 2012. Retrieved from: <https://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en.pdf>[29 October 2015]

⁹⁶ European Commission. Persons with disability. Retrieved from: <<http://ec.europa.eu/social/main.jsp?catId=1137>>[1 October 2015]

⁹⁷ European Commission. (15.11.2010) European Disability Strategy 2010-2010: A Renewed Commitment to a Barrier Free Europe. Brussels. 15.11.2010.; COM (2010) 636 final. Retrieved from: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0636:FIN:en:PDF>>[1 October 2015]

disabilities have long been cornerstones of the EU policy.”⁹⁸ The EU reported that “equality principle (prohibition of disability related discrimination) is included in Treaty on the European Union and in several EU Directives and Regulations.”⁹⁹

However disability was not included into catalog of discrimination in EU, before the amendments of Treaty of Amsterdam (1999),¹⁰⁰ while medical understanding of disability (receiving care¹⁰¹), rather than human rights understanding (“persons with disabilities were not encourage gaining income from employment”)¹⁰² was implemented.¹⁰³

Although neither the EU report,¹⁰⁴ nor the Committee’s “*List on issues in relation to the initial report of the EU*”¹⁰⁵ or the Committee’s “*Concluding observations on the initial report of the European Union*”¹⁰⁶ did not include any reference to the notary system and persons with disability rights, there are some interesting aspects which can be taken into consideration.

For example, the Committee suggested to extend the protection of persons with disabilities in other fields (social security, rehabilitation etc.) in the EU level, as currently persons with disabilities can be protected mostly in employment.¹⁰⁷

⁹⁸ European Union. (2014) Consideration of reports submitted by States parties under Article 35 of Convention. Initial Report of States parties due in 2012. European Union. Received: 5 June 2014. United Nations. Conventions on the Rights of Persons with Disabilities. Retrieved from: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/232/64/PDF/G1423264.pdf?OpenElement>>[1 October 2015]

⁹⁹ Ibid., Retrieved from: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/232/64/PDF/G1423264.pdf?OpenElement>>[1 October 2015]

¹⁰⁰ Hendriks, A. (2005) Promoting Disability Equality after the Treaty of Amsterdam: New Legal Directions and Practical Expansion Strategies. Disability rights in Europe from theory to practice. Ed. Lawson A & Gooding C. Oxford and Portland, Oregon. 189. p.

¹⁰¹ Ibid., 189. p.

¹⁰² Ibid., 189. p.

¹⁰³ Ibid., 189. p.

¹⁰⁴ European Union. (2014) Consideration of reports submitted by States parties under Article 35 of Convention. Initial Report of States parties due in 2012. European Union. Received: 5 June 2014. United Nations. Conventions on the Rights of Persons with Disabilities. Retrieved from: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/232/64/PDF/G1423264.pdf?OpenElement>>1 October 2015]

¹⁰⁵ United Nations Committee on the Rights of Persons with Disabilities. List of Issues in relation to the initial report of the European Union. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/098/84/PDF/G1509884.pdf?OpenElement>>[8December 2015]

¹⁰⁶ Committee on the Rights of Persons with Disabilities. (4 September 2015) Concluding observations on the initial report of the European Union.. Retrieved from: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEU%2fCO%2f1&Lang=en> [8December 2015]

¹⁰⁷ Ibid., Retrieved from: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEU%2fCO%2f1&Lang=en> [8December 2015]

The EU indicated that the principle of equal recognition before the law [*Article 12, CRPD, the author's remark*] is under jurisdiction of MS, not the EU.¹⁰⁸ However the Committee recommended “that the EU take appropriate measures to ensure that all persons with disabilities deprived of their legal capacity can exercise all the rights enshrined in EU treaties and in EU legislation such as on access to justice, to goods and services, including banking and employment, and to healthcare, as well as voting and consumer rights, in line with the CRPD.”¹⁰⁹ Therefore the Committee pointed out the rights of persons with mental and intellectual disability which might be deprived of their legal capacity, not pointing out the rights of persons with other types of disability whose legal capacity can be deprived in practice (functional testing).

The EU has adopted several Directives on access to justice [*Article 13, CRPD, the author's remark*], for example, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.¹¹⁰ Although all Directives mention persons with disabilities and alternative communication ways/ tools, Directives regulate only criminal proceedings, and they do not determine rights for witnesses. The Committee gave the most valuable recommendation regarding the implementation of the Article 13 of CRPD- “the EU take appropriate action to combat discrimination persons with disabilities face in accessing justice by providing full procedural accommodation within its Member States, and the provision of funding for training of justice personnel on the Convention.”¹¹¹ Therefore it is possible to presume that the EU will encourage the MS to make amendments in the normative acts ensuring the rights of persons with disabilities in all judicial proceedings.

¹⁰⁸ European Union.(2014) Consideration of reports submitted by States parties under Article 35 of Convention. Initial Report of States parties due in 2012. European Union. Received: 5 June 2014. United Nations. Conventions on the Rights of Persons with Disabilities. Retrieved from: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/232/64/PDF/G1423264.pdf?OpenElement>>1 October 2015]

¹⁰⁹ Committee on the Rights of Persons with Disabilities. (4 September 2015) Concluding observations on the initial report of the European Union. Retrieved from: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fCO%2f1&Lang=en> [8December 2015]

¹¹⁰ European Union. (2014) Consideration of reports submitted by States parties under Article 35 of Convention. Initial Report of States parties due in 2012. European Union. Received: 5 June 2014. United Nations. Conventions on the Rights of Persons with Disabilities. Retrieved from: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/232/64/PDF/G1423264.pdf?OpenElement>>1 October 2015]

¹¹¹ Committee on the Rights of Persons with Disabilities. (4 September 2015) Concluding observations on the initial report of the European Union. Retrieved from: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fCO%2f1&Lang=en> [8December 2015]

During the EU evaluation process in UN, 15 non-governmental organizations (hereinafter- NGO) submitted the reports or comments on the EU report.¹¹² The Articles 5, 12 or 13 of CRPD were described or mentioned according to each NGO's specifics, for example, NGO representing rights of people with autism pointed out to problems concerning people with autism etc. None of NGOs mentioned the notary system.

It can be explained: firstly, the notary systems in the EU MS are accessible to persons with disabilities in all stages (as the parties or witnesses); secondly, people with disabilities are not included in public life in such way that they would need to use the services of the notaries, and therefore persons with disabilities are not aware restrictions in the notary system. Thirdly, persons with disabilities are aware of restrictions in the notary system, however they choose not to complain.

CJEU¹¹³ has not had many proceedings on CRPD, however it is possible to draw few interesting conclusions. CJEU (case C-363/12, 18 march 2014), Section 91 points out that „the validity of that directive (*Directive 2000/78/ EC, the author's remark*) cannot be assessed in the light of the UN Convention (*CRPD, the author's remark*), but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention (*CRPD, the author's remark*).“¹¹⁴ CJEU (case C-356/12) admits that: „consequently, the provisions of that CRPD are, from the time of its entry into force, an integral part of the EU legal order (see Case 181/73 *Haegeman* EU:C:1974:41, paragraph 5, and Z EU:C:2014:159, paragraph 73).“¹¹⁵ Thus, the CJEU admits that

¹¹² United Nations. Human Rights Office of the High Commission. (17 August 2015- 4 September 2015). CRPD - Convention on the Rights of Persons with Disabilities. 14 Session Retrieved from: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=995&Lang=en> [8 December 2015]

¹¹³ See the Chapter 2 Methodology on data collection.

¹¹⁴ Court of Justice of the European Union. Judgment of the Court (Grand Chamber). Case C-363/12 Request for a preliminary ruling under Article 267 TFEU from the Equality Tribunal (Ireland), made by decision of 26 July 2012, received at the Court on 30 July 2012, in the proceedings Z.v A Government department, The Board of management of a community school. 18 March 2014. Retrieved from: <<http://curia.europa.eu/juris/document/document.jsf?text=ANO%2BKonvencijas%2Bpar%2Bpersonu%2BBar%2Binvalidit%25C4%2581ti%2Bties%25C4%25ABb%25C4%2581m&docid=149388&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=651226#ctx1>> [8 December 2015]

¹¹⁵ Court of Justice of the European Union. Judgement in Case C-356/12, Request for a preliminary ruling under Article 267 TFEU from the Bayerischer Verwaltungsgerichtshof (Germany), made by decision of 5 July 2012, received at the Court on 27 July 2012, in the proceedings Wolfgang Glatzel v Freistaa Bayern. Retrieved from: <<http://curia.europa.eu/juris/document/document.jsf?text=ANO%2BKonvencija%2Bpar%2Bpersonu%2BBar%2Binvalidit%25C4%2581ti%2Bties%25C4%25ABb%25C4%2581m&docid=152650&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=747397#ctx1>> [8 December 2015]

CRPD is the part of the EU legal system, and the EU normative acts should be interpreted into the light of the CRPD.

CRPD is ratified by 25 EU MS, and 21 EU MS has also ratified the Optional Protocol.¹¹⁶ EU Agency for fundamental rights (hereinafter- FRA) has concluded that in 2014 the equality principle was the main principle among the EU MS which was used to harmonize the legislation according to CRPD,¹¹⁷ however not relating to the notary system, as the non-discrimination principle has been used the most regarding:

a) “legal capacity (Article 12);

b) involuntary placement and treatment, which is linked to the rights to liberty and security of the person (Article 14), the prohibition of torture of cruel, inhuman or degrading treatment or punishment (Article 15), the protection of the integrity of the person (Article 17) and health (Article 25);

c)accessibility (Article 9).”¹¹⁸

CRPD entered into force in Latvia on 31 March 2010.¹¹⁹ According to Article 35 paragraph 1 Latvia submitted UN the report on implementation CRPD in 2014 (hereinafter- the Report).¹²⁰ The Report describes prohibition of discrimination in laws related with employment, social security etc. (Article 5, CRPD).¹²¹ According to the Report an equal recognition before the law (Article 12, CRPD) is ensured by amendments in Civil law and Civil Procedure law when “withdrawal of full capacity to act was replaced with the institute of restricted ability to act.”¹²² The Report does not

¹¹⁶ Fundamental Rights Agency. Has your country accepted the CRPD? Retrieved from: <<http://fra.europa.eu/en/node/4424>>[1 October 2015]

¹¹⁷ European Union Agency for Fundamental Rights. (2015) *Annual report 2014. Fundamental rights: challenges and achievements in 2014*. Publications Office of the European Union. 30 p.

¹¹⁸ Ibid., 31 p.

¹¹⁹ Konvencija par personu ar invaliditāti tiesībām. Pieņemts 13.12.2006, stājās spēkā 31.03.2010. Publicēts „Latvijas Vēstnesis“, 27 (4219), 17.02.2010. Pieejams: <<http://likumi.lv/doc.php?id=205328>> [1 October 2015]

¹²⁰ United Nations. Human rights. Human rights bodies. Retrieved from: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLVA%2f1&Lang=en>[1 October 2015]

¹²¹ Republic of Latvia (2014)Initial Report by the Republic of Latvia on the implementation of the Convention of December 13, 2006 on the Rights of Persons with Disabilities from March 31, 2010 to December 31, 2013 in the Republic of Latvia. United Nations. Human rights. Human rights bodies. Retrieved from: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLVA%2f1&Lang=en>[1 October 2015]

¹²² Ibid., Retrieved from: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLVA%2f1&Lang=en>[1 October 2015]

include information on persons with disabilities rights to participate in proceedings as the witnesses (Article 13, CRPD).¹²³ The Report does not cover the topics related with notaries or Latvian law. It can be explained: firstly, responsible institutions have not analyzed the norms of Latvian law at all; secondly, responsible institutions have analyzed the norms of Latvian law and have concluded that the norms correspond CRPD. Mainly two policy documents regulate the implementation of CRPD in Latvia - “Action plan on implementation the UN Convention on the Rights of persons with disabilities 2010-2012”¹²⁴ and “Policy on implementation the UN Convention on the Rights of persons with disabilities 2014-2020.”¹²⁵ Also the document “Issues to be addressed in policy on implementation the UN Convention on the Rights of persons with disabilities 2013-2019”¹²⁶ can be mentioned as it analyzed in details the problems related with CRPD implementation. None of abovementioned documents mention the Latvian law.

Therefore the responsible institutions have not analyzed the Latvian law in the light of CRPD, and it is necessary to investigate if the Latvian law norms reflect the principles and norms of the CRPD.

¹²³ Republic of Latvia (2014) Initial Report by the Republic of Latvia on the implementation of the Convention of December 13, 2006 on the Rights of Persons with Disabilities from March 31, 2010 to December 31, 2013 in the Republic of Latvia. United Nations. Human rights. Human rights bodies. Retrieved from:

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLVA%2f1&Lang=en>[1 October 2015]

¹²⁴ Ministru kabineta 2009.gada 12.oktobra rīkojums Nr. 693 „Par Apvienoto Nāciju Organizācijas Konvencijas par personu ar invaliditāti tiesībām īstenošanas plānu 2010.-2012.gadam”. Pieņemts 12.10.2009., stājas spēkā 12.10.2009. Publicēts „Latvijas Vēstnesis”, 165 (4151), 16.10.2009. Pieejams: <<http://likumi.lv/doc.php?id=199220>>[1 October 2015]

¹²⁵ Ministru kabineta 2013.gada 22.decembra rīkojums Nr. 564 „Apvienoto Nāciju Organizācijas Konvencijas par personu ar invaliditāti tiesībām īstenošanas pamatnostādnes 2014.–2020.gadam Pieejams: <<http://www.mindbank.info/item/4464>>[1 October 2015]

¹²⁶ Labklājības ministrija. Apkopojums „Problēmas, kuru risinājums iekļaujams ANO Konvencijas „Par personu ar invaliditāti tiesībām” īstenošanas pamatnostādņēs 2013.-2019.gadam.” Pieejams: <<http://www.lm.gov.lv/upload/aktualitates/diskusija270910.pdf>>[1 October 2015]

Chapter II

Methodology

In order to analyze Latvian, Estonian and Lithuanian law, the author has chosen several interpretation methods which are the most effective:

a) Grammatical method which “is a technique explaining how to understand the norms.”¹²⁷ Grammatical method will be used, firstly, to analyze in details respective norms of Latvian law, and secondly to investigate the possible examples of Estonia and Lithuania. Grammatical method will be used in subchapters 3.1. and 4.1., when analyzing the Articles 86 and 94 of Latvian law, as well as in chapter 5, when analyzing the norms of Estonian law and Lithuanian law.

b) Systematical method is a technique, which “explains how the norms are involved with other norms, laws, principles and the system of rights.”¹²⁸ Systematical method will be used in the subchapters 3.2.and 4.2., when analyzing the Articles 86 and 94 of Latvian law, and in chapter 5 when analyzing the Estonian and Lithuanian law.

c) Historical method is used to explain “how and why the norms were adopted and amended”,¹²⁹ thus historical method will explain the development of Latvian law, attitude towards persons with disabilities in the 20th century through the international documents regulating the rights and obligations of the persons with disabilities. Historical method is used in chapter 1.2, chapter 3 and 4.

d) Theological method is a “technique to explain the aim and the content of the norm.”¹³⁰ The theological method will be used in subchapters 3.3.and 4.3, when analyzing the aim of Article 86 and Article 94 of Latvian law through historical development.

In order to inquire how the practical implementation is made, the interviews will be conducted. The interview as a method is used to gain the information “behind the participant’s experience.”¹³¹ Due the lack of case-law on a notary system and CRPD, interviews will be used to get input on practical implementation of Latvian, Estonian

¹²⁷ Rakstu krājums dr.habil.iur., prof., Melķiša E. Zin.redakcijā. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā. Rīga: Latvijas Universitātes Juridiskā fakultāte. 2003., 117.lpp

¹²⁸ Ibid., 117.lpp

¹²⁹ Ibid., 121.lpp

¹³⁰ Ibid., 123.lpp

¹³¹ Valenzuela A., Shrivastava P., Interviews as a method for qualitative research. Retrieved from: <<http://www.public.asu.edu/~kroel/www500/Interview%20Fri.pdf>>[19 March 2016]

and Lithuanian law regarding the rights of people with disabilities. Interview questions were different for each country (see appendix Nr.1), because normative regulation of the Notary system vary among Baltic States. Therefore the questions were specifically design to capture the essence of notary law of each country. The answers of questionnaire were incorporated in chapter 3, 4 and 5. The author chose one representative of a notary system from each Baltic State. The representative from Latvia and Estonia wanted to stay anonymous, therefore ethical norms should be followed and further in the text will be used the words “Latvian representative” or “Estonian representative” when referring to the person/ organization. Lithuanian Chamber of Notaries (hereinafter- Lithuanian representative) gave the answers to corresponding questions.

