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**LEGAL CAPACITY REFORM – IMPLEMENTATION OF ARTICLE 12 OF THE UN
CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN
GEORGIAN LEGISLATION**

Master's thesis

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INTRODUCTION

The concept and practice of legal capacity is well known since the ancient times. The history of humankind has several times compelled the lawmakers to revise and re-examine the understanding of the concept of legal capacity itself. In different societies and at different times, some groups were not granted the same rights as others, never had the right to act on behalf of themselves. Some groups, like slaves in Roman law were not even perceived as human beings and were rather seen as property.¹ It was not because slaves were different from other humans, but because of the existing law and as James Walvin rightfully stated: “It was a system often supported by draconian slave codes that relegated the slave to a position nearer to the animal kingdom than to humanity.”² Slavery existed until the end of the 19th century³ and only after the abolition of slavery the members of this group were granted the civil and political rights.

Alongside slaves, women also remained without the full legal capacity for a long period. In ancient Rome, after reaching the adulthood women remained under the guardianship of their fathers, or were placed under husbands’ special care.⁴ This pattern remained active in Europe throughout the Middle Ages.⁵ In some countries like Saudi Arabia,⁶ Oman⁷ and Kuwait⁸ even nowadays women and girls are still placed under the male guardianship. In Jordan women need to obtain guardians’ permission for marriage, divorce, work or movement.⁹ In Europe women were denied the right to education and voting even in the first half of the 20th century. For example, in 1873, female students lost their claim against the Edinburgh University over the opportunity to complete their degrees in medicine. It was stated during the hearing that “from the year 1411 to about the year 1860, a period of 450 years, there is no instance

¹ P. du Plessis. Borkowski’s Textbook on Roman Law. Oxford: Oxford University Press 2015, p. 90.

² J. Walvin. Atlas of Slavery. New York: Routledge 2014, p. 27.

³ Ibid., Map 81, p. 124.

⁴ C. Sanfilippo. Kurs Rimskogo častnogo prava. Perevod s ital’ânskogo. Pod obšej redakciej, prof D.V Doždeva. Moskva: NORMA 2012, p. 86.

⁵ C. Benati. Voremunde Hebben: Children, Elderly and Impaired People in Eike von Repgow’s Sachsenspiegel. - P. Andersen, M. Münster-Swendsen & H. Vogt (ed). Law and Private Life in the Middle Ages. Copenhagen: DJOF Publishing, 2011, p. 209.

⁶ CEDAW, Concluding observation on the combined third and fourth periodic reports of Saudi Arabia, CEDAW/C/SAU/CO/3-4, 14.03.2018, para 15.

⁷ CEDAW, Concluding observations on the combined second and third periodic reports of Oman, CEDAW/C/OMN/CO/2-3, 22.11.2017, para 54.

⁸ CEDAW, Concluding observations on the fifth periodic reports of Kuwait, CEDAW/C/KWT/CO/5, 22.11.2017, para 15.

⁹ CEDAW, Concluding observations on the sixth periodic report of Jordan, CEDAW/C/JOR/CO/6, 09.03.2017, para 55(a).

proceedable of a woman having been educated at any Scottish University.”¹⁰ In France denial of political rights for women was justified because “women were intellectually incapable of understanding politics, and, in any case, were not interested in it.”¹¹ Only in 1944 women in France were able to obtain the right to vote.¹² It happened a little earlier in other European countries: Finland granted to women the capacity to vote in 1906,¹³ Estonia in 1918¹⁴ and Britain in 1928.¹⁵ In USA the class and race of women were decisive in granting them rights and even after the victory of women’s suffrage, black women continued to be prevented from exercising their newly obtained rights.¹⁶

The understanding of legal capacity in the 21st century was once again strongly shaken by Convention on the Rights of Persons with Disabilities (CRPD).¹⁷ Adopted in 2006, the CRPD recognized on the international level that persons with disabilities cannot be denied legal capacity based on disability; cannot be described or treated as legally incapable and cannot be waived from the enjoyment of all civil and political rights. The idea was reaffirmed in the Article 12 (Equal recognition before the law): “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”.¹⁸