Additionally comparative approach was used. Comparative approach “is a technique for comparative studying of legal problems or instruments in two or more legal systems. Legal problems or instruments may include the development of terms, norms, their interpretation, commentaries, legal practice behind, institutions, cultures, attitudes, methodologies, and even entire legal systems. Method consists of identification, analysis and explanation of similarities and differences regarding carefully and purposefully chosen legal problems or instruments in order to find their causes. Results are implemented in proposal of a draft document.”¹³² Comparative approach will be used to compare the terms, similarities and differences among the norms of Estonian, Latvian and Lithuanian law which describe persons with disabilities rights and obligations.

The author, based on the conclusions from previous chapters, in chapter 6 will use grammatical and theological method to develop improvements in Latvian law.

The author chose to analyze Notariate laws of Lithuania and Estonia, because all Baltic States share the same historical development. All Baltic States belong to the same legal system – continental legal system. All Baltic States are the EU MS, which means that the legislative developments in the EU refer to all Baltic States. Estonia and Lithuania

¹³² Bazyler M. J. Comparative Law Method. Retrieved from <<http://www.michaelbazyler.com/downloads/Comparative-Law-Spring-2007.pdf>>, p. 17. [1 October 2015]

also are the MS of CRPD: Estonia ratified CRPD on 2012 and Lithuania on 2010.¹³³ All three Baltic countries belong to Latin-type notary system.¹³⁴

Review of data, collection of data and analysis

Materials, articles, books from several data bases are used in thesis: Westlaw UK, Westlaw Next, Hein Online, Hein Online Law Journal Library and Jurista vārds.¹³⁵

Chapter 1, section 1.1. includes analyze from scholarly articles on the main aspects and the importance of CDT. Information was gained from National library, Riga Graduate School of Law library and previous mentioned data bases.

Chapter 1, section 1.2. includes information from the EU and the UN reports about essence of the CRPD and how the particular articles of CRPD should be implemented. Considering that CRPD is the first international human rights treaty EU joined as a party, the author analyzes how the EU has used CRPD in the EU documents. The author analyzes the reports of the EU on implementation of CRPD.

Additionally author used several case-law data bases to gain information on case - law regarding both - Notariate law and CRPD:

a)Jurisprudence of UN

According to Article 34 of CRPD Committee on the Rights of Persons with Disabilities is established (hereinafter – the Committee).¹³⁶ The Committee's duties mainly are to consider the State reports (Article 35, 36 of CRPD) and to consider communications from and on behalf of individuals and groups of individuals who claim the violation of CRPD by the States.¹³⁷ 158 States have ratified the CRPD, however only 87 States have joined the Optional protocol, which allows the individuals from the States to inform the Committee about the violations of CRPD.¹³⁸ The Committee has 18 pending cases¹³⁹

¹³³ European Union Agency for Fundamental rights. Retrieved from: <<http://fra.europa.eu/en/node/4424>>[1 October 2015]

¹³⁴ International union of notaries. Retrieved from: <<http://www.uinl.org/6/member-notariats-country>>[3 March 2016]

¹³⁵ *The word of lawyer.*

¹³⁶ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3. Retrieved from: <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>>[23 January 2016]

¹³⁷ UN Convention on the rights of personswith disabilities. Optional protocol. Article 1. Enterted into force 6 December 2006. Retrieved from: <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>>[23 January 2016]

¹³⁸ UN Human rights office of the High Commissioner. View the ratification status by country or by treaty. Retrieved from:

and six cases where the Committee has shared the views.¹⁴⁰ The author used the term “CRPD” and time period from the year 2008 to 2015 in the Committee’s data base and gained six views of the Committee on the violation of CRPD,¹⁴¹ none of them were related to the notary system. Therefore no case law from the UN can be used in thesis, and thus more detailed analyze of UN documents explaining Articles of CRPD is needed.

b) CJEU data base

To collect data from the CJEU data base, the author used the words “non-discrimination” and “UN Convention on the Rights of Persons with Disabilities” in Latvian language, and as the result gained one court decision. Further the author used words “UN Convention on the Rights of Persons with Disabilities” in Latvian language and gained results of three court decisions and three decisions of general advocate. The author used in CJEU data base words “UN Convention on the Rights of Persons with Disabilities” in English language and as the result gained three court decisions and two decisions of general advocate.

The author used word “notariāts” (notary) in Latvian language and gained two opinions of advocate general in CJEU data base. Both opinions are related to freedom of establishment and a profession of notary, therefore the opinions will not be analyzed in thesis. The author used a word “notāri” (notaries) in Latvian language and gained 54 results in CJEU data base,¹⁴² from which 35 were court judgements or summaries of the judgements, seven applications, nine opinions of advocate general, one view of advocate general and two orders of the court. None of the documents were related to CRPD and notary. The case C-151/14 European Commission vs Republic of Latvia was

<http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en> [23 January 2016]

¹³⁹ UN Human rights office of the High Commissioner. Committee on the rights of persons with disabilities. Pending cases. Retrieved from: <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Tablependingcases.aspx>> [23 January 2016]

¹⁴⁰ United Nations Human rights office of the high commissioner. About the jurisprudence. Retrieved from: <<http://juris.ohchr.org/search/results>> [21 January 2016]

¹⁴¹ Ibid., Retrieved from: <<http://juris.ohchr.org/search/results>> [21 January 2016]

¹⁴² Eiropas Savienības tiesa. Tiesas judikatūra. Rezultātu saraksts. Pieejams: <<http://curia.europa.eu/juris/documents.jsf?pro=&nat=or&oq=&lg=&dates=&language=lv&jur=C%2CT%2CF&cit=none%252CCJ%252CCR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&text=not%25C4%2581ri&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=415103>> [21 janvāris 2016]

about the nationality requirement for a person to become a notary in Latvia,¹⁴³ however it was not related to CRPD and thus, it will not be analyzed in the thesis.

c) European Court of Human rights (hereinafter- ECOHR) data base

The author used words “United Nations Convention on the Rights of Persons with disabilities” in English language in ECOHR data base and gained 67 results, from which ten were court judgements, while other documents were translations of the judgements in various languages. None of the court judgement was related to notary system and CRPD. Therefore none of the judgements will be analyzed in the thesis. In generally ECOHR investigates more cases regarding the rights of persons with mental disability, for example, access to court, independent life etc.,¹⁴⁴ which support FRA argument that the largest challenge is to ensure the active legal capacity for persons with mental disabilities in all Europe.

Chapter 3 and 4 include diverse sources. The author will use laws (Notariate law, Administrative proceeding law, Criminal proceeding law etc), comments on laws, information from the interview, scholarly articles to analyze the legal and notary system in Latvia for the persons with disabilities.

Data on historical development of the articles 86 and 94 of the Latvian law were gained from State History archive of the Republic of Latvia and from the National library of the Republic of Latvia. The author did not analyze the Latvian Soviet Socialist Republic Notariate law because the Republic of Latvia did not take over the norms of Soviet period.

The State History archive divides the information according to the institutions, which have issued it. Thus the author was searching information about the original Notariate law of the Republic of Latvia (version of 1937) in Government protocols, Ministry of Justice draft-laws and documents of the Parliament. There is a difference between the format of Government protocols and Parliament protocols. Parliament protocols contain more information as they are drawn up as the transcripts. Government protocols contain

¹⁴³ Court of Justice of the European Union. 10 September 2015. Judgement, Case C-151/ 14 European Commission vs. Republic of Latvia. Retrieved at: <http://curia.europa.eu/juris/document/document.jsf?text=not%25C4%2581ri&docid=167285&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=455614> >[21 January 2016]

¹⁴⁴ European Court of Human Rights. Persons with Disabilities and the European Convention of Human rights. Factsheet. 2016 March. Retrieved from: http://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf>[27 March 2016]

information about the agenda, made decisions, but do not describe the discussions. Thus, Parliament protocols would be the most useful. However, the political regime in Latvia changed from democracy to authoritarianism in 1934 and the Parliament was dissolved. Thus, there was a possibility that Parliament protocols from 1937 would not be available. The last Parliament protocols available were from year 1935. The author was considering Parliament protocols from 1935 as the source of information because the adoption of the law is time-consuming process. Therefore it was possible that the Latvian law was submitted to Parliament before the final dismissal of Parliament (in 1934 or 1935), and the Parliament could have discussed Latvian law. Nevertheless, such information was not found. The author analyzed the protocols of the Government from 1935- 1937. The only protocol on 14 December of 1937 contained information on Latvian law, as it was adopted in the Government. The Government protocol does not contain any information about discussion on Latvian law. It also did not have additional documents (supporting documents). Therefore, it was necessary to do research on the ministries which can be responsible for drafting Latvian law. Currently the Ministry of Justice is responsible for the amendments in Latvian law. Therefore the author analyzed draft laws submitted by the Ministry of Justice to the Government from 1935-1937. According to the data of the Ministry of Justice, Latvian law had two supporting documents. Both documents are described more detailed in the corresponding chapters of the thesis.

Additionally author used several case-law data bases to gain information on case - law regarding both- Latvian law and CRPD:

a) Court judgment data base of the Republic of Latvia.¹⁴⁵

The author used the words “ANO Konvencija par personu ar invaliditāti tiesībām” (CRPD) and found one judgment.¹⁴⁶ The above-mentioned judgment was related with accessibility, not with the notary system, therefore it will not be analyzed in the thesis. The author used the word “notāri” (notaries) and found 125 judgments from year 2007-2015 in the court judgment data base of the Republic of Latvia.¹⁴⁷ None of the judgments were related to CRPD.

¹⁴⁵ The data base contains judgments of all level court of Latvia.

¹⁴⁶ Latvijas tiesu portāls. Anonimizētu nolēmumu atlase. Pieejams: <<https://www.tiesas.lv/nolemumi>>[21 janvaris 2016]

¹⁴⁷ Ibid. Pieejams: <<https://www.tiesas.lv/nolemumi>>[21 janvaris 2016]

b) the data base of the Supreme Court of the Republic of Latvia:

The Supreme Court of the Republic of Latvia has grouped the judgements in several data bases, based on the search topic: “Decisions of Department of Civil cases,” “Articles of Civil law (2003-2016),” “Normative acts (2012-2016),” “Classification according to the topics of cases (since 2003)” and “Chronological order (2003-2016).”¹⁴⁸ The author used two data bases: “Normative acts from 2012- 2015” and “Chronological order (2003-2016).” According to data base “Normative acts from 2012-2015”, in 2015 the Supreme Court has implemented CRPD in one case on the rights to work, therefore will not be analyzed in thesis. In 2014 and 2012 CRPD was not used at all in the cases of the Supreme Court. In 2013 the Supreme Court implemented CRPD in one case on persons with mental disability rights, which was not related to the notary system and therefore will not be analyzed in the thesis.¹⁴⁹ The Supreme Court implemented Latvian law two times in year 2015, none of the cases were related to CRPD.¹⁵⁰ The Supreme Court implemented Latvian law two times in year 2014, none of the cases were related to CRPD.¹⁵¹ The Supreme Court in year 2013 did not use Latvian law.¹⁵²

As the CRPD entered into force in Latvia in 2010, but data base “Normative acts from 2012- 2015” does not give the information on judgements from year 2010, 2011, then the author additionally analyzed the data base “Chronological order (2003-2016)”, only year 2010 and 2011. In 2010, starting from 31 March,¹⁵³ Supreme Court has made 37

¹⁴⁸ Latvijas Republikas Augstākā tiesa. Judikatūras nolēmumu arhīvs. Civillietu departaments. Pieejams: <http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/hronologiska-seciba_1/>[27 March 2016]

¹⁴⁹ Latvijas Republikas Augstākā tiesa. Tiesību aktu rādītājs 2012-2015. Pieejams: <<http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/tiesibu-akturaditajs/>>[21 janvāris 2016]

¹⁵⁰ Latvijas Republikas Augstākā tiesa. Latvijas Republikas likumi. 2015.gads. Pieejams: <<http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/tiesibu-akturaditajs/2015/1-latvijas-republikas-tiesibu-akti/12-latvijas-republikas-likumi/#50>>[21 janvāris 2016]

¹⁵¹ Latvijas Republikas Augstākā tiesa. Latvijas Republikas likumi. 2014.gads. Pieejams: <<http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/tiesibu-akturaditajs/2014/1-latvijas-republikas-tiesibu-akti/12-latvijas-republikas-likumi/#99>>[21 janvāris 2016]

¹⁵² Latvijas Republikas Augstākā tiesa. Latvijas Republikas likumi. 2013.gads. Pieejams: <<http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/tiesibu-akturaditajs/2013/1-latvijas-republikas-tiesibu-akti/>>[21 janvāris]

¹⁵³ *CRPD entered into force in 31 March 2010, therefore older cases are not relevant for the thesis.*

judgments; none of them were related to CRPD and the notary system.¹⁵⁴ The Supreme Court has made 56 judgments in year 2011,¹⁵⁵ none of them were related to CRPD and the notary system. Therefore it can be concluded that there is no case-law on CRPD and the notary system which would be analyzed by the Supreme Court.

c) the data base of the Constitutional Court of Latvia.

The author used words “likums” (law) and “Notariāta likums” (Notary law) and gained one result, however it was not related with the disability, therefore will not be used in thesis. The author used words “likums” (law) and “Civilprocesa likums” (Civil proceeding law) and gained 54 results, one result was related with persons with disability rights, thus it will be analyzed in thesis.

Chapter 5 includes information on corresponding norms on persons with disabilities rights from Estonian and Lithuanian laws, Civil Codes of Estonia and Lithuania, reports to UN on implementation of CRPD, as well as information from interviews (Estonia and Lithuania).

Chapter 6 includes observations and conclusions from previous chapters.

Possible problems in collecting data:

1. Although the UN and the EU is interested in improving life of persons with disabilities, legal issues concerning persons with disabilities are not very popular among scholars, especially in Latvia. Thus, lack of data and useful information (articles, books) is a problem for developing the thesis.
2. CRPD is a relatively new international treaty, thus the UN can be almost the only source, which share the reliable information about the interpretation of the CRPD.
3. Lack of the case-law of the Republic of Latvia on Latvian law, especially such court decisions, which analyzes both: Latvian law and the CRPD.

¹⁵⁴ Larvijas Republikas Augstākā tiesa. Judikatūras nolēmumu arhīvs. Civillietu departaments. 2010.gads. Pieejams: <http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/hronologiska-seciba_1/2010/> [21 janvāris 2016]

¹⁵⁵ Larvijas Republikas Augstākā tiesa. Judikatūras nolēmumu arhīvs. Civillietu departaments. 2011.gads. Pieejams: <http://at.gov.lv/lv/judikatura/judikaturas-nolemumu-arhivs/senata-civillietu-departaments/hronologiska-seciba_1/2011-hronologiska-seciba/> [21 janvāris 2016]

4. Lack of case –law of the Republic of Estonia and Republic of Lithuania on the Notariate law in the relationship with the CRPD. Following the research in national data base case-law approach was lacking and was not consistent enough.¹⁵⁶

5.Lack of CJEU case-law where both themes: CRPD and a notary system are analyzed.

¹⁵⁶ Supreme court of the Republic of Estonia: <http://www.nc.ee/?id=872>, Riigi Teataja: https://www.riigiteataja.ee/kohtulahendid/koik_menetlused.html, Supreme Court of the Republic of Lithuania <http://www.lat.lt/lt/teismu-praktika.html>, Constitutional Court of the Republic of Lithuania <http://www.lrkt.lt/lt/prasymai/prasymu-sarasas/370>

Chapter III: Persons with disabilities rights to act as a witness under the Notariate law of the Republic of Latvia

3.1. Construction and terminology of the Article 86 of the Notariate law of the Republic of Latvia

The Article 86¹⁵⁷ of Latvian law (hereinafter- Article 86)¹⁵⁸ defines groups of persons who are denied to act as the witnesses in the Deed. The Article 86 consists of 5 paragraphs, the sixth paragraph is deleted. Only the first paragraph of the Article 86 mentions persons with disabilities, and thus will be analyzed in more detailed. The Article 86 sets two groups of persons with disabilities- persons with mental disabilities and persons with physical disabilities or more specifically - sensor disabilities (vision, hearing, speech) who are denied the rights to be witnesses in Deeds. No other article of the Latvian law determines restrictions for persons with other type of disabilities to act as witnesses in the Deed. Thus the Article 86 *prima facie* sets unequal attitude between persons with sensor and mental disability regarding witnessing the Deed; and persons with other type of disability who can act as the witnesses.

The Article 86 uses terms “the deaf, the dumb and the blind” to describe persons with disabilities. Thus the terminology provides the following. Firstly, the disability defines a person. According to CRPD and CDT principles disability is created “from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”¹⁵⁹ The people cannot be defined because of their disability.¹⁶⁰ Therefore

¹⁵⁷ *Article 86, Latvian law: 1) illiterates, minors and those who are unable to correctly and completely comprehend and certify the deed due to physical or mental deficiencies, namely those with mental impairments, the deaf, the dumb and the blind;*
 2) *those for whose benefit the deed is made or the order issued;*
 3) *those who are in the relations with the sworn notary referred to in Section 41, his or her spouse, participants of the deed or third persons determined in the deed for whose benefit the deed is made or the order is issued;*
 4) *employees of the sworn notary and members of staff of the sworn notary and his or her employees;*
 5) *persons without knowledge of the official language;*
 6) [24 October 2002].

¹⁵⁸Notariāta likums. Latvijas Republika. Pieņemts 01.06.1993., stājās spēkā 01.09.1993. Publicēts „Latvijas Vēstnesis” 48, 09.07.1993., 86.pants, Pieejams: <<http://likumi.lv/doc.php?id=59982>>[1 October 2015]

¹⁵⁹ United Nation Human rights office of the high commissioner. (2014) The Convention on the rights of persons with disabilities. Training guide. Professional Training series. No 19.. Retrieved from: <http://www.ohchr.org/Documents/Publications/CRPD_TrainingGuide_PTS19_EN%20Accessible.pdf>[27November 2015]

abovementioned terms can be considered as offensive and should be replaced by less offensive terms.

Secondly, terms “the deaf, the dumb and the blind” means the total loss of particular sense, which can mean that persons with partial loss of senses can act as witnesses. Disability is divided into three categories in Latvia: group I disability – very severe disability (80-100% loss of ability to work); group II disability- severe disability (60-79% loss of ability to work); group III disability- moderately expressed disability (25-59% loss of ability to work).¹⁶¹ Therefore a person with I disability group could not act as a witness. The Article 86 does not define the person who can evaluate if the person has a total or partial loss of sense. However in practice a notary evaluates person’s abilities and it is a notary’s responsibility to evaluate if a person understands the Deed, circumstances and consequences; additionally a notary does not take into consideration the disability group.¹⁶²

The part of sentence “those who are unable to correctly and completely comprehend and certify the deed” of the Article 86 automatically presumes that persons with particular disability (mental/ sensor) are not capable to understand the Deed. It illustrates that the person with sensor disability does not understand the Deed, rather than the notary has not prepared the Deed in the way which can be understandable by the person with the sensor disability. Additionally it excludes possibility to use alternative approaches to make the Deed understandable for persons with disability. The author points out that the previously mentioned contradicts the Article 2 of CRPD which urges MS to use alternative communication ways in the communication with persons with disabilities.

3.2.A person with disability as a witness – systemic structure of the Republic of Latvia

As the Article 86 forbids persons with mental and/ or sensor disability to be witnesses in a Deed, it is necessary to investigate how the article 86 is involved with other laws and

¹⁶⁰ United Nation Human rights office of the high commissioner. (2014) The Convention on the rights of persons with disabilities. Training guide. Professional Training series. No 19.. Retrieved from: <http://www.ohchr.org/Documents/Publications/CRPD_TrainingGuide_PTS19_EN%20Accessible.pdf>[27November 2015]

¹⁶¹ Invaliditātes likums. Latvijas Republika. Pieņemts 20.05.2010., Stājās spēkā 01.01.2011., Publicēts „Latvijas Vēstnesis“, 91 (4283), 09.06.2010., 6.pants. Retrieved from: <<http://likumi.lv/doc.php?id=211494>>[18 March 2016]

¹⁶² Interview with Latvian representative.

norms which are in force in Latvia. The author will not analyze CRPD as the analysis is provided in the previous chapter.

An article 91 (hereinafter- Article 91) of the Constitution of the Republic of Latvia (hereinafter- Constitution) determines „all human beings in Latvia shall be equal before the law and the courts. Human rights shall be realized without discrimination of any kind.”¹⁶³ The Article 91 includes two principles: equality principle and non-discrimination principle. “The legislator, executive power and courts should abide the equality principle. State should take into consideration that all people are equal while issuing, applying or interpreting norms(everybody has the equal rights and equal obligations).”¹⁶⁴ The second principle – non- discrimination principle- means that “it is forbidden to legally differentiate people, define a person according to the criteria which is included in prohibition of discrimination.”¹⁶⁵ Although Constitution does not set exact discrimination catalog, Latvia as the MS of EU and the MS of various international treaties consider the disability as one of the criteria’s of discrimination catalog.¹⁶⁶ Therefore it can be said that the norms which create unequal attitude or discrimination towards various persons with disability shall be forbidden.

Civil law is the main law in Latvia which sets the rights and obligations for inhabitants of Latvia. It also determines the principle of legal capacity. Legal capacity was deprived for persons with mental disability until 2012. In 2010 the Constitutional Court of the Republic of Latvia intended that “according to the international human rights the State has an obligation to provide such restrictions of legal capacity that includes individual assessment of each situation and individual assessment of each restriction. [...] The situation, when the norms do not provide any liminality and sets only fully deprivation of legal capacity is against the human rights.”¹⁶⁷ Thus significant amendments in Civil law were adopted to change the full deprivation of legal capacity to limited legal capacity in particular areas.

¹⁶³ Latvijas Republikas Satverme. Pieņemta 15.02.1922., stājās spēkā 07.11.1922. „Latvijas Vēstnesis”, 43, 01.07.1993., 91.pants. Pieejams: <<http://likumi.lv/doc.php?id=57980>>[1 October 2015]

¹⁶⁴ Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības. (2011) Autoru kolektīvs Zin.vad.prof.R.Balodis., Rīga: Latvijas Vēstnesis., 92. lpp

¹⁶⁵ Ibid, 99. lpp

¹⁶⁶ Ibid, 100. lpp

¹⁶⁷ Satversmes tiesas 2010.gada 27.decembra spriedums lietā Nr.2010-38-01. Pieejams: Pieejams: <http://www.satv.tiesa.gov.lv/upload/spriedums_2010-38-01.htm>[1 October 2015]

Article 1405 of Civil law determines that “in order for a transaction to have legal force, it is necessary that the parties to the transaction have legal capacity and the capacity to act for making such transaction; otherwise the transaction is void.”¹⁶⁸

Abovementioned article sets that the a term „person with legal capacity“ should be understood also as „a full age person with limited legal capacity to the extent that the court has not limited.”¹⁶⁹ The physical impairments cannot be the reason for limiting the legal capacity.¹⁷⁰ The legal capacity of the person with disability can be limited individually and only in those areas which are set by the judgement of the court. It cannot be limited or restricted by the general law.

As the persons with mental/ sensor disability cannot be witnesses in the Deed, but according to the Article 2 of Latvian law the notaries belong to the court system,¹⁷¹ and as the article 13 of CRPD sets that persons with disability can be witnesses in all legal proceedings, it is necessary to analyze procedural laws of the Republic of Latvia – Civil procedure law, Administrative procedure law and Criminal procedure law. Article 163¹⁷² of Administrative procedure law determines five groups of people who cannot be summonsed and examined as witnesses,¹⁷³ while Article 106 of Civil procedure Law¹⁷⁴ sets four groups. Both abovementioned articles determines that “persons whose physical or mental deficiencies render them incapable of correctly perceiving circumstances of significance to the matter.”¹⁷⁵

¹⁶⁸ Latvijas Republikas Civillikums. Pieņemts 28.01.1937, stājas spēkā 01.09.1992; publicēts „Valdības Vēstnesis“ 41, 20.02.1937., 1405.pants. Pieejams: <<http://likumi.lv/doc.php?id=225418>>[1 October 2015]

¹⁶⁹ Likumprojekts „Grozījums Civillikumā.“ Ministru kabinets. 15.11.2011. Nr.90/TA-2755 (2011) Pieejams: <<http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/F81AEAE4B081B277C225794A00253F71?OpenDocument>>[1 October 2015]

¹⁷⁰ Ibid., Pieejams: <<http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/F81AEAE4B081B277C225794A00253F71?OpenDocument>>[1 October 2015]

¹⁷¹ Notariāta likums. Latvijas Republika. Pieņemts 01.06.1993., stājā spēkā 01.09.1993.Publicēts “Latvijas Vēstnesis” 48, 09.07.1993. 2.pants. Pieejams: <<http://likumi.lv/doc.php?id=59982>>[8December 2015]

¹⁷² *Author’s remark: Article 163 of Administrative procedure law was amended once, on 26 October 2006, however the amendment is not relevant to the thesis, thus it will not be analyzed.*

¹⁷³ Administratīvā procesa likums. Pieņemts 25.10.2001., stājās spēkā 01.02.2004. „Latvijas Vēstnesis”, 164 (2551) 14.11.2001., 163.pants. Pieejams: <<http://likumi.lv/doc.php?id=55567>>[1 October 2015]

¹⁷⁴ Civilprocesa likums. Pieņemts 14.10.1998., stājās spēkā 01.03.1999., „Latvijas Vēstnesis”, 326/330 (1387/1391), 03.11.1998. Pieejams: <<http://likumi.lv/doc.php?id=50500>>[1 October 2015]

¹⁷⁵ Administratīvā procesa likums. Pieņemts 25.10.2001., stājās spēkā 01.02.2004. „Latvijas Vēstnesis”, 164 (2551) 14.11.2001., 163.pants. Pieejams: <<http://likumi.lv/doc.php?id=55567>>[1 October 2015]

Administrative Procedure law and Civil Procedure law the same as Latvian law sets restrictions for persons with mental or physical deficiencies to be witnesses in administrative and civil proceedings. It is not specified which physical deficiencies can limit disabled person's rights to be a witness in the proceedings, but according to secondary sources of law, the term "physical deficiencies" refers to sensor deficiencies.¹⁷⁶ Restrictions on persons with deficiencies can be interpreted narrow – automatically restricting all persons with disabilities from being a witness- or interpreted more broadly, when individual assessment of deficiency is done in each case. There is interesting development in scholars' opinion on implementation of the Article 106 of Civil procedure law. For example. it was considered that the restrictions of persons with disabilities to be the witnesses are included because of "ethical consideration, and the duty of the court is to suspend mentioned persons from giving the testimony"¹⁷⁷ in 1999. Later on explanation was developed that "physical deficiencies are all sensor deficiencies. More sensitive is the question on "mental deficiencies", as there is no doubt that if a person has the mental deficiencies then the persons active legal capacity is limited due the mental disability. In Civil procedure law version of year 1938 it was mentioned that a person cannot testify, if a person is under the medical supervision due the mental deficiency or is treating the mental deficiency."¹⁷⁸ However the last comment issued in 2016 is very different from previous: "physical impairments should be understood as perceptual disorders (sensor disorders). More complicated is the issue on mental impairments. There are no doubts that persons with limited legal capacity have mental impairments. The norm does not forbid persons with mental disability to witness. In practice however the norm is interpreted very narrow, excluding persons with mental disabilities to be witnesses. It can be agreed that persons with mental disabilities can be witnesses and the court should evaluate their testimony very carefully together with other evidences."¹⁷⁹ The author positively estimates the change in attitude of scholars mentioning that persons with mental disabilities can be witnesses

¹⁷⁶ Civilprocesa likuma komentāri. Papildinātais izdevums. Sagatavojis autoru kolektīvs K.Torgāna un M.Dudeļa vispārīgā zinātniskā redakcijā. Tiesu namu aģentūra. Rīga: 2001;

¹⁷⁷ Civilprocesa likuma komentāri. Autoru kolektīvs prof.K.Torgāna un M.Duduļa vispārīgā zinātniskā redakcijā. Tiesu namu aģentūra. Rīga: 1999.; 114.lp.

¹⁷⁸ Civilprocesa likuma komentāri. Papildinātais izdevums. Sagatavojis autoru kolektīvs K.Torgāna un M.Dudeļa vispārīgā zinātniskā redakcijā. Tiesu namu aģentūra. Rīga: 2001; 131.lp.

¹⁷⁹ Civilprocesa likuma komentāti. I daļa (1.-28.nodaļa). Otrais papildinātais izdevums. Sagatavojis autoru kolektīvs prof.K.Torgāna zinātniskajā redakcijā. Rīga: Tiesu namu aģentūra. 2016., 370.lpp.

in civil proceedings. However if the problem is in implementation of the norm, then it would be necessary to reevaluate the current version of Article 106 of Civil procedure law in order to clarify the implementation.

Historically persons with sensor disabilities could act as witnesses, unless the testimony included information where the lost ability was needed, for example, „persons with vision disability could not give the testimony on the fact which shall be recognized by the vision, persons with hearing disabilities - on facts which has to be recognized by hearing.”¹⁸⁰ As admitted before then practical implementation is heterogeneous, thus also the rights of persons with sensor disabilities in practice can be limited the same as for persons with mental disabilities.

Regarding the administrative procedure scholars agree that “procedural active legal capacity can be limited only in particular fields and in particular amount, therefore court and State institutions should take into consideration the limitations when a person with limited legal capacity submits the claim or application.”¹⁸¹ However Administrative District Court of the Republic of Latvia in judgment (17 May 2012) mentioned that opinion of person without legal capacity cannot be preferred over trustee’s opinion.¹⁸² Thus it cannot be concluded that persons with disabilities can fulfil their rights in administrative proceedings.

The author considers that in situations where particular sense is not the priority persons with sensor disabilities can act as witnesses. Similar approach is used when “a person who does not understand the language in which a dispute has happened, can give a testimony about circumstances of the meeting and conversation.”¹⁸³ Therefore a person with hearing disability might not hear the conversation, however a person can understand circumstances on the meeting (the same as a person without language knowledge), moreover persons with hearing disability can read lips. A person with vision disability might not see the participants of the meeting, but can hear the conversation. Thus, the author believes that more explanatory norms on persons with

¹⁸⁰ Bukovskis, V., prof.dr.jur. (1933) *Civīlprocesa mācības grāmata*. Rīga: autora izdevums. atkārtoti izdots 2015.gads. Drukāts Jelgavas tipogrāfijā. 359.lpp

¹⁸¹ *Administratīvā procesa likuma komentāri. A un B daļa. Sagatavojis autoru kolektīvs dr.iur.J.Briedes zinātniskajā redakcijā. Tiesu namu aģentūra. 2013., 310.lpp*

¹⁸² Rīgas Administratīvā rajona tiesas 2012.gada 17.maija spriedums lietā Nr.A420336312. Pieejams: <<http://www.l2d.lv/v.php?i=24338>>[20 februāris 2016]

¹⁸³ *Civīlprocesa likuma komentāri. I daļa. 1.-28.nodaļa. Sagatavojis autoru kolektīvs prof.K.Torgāna zinātniskajā redakcijā. Tiesu namu aģentūra: Rīga. 2011., 291.lpp.*

disabilities rights should be included in Civil procedure law and Administrative procedure law.

Two of three procedure laws in Latvia forbid persons with mental or sensor deficiencies to act as the witnesses in the proceedings. However neither Criminal law, nor Criminal procedure law determines any specific restrictions for persons with disabilities or persons with deficiencies to become the witnesses.¹⁸⁴

According to the conclusions from the Chapter 1 on UN opinion on Article 13 of CRPD, it can be concluded that Civil Procedure Law and Administrative Procedure Law does not fully reflect principles of Article 5, 12 and 13 of CRPD.

Moreover the author joins the claim that ““access to justice” obstacles are not confined to the physical barriers to access, frequently encountered by those with mobility or sensory impairments, but extend to the more subtle, ultimately more disabling, barriers thrown up by the judicial process itself; by its language, its assumption, its way of working – in short, by its “culture.””¹⁸⁵ Mostly the rights of the persons with disabilities are violated, when they cannot act as the parties in the court. For example, European Court of Human rights held violation on rights to fair trial in case *Shtukaturov v. Russia* (27 March 2008), when a person with mental illness was deprived his “legal capacity without his knowledge.”¹⁸⁶ Similar case was *Stanev v. Bulgaria* (17 January 2012), when person without legal capacity could not “apply to court to seek release from partial guardianship.”¹⁸⁷ Therefore if persons with disabilities cannot act as the parties in proceedings, then providing the rights to persons with disabilities to act as the witnesses can be even harder.

¹⁸⁴ Kriminālprocesa likums. Pieņemts 21.04.2005. Stājās spēkā 01.10.200., „Latvijas Vēstnesis”, 74 (3232), 11.05.2005., „Ziņotājs”, 11, 09.06.2005. 121.pants. Pieejams:

<<http://likumi.lv/doc.php?id=107820>> [2 februāris 2016]

¹⁸⁵ O’Braien, N. (2005) The UK DRC and Strategic Law Enforcement. *Disability rights in Europe from theory to practice*. Ed. Lawson A. & Gooding C. University of Leeds. Hart Publishing. Oxford and Portland, Oregon. 255 p.