The above statement does not mean that CRPD was the first ever international document addressing disability issues. For example, in 1971 the General Assembly proclaimed the Declaration on the Rights of Mentally Retarded Persons.¹⁹ In 1975, the General Assembly also proclaimed Declaration on the Rights of Disabled persons.²⁰ In 1993, the General Assembly adopted resolution on Standard Rules on the Equalization of opportunities for

¹⁰ J. Bridgeman and S. Millns. *Feminist Perspectives on Law: Law’s Engagement with the Female Body*. London: Sweet & Maxwell 1998, p. 12.

¹¹ S. Chaperon. *The Difficult Struggle for Women’s Political Rights in France*. - B. Rodriguez-Ruiz, R. Rubio-Marin (ed). *The Struggle for Female Suffrage in Europe: Voting to Become Citizens*. Leiden: Brill 2012, p. 312.

¹² *Ibid.*, p. 306.

¹³ A. Korppi-Tommola. *A Long Tradition of Equality: Women’s Suffrage in Finland*. - B. Rodriguez-Ruiz, R. Rubio-Marin (ed). *The Struggle for Female Suffrage in Europe: Voting to Become Citizens*. Leiden: Brill 2012, p. 47.

¹⁴ H. Biin and A. Albi. *Suffrage and the Nation: Women’s Vote in Estonia*. - B. Rodriguez-Ruiz, R. Rubio-Marin, (ed). *The Struggle for Female Suffrage in Europe: Voting to Become Citizens*. Leiden: Brill 2012, p. 120.

¹⁵ K. Cowman. *Female Suffrage in Great Britain*. - B. Rodriguez-Ruiz, R. Rubio-Marin, (edit.). *The Struggle for Female Suffrage in Europe: Voting to Become Citizens*. Leiden: Brill 2012, p. 273.

¹⁶ A.Y. Davis. *Women, Race and Class*. New York: Random House Inc. 1981, p. 87.

¹⁷ Convention on the Rights of Persons with Disabilities, New York 13.12.2006, entry into force force 03.05.2008.

¹⁸ *Ibid.*, Article 12(2).

¹⁹ Declaration on the Rights of Mentally Retarded Persons. UN General Assembly A/RES/2856(XXVI), adopted 20.12.1971.

²⁰ Declaration on the Rights of Disabled Persons. UN General Assembly A/RES/3447(XXX), adopted 09.12.1975.

Persons with Disabilities.²¹ In 1999 the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities was adopted.²² However, none of these documents managed to address legal capacity issues of persons with disabilities and, except for the Inter-American Convention, none of them were legally binding. Also, the documents from 1971 and 1975 were based on the medical model of disability and impairment was still seen as a legitimate ground for restricting or denying rights.²³ Thus, the CRPD was the first legally binding international instrument, which enabled persons with disabilities, particularly people with mental and intellectual disabilities and psycho-social needs – a group of people, who for the longest period in history were in practice denied legal capacity and consequently certain other civil rights and duties - to choose, to act on behalf of themselves and finally enjoy full citizenship.

As part of the international community and signatory to most international human rights treaties, Georgia ratified the CRPD on 13 March 2014.²⁴ In October of the same year the Georgian Constitutional Court made a decision²⁵ under which it was declared unconstitutional to remove legal capacity from a person. This judgment placed the dispute for comprehensive legal amendments concerning legal capacity issues and related procedures on the agenda of Georgia's Parliament, which by February 2015 prepared amendments all at once for 65 legal acts, adopted them after a month and finally entered them into force on 1 April 2015.²⁶

The presented paper seeks to assess whether the Georgian legislative amendments concerning legal capacity and the procedures of its determination are in compliance with the standards set out by the CRPD and particularly by its Article 12 (Equal recognition before the law). The paper will identify the aspects of the legal capacity reform in Georgia which meet the requirements of international standards; the remaining material and procedural gaps and inconsistencies which keep preventing persons with disabilities from enjoying their legal capacity and related rights in various aspects of life on equal basis with others. Analyzing

²¹ Standard Rules on the Equalization of Opportunities for persons with Disabilities. UN General Assembly A/RES/48/96, adopted 04.03.1994.