¹⁸⁶ European Court of Human Rights. Persons with disabilities and the European Convention on Human rights. Retrieved from: <http://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf>[20 February 2016]

¹⁸⁷ Ibid., Retrieved from: <http://www.echr.coe.int/Documents/FS_Disabled_ENG.pdf>[20 February 2016]

3.3.A person with disability as a witness in the Notariate law of the Republic of Latvia – the aim through historical development

The Article 86 has had two amendments– on 24 October 2002¹⁸⁸ and on 23 May 2013¹⁸⁹ - since Latvian law was adopted in 1937. However no amendments have been made in the first paragraph of Article 86.

According to the law “On restoration of Latvian Republic 1937 Notary law and the amendments in it”¹⁹⁰ Latvia did not take over norms from Latvian Soviet Socialist Republic Notariate law, but made the amendments linking the Latvian law of 1937 with the legal situation in 1990s.¹⁹¹ However norms on persons with disabilities were not amended. For example, parliament debated on Latvian law on May 18¹⁹² and 25¹⁹³, 1993, after which Latvian law was adopted on June 1, 1993;¹⁹⁴ however there were no discussions on the rights of persons with disabilities. The meaning of equality principle and non-discrimination principle is the attitude. Therefore it is interesting why the Parliament did not see unequal attitude in the norms regulating persons with disability rights and obligations in Latvian law.

It can be explained by the international understanding of the rights of persons with disabilities. As mentioned in Chapter 1, disability as a part of discrimination catalog was introduced relatively late. In 1990s the president of International Union of Notaries admitted that Latvian law is the best from all Notary laws of transitional countries; additionally notaries from Germany and Italy assisted drafting the amendments in

¹⁸⁸ Likums „Grozījumi Notariāta likumā”. Pieņemts 24.10.2002., stājās spēkā 01.01.2003. „Latvijas Vēstnesis”, 165 (2740), 13.11.2002. Pieejams: <<http://likumi.lv/ta/id/68312-grozijumi-notariata-likuma>>[1 October 2015]

¹⁸⁹ Likums „Grozījumi Notariāta likumā”. Pieņemts 23.05.2013, stājās spēkā 01.11.2013. „Latvijas Vēstnesis”, 112 (4918), 12.06.2013. Pieejams: <<http://likumi.lv/ta/id/257426-grozijumi-notariata-likuma>>[1 October 2015]

¹⁹⁰ Latvijas Republikas likums „Par Latvijas Republikas 1937.gada Notāru likuma spēka atjaunošanu un grozījumiem un papildinājumiem tajā. 01.09.1993. Pieejams: <http://m.likumi.lv/doc.php?id=59982&version_date=01.09.1993>[1 October 2015]

¹⁹¹ Krūmiņa S. (2013) Katram laikam ir savs notariāts un notārs. Intervija G.Litvins. „Latvijas Notārs”. Pieejams: <http://notary.lv/site/docs/2013/12/12/Zurnals_Latvijas_notars-2013.pdf> [2 februāris 2016]

¹⁹² Latvijas Republikas Augstākās padomes 1993.gada 18.maija sēdes stenogramma.Pieejams: <http://saeima.lv/steno/AP_steno/1993/st_930518v.htm>[26 November 2015]

¹⁹³ Latvijas Republikas Augstākās padomes 1993.gada 25.maija sēdes stenogramma.Pieejams: <http://saeima.lv/steno/AP_steno/1993/st_930525v.htm>[26 November 2015]

¹⁹⁴ Latvijas Republikas Augstākās padomes 1993.gada 1.jūnija sēdes stenogramma. Pieejams: <http://saeima.lv/steno/AP_steno/1993/st_930601.htm>[26 November 2015]

original version of Latvian law.¹⁹⁵ However the norms on people with disabilities were not changed. In year 2003, Latvian notaries organized conference on the challenges of Latvian law before becoming the MS of EU. The two main conclusions were that, firstly, the Latvian law corresponds the rights of the EU and the norms of EU MS; and secondly, the EU institutions did not suggest making any changes in Latvian law before Latvia joined the EU.¹⁹⁶ One of cornerstones of the EU was and still is the equality principle and non-discrimination. Moreover the year 2003 was the European Year of People with disabilities,¹⁹⁷ but nobody discussed persons with disabilities rights in the notary systems.

Author believes it can be explained by the fact that the CRPD was not adopted yet, and as mentioned before persons with disabilities were considered as objects of charity, rather than subjects of rights. In 2003 researchers claimed that “disability law (*and therefore understanding the rights of the persons with disabilities in practice*)¹⁹⁸ as a branch of legal research is a fairly recent development in most countries. Thus, legal literature on disability law and comparative studies on disability law are still rather raw.”¹⁹⁹ It can be concluded that limitation and restriction in the Notariate laws for persons with disabilities is the norm, and nobody considers it as discrimination.

Unfortunately also the original Latvian law and its supporting documents do not explain the restriction of persons with disabilities rights in notary system. The Article 76²⁰⁰ of the original Latvian law version (1937) included restrictions for the person groups to become the witnesses in the Deeds.²⁰¹ The original Latvian law had two supporting documents: an explanatory memorandum (hereinafter- the Annotation) signed by the Minister of Justice Mr.H.Apsītis on December 6, 1937 and opinion of the Codification division of the State Chancellery (hereinafter – the opinion). The Annotation describes

¹⁹⁵ Krūmiņa S. (2013) Katram laikam ir savs notariāts un notārs. Intervija G.Litvins. „Latvijas Notārs”. Pieejams: <http://notary.lv/site/docs/2013/12/12/Zurnals_Latvijas_notars-2013.pdf> [2 februāris 2016]

¹⁹⁶ Orlovska S. (2003.gada 23.decembris). *Eiropas Savienības un Latvijas notariāts*. Rīga: “Jurista vārds.”, Nr.46 (304)

¹⁹⁷ European Year of People with Disabilities 2003. EU-Lex. Available from: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:c11413>> [7 December 2015]

¹⁹⁸ *Author’s remark*

¹⁹⁹ Degener T. Disability as a Subject of International Human Rights Law and Comparative Discrimination law. The Human Rights of persons with intellectual disabilities. S.S.Herr, L.O.Gostin, H.H.Koh. Oxford University Press. 2003., 161.p.

²⁰⁰ *Corresponds Article 86 of Latvian law.*

²⁰¹ Notariāta likums. 1937. Latvijas Vēstures arhīvs lieta Nr.1307, 1, 288, 229.lp.

the reason on developing a new notary system; explain the rules on notaries etc.²⁰² However persons with the disabilities are not mentioned at all in the Annotation, therefore there is not any additional information why Latvian law restricted the rights of people with disabilities. The opinion did not have any comments on prohibition of persons with sensor disability to be the witness in the Deed.²⁰³

Therefore when analyzing the historical development of Article 86, there are not clear documentary evidence which would explain the limitations of persons with sensor and mental disabilities to participate in the Deed as the witnesses. However author believes that the justification results from two strongly linked aspects: firstly the substance of the notary system and secondly, society's attitude towards persons with disabilities which reflects in laws.

There are two types of legal systems which currently can be considered as the main ones: Civil law system and Common law. Each of them has very different notary system.²⁰⁴ The aim of Civil law notary system (Latin - type notary system) is to prevent the disputes, support written evidence, and consider the Deed as the best written evidence; while Common law system supports evidence in oral format.²⁰⁵ Latvian notary system belongs to Latin- type notary system, which includes: firstly, monitoring the legal requirements; secondly, explaining the legal requirements to the parties of the Deed.²⁰⁶ It is the duty of the notary to make sure that the parties of the Deed are protected "from their own incompetence, as well as from possible malice. The notary is responsible to ensure the legal capacity of the parties, to explain the consequences of the deed, to follow the requirements of the law and ensure that the deed represents the will of the parties."²⁰⁷ Therefore Latvian law should provide all tools to ensure that the notaries can fulfill their duties. The second, third and fourth paragraph of the Article 86 forbids persons who can be personally interested in a Deed or can be influenced by the

²⁰² Notariāta likums. Latvijas Republika. Paskaidrojuma raksts. 1937.gada 5.decembris. Valsts vēstures arhīvs.

²⁰³ Latvijas Republikas Valsts kancelejas Kodifikācijas nodaļa. Viedoklis Nr.268, 23.11.1937. Valsts Vēstures arhīvs.

²⁰⁴ Latvijas Zvērinātu notāru padome. Latīņu tipa notariāts un starptautiskā latīņu notariāta savienība. Latvijas atjaunotā notariāta desmitgade. Pieejams: < http://notary.lv/site/docs/2007/10/16/Starptautiska_notaru_savieniba.pdf> [2 februāris 2016]

²⁰⁵ Ibid. Pieejams: < http://notary.lv/site/docs/2007/10/16/Starptautiska_notaru_savieniba.pdf> [2 februāris 2016]

²⁰⁶ Lediņa L. (2004.gada 24.februāris) „Latvijas notariāts kontinentālās Eiropas tiesību sistēmā.“ „Jurista vārds.“ Nr.7 (312)

²⁰⁷ Ibid., Nr.7 (312)

parties or a notary to be a witness. Thus, the restrictions set in 2nd-4th paragraph of Article 86 can justify the aim of the norm. The first and fifth paragraph of Article 86 forbids persons who might not understand the Deed to be witnesses.

Persons with disabilities participated in so –called “freak shows” in the 19th century in Europe and United States, they were institutionalized (more people with mental disability), abused, sterilized etc.²⁰⁸ Therefore persons with disabilities clearly did not qualify as competent people which is precondition to participate in Deeds. Additionally “the right to equal treatment extended only to those who were characterized as equal; but women, black and disabled people were relevantly different.”²⁰⁹ For example, the Notariate provisions (adopted in 1914) determined the women could act as the witnesses in the Deeds only if the men were not available; and only the women with perfect behavior could be the witnesses in the Deed.²¹⁰ The previously mentioned is not included in Latvian law anymore, as the attitude towards gender equality has been changed in Latvia.

Notariate provision also determined clearer attitude towards persons with disabilities. It was forbidden for persons who lacked ability to write and read (more specific *blind, deaf, dumb and mentally sick*²¹¹) to be the witnesses in the Deed, otherwise the notarial Deed did not have the legal force.²¹² Although the Article 86 does not directly determine that persons with disabilities can influence the legality of the Deed, the essence of Article 86 has maintained the same. Therefore it can be argued that Latvia follows even older norms, than the norms of original Latvian law version (1937).

The legal capacity of the witnesses and skills (ability to read, hear, understand) of the witnesses are one of the tools for the notary to ensure the legality of the Deed. However exclusion of persons with disability due their disability contradicts with the equality

²⁰⁸ Braddock, D.L., Parists S.L. (2003) Social Policy Toward Intellectual Disabilities in the 19th and 20 th centuries. Human rights of Persons with intellectual disabilities. Ed. By S.S. Herr, L.O.Gostin, H.H.Koh. Oxford University Press, 99.p.

²⁰⁹ Fredman S. (2005) Disability Equality and the Existing Paradigm. Disability rights in Europe. Ed. Lawson A& Gooding C., Oxford and Portland, Oregon. 201.p

²¹⁰ Jurkovska, O., cand.iur., rediģējis prof.dr.jur. V.Bukovskis. Notariāta nolikums. 284.pants. Tulkojums ar pārgrozījumiem, papildinājumiem, paskaidrojumiem un pielikumiem.. Rīga: neoficiāls izdevums, 1933., 31.lpp

²¹¹ Author uses the terms from the Notarial rules.

²¹² Jurkovska, O., cand.iur., rediģējis prof.dr.jur. V.Bukovskis. Notariāta nolikums. 284.pants. Tulkojums ar pārgrozījumiem, papildinājumiem, paskaidrojumiem un pielikumiem.. Rīga: neoficiāls izdevums, 1933., 31.lpp

principle of CRPD, as well as with the Article 13 of CRPD. Additionally it leads to “functional testing”.

The main aspect in the first paragraph of Article 86 is the meaning and actions of the witness in the Deed. The meaning of the witness is to ensure that the rights of all parties have been respected during the process; it is possible that witness does not know the content of the Deed.²¹³ The witness is the safety of a notary in case of a dispute.²¹⁴ Therefore there is a difference between the witnesses in court proceedings and witnesses in a notary system. The witnesses in the court testify on circumstances of a dispute, while in a notary system presence of witnesses ensures the reduction of dispute in the future.

Thus the witnesses have two main duties: 1)ensure the legality of the notarial process; 2)ensure the content of the Deed, if necessary.

If the persons with disability has to ensure the legality of the notarial process, then person with speech disability (who can hear and see, but cannot talk), can see and hear whole process, therefore no restrictions for persons with speech disabilities are needed. Person with hearing disability can see the process, but cannot hear the conversations, however sign translator can assist in the process. Although Latvian representative mentioned that it is necessary that the witness can communicate with a notary directly, not through the sign translators or other assistants,²¹⁵ Latvian representative did not give clear answer why the alternative communication tools (sign translators) are not acceptable also for witnesses. The persons with hearing disabilities belong to deaf culture,²¹⁶which means that persons with hearing disabilities might not have many friends who can hear which can lead to problems in finding witnesses for the Deeds. If persons with hearing disabilities could invite persons with hearing disabilities as witnesses and sign translators, it would still be possible to ensure the legality of the Deed. Persons with vision disability can hear the process, but cannot ensure legality of the Deed signing process. Person with intellectual disability can hear and see the process, however person might not digest the process and consequences. Person with mental disability can hear, see the process and even digest the process, however clear

²¹³ Interview with Latvian representative.

²¹⁴ Interview with Latvian representative.

²¹⁵ Interview with Latvian representative.

²¹⁶ World Federation of the Deaf. Retrieved from: <<http://wfdeaf.org/our-work/focus-areas/deaf-culture>>[12 April 2016]

understanding of the process depends on disease. Although CRPD gives the rights to persons with disabilities, it still can be challenging for some disability categories to ensure the rights.

If the person with disability has to ensure the content of the Deed, then a person with intellectual/ mental disability might have problems to understand based on disease. A person with vision disability cannot read the Deed, if the Deed is not prepared in the form which person with vision disability can understand. Person with hearing and/ or speech disability can read the Deed and understand the content of the Deed; however a person cannot communicate with notary and parties in the way they understand, therefore additional alternative communication tools are needed. In case if a person with hearing disability knows only sign language, then a person cannot read a Deed and also cannot communicate with notary and parties, therefore additional alternative communication tools are needed. Thus the main reason of restriction for a person with mental or sensor disability to be a witness in a Deed is a form of communication.

According to Article 2 of Convention, “Communication” includes languages (spoken, sign and other forms of non spoken languages), display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology.²¹⁷ Additionally Article 21 of CRPD MS should ensure “accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions.”²¹⁸

Thus, the author believes it is possible to ensure that persons with disabilities can understand a content of a Deed when using alternative tools of communication. The ensuring of the notarial process is more challenging, as not all persons with disabilities can evaluate the process.

²¹⁷ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3., Article 2, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

²¹⁸ Ibid., Article 2, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

Therefore three aspects should be taken into consideration, when discussing persons with disabilities rights to act as witnesses in the Deeds: persons with disabilities rights to be a part of society,²¹⁹ legality of the Deed, and equality principle between persons with mental/ sensor disabilities and persons without disabilities.

Despite the fact that Constitution forbids discrimination due disability and designate the equality principle, and CRPD sets the obligation to ensure persons with disabilities rights in all proceedings, in practice persons with mental and sensor disabilities rights to act as witnesses in civil, administrative proceedings and notarial procedure are limited or even deprived. It is possible to see the change of attitude among scholars in Latvia regarding the rights of persons with disabilities, which is assessed positively.

However the author believes that amendments in Latvian law, Civil procedure law and Administrative procedure law are needed to fully incorporate equality principle regarding the rights of persons with disabilities to be witnesses. The amendments are needed to give the rights to persons with disabilities and prevent heterogeneous implementation of procedural laws. The author believes that it can be challenging to give full power/ rights to all types of persons with disabilities as witnesses in the Deeds. However it is possible to provide more equality by including norms on alternative communications tools, which currently lacks in Article 86.

²¹⁹ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3., Article 5, Retrieved from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[1 October 2015]

Chapter IV: Persons with disabilities rights to be a party under the Notariate law of the Republic of Latvia

4.1. Construction and terminology of the Article 94 of the Notariate law of the Republic of Latvia

The article 94 of Latvian law (hereinafter – Article 94) consists of two sentences.²²⁰ The Article 94 allows persons with hearing, speech and vision disability act as parties in the Deeds and defines special regulation. Article 94 does not mention other type of disability. Only the article 83 of Latvian law²²¹ mentions persons with other type of disability, when restricting persons with limited legal capacity, and this issue will be analyzed in the next part. Latvian law does not determine any other rights or obligations for other type of persons with disabilities. Therefore it is possible to conclude that special regulation is set for persons with sensor disability and persons with mental disability.

The first sentence of article 94 uses terms “the deaf, the dumb or the blind”, and the terminology analyses from previous chapter can be applied regarding Article 94 as well: the used terms are offensive, the terms refer to persons with sensor disability only. Thus the terms have to be changed.

The abovementioned terms mean the total lack of particular sense, although as mentioned before Disability law of Latvia determines several categories of disability. In practice a notary evaluates person’s senses and a physical deprivation is the main criterion to require the presence of two witnesses.²²² However the goal is not to indicate the lack of abilities, but to protect a person with sensor disability and additionally a notary.²²³ Sometimes if a person does not show the disability card, then a notary might not know at all that a person has disability. The main criterion nevertheless is the person’s ability to understand the Deed and the legal consequences, therefore a notary have a conversation with a person first.²²⁴

²²⁰ Article 94 of Latvian law: “94. In making deeds in which the deaf, the dumb or the blind participate, the presence of at least two witnesses shall be required.
Provisions of Section 90 shall not be applicable to such deeds.”

²²¹ Article 83 of Latvian law: “a sworn notary shall verify the identity, capacity to act and the right of representation of the participants of the notarial deed.”

²²² Interview with Latvian representative.

²²³ Interview with Latvian representative.

²²⁴ Interview with Latvian representative

Article 94 determines the need of “at least two witnesses”, thus firstly, setting the minimum number of witnesses in cases with persons with sensor disability. Secondly, the article 94 sets the obligation not the rights to choose the witnesses for persons with sensor disabilities. Persons without disabilities or persons with other type of disabilities (unless persons with mental disabilities) have rights to choose witnesses according to article 84²²⁵ of Latvian law. Thus, the article 84 and article 94 sets unequal attitude between persons with sensor disability and persons without disability; and persons with sensor disabilities and persons with other type disabilities. Additionally persons with sensor disabilities have to pay for each witness, as the witness is also signing the Deed²²⁶ and the notary has to verify the identity of every person in two data bases.²²⁷ The EU has chosen another approach regarding the additional assistance for persons with disabilities, for example, persons with disability can receive the assistance without additional charge in railways²²⁸ and planes²²⁹ to increase social inclusion of persons with disabilities. Therefore Article 94 does not reflect the regional standards. The second sentence of the Article 94 refers to Article 90²³⁰ of Latvian law, limiting the rights of persons with sensor disabilities even more, as persons with sensor disabilities cannot choose to keep the content covert from the witnesses, as persons without disability or persons with other type disability (except mental) can do.

²²⁵ Article 84, Notariate law of the Republic of Latvia: „*Deeds may be made in the presence of witnesses or without them (Section 1474 of The Civil Law). When making or depositing for safekeeping a will, as well as when performing notarial activities in cases determined in Sections 72 and 94, the presence of two witnesses shall be required; these witnesses may also certify the identity of the participants of the deed (Section 76)*”

²²⁶ Ministru kabineta 2013.gada 3.septembra noteikumi Nr.737 “Noteikumi par zvērinātu notāru atlīdzības taksēm un to noteikšanas kārtību”. Pieņemti 03.09.2013., stājā spēkā 01.01.2014., Publicēts “Latvijas Vēstnesis”, 174 (4980), 06.09.2013., Pieejams: <<http://likumi.lv/doc.php?id=259604>> [30March 2016]

²²⁷ Interview with Latvian representative.

²²⁸ Regulation (EC) NO 1371/2007 of the European Parliament and the Council of 23 October 2007 on rail passengers’ rights and obligations. Article 23, L315/14. Official Journal of the European Union. 03.12.2007. Retrieved from: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:315:0014:0041:en:PDF>> [30 March 2016]

²²⁹ Regulation (EC) No 1107/2006 of the European Parliament and the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. 26.07.2006. Official Journal of the European Union L 204/1. Retrieved from: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0001:0009:EN:PDF>> [30March 2016]

²³⁰ Article 90, Latvian law: “*If the participants of the notarial deed do not wish that the invited witnesses know the content of the deed and they have listened to the content thereof in the absence of the witnesses, then upon the signing of the deed the participants thereof shall inform the witnesses that they have heard it.*”

The author believes that Article 94 restricts the free will (the rights) of the persons with sensor disability. It portrays persons with sensor disability as incapable, additionally putting more financial burden to persons with sensor disabilities as to any other person. The author would like to point out another interesting aspect. Latvian representative mentioned that all additional assistance and witnesses are needed to protect the best interest of persons with sensor disabilities.²³¹ Article 69 of Latvian law allows inviting the interpreter, if the parties or a party is not fluent in Latvian language. The interpreter has a criminal liability in respect of a knowingly false translation.²³² If persons with sensor disabilities are considered to be the vulnerable party and therefore more protection is needed, then Latvian law allows inviting the person who can communicate with the person with sensor disability, however this person does not have any liability. Author considers that the sign language or other way of communication is still a communication in the language which the notary does not understand, and therefore the sign language translator provides the communication between the notary and a person with disability the same way as the translator who provides the communication between the notary and a person who does not know the State language. Thus the analogical liability is needed for translator or assistant who can communicate with a person with disability to ensure the legality of the Deed and the best interests of a person with disability.

4.2.A person with disability as a party in a notarial deed – systemic approach.

As the Article 94 sets restrictions for people with sensor disabilities, it is necessary to analyze how the article 94 is involved with other laws and norms which are in force in Latvia. The same as in previous chapter, the article 91 of Constitution²³³ can be applied; according to which all people are equal and disability based discrimination is forbidden. Civil law is the general law in the Republic of Latvia which regulates the relations between the inhabitants of the Republic of Latvia. Article 1405 of Civil law was amended in 2012 when the full deprivation of legal capacity was changed to limited legal capacity. The Article 1405 of Civil law points out the legal capacity as the main

²³¹ Interview with Latvian representative.

²³² Notariāta likums. Latvijas Republika. Pieņemts 01.06.1993., stājās spēkā 01.09.1993. Rīga: „Latvijas Vēstnesis” 48, 09.07.1993., 96.pants, Pieejams: <<http://likumi.lv/doc.php?id=59982>>[1 October 2015]

²³³ Latvijas Republikas Satverme. Pieņemta 15.02.1922., stājās spēkā 07.11.1922. „Latvijas Vēstnesis”, 43, 01.07.1993., 91.pants. Pieejams: <<http://likumi.lv/doc.php?id=57980>>[1 October 2015]

aspect for transactions to be in force.²³⁴ Legislator for Article 1405 of Civil law has explained that special rules should be implemented on persons with limited legal capacity. A person with limited legal capacity due to mental disability will be able to make a transaction and a transaction will be in force, if the court has not limited a person's legal capacity to make transactions in particular areas and in particular volume.²³⁵ Additionally also the transactions will be in the force which will be done by the person with limited legal capacity together with a guardian. A guardian can make a transaction in particular area or in particular volume (for example, buying a real estate for 50 000 EUR) without a person with limited legal capacity, if the court has allowed the guardian to act in this particular area.²³⁶

Article 83 of Latvian law²³⁷ requires the verification of the legal capacity of the person, thus if a person has deprived legal capacity, a person cannot act as a party in the Deed. Additionally a person cannot act as a party in the Deed, if a person has limited legal capacity.²³⁸

Therefore there is a conflict between younger general norm (Civil law) and older special norm (Latvian law), in such cases the older special norm should be implemented,²³⁹ as principle *lex specialis derogat legi generali* (special norm has higher legal force than general norm) has higher legal force than principle *lex posterior derogat legi priori* (younger norm has higher legal force than the older norm).²⁴⁰ The author disagrees that this situation can be solved by limiting rights of persons with mental disabilities, which is contrary to the CRPD. Thus the only possible solution is to map Latvian law with

²³⁴ Article 1405, Civil law of the Republic of Latvia: "In order for a transaction to have legal force, it is necessary that the parties to the transaction have legal capacity and the capacity to act for making such transaction; otherwise the transaction is void."

²³⁵ Likums „Grozījumi Civillikumā”. Anotācija. Pieņemts 29.11.2012., stājies spēkā 01.01.2013., Publicēts „Latvijas Vēstnesis”, 200 (4803), 20.12.2012. Pieejams: <<http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/F81AEAE4B081B277C225794A00253F71?OpenDocument>>[1 October 2015]

²³⁶ Ibid., Pieejams: <<http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/F81AEAE4B081B277C225794A00253F71?OpenDocument>>[1 October 2015]

²³⁷ Article 83, Latvian law: „A sworn notary shall verify the identity, capacity to act and the right of representation of the participants of the notarial deed.”

²³⁸ Interview with Latvian representative.

²³⁹ Krājums dr.habil.iur, professor E.Meļķiņa zin.redakc. Juridiskās metodes pamati. 11 soļi tiesību normu piemērošanā.(2003) Rīga: SIA „Ratio iuris”109.lp.

²⁴⁰ Ibid., 109.lp.

Civil law. Additionally Civil law does not restrict or limit the rights of persons with sensor disability; however their rights are restricted in the Latvian law.

When it comes to the rights of persons with disabilities to act as a party in legal proceedings, then regarding to persons with mental disabilities it is interesting to mention the opinions of scholars. For example, scholars have mentioned regarding Article 72 of Civil procedure law (legal capacity in civil procedure) “people with limited legal capacity can participate in case only to give explanations, however other rights are produced by their representatives. Explanations can give the clearer understanding on the situation, however the request of people with mental disabilities on recognition, amendments in claim is not binding for the court.”²⁴¹ Less strict approach is in comments of the Article 19 of Administrative procedure law on procedural legal capacity, when it is said “that person with limited legal capacity can fulfill the procedural rights and obligations only in the amount of the law and judicial decision. [...]However court will not accept the claim submitted by the person with limited legal capacity.”²⁴²

The author express strong concerns, if the abovementioned reflects the principles of CRPD for the access to the court, therefore additional and more detailed research is needed on persons with disabilities rights to be the party in proceedings (all status and stages), especially on persons with mental disability rights.

Additionally five more articles of Latvian law determine how people with sensor disability can make a Deed.²⁴³ As it can be seen Article 95-99 of Latvian law determine special provisions for persons with hearing and speech disability, letting to use alternative communication tools, additionally to two witnesses. The Latvian law does not set any special norms for persons with vision disability.

²⁴¹ Civilprocesa likums. I daļa 1.-28.nodaļa. (2011) Sagatavojis autoru kolektīvs prof. K.Torgāna zinātniskajā redakcijā. Rīga: Tiesu namu aģentūra., 207.lpp.

²⁴² Administratīvā procesa likuma komentāri. A un B daļa.(2013) Sagatavojis autoru kolektīvs dr.iur.J.Briedes zinātniskajā redakcijā. Rīga: Tiesu namu aģentūra., 311.lpp

²⁴³ Article 95, Latvian law: „95. *A literate deaf person shall read the deed him or herself and tell whether it expresses his or her intent. It shall also be indicated in the deed.*

4.3. The purpose of article 94 of the Notariate law of the Republic of Latvia through the historical development.

The Articles 94 - 99²⁴⁴ of Latvian law have not been modified since Latvian law was adopted in 1993. As mentioned in the previous chapter of the thesis Latvia did not take over a law from Soviet period, and it was renewed with amendments on June 1, 1993,²⁴⁵ but without discussions on the rights of persons with disabilities.

When the original version of Latvian law was drafted, then the State Chancellery Codification division was the only one giving the opinion regarding the persons with disabilities, pointing out that the word “signs” should be deleted (original Article 86, current Article 94), as “there are deaf people who can use sign language for communication, and they can read words from the lips.”²⁴⁶ Thus, it can be seen that the legislature considered the alternative communication ways between persons with disabilities and the notaries. Although alternative communication tools were included in Latvian law, the annotation of Latvian law does not describe the aim of Article 94 of Latvian law at all and the opinion addresses very generally the persons of disabilities, which in the way indicates invisibility of persons with disabilities.

If compared with older Notariate provision²⁴⁷ (adopted in 1914), the norms were less diplomatic in 1914 version than in 1937 Latvian law. Notariate provision determined “not regarding on the wishes of the parties people with vision, hearing, speech and

²⁴⁴ Latvian law: „96. In making a deed an illiterate deaf person in addition to the ordinary witnesses shall also invite a person whom he or she trusts and who is able to communicate with him or her. Such person may be in kinship or affinity with the deaf person but he or she shall meet all the other requirements of Section 86.

97. The sworn notary shall make sure whether the illiterate deaf person understands the signs shown to him or her.

98. A literate dumb person or deaf and dumb person shall read the deed him or herself and with his or her own hand write that he or she has read it and that it expresses his or her intent.

99. When making a deed for an illiterate dumb or deaf and dumb person, in addition to a person who is capable of communicating with him or her in signs, a second person shall be invited to whom these signs are understandable (an interpreter).

This person may be in kinship or affinity with the dumb or the deaf and dumb, but he or she shall meet all other requirements of Section 86.”

²⁴⁵ Latvijas Republikas Augstākās padomes 1993.gada 1.jūnija sēdes stenogramma. http://saeima.lv/steno/AP_steno/1993/st_930601.htm[26 November 2015]

²⁴⁶ Latvijas Republikas Valsts kancelejas Kodifikācijas nodaļa. Viedoklis Nr. 268, Novembris 23 1937. Valsts vēstures arhīvs.

²⁴⁷ Notariate rules (adopted in 1914) were adopted to unify the notariate system in Latvia. Vidzeme, Kurzeme and Zemgale had one notary system, however Latgale had Russian type notary system. In the thesis Notariate rules norms are used to illustrate the development of rights, more detailed analysis will not be provided.

mental disability had to have two witnesses in the Deeds.²⁴⁸ Thus, Notariate provision determined the obligation to have two witnesses if the persons with sensor disabilities were the parties in the Deeds. Additionally Notariate provision said specifically that persons with disabilities cannot have any wishes regarding the number of the witnesses. It was a mandatory norm, which reflected the lack of power and the lack of rights of persons with disabilities.

The Article 94 of Latvian law is also a mandatory norm and does not give the rights to persons with disabilities to choose less than two witnesses. The only difference between the Article 94 and Notariate provision (1914) is that Article 94 does not contain the words “not regarding on the wishes of the parties.” However the meaning is stored the same - persons with sensor disabilities do not have rights to choose, whether they want the witnesses to protect their rights and avoid trickery. Also the number of the witnesses is the same in 1937 Latvian law and in 1914 Notariate provision. Thus, it can be argued that currently in 2016, Latvia regarding the attitude towards persons with sensor disabilities in the notary system follows the norms written not only in 1937, but even in 1914.

Although persons with sensor disabilities were allowed to be parties in the Deeds, Civil law determined that “legal acts where one/ both parties were blind, deaf, with other disabilities, are in force, until it is proven that these persons did not understand the aim of the legal act or the persons were not capable to set their wishes, when the legal act was signed.”²⁴⁹

Therefore persons with sensor disabilities were given the rights to be parties in the Deeds, however they had severe restrictions and additional obligations which did not apply to persons without disabilities. The author believes the aim of the additional obligations for persons with disabilities was the same as it was described in the previous chapter - to ensure legality of the Deed and to protect interests of people with disabilities. Abovementioned was confirmed also by Latvian representative, that the presence of witnesses is protecting the person with disability, as well as a notary.

²⁴⁸ Jurkovska, O., cand.iur., rediģējis prof.dr.jur. V.Bukovskis. Notariāta nolikums. 284.pants. Tulkojums ar pārgrozījumiem, papildinājumiem, paskaidrojumiem un pielikumiem. Rīga: neoficiāls izdevums, 1933., 36.lpp

²⁴⁹ Ibid., 36.lpp

Additionally two witnesses are needed, in case one witness dies, then another one can verify the situation how the Deed was signed.²⁵⁰

Author agrees that both previous mentioned aspects are very important, however current norms do not provide opportunity for the person with sensor and mental disability to be a part of society on equal terms.

Therefore it is possible to talk about unequal attitude towards people with sensor and mental disabilities, which does not correspond to the Article 5 and 12 of CRPD and is not incorporated into Latvian law.

²⁵⁰ Interview with Latvian representative.

Chapter V: Comparative analysis of the norms of

Notariate law of the Republic of Estonia and the Republic of Lithuania

5.1. Rights to be a witness in the notarial deed in Estonia and in Lithuania

The comparative analyze will be divided into two sections: persons with the disabilities as the witnesses in Estonian and Lithuanian law and persons with disabilities as the parties in the Deeds in Estonian and Lithuanian law. Additionally each section will analyze terminology used in Estonian and Lithuanian law, analyze the use of special communication ways and tools and do the comparison with Latvian law, CRPD and CDT.