²² Inter-American Convention on The Elimination of all Forms of Discrimination Against Persons with Disabilities. Guatemala 06.08.1999, entry into force 14.09.2001.

²³ Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018), CRPD/C/GC/6, 26.04.2018.

²⁴ Convention on the Rights of Persons with Disabilities. New York 13.12.2006, entry into force 03.05.2008.

²⁵ The Judgment of the Constitutional Court of Georgia, N2/4.532,533, Irakli Kemoklidze and David Kharadze against the Parliament of Georgia date 08.10.2014.

²⁶ Ibid.

both, successes and failures of the reform will support the advocacy efforts for further legislation amendments to remedy identified gaps and ensure equality for persons with disabilities in practice. It will also offer important insights to countries, which have ratified the CRPD and have to reform their legislation on legal capacity in compliance with its standards. The Georgian case study can be particularly interesting for post-Soviet countries like Armenia, Azerbaijan, Belarus, Moldova, Russian Federation, and even Estonia. These countries have also ratified the CRPD but are still practicing denial of legal capacity to persons with disabilities. For example, the Civil Code of Russia permits recognition of a person as legally incapable because of mental disorder and therefore, s/he is placed under guardianship.²⁷ The Civil Code of Armenia makes the same statement.²⁸ Under The Civil Code of Moldova recognition of a person as legally incapable is permissible in case of mental disorder, mental illness or deficiency.²⁹ The Civil Code of Azerbaijan uses more outdated wording such as “mental retardation or mental disease” applied by the courts as the basis for declaring a person as legally incapable and establishing guardianship over them.³⁰ The same wording and concept of legal capacity is used in the Civil Codes of Belarus.³¹ Estonian legislation does not allow total incapacitation; however it permits restriction of legal capacity to a certain extent when a person is perceived to be unable to understand or direct her/his actions based on disability (mental illness, mental disability, other mental disorders).³²

In 2016 the Public Defender of Georgia published the research report “Legal Capacity – Legislative Reform without Implementation.”³³ The report mainly focused on the Georgian Common Courts practice about recognizing persons with disabilities as support-recipients between April 2015 - January 2016, i.e during the first nine months after the reform was introduced in Georgia. The presented paper will expand on the existing report through offering a more comprehensive understanding of: the values and approaches to disability which underpin the concept of legal capacity in the CRPD; the standards proposed by the CRPD; the gaps overlooked in the Public Defender’s report and by means of answering the

²⁷ Graždanskij kodeks Rossijskoj Federacii (Russian Civil Code, Part 1). Adopted 21.10.1994, entry into force 01.01.1995, Art 29(1).

²⁸ The Civil Code of Armenia. Adopted 05.05.1998, entry into force 01.01.1999, Art 31(1).

²⁹ Codul Civil Al Republicii Moldova (The Civil Code of the Republic of Moldova). Adopted 06.06.2002, entry into force 22.06.2002, Art (24).

³⁰ Azərbaycan Respublikasının Mülki Məcəlləsi (The Civil Code of Azerbaijan Republic). Adopted 28.12.1999, entry into force 01.09.2000, Art 28(8).

³¹ Graždanskij kodeks Respubliki Bielaruś (The Civil Code of the republic of Belarus). Adopted 28.10.1998, entry into force 01.07.1999, Art 29(1).

³² Tsiviilseadustiku üldosa seadus (Riigikogu General Part of the Civil Code Act). Adopted 27.03.2002, entry into force 01.07.2002, Art 8(2).

³³ Public Defender (Ombudsman) of Georgia, study report, Legal Capacity – Legislative Reform Without Implementation, 2016.

following questions: (i) what are the main requirements of Article 12 of the CRPD in achieving equality for persons with disabilities on equal basis with others; (ii) how Georgia has implemented Article 12 of the CRPD in its legislation; (iii) how legislative changes were applied in Common Court practice?

To address the questions posed above, the paper primarily applies analytical method of research supplemented by the comparative method. The research is largely qualitative, carried out from a legal, human rights perspective. It comprehensively analyzes national laws amended during the legal capacity reform in Georgia as well as Georgian Courts judgments about the recognition of persons as support-recipients in order to assess if there are any gaps remaining in the legal framework or in practice that need to be addressed. For this purpose, the Georgian laws and court judgments will be analyzed in the light of the requirements of the CRPD. Therefore, the CRPD and the relevant documents issued by the CRPD Committee will also be analytically examined. Comparative method will be used to make references to the Estonian legislation where applicable in order to highlight the prevalence of the research problem in Estonia as well.³⁴ The presented analysis and comparison is supplemented by the study of relevant literature, expert opinions and reports of international organizations.

The paper evolves around the hypothesis that (i) the Georgian legislative amendments made in 2015 concerning legal capacity of persons with disabilities have met the minimum main requirements of the international standard set out in the CRPD; (ii) despite the important changes introduced in the legislation, a number of significant impediments remain, obstructing effective implementation of the reform in practice. Consequently, the main research objects of the thesis include Georgian laws which were amended or have been introduced as a result of the legal capacity reform in 2015; national court judgments – a total of 247 (two hundred forty-seven)³⁵ of them decided between 2015 - 2018 concerning the recognition of persons with disabilities as support-recipients³⁶; the CRPD and various documents issued by the Committee on the Rights of Persons with Disabilities (the

³⁴ The purpose of the presented thesis is not to compare the law and practice of different States on the research problem. Therefore, the comparison between the Georgian and Estonian law will be made only with regard to the core issues of legal capacity. These comparisons can trigger further research in Estonian academia for analyzing Estonian law connected with legal capacity issues of persons with disabilities.

³⁵ *Infra*. Appendix 1. Table of Georgian Cases.

³⁶ In Georgia only Supreme Courts' judgments are publicly available. In order to analyze the First Court and Appeal Courts practice, the author of the thesis officially requested the judgments regarding the legal capacity issues from 13 Courts of different cities and regions. The number of judgments to be provided depends on each Court. By the Courts were provided a total of 247 judgments. As the legal capacity reform was carried out in 2015, judgments adopted from 2015 to 2018 were requested.

Committee) including General Comments and 75 (seventy-five) concluding observations on the reports of CRPD member States between 2011-2018³⁷; Estonian legislation on legal capacity and guardianship issues. Alongside the mentioned documents, studies and articles by international disability law professionals on the models of disability and legal capacity will also be examined as well as the reports of the Georgian Public Defender on the legal capacity reform.

The thesis consists of three chapters. The first chapter elaborates on various models of disability, analyzing how the understanding of disability gradually shifted from the medical to the social model and finally how the concept of disability evolved around the human rights model. Exploring these developments up to the human rights model is important, as this model underpins the principles enshrined in the CRPD and without examining the major values and principles on which the CRPD was built, it is difficult to understand the paradigm shift proposed by the CRPD including by its Article 12 and the concept of legal capacity for persons with disabilities.

The second chapter explains and explores the concept of legal capacity for persons with disabilities put forward by the CRPD and its Article 12 through the analysis of documents issued by the Committee, particularly, General Comment N1 (2014) the Committee's concluding observations on the reports of member States starting from 2011³⁸ to 2018, the views adopted by the Committee during the individual communications. Reference to ECtHR cases are made where applicable. The chapter also makes references to the Protocol to the African Charter on Human and People's Rights on the Rights of Persons with disabilities³⁹ and the Inter-American Convention on Protecting the Human Rights of Older Persons⁴⁰ in order to explain the development of the new paradigm of legal capacity after adoption of the CRPD. Alongside these international documents, the chapter also provides an overview of the research conducted in disability law about the understanding of legal capacity.