Estonian law and Lithuanian law set different approach for the normative regulation of a notary system. Estonian law regulates all actions of a notary, while Lithuania has divided it between Lithuanian law²⁵¹ and Lithuanian Civil Code.²⁵²

According to Lithuanian law only the persons who are beneficiaries of notarial acts cannot act as witnesses in Deed in Lithuania.²⁵³ There are no other restrictions for persons to become witnesses. Lithuanian notaries had not have problems with implementation of the norms regarding persons with disabilities as witnesses, therefore Lithuanian Chamber of Notaries has not issued any recommendations or explanations regarding this question, however “it should be assumed that a witness should be able to sign the document, understand the circumstances, etc.”²⁵⁴

Article 47 of Lithuanian law is the only article referring to the witnesses, and it determines the possibility to have witnesses only in wills. Lithuanian law does not set any need to have witnesses in other Deeds. Therefore it can be concluded that the witness institution in Lithuania is not as popular as the witness institution in Latvia. Additionally Lithuanian representative agrees that it would be theoretically possible for persons with disabilities to act as witnesses in Deeds where persons with disabilities are parties, however “practically it depends on a specific situation.”²⁵⁵ As Lithuanian law

²⁵¹Law on the Notarial Profession. Republic of Lithuania. Adopted 15 September 1992. No 1-2882. Retrieved from: <<http://www.notarurumai.lt/index.php/en/legal-acts/law-on-the-notariate>>[1 November 2015]

²⁵² Civil Code of the Republic of Lithuania. Adopted 2011.06.21. No VIII-1864. Retrieved from: <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=404614>[1 November 2015]

²⁵³ Law on the Notarial Profession. Republic of Lithuania. Adopted 15 September 1992. No 1-2882. Article 47. Retrieved from: <<http://www.notarurumai.lt/index.php/en/legal-acts/law-on-the-notariate>>[1 November 2015]

²⁵⁴ Interview with Lithuanian representative.

²⁵⁵ Interview with Lithuanian representative.

does not refer to persons with disabilities as witnesses, then evaluation of the used terminology and alternative communication tools is not needed.

Estonian law has special division – Division 4 - which describes the rights and obligations on the persons with disabilities in the Deed. Division 4 consist of five articles, from which the first four describe persons with disability possibilities to be a party in the Deed, and the last one indicates the rights of persons with disabilities to act as the witnesses in the Deed. The author will analyze the rights of persons with disabilities to be the witnesses in the Deed first.

Article 27²⁵⁶ of Estonian law consists of 9 paragraphs.²⁵⁷ The 1st -5th paragraph of Article 27 forbids persons who can be beneficiaries or could have influence legality of the Deed to be witnesses. The abovementioned restriction is legitimate as it ensures that the legality of the Deed is beyond a dispute. The 6th -9th paragraph of Article 27 forbids persons to act as the witnesses due their abilities. The 6th and 7th paragraph of Article 27 will be analyzed more detailed as abovementioned parts refer to the persons with disabilities.

The paragraph 6 of Article 27 determines that persons with restricted active legal capacity cannot act as witnesses in Deeds in Estonia. The legally binding²⁵⁸ version of Estonian law in Estonian language uses the same terminology - “on piiratud teovõimega”²⁵⁹ - as in English. Thus it is possible to rely on English version in further analyses. The term “restricted” means “limited in extent, number, scope, or action.”²⁶⁰ According to Estonian Civil Code Act, Article 7 legal capacity can be passive and active. Passive legal capacity is „the capacity to have civil rights and perform civil

²⁵⁶Article 27, *The Notarization Act of the Republic of Estonia*:

- 1) persons who are parties to the transaction or represent a party;
- 2) persons who gain benefit from the transaction to be authenticated;
- 3) a person who is married to the notary;
- 4) a person who is the direct blood relative, brother or sister, half-brother or half-sister of the notary or his or her spouse;
- 5) employees of the notary's office;
- 6) persons with restricted active legal capacity;
- 7) persons who are unable to hear, speak or see sufficiently;
- 8) persons who are unable to write;
- 9) persons who are not sufficiently proficient in the language in which the notarial instrument is prepared.

²⁵⁷ Notarisation Act.Republic of Estonia. In force from 01.01.2014., in force until 31.12.2019. Article 27. Retrieved from: <<https://www.riigiteataja.ee/en/eli/511112013005/consolide>>[1 November 2015]

²⁵⁸ *Translations is unofficial text, which is not legally binding.* Riigi Teataja. Retrieved from: <<https://www.riigiteataja.ee/en/>>[12 April 2016]

²⁵⁹ Tõestamiseseadus. Vastu võetud 14.11.2001, RT I 2001, 93, 564, jõustumine 01.02.2002, osaliselt 14.12.2001. a. , 27. Retrieved from: <<https://www.riigiteataja.ee/akt/110032016013>>[1 November 2015]

²⁶⁰ Oxford dictionaries. Language matters. Retrieved from: <http://www.oxforddictionaries.com/us/definition/american_english/restricted>[1 November 2015]

obligations. All natural persons have uniform and unrestricted passive legal capacity.²⁶¹ Active legal capacity of „a natural person is the capacity to enter independently into valid transactions.“²⁶² According to Civil Code Act, Article 8, part two: “Persons who have attained 18 years of age (adults) have full active legal capacity. However legal capacity can be restricted for persons who due to mental illness, mental disability or other mental disorder are permanently unable to understand or direct their actions. The restricted active legal capacity of an adult affects the validity of the transactions entered into by the person only to the extent in which he or she is unable to understand or direct his or her actions.”²⁶³

Thus firstly, the active legal capacity in Estonia, the same as in Latvia, can be limited only to the persons with mental illness and mental disability. Active legal capacity cannot be restricted due the physical or sensor disability. Secondly, the active legal capacity can be restricted only in those areas where a person with mental disability cannot understand or lead his/her actions. Moreover Estonian report “Implementation of the Convention on the rights of persons with disabilities. Initial Report submitted by State party under Article 35 of the Convention” (hereinafter- Estonian report) defines “the restrictions of legal capacity is not determined based on the existence of a disability or any diagnosis, but rather solely based on the ability of a person to comprehend the nature and consequences of his or her actions. Under no circumstances can the active legal capacity of a person be restricted merely because the person has a physical, sensory, mental or intellectual impairment.”²⁶⁴ However Estonian law sets the prohibition solely based on disability, rather than evaluation of ability, and Estonian representative mentions that if a persons has a legal guardian, a person cannot act as witness.²⁶⁵ Although Estonian report emphasizes that persons with disabilities in

²⁶¹ General Part of the Civil Code Act. The Republic of Estonia. Passed 27.03.2002., RT 2002, 35, 216, entry into force 01.07.2002., Retrieved from:<
<https://www.riigiteataja.ee/en/eli/ee/528032014002/consolide/current>>[1 November 2015]

²⁶² Ibid., Retrieved from:< <https://www.riigiteataja.ee/en/eli/ee/528032014002/consolide/current>>[1 November 2015]

²⁶³ Ibid, Retrieved from:< <https://www.riigiteataja.ee/en/eli/ee/528032014002/consolide/current>>[1 November 2015]

²⁶⁴ The Republic of Estonia (2015) Implementation of the Convention on the rights of persons with disabilities. Initial Report submitted by State party under Article 35 of the Convention. Estonia. Article 12. Retrieved at:
 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEST%2f1&Lang=en>[21 February 2016]

²⁶⁵ Interview with Estonian representative.

Estonia have full procedural “legal capacity, unless this has been explicitly restricted by a court of law,”²⁶⁶ the author disagrees with the statement, considering that persons with disabilities cannot act as witnesses in Deeds, and Estonian law does not refer to restriction to act as witnesses, if it is denied by the court. Therefore it contradicts Estonian report.

The situation in Latvia and Estonia is the same: restrictions of active legal capacity are set in Estonian Civil Code Act (Latvian Law on Civil Proceedings) additionally pointing out that active legal capacity of persons with mental disability can be restricted only by the court and in particular areas, however Estonian law (also Latvian law) restricts active legal capacity of persons with mental disability due disability to act as witness in all areas.

The part 7 of the Article 27 of Estonian law, the same as Latvian law, forbids the persons with sensor disability – who cannot see, speak or hear sufficiently- act as witnesses in the Deeds. The legally binding version of Estonian law uses the same terminology as in translated version “ei ole võimeline piisavalt kuulma, kõnelema või nägema,”²⁶⁷ thus it is possible to rely on English version of Estonian law. On one hand Article 27 of Estonian law does not use the terminology of CRPD and CDT, however the terminology used is not offensive when referring to limitation of particular ability. On other hand Estonia the same as Latvia sets three degrees of disability –profound, severe and moderate.²⁶⁸ In practice notaries do not take degrees of disability into consideration, and thus the notaries do not automatically deny a person with disability as a witness. Estonian law does not mention disability as the criterion of restriction, but uses the word “sufficient” which broadens possibility to deny the rights of person to be witness regardless of disability and can set the restrictions due the health condition. In practice a notary evaluates if a person speak, hear or see sufficiently, while communicating with a person.²⁶⁹ The main goal is to clarify if a person can understand a

²⁶⁶ The Republic of Estonia (2015). Implementation of the Convention on the rights of persons with disabilities. Initial Report submitted by State party under Article 35 of the Convention. Estonia. Article 13. Retrieved at: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEST%2f1&Lang=en>[21 February 2016]

²⁶⁷ Tõestamisseadus. Vastu võetud 14.11.2001, RT I 2001, 93, 564, jõustumine 01.02.2002, osaliselt 14.12.2001. a. , 27. Retrieved from: <<https://www.riigiteataja.ee/akt/110032016013>>[1 November 2015]

²⁶⁸ Social benefits for Disabled Persons Act. The Republic of Estonia. Passed 27.01.1999., RT I 1999, 16, 273, Retrieved from: <<https://www.riigiteataja.ee/en/eli/ee/501022016021/consolide>>[18 March 2016]

²⁶⁹ Interview with Estonian representative.

notary.²⁷⁰ Therefore the “sufficiency” depends on the notary’s understanding of the needs of person with disabilities and alternative ways how to communicate to persons with disabilities. Additionally Estonian representative pointed out that persons with sensor disabilities cannot act as witnesses, only if they cannot understand the situation sufficiently.²⁷¹ Thus, although Latvian law and Estonian law sets similar restrictions for persons with sensor disabilities to act as witnesses, Estonian notaries interpret the norm more broadly, therefore giving more rights to persons with disabilities.

If the rights to be witness are analyzed in systemic perspective, then persons with disabilities have limited rights to act as witnesses in other proceedings in Estonia and Lithuania. For example, Code of Civil proceeding of the Republic of Estonia determines; that the court has rights to refuse a person as a witness due the person’s physical or mental disability, if the person cannot comprehend the relevant facts.²⁷² Code of Civil Procedure of the Republic of Lithuania forbids the same only “due to physical or mental defects.”²⁷³ The Code of Administrative Court procedure of the Republic of Estonia does not set direct rules for witnesses,²⁷⁴ while Lithuanian Administrative procedure law forbids summoning people with disabilities as witnesses the same as in Civil proceeding.²⁷⁵ Code of Criminal Procedure of the Republic of Estonia²⁷⁶ does not forbid summoning as a witness a person with mental or physical disability, but allows “apply less stressful procedures towards persons with disabilities.”²⁷⁷ Estonia admits that persons with disabilities have full procedure capacity, unless it is restricted by the law.²⁷⁸ The author believes that every restriction

²⁷⁰ Interview with Estonian representative.

²⁷¹ Interview with Estonian representative

²⁷² Code of Civil Procedure. Republic of Estonia. Passed 20.04.2005., rt i 2005, 26, 197, Article 256. Retrieved from: <<https://www.riigiteataja.ee/en/eli/ee/514032016001/consolide>>[18 March 2016]

²⁷³ Code of Civil Procedure of the Republic of Lithuania. 28 february 2002. Approved by decree No.IX-743, Article 189. Retrieved from: <www.antstoliurumai.lt/download.php/fileid/3994>[18 March 2016]

²⁷⁴ Code of Administrative Court Procedure. The Republic of Estonia. Passed 27.01.2011., RT I, 23.02.1011, 3, entry into force 01.01.2012., Retrieved from: <<https://www.riigiteataja.ee/en/eli/ee/530032015001/consolide>>[18 March 2016]

²⁷⁵ Law on the amendment of the law on Administrative proceedings. Republic of Lithuania. 14 January 1999 NO VIII-1029., adopted 09.19.2000. Article 60. Retrieved from: <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=162936>[18 March 2016]

²⁷⁶ *Lithuanian report does not specify rules regarding the rights to witnesses in Criminal proceedings.*

²⁷⁷ Code of Criminal procedure. The Republic of Estonia. Passed 12.02.2003. RT I 2003, 27, 166, entry into force 01.07.2004., Retrieved from: <<https://www.riigiteataja.ee/en/eli/ee/527012016001/consolide>>[18 March 2016]

²⁷⁸ Implementation of the Convention on the rights of persons with disabilities. Initial Report submitted by State party under Article 35 of the Convention. Estonia. Article 12. Retrieved at:

gives the possibility to interpret the norm very narrow, thus narrowing the rights of persons with disabilities. Therefore it would be useful to reevaluate previous mentioned norms. Lithuanian report “Consideration of report submitted by State parties under Article 35 of Convention. Initial report of State parties due 2012“ (hereinafter-Lithuanian report) points out the equality principle which should be ensured in all proceedings, regardless of persons disability, nevertheless Lithuanian report mentions restrictions for persons with disabilities to witnesses in proceedings.²⁷⁹ Thus all Baltic States have similar restrictions regarding the rights of persons with disabilities to be witnesses in proceedings. Therefore it can be necessary for Estonia and Lithuania, the same as for Latvia, to evaluate the procedural norms regarding the persons with disabilities and CRPD.

Regarding the alternative communication tools Estonian report mentions the possibility to use Estonian sign language in communication with notaries.²⁸⁰ Additionally Estonian report determines that alternative communication tools (communication in writing, sign language translator) are used in proceedings if a participant in a proceeding is with hearing or speech disabilities.²⁸¹ The author believes that the alternative communication tools can be used in communication with notaries regardless of the status of a person (party or witness) and also regardless of disability (not only persons with hearing disabilities).

When compared all three Baltic States, persons with mental disabilities are excluded the most from the notary system and the legal system in general. Latvian and Estonian law restricts persons with mental disabilities to act as witnesses in notary system and in other proceedings. Thus Estonian approach cannot be transformed into Latvian law. Lithuanian procedural laws set more restrictions for persons with mental disabilities

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEST%2f1&Lang=en>[21 February 2016]

²⁷⁹ Consideration of report submitted by State parties under Article 35 of Covenant. Initial reports of State parties due 2012. Lithuania. Date received: 18 september 2012. Article 12. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/232/07/PDF/G1423207.pdf?OpenElement>>[21 February 2016]

²⁸⁰ Implementation of the Convention on the rights of persons with disabilities. Initial Report submitted by State party under Article 35 of the Convention. Estonia. Article 2. Retrieved from: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEST%2f1&Lang=en>[21 February 2016]

²⁸¹ Ibid., Retrieved from: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEST%2f1&Lang=en>[21 February 2016]

than Lithuanian law. Lithuanian law does not set any restrictions for persons with mental disabilities to act as witness in Deed; however Lithuanian law also determines the need to have witnesses only in the wills. This aspect marks the difference between Latvian law and also Estonian law where the institute of the witnesses is stronger, applies more frequently and is more detailed described. Therefore Lithuanian experience cannot be transformed into Latvian law. The author believes restrictions for particular groups are needed to provide the legality of a Deed, for example, beneficiaries of the Deed, close relatives or employees of a notary etc.

When Estonian and Latvian law is compared (Article 86), then it is possible to conclude none of the laws uses CRPD terminology. However Estonian law uses less offensive terminology than Article 86 of Latvian law. Estonian law the same as Latvian law does not put any restrictions for persons with other types of disabilities (only sensor/ mental disability), therefore using the analogy it can be concluded that the reason of restriction is the communication barrier between persons with sensor disabilities and notaries. Latvian law and Estonian law sets similar regulation on limitation persons with sensor disabilities to act as witnesses, however implementation is different, when Estonian notaries evaluates person's abilities and do not forbid them to act as witnesses automatically. Nevertheless Estonian experience cannot be used as example in Latvia, as Article 86 of Latvian law is more firm than Estonian law and even if notaries will be trained to use Article 86 in broader way, there still will be possibility that Article 86 can be used in narrow understanding.

None of Notaries law describes alternative communications tools or forms to persons with disabilities, even Lithuanian law which theoretically allows persons with disabilities to act as witnesses. The author believes that persons with disability have rights, but their rights should be protected against unlawful actions. Therefore it would be necessary to set the regulation on alternative communication tools which can be used by the notary to ensure that a person with disability can fulfill his/ her rights. Therefore neither of Baltic States Notariate laws can be used as the good practice example regarding the rights of persons with disabilities to be witnesses in Deeds.

5.2. Persons with disabilities rights to be a party in the notarial deed in Estonia and in Lithuania

The Article 23 of the Estonian law is the main article which regulates the rights and obligations for persons with disabilities as the parties in the Deeds. The Article 23 in the title of a norm uses terms “deaf, dumb or blind” (“kurt, tumm ja pime²⁸² osaleja”),²⁸³ while in the text of a norm the terms “does not hear, speak or see sufficiently”²⁸⁴ (“piisavalt ei kuule, ei kõnele või ei näe²⁸⁵”)²⁸⁶ are used. Therefore the same as Latvian law, Estonian law in a title of a norm uses more offensive terms for people with disabilities, which does not reflect the terminology of CRPD and CDT. If compared with Lithuanian law, then the Article 32 of Lithuanian law uses terms like “physical defects” or “disease”²⁸⁷ (fizinį trūkumą, ligos ar dėl kitų priežasčių²⁸⁸)²⁸⁹ and Article 5.29 of Civil Code of the Republic of Lithuania uses terms “physical disabilities, illness or any other reasons”²⁹⁰ when describing persons with disabilities, thus the Lithuanian law (also Civil Code) does not use the terminology of CRPD, however used terminology, unlike in Latvian or Estonian law, is not offensive towards persons with disabilities.

Estonian law, the same as Latvian law, determines the specific norms only to persons with sensor disabilities and persons who are not able to write.²⁹¹ Persons with mental/intellectual disabilities cannot be a party of a Deed in Estonia, according to Article 4

²⁸² Analogical terms are used in Estonian and English version. Thus it is possible to use English version for analyses.

²⁸³ Tõestamisseadus. Vastu võetud 14.11.2001, RT I 2001, 93, 564 jõustumine 01.02.2002, osaliselt 14.12.2001. a., 23. Retrieved from: <<https://www.riigiteataja.ee/akt/110032016013>>[12 April 2016]

²⁸⁴ Notarisation Act. Republic of Estonia. Passed 14.11.2001., RT I 2001, 93, 564, Entry into force 01.02.2002., Article 23. Retrieved from: <<https://www.riigiteataja.ee/en/eli/511112013005/consolide>>[1 November 2015]

²⁸⁵ Analogical terms are used in Estonian and English version. Thus it is possible to use English version for analyses.

²⁸⁶ Tõestamisseadus. Vastu võetud 14.11.2001, RT I 2001, 93, 564 jõustumine 01.02.2002, osaliselt 14.12.2001. a., 23. Retrieved from: <<https://www.riigiteataja.ee/akt/110032016013>>[12 April 2016]

²⁸⁷ Law on the Notarial Profession. Republic of Lithuania. Adopted 15 September 1992. No 1-2882. Retrieved from: <<http://www.notarurumai.lt/index.php/en/legal-acts/law-on-the-notariate>>[1 November 2015]

²⁸⁸ Analogical terms are used in Lithuanian and English version. Thus it is possible to use English version for analyses.

²⁸⁹ Lietuvos Respublikos Notariato istatymas. 1992 m. rugsėjo 15 d. Nr. I-2882, Vilnius. 32. Retrieved from: <<http://www.notarurumai.lt/index.php/lt/notar%C5%B3-r%C5%ABmai/teis%C4%97s-aktai/notariato-%C4%AFstatymas>>[12 April 2016]

²⁹⁰ Article 5.29. Civil Code of the Republic of Lithuania: „In the event where the testator due to his physical disabilities, illness or any other reasons is unable himself to sign the will, it may be signed upon the testator’s request and in the presence of the notary or any other official authorised to attest the will by another legally capable natural person who is not a testate successor, by concurrently indicating the reason for which the testator is not able to sign the will himself. Witnesses shall also put their signatures in the will.”

²⁹¹ Notarisation Act. Republic of Estonia. In force from 01.01.2014., in force until 31.12.2019. Article 11. Retrieved from: <<https://www.riigiteataja.ee/en/eli/511112013005/consolide>>[1 November 2015]

and 11 of Estonian law, which allows “a notary to refuse authentication, if a notary is convinced that a party lacks the necessary active legal capacity or the capacity to exercise will.”²⁹² Author would like to point out that according to above mentioned in Estonian report only a court can limit the active legal capacity, not a notary. Persons with other types of disabilities (rather than sensor disabilities) do not have special regulation on their rights to be parties in the Deeds.

Lithuanian law does not divide persons with disabilities into two categories, unlike Estonian and Latvian law: people with speech, hearing, vision disability and people who cannot sign. Lithuanian law and Lithuanian Civil Code does not define particular disability (hearing, speech or vision), which can be considered as the limitation for particular notarial actions.²⁹³ Author believes that such approach reflects better the principles of CRPD, because not all persons with vision, hearing or speech disability will need assistance.

However Lithuanian law, the same as Estonian and Latvian law, pays special attention to the active legal capacity of a party, which is understandable because of the Latin-type Notariate system where the active legal capacity is one of the cornerstones to provide legality of the Deed. According to Lithuanian report legal capacity in Lithuania can be restricted if “a person as a result of mental illness or imbecility is not able to understand the meaning of his actions.”²⁹⁴ However, if “a person does not understand the meaning of his actions, and there is psychiatrist’s conclusion on mental disease or disability, it does not automatically mean that a court should declare a person incapable.”²⁹⁵ According to Lithuanian report “people with disabilities have the same rights as other persons as regards ownership or inheritance, control of their own financial affairs, equal

²⁹² Notarisation Act. Republic of Estonia. Passed 14.11.2001., RT I 2001, 93, 564, Entry into force 01.02.2002., Article 11, Retrieved from: <<https://www.riigiteataja.ee/en/eli/511112013005/consolide>>[1 November 2015]

²⁹³ Law on the Notarial Profession. Republic of Lithuania. Adopted 15 September 1992. No 1-2882. Retrieved from from: <<http://www.notarurumai.lt/index.php/en/legal-acts/law-on-the-notariate>>[1 November 2015]

²⁹⁴ The Republic of Lithuania (2012) .Consideration of report submitted by State parties under Article 35 of Conveiton. Initial reports of State parties due 2012. Lithuania. Date received: 18 september 2012. Article 12. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/232/07/PDF/G1423207.pdf?OpenElement>>[21February 2016]

²⁹⁵Ibid., Article 12. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/232/07/PDF/G1423207.pdf?OpenElement>>[21February 2016]

access to banks and loans according to Article 12 of CRPD.”²⁹⁶ Author believes that Lithuanian report contradicts the Lithuanian law, which forbids persons without active legal capacity to be a testator.

Therefore all Baltic States have limitations regarding the rights of persons with mental disability. The author agrees with FRA and UN that implementation of Article 12 of CRPD is the most challenging.

When analyzing the rights or obligations to have witnesses in the Deeds when a party is a person with disability, then it is possible to conclude that systems are very different in each Baltic State. As mentioned in previous chapter, two witnesses are obligation when a person with disability is a party in a Deed in Latvia. Estonian law sets the rights to choose one witness if a party has disability, but only if the parties agree to have a witness.²⁹⁷ Therefore a person with sensor disability has rights and a person can evaluate his/ her abilities to understand a Deed. According to Estonian law the obligation to have one witness, is only in case when a party is not able to write.

Lithuanian law²⁹⁸ and Civil Code²⁹⁹ of the Republic of Lithuania set an obligation of two witnesses only in case of a will and only if a testator due to his physical disabilities, illness or any other reasons is unable to sign himself. However Article 47 of Lithuanian law does not define which person can decide if the person with disability needs assistance. In practice a notary encourages a person to take assistance.³⁰⁰

The author believes that giving the rights to person with disability to choose is the best way to implement the principles of CRPD. Therefore the State would consider a person

²⁹⁶ The Republic of Lithuania (2012) .Consideration of report submitted by State parties under Article 35 of Covenant. Initial reports of State parties due 2012. Lithuania. Date received: 18 september 2012. Article 12. Retrieved from: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/232/07/PDF/G1423207.pdf?OpenElement>>[21February 2016]

²⁹⁷ Article 23. Estonian law:“ *If a party, according to him or her or according to the observations of a notary, does not hear, speak or see sufficiently, the notary shall involve a witness in the authentication, unless all parties waive the right to have a witness involved. The notary shall indicate such facts in the notarial instrument.*”

²⁹⁸ Article 47, Lithuanian law. „In the case specified in Article 5.29 of the Civil Code, a notary must attest wills in the presence of at least two witnesses. A notary may attest wills and other transactions in the presence of witnesses where the presence of witnesses is requested by the testator or a party to the transaction.“

²⁹⁹ Article 5.29. Civil Code of the Republic of Lithuania: „*In the event where the testator due to his physical disabilities, illness or any other reasons is unable himself to sign the will, it may be signed upon the testator’s request and in the presence of the notary or any other official authorised to attest the will by another legally capable natural person who is not a testate successor, by concurrently indicating the reason for which the testator is not able to sign the will himself. Witnesses shall also put their signatures in the will.*”

³⁰⁰ Interview with Lithuanian representative.

with disabilities as a subject of rights, rather than object of charity, which one of the main principles of CRPD. Therefore if compared Estonian law and Lithuanian law, although Lithuania have an obligation for witnesses only in one situation, it is still an obligation, while Estonian approach represents principles of CRPD better, because a person has rights to choose in all Deeds.

The third element which should be compared is the alternative communication tools and ways in a Deed. Estonian law, the same as Latvian law, sets the alternative communication ways for a person with hearing disability, for example, communication through writing. Estonian law, the same as Latvian law, does not specify any alternative communication tools for people with vision disability, which can be explained by the fact that a notary reads loudly a Deed for both parties. In case if a person is not able to write, then a witness is signing for a person, which is similar requirement as in Lithuanian law. Estonian law determines the obligation for a representative who can communicate with a party if a party is not able to speak, hear or write. However in this situation parties still have rights to choose, if they need a witness in a Deed. The same as in Latvian law, also in Estonian law a person who can communicate with a person with disability (translator) does not have any liability.

Lithuanian law, unlike Latvian and Estonian law, does not have any other specific tools mentioned regarding to people with sensor disabilities.

If compared Notariate laws of all three Baltic countries, it is possible to conclude that firstly, Baltic States do not use the terminology of CRDP in Notary laws, when referring to persons with disabilities. Secondly, Estonian and Latvian laws are more alike regarding the structure and content of norms on persons with disabilities, than Lithuanian law. Thirdly, Latvian law restricts persons with disabilities rights the most compared with other Baltic States, as persons with disabilities in Latvian law have only obligations, not rights. Thus Latvian law should shift away from medical understanding of persons with disabilities to human rights understanding. The author believes that Estonian law reflects the CRPD and also CDT principles more: for example, Estonian law gives a person with disability rights to choose a witness and rights to deny a witness, thus considering a person with disability as a subject of rights and giving a power according to CDT principle. The rights to choose a witness can protect a person

with sensor disability from unlawful actions. Additionally it also ensures the legality of a Deed, because the notary can ascertain the will of the parties.

Author considers the Lithuanian law approach too two-sided. On one hand there is no regulation on witnesses, which can lead to violation of rights for a person with disabilities as a party; on other hand there is an obligation to have two witnesses for a person with disability when a person with disability wants to draft the will. The author believes that “the rights to choose” approach or understanding that a person is a subject of rights reflects the principles of CRPD the best. Therefore Estonian law is more flexible and allows each person to protect its rights the best.

Unfortunately Estonia and Lithuania has the same restrictions for persons with mental disabilities in Deeds as Latvia. Therefore Latvia should concentrate more on UN comments on Article 12 of CRPD, when incorporating the principles in Latvian law.

Chapter VI: Possible improvements in Notariate law of the Republic of Latvia in the light of CRPD

Persons with disabilities rights to act as witnesses in the notarial deed

According to conclusions from previous chapters,³⁰¹ it is necessary to make significant amendments into Latvian law regarding the terminology, the rights of persons with sensor/ mental disabilities and alternative communication ways and tools which can be used to protect persons with disabilities. The change of terminology is the easiest, as the terms “the deaf, the dumb and the blind” of Latvian law does not reflect the terminology used in CRPD and CDT. It would be necessary to use terms “person with hearing disability,” “person with speech disability” and “person with vision disability” in Latvian law. However terminology change only is not efficient, and thus also amendments in Article 86, 94 of Latvian law and respective norms of Civil procedure law and Administrative procedure law must be made at the same time. The author believes that the hardest is to ensure the rights of persons with sensor/ mental disabilities to be witnesses, as historically these groups did not have such rights. The improvements suggested below are based on CRPD principles only, as comparative approach did not give satisfactory results.

a)The part 1 of Article 86.³⁰² *The following may not act as witnesses to a notarial deed of the Latvian law should be read as follows:*

“1) illiterates, minors;”

The abovementioned amendment would set the equal attitude towards persons with mental/sensor disabilities and persons with other types of disabilities, as well as equal attitude between persons with mental/ sensor disabilities and persons without disabilities, as Article 5 of CRPD binds the State to ensure the equality and non-discrimination principle towards persons with disabilities. Additionally the Article 12 and 13 of CRPD would be incorporated into Latvian law, because persons with mental

³⁰¹ *The chapter will include observations and conclusions from previous chapters.*

³⁰² *Article 86, Latvian law: The following may not act as witnesses to a notarial deed:*

1) illiterates, minors and those who are unable to correctly and completely comprehend and certify the deed due to physical or mental deficiencies, namely those with mental impairments, the deaf, the dumb and the blind;

disabilities would have possibility to use their legal capacity, and the amendments would give the rights to be witnesses for persons with sensor/ mental disabilities.

b) Article 84 of Latvian law³⁰³ should be read as follows:

“Deeds may be made in the presence of witnesses or without them (Section 1474 of The Civil Law).

When performing notarial activities in the cases indicated in Section 72, the presence of two witnesses shall be required; these witnesses may also certify the identity of the participants of the deed (Section 76).

If the person with sensor disability is a witness in the notarial deed, then the person with sensor disability can invite, if needed, a person who can assist in communication with a notary and the parties. The person who can communicate with the person with deficiencies can be held criminally liable under the Criminal law for the refusal to communicate or knowingly incorrect communication.

Person with limited active legal capacity can be a witness in those deeds and on those issues where the person’s active legal capacity is not limited.”

The abovementioned amendments stipulate several aspects.

Firstly, equality principle and non-discrimination principle (Article 5, 12 of CRPD) towards persons with sensor disabilities and persons with mental disabilities would be incorporated in Latvian law.

Secondly, information on alternative communication tools will be included into the norm, thus, the practitioners distinctly will understand that persons with sensor or mental disabilities can participate in proceedings. As it was mentioned before the current norms are not clear enough. Thus the author believes that a norm needs to ensure the coherent implementation. Persons with sensor disability will have rights (giving the power according to CDT) to choose, if additional assistance would be needed in communication with a notary. Moreover assistants (translators etc.) would have criminal liability to ensure the rights of person with sensor disability and legality of a Deed.

³⁰³ Article 84 Latvian law: „Deeds may be made in the presence of witnesses or without them (Section 1474 of The Civil Law).

When performing notarial activities in the cases indicated in Sections 72 and 94, the presence of two witnesses shall be required; these witnesses may also certify the identity of the participants of the deed (Section 76).”

Thirdly, the author offers to use a new approach to ensure the rights of persons with mental disabilities. UN suggests that legislation should take more human rights approach and “the regimes where a guardian makes decision on behalf of a person must be replaced by systems which respect the person’s autonomy, will and preferences”³⁰⁴ and individual assessment should be made.³⁰⁵

As the Civil procedure law of the Republic of Latvia determines the individual evaluation of each mentally and intellectually disabled person regarding the active legal capacity, then Latvian law should respect the individual evaluation and the legal effect of limitation of active legal capacity. Therefore a person with limited active legal capacity should be allowed to act as a witness in those areas where the legal capacity is not limited. The author believes that this approach should be taken into consideration when drafting the amendments in Latvian law.