³⁷ Between 2011-2018 the Committee on the Rights of Persons with Disabilities issued overall 75 concluding observations on the state parties initial or annual reports.

³⁸ According to Article 35(1) of the CRPD, State Parties shall submit to the Committee reports on implementation of the CRPD within two years after the entry into force of the CRPD. The CRPD entered into force May 2008. First reports by member States were made in 2010 and the first concluding observations by the CRPD Committee was made in 2011.

³⁹ Protocol to the African Charter on Human Rights and Peoples' Rights on the Rights of Persons with Disabilities in Africa. Addis Ababa 29.01.2018, Art 7.

⁴⁰ Inter-American Convention on Protecting the Human Rights of Older Persons. Washington, D.C. 15.06.2015, entry into force 11.01.2017, Art 30.

The third chapter deals with the description and analysis of the Georgian situation of legal capacity of persons with disabilities. It briefly analyzes the Georgian Constitutional Court judgment on the legal capacity, which triggered the legal capacity reform in Georgia; it looks at the amendments made in the Georgian legislation to comply with the legal capacity reform and international standards and analyses the Georgian Courts judgments on the issue; underlines the successful changes in legislation as well as the gaps, ambiguities and inconsistencies, which remain in the Georgian legislation. The chapter also provides comparisons with Estonian legislation on some of the most important legal capacity issues and briefly describes how they are regulated in Estonia. The analysis presented in this chapter is based on the evaluation through the lenses of all the international standards laid down in previous chapters.

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Keywords: human rights; disability; legal capacity; Georgia;

1. MODELS OF UNDERSTANDING DISABILITY AND THE CRPD

1.1 Medical Model of Disability

The CRPD is a multidimensional achievement of the disability movement, disability and sociology scholars and legal professionals. The ideology which underpins the CRPD and the changes it has brought into humanity can better be understood by deconstructing the stages of approaches towards disability and how they have evolved during the recent history of humankind starting with the most archaic medical approach; continuing with the latest disability movement history and the social model of disability; later developments made in academia in disability studies and finalizing with all the knowledge and experiences accumulated into the CRPD which proposes the human rights approach to disability.

According to WHO, over a billion people, about 15% of the world's population, have some form of disability.⁴¹ Hypothetically, if we assume that one billion persons with disabilities have at least one family member, relative, or a close friend, it would mean that disability directly affects a minimum 30% of the world population. By the most outdated medical model of disability the issues of this 30% of population were seen as an individual problem. Medical model of disability characterized disability as a pathology, where person with disability is alone with their "personal limitation"⁴², physical or mental dysfunction and it is the impairment which impedes their inclusion in the society or makes them unable to compete with able-bodied persons on the labor market.⁴³ This model views the social and physical environment completely unproblematic and all focus is placed on allocated resources to "fix persons with disabilities"⁴⁴ in order to make them fit for the society.

In general, any approach, which assesses disability from the medical point of view only, perceives it as a deviation from normality and an individual problem of persons with impairments and fails to see the problem in the societal environment, can be described as the 'medical model' of disability. However, in 2014, the United Nations Human Rights Office of the High Commissioner released a professional training package guide to the Convention on the Rights of Persons with Disabilities, where it also briefly presents the charity approach to

⁴¹ World Health Organization. World Report on Disability, WHO/NMH/11.01, 2011, p. 7.

⁴² C. Cameron (ed). Disability Studies: A Student's Guide. London: SAGE 2014, p. 99.

⁴³ R.D. Kelemen & L. Vanhala. The Shift to the Rights Model of Disability in the EU and Canada. - Regional and Federal Studies, Vol. 20, No. 1, 1-18, March 2010, p. 3.