At the same time the author understands that the society (including legislators) might not be ready to admit the rights and needs of persons with mental and intellectual disability. The essential part of the society in Latvia considers that persons with mental and intellectual disabilities shall not participate in public life at all (respectively 31% and 25%).³⁰⁶ At the same time society (4-5 %) considers that persons with other types of disabilities – movement, hearing, vision disability - should not participate at all in public life.³⁰⁷ Thus the author doubts that any changes in legislation or in practice will take place regarding the rights of persons with mental disabilities.

c)As concluded before the Article 106 of Civil procedure law and Article 163 of Administrative procedure law does not correspond the Article 13 of CRPD, which clearly determines the obligation for the State to provide opportunity for persons with disabilities to access to justice, including to be a witness in proceedings. The Article 13

³⁰⁴ European Union Agency for Fundamental rights. (2015) *Fundamental rights: challenges and achievements in 2014. Annual report 2014*. Publications Office of the European Union. 31.p.

³⁰⁵ Shnit D. (2003) *When to Take Disabilities into Account*. The Human rights of persons with intellectual disabilities. Ed.by S.S.Herr, L.O.Gostin, H.H.Koh. Oxford University Press. 251.p.

³⁰⁶ Latvijas Republikas Tiesībsarga birojs. (2014) Pētījums „Latvijas iedzīvotāju aptauja personu par invaliditāti tiesībām“. Pieejams: <http://www.tiesibsargs.lv/files/content/Petijumi/ANO_invaliditates_konvencija_Latvijas_iedzivotaju_aptauja_2014_pielikums_2.pdf>[21 Februāris 2016]

³⁰⁷ Ibid., Pieejams: <http://www.tiesibsargs.lv/files/content/Petijumi/ANO_invaliditates_konvencija_Latvijas_iedzivotaju_aptauja_2014_pielikums_2.pdf>[21 Februāris 2016]

of CRPD does not specify or limit proceedings, therefore it can be concluded that Latvia has to ensure that persons with disabilities can act as witnesses in all proceedings (civil, criminal and administrative). If Latvia would allow people with disabilities to act as the witnesses, then also the Article 5 of CRPD would be fulfilled in regarding to equal access to justice. Therefore amendments in Civil procedure law and Administrative procedure law are needed.

c1)The author offers to delete the paragraph 3 of Section 106 of Civil procedure law³⁰⁸ and supplement the Civil procedure law with Section 106.¹ Persons with disabilities as witnesses:

“Person with limited active legal capacity can be summoned as a witness in those areas and on those issues where the active legal capacity of a person is not limited.

If a person with physical or mental deficiencies is summoned as a witness, the court provides a person who can communicate with the person with deficiencies, if necessary. The person who can communicate with the person with deficiencies can be held criminally liable under the Criminal law for the refusal to communicate or knowingly incorrect communication.

The court should provide reasonable communication tools for person with sensor disability, if necessary. ”

c2)The author offers to delete the paragraph 4 of Section 163 of Administrative procedure law³⁰⁹ and supplement the Administrative procedure law with Section 163.¹ Persons with disabilities as Witnesses:

“Person with limited active legal capacity can be summoned as a witness in those areas and on those issues where the active legal capacity is not limited. If a person with physical or mental deficiencies is summoned as witness, the court provides a person who can communicate with the person with deficiencies.

The person who can communicate with the person with deficiencies can be held criminally liable under the Criminal law for the refusal to communicate or knowingly incorrect communication.

³⁰⁸ Section 106. Civil procedure Law of the Republic of Latvia: “*Persons who may not be Witnesses: 3) persons whose physical or mental deficiencies render them incapable of appropriate assessment of facts relevant to the matter.*”

³⁰⁹ Section 163 , Administrative Procedure Law of the Republic of Latvia: „*Persons who May not be Witnesses: 4) persons whose physical or mental deficiencies render them incapable of correctly perceiving circumstances of significance to the matter.*”

The court should provide reasonable communication tools for person with sensor disability, if necessary.”

d) The author offers to supplement *Section 300*³¹⁰ of Criminal law³¹¹ : “For a person who knowingly commits giving false testimony, opinion, translation, surdotranslation (or any other assistant service for person with disabilities) explanation or application during pre-trial criminal proceedings, in court, to a notary or bailiff, if such act has been committed by a person who has been warned regarding criminal liability for giving false testimony, opinion, translation, explanation or application.”

The amendment protects persons with disabilities in case of a fraud and malice.

Persons with disabilities rights to be a party in the notarial deed

According to conclusions from previous chapters,³¹² it is necessary to make significant amendments into Latvian law regarding the terminology, the rights of persons with sensor/ mental disabilities as a parties, and alternative communication ways and tools which can be used to protect persons with sensor/ mental disabilities. As mentioned before the change of terminology is the easiest, as the terms “the deaf, the dumb and the blind” of Latvian law does not reflect the terminology used in CRPD and CDT. It would be necessary to use terms “person with hearing disability,” “person with speech disability” and “person with vision disability” in Latvian law. The author believes that terminology change must be done simultaneously with other changes. The improvements suggested below are based on CRPD principles and the results of comparative approach.

a) Delete Article 94.³¹³

³¹⁰ Section 300, Criminal law of the Republic of Latvia.: *„For a person who knowingly commits giving false testimony, opinion, translation, explanation or application during pre-trial criminal proceedings, in court, to a notary or bailiff, if such act has been committed by a person who has been warned regarding criminal liability for giving false testimony, opinion, translation, explanation or application, the applicable punishment is temporary deprivation of liberty or community service, or a fine.“*

³¹¹ Krimināllikums. Pieņemts 17.06.1998., stājās spēkā 01.04.1999. Publicēts „Latvijas Vēstnesis,” 199/200 (1260/1261), 08.07.1998., „Ziņotājs,” 300.pants. Pieejams: <<http://likumi.lv/doc.php?id=88966>>[27 November 2015]

³¹² *The chapter will include observations and conclusions from previous chapters.*

³¹³ Article 94, Latvian law: *„ In making deeds in which the deaf, the dumb or the blind participate, the presence of at least two witnesses shall be required. Provisions of Section 90 shall not be applicable to such deeds.“*

Article 94 stipulates unequal attitude between persons with sensor disabilities and persons with other types of disabilities and persons without disabilities, thus it does not reflect the Article 5 of CRPD.

b) Article 96³¹⁴ should read as follows:

“96. In making a deed an illiterate person with hearing disabilities can invite a person whom he or she trusts and who is able to communicate with him or her. Such person may be in kinship or affinity with the person with hearing disabilities but he or she shall meet all the other requirements of Section 86. The person who can communicate with the person with deficiencies can be held criminally liable under the Criminal law for the refusal to communicate or knowingly incorrect communicate.”

As persons with disabilities are considered as more vulnerable party, then criminal liability shall be set for persons who assist persons with disabilities, the same as criminal liability is set for persons who assist (translators) persons without disabilities. Articles 95-99 of Latvian law sets alternative communication tools for persons with hearing and speech disabilities, therefore Latvian law already has incorporated Article 2 of CRPD and additional amendments regarding the person with hearing or speech disabilities are not needed.

c) Add Article 96¹: “In making deed a person with disability has rights to invite one witness.

The notary should use the alternative communication ways and tools to make sure that a person with disability understands the deed.

A person with limited legal capacity can be a party in the deed, in the field where the person’s legal capacity is not limited.”

The abovementioned improvements set several aspects.

Firstly, the amendments give rights to persons with mental disabilities (and limited legal capacity) according to Article 5 and 12 of CRPD. As discussed before, persons with limited active legal capacity are fully restricted to be a party in Deed. The author believes that regulation of Civil law of Latvia should be taken into consideration when a

³¹⁴ Article 96, Latvian law: *„In making a deed an illiterate deaf person in addition to the ordinary witnesses shall also invite a person whom he or she trusts and who is able to communicate with him or her. Such person may be in kinship or affinity with the deaf person but he or she shall meet all the other requirements of Section 86.”*

person with limited active legal capacity wants to be a party in a Deed. Therefore persons with limited active legal capacity should be allowed to participate as a party, in those areas where the legal capacity is not limited. The author believes that suggested approach can be a challenge for the notaries, as the active legal capacity has been the cornerstone of the Deed.

Secondly, the amendments give the rights to persons with sensor/ mental disabilities invite one witness, if they need to. The amendment is taken from comparative analyze, where Estonian law has incorporated “rights to choose a witness” approach. The author considers this approach as good practice example, which should be incorporated in Latvian law. Additionally “rights to choose a witness” approach is applied to persons without disability in Latvia. Thus the equality principle (Article 5 of CRPD) would be incorporated into Latvian law, as the same rule would apply also to persons with sensor/ mental disabilities. The author believes the improvement can be adopted, as similar norm exists and is applied in another country, thus giving the opinion that “rights to choose a witness” approach can protect the notaries, the persons with disabilities as vulnerable party and ensure the legality of the Deed.

The proposed amendments relate to a fuller and more inclusive dimension of equality principle, as the equality shall be ensured not only in theory, but also in practice.

Summary

According to CDT disability is rather “the question of politics and power,”³¹⁵ than incapability due the health factors. CDT argues on giving the power and rights to persons with disabilities, encouraging limiting attitudinal and environmental barriers towards persons with disabilities, therefore shifting from medical understanding of persons with disabilities towards human rights understanding and additionally considering that persons with disabilities are not incapable. Therefore it is only logical that CDT is a theory from the bottom up, as persons with disabilities have been historically excluded group, therefore persons with disabilities know the best what needs, rights and attitude needs to be asked from society and normative acts.

CRPD reflects the abovementioned principles of CDT. Moreover Article 5 of CRPD binds the States to recognize equality of all people and to take the measures to ensure reasonable accommodation.³¹⁶ Article 12 of CRPD binds the States to recognize the passive and active legal capacity of persons with disability.³¹⁷ Article 13 of CRPD binds the States to ensure equal access to justice for persons with disabilities.³¹⁸ The author points out that CRPD sets for the States the obligation, not rights. Therefore if the State has ratified the CRPD, then State should follow the rule of law principle³¹⁹ and incorporate the CRPD in national legislation and in practice.

The CRPD is the first international treaty joined by the EU. Disability related issues take important place in the EU policy documents, for example, European Union Disability strategy 2010-2020 or EU Charter of Fundamental rights where the disability based discrimination is forbidden, however CRPD has to be implemented in MS level and as some EU institutions have admitted (mentioned before), few CRPD articles are very challenging in implementation.

³¹⁵ Pothier D., Devlin R., (2006) *Critical disability theory: Essays in Philosophy, Politics, Policy and Law*. Vancouver. Toronto: UBC Press. 9p.

³¹⁶ United Nation Convention on the Rights of Persons with disabilities. Adopted on 13 December on 2006. The 61st Session of General Assembly, resolution A/RES/61/106. Entered into force 3 May 2008. UN Treaty series, vol.2515, p.3. Article 5. Available from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[19 March 2016]

³¹⁷ Ibid., Article 12. Available from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[19 March 2016]

³¹⁸ Ibid., Article 13. Available from: <<http://www.un.org/disabilities/convention/conventionfull.shtml>>[19 March 2016]

³¹⁹ Rule of law. Available from: <<http://legal-dictionary.thefreedictionary.com/rule+of+law>>[18 March 2016]

Currently Latvian law has major restrictions for persons with sensor and mental disabilities to fully use their rights according to CRPD:

a) terminology used in Latvian law regarding people with sensor/ mental disability is insulting and thus does not reflect nor CRPD terminology, neither CDT.

b) persons with sensor and mental disability cannot act as witnesses in the Deed, while persons without disability or people with other type of disability can act as witnesses (Article 86 of Latvian law), thus providing unequal attitude, which is restricted by CRPD.

Persons with mental/ sensor disabilities cannot act as the witnesses also in civil and administrative proceedings in Latvia, which is against the Article 5 and 13 of CRPD.

c) persons with mental disabilities cannot be a party in a Deed at all.

d) persons with sensor disabilities have additional rules to be a party in a Deed (two witnesses), which leads to additional expenses. Latvian law provides unequal attitude towards persons with sensor disabilities and persons without disabilities or persons with other types of disabilities as other society groups do not have the obligations for the witnesses. Therefore Latvian law sets unequal attitude towards persons with sensor disabilities. Additionally in practice functional testing is applied towards persons with sensor disabilities.

Latvian law reflects more medical understanding on persons with disabilities than human rights understanding; therefore amendments regarding CRPD and CDT are needed.

Although Baltic countries have had similar development of the rights, the norms regulating persons with disabilities rights to be the witnesses or to be parties in the Deeds are various. Estonian law the same as Latvian law limits persons with sensor disabilities to be the witnesses in the Deeds, however in practice the notaries evaluate person's abilities. Estonia gives the rights to person with sensor disability choosing the witnesses in the Deed, while Lithuania determines the obligation of the witnesses only for the wills.

As Estonia has more "rights to choose" approach regarding the rights to be party, then the author believes that abovementioned approach reflect better the principles of CRPD and also lets to protect the best interest of person with sensor disability in Latin-type notary system.

Estonia and Lithuania denies the rights of persons with mental disability in the Deed, the same as Latvia. Therefore it is possible to agree with UN and FRA that Article 12 of CRPD is the most challenging. Moreover giving the pioneering nature of the work the author believes that more detailed research is needed on persons with mental disabilities rights in various proceedings, statuses and levels.

One of the cornerstones of the EU is equality principle and non-discrimination. However the thesis reflected the difference between the theory and reality, showing that although in theory equality principle is set, in practice and also in normative acts persons are divided based on disabilities. Thus, it cannot be concluded that in the EU all persons are equal, as they do not have equal access to their rights. As it can be seen there is still work needed to ensure the equality in the EU level.

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Appendix 1

Interviews of Latvian, Estonian and Lithuanian notaries

Latvia	Estonia	Lithuania
<p>Article 86 of Latvian law forbids persons who are “blind, deaf and mute” to be witnesses in the notarial deed.</p> <p>Article 94 of Latvian law determines the obligation for two witnesses if person who is “blind, deaf or mute” wants to be a party in notarial deed.</p> <p>Disability law sets three disability categories.</p> <p>1.Does a notary take into consideration disability category, if a person with vision, hearing or speech disability wants to be witness or a party? For example, can a person with III category disability be witness? Does the prohibition applies only to the I category disability?</p>	<p>1. Which person is the one who determines if a person cannot speak or hear sufficiently:</p> <p>a) a notary;</p> <p>b) a person with disability (a person itself);</p> <p>c) a party of a notarial deed;</p>	<p>I. Law on the Notarial Profession of the Republic of Lithuania and the Civil Code of the Republic of Lithuania does not set the limitation for people with disability to be witnesses in the notarial deed.</p> <p>1.1.Do people with disabilities (look below) can be witnesses in the notarial deed in practice (please color in bold those who can be witnesses)?</p> <p>a)vision disability;</p> <p>b)hearing disability;</p> <p>c)speech disability;</p> <p>d)mental disability;</p> <p>e)intellectual disability.</p>
<p>2.If disability category is not taken into consideration, how a notary can determine that a person is “blind, mute or deaf”?</p>	<p>2. How is determined “sufficiently”?</p>	<p>1.2.How the communication is provided with a person with vision, hearing, or speech disability, if a person with vision, hearing, or speech disability is a witness?</p>
<p>3.According to Civil law active legal capacity is not deprived anymore, currently it is possible to limit active legal capacity. Can a person with limited active legal capacity be a witness or a party in the deed in fields where the active</p>	<p>3. There are several categories (levels) of the severity of disability. Are those categories taken into consideration when the “sufficiently” is determined? For example, only persons with the most severe disability cannot be witnesses?</p>	<p>1.3.Can people with abovementioned disabilities participate as witnesses also in the deeds where a party or a testator is a person with disability?</p>

legal capacity is not limited?		
What are the duties of witnesses?	<p>4.Estonian Civil Code determines that active legal capacity can be restricted but not completely taken away. Thus active legal capacity can be restricted in particular areas, for example, a person cannot deal with real estate, but can work, take care of his/her children.</p> <p>Is the field where the active legal capacity is not restricted taken into consideration, when the person wants to be a witness? Or is the priority given to the fact that a person has restricted active legal capacity?</p>	<p>II.Article 32 part 2 of Law on the Notarial Profession determines that if a person cannot sign him/her self then other person should sign for him/her. A person has rights, not obligation to ask for the assistance.</p> <p>2.1.Can a notary encourage to use the assistance in such cases?</p>
Persons with hearing disabilities tend to live among other persons with hearing disabilities. Thus they do not have many friends with hearing, which leads to problems when persons with hearing disabilities need to find witnesses for a notarial deed. Can a person with hearing disability be a witness for another person with hearing disability.	<p>5. Why are the people with disabilities not allowed to be witnesses in a notarial deed?</p>	<p>2.2.Can a notary refuse to make a deed or a will, if a person with disability refuses to ask for assistance in signing a deed or a will?</p>

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