⁴⁴ Cameron (ed), *op. cit.*, p. 99.

disability.⁴⁵ According to this approach, persons with disabilities are passive objects of kind acts, target of pity and dependent on the goodwill of society.⁴⁶

Barbara Fawcett describes different explanations as to why the medical model of disability emerged within the society.⁴⁷ On the one hand, she provides an account of the birth of the medical model of disability through Foucault's view, that creation of the disciplinary society since the 17th century made the feudal rights shift to the property rights and the sovereign power to "disciplinary power"⁴⁸, thus those who were unable to discipline themselves and fit into the general conditions, were "subject to dividing practices, which created divisions healthy/ill, sane/mad, legal/delinquent and, it is possible to add able-bodied/disabled-bodied".⁴⁹ On the other hand, Fawcett provides Scull's explanation from the Marxist perspective according to which, urbanization and scientific ideology in the 19th century allowed medical professionals the opportunity to benefit financially from the societal changes and medicalization of disability was the consequence of these processes.⁵⁰ Finally, she also offers Barnes' explanation of the medical model, as medically oriented product of the 19th century, which evolved due industrialization, population increase, science and eugenics.⁵¹

Among these reasons, the doctrine of eugenics⁵² (until 1945) adopted in policies of the majority of the developed western world (USA, Denmark, Finland, Norway, Sweden, Germany)⁵³ had the most severe consequences for persons with disabilities with the Third Reich practice between 1933-1939 characterized with the most extreme cruelty. Namely, the Third Reich actively practiced euthanasia, extermination in gas chambers (several hundred thousand children and adults with mental health conditions or learning difficulties), extermination by lethal injections or by gun.⁵⁴

The medical model of disability was a dominant approach to disability until the 1970s-80s, before it started to become the subject of critique by disability scholars in Europe and the

⁴⁵ United Nations Humans Rights Office of the High Commissioner. The Convention on the Rights of Persons with Disabilities, Training Guide, Professional Training Series No. 19. Geneva: United Nations 2014, pp. 8-9.

⁴⁶ Ibid., p. 8.

⁴⁷ B. Fawcett. *Feminist Perspectives on Disability*. London: Pearson Education Limited 2000, pp. 16-26.

⁴⁸ Ibid., p. 18.

⁴⁹ Ibid., p. 10.

⁵⁰ Ibid., p. 19.

⁵¹ Ibid.

⁵² Eugenics- the idea that it is possible to improve humans by allowing only some people to produce children, - Cambridge University Press, Online Cambridge Dictionary, 2018, <https://dictionary.cambridge.org/us/dictionary/english/eugenics>.

⁵³ T. Shakespeare. *Disability: The Basics*. New York: Routledge 2018, p. 37.

⁵⁴ Ibid., p. 135.

emerging social movements, which generated resistance to the existing laws both in Europe and USA.

1.2 Social Model of Disability

Activists with disabilities in the UK started their fight against the medical model of disability in the 1960s. Demands of some activists groups at that time were small-scale such as benefits for married disabled women who had never worked while other groups, like Union of the Physically Impaired Against Segregation (UPIAS), put forward a broader political agenda.⁵⁵ Particularly, UPIAS argued that the society was the one who disabled, isolated and excluded persons with physical impairments. This approach later became known as the ‘social model’ of disability penned by Michael Oliver, a scholar with disabilities, in his articles about disability published in the 1980s.⁵⁶

Meanwhile, the social model of disability started emerging in the USA too, due to strong civil movements and individual efforts of persons with disabilities to achieve greater independence. Edward Roberts was one of the first advocates with disabilities who started challenging the social and physical environment in the 1970s, realizing that attending school with iron lungs was not a problem in itself, rather it was a problem within the environment and the society and their refusal and unpreparedness to accept and accommodate people with different conditions and characteristics.⁵⁷ He was one of the first proponents of Independent Living philosophy in the USA and he became the embodiment of the principle of self-determination for people with disabilities.⁵⁸ Alongside Edward Roberts and in the same period, Judith Heumann, another activist with disabilities, individually started confronting the existing rules which were based on the medical model and started her fight with a lawsuit against the prohibitive regulations of New York City Board of Education, according to which persons with disabilities were unable to work as teachers. The Board of Education justified these regulations based on the perceived inability of persons with disabilities to escort students out of the building in case of fire.⁵⁹

⁵⁵ Ibid., p. 12.

⁵⁶ Ibid., pp. 12-13.

⁵⁷ D. Zames Fleischer and F. Zames. *The Disability Rights Movement: From Charity to Confrontation*. Philadelphia: Temple University Press 2014, pp. 37-38.

⁵⁸ Ibid., p.40.

⁵⁹ Ibid. p. 73.

The main ideological shift proposed by the social model of disability was the refocusing of attention from individual impairments to the social factors and identification of external barriers as the main obstacles to the inclusion in the mainstream society. This new understanding of disability which proclaimed that impairment should be considered as a difference⁶⁰ and not something to be ashamed of; which viewed stereotypes and stigma toward persons with disabilities as an important problem and argued that the existing rules and regulations on disability generated segregation, made it possible for persons with disabilities to form a strong disability identity. They became psychologically and emotionally strongly attached to the social model analysis.⁶¹ Another disability scholar, Tom Shakespeare, compares the formation of disability identity politics with other social movements and argues that social movements like women's liberation, gay rights, anti-racism and disability rights are similar in many ways, as each of them challenges the pathologization of differences and forms a strong alliance between academia and activism.⁶²

With the emergence of the social model, scholars and activists started to pay specific attention to the disability related terminology and language. The central significance was placed on the definition of disability itself and the distinction between impairment and disability. Shakespeare compares impairment/disability distinction with the sex-gender dichotomy. He argues that just like the feminists insisted on the distinctions between sex: the biological difference between male and female, and gender: the socio-cultural distinction between men and women, or masculine and feminine, it can be claimed that "sex corresponds to impairment, and gender corresponds to disability. Impairment is the deficit of body or mind; disability is the social oppression and exclusion".⁶³ He also argues strongly that these two terms are not dichotomous but a continuum of one notion and where impairment ends, disability starts.⁶⁴ This is a significant statement to be taken under consideration, as the strongest argument of the social model, which rejected any importance of impairment and thus brought the concept of disability into the light, later became its weakest point and the subject of major criticism from the scholars and activists alike.

Despite this criticism the shift from medical to social model of disability has had influential consequences on the lives of persons with disabilities. The social model gave stimuli to

⁶⁰ Ibid. p. 122.

⁶¹ T. Shakespeare. *Disability Rights and Wrongs Revisited*. London: Routledge 2014, p. 20.

⁶² Ibid., p. 29.

⁶³ Shakespeare 2018, *op. cit.*, p. 13.

⁶⁴ Shakespeare 2014, *op. cit.*, p. 25.

disabled people to fight against social oppression, challenge socially constructed barriers and the segregating laws or policies and what is most important, it enabled persons with disabilities to view themselves as expert on their lives and establish and enforce the principle of ‘nothing about us without us’.⁶⁵ It is not coincidental that the CRPD emerged within social model understanding and is often described as the ‘culmination of social model approach’⁶⁶. In addition, while building on the social model, the CRPD furthermore introduces a new concept of human rights model of disability.

1.3 Human Rights Model of Disability

In its General Comment No. 6 on equality and non-discrimination the Committee on the Rights of Persons with Disabilities clearly states and reaffirms that the ideology enhanced in the CRPD is indeed the human rights model of disability. The document provides a definition of the human rights model and the aspects in which it precedes, or varies from previous models of understanding disability.⁶⁷ According to this definition, the “human rights model of disability recognizes that disability is a social construct and impairments must not be taken as a legitimate ground for the denial or restriction of human rights. It acknowledges that disability is one of several layers of identity”.⁶⁸

The human rights model of disability is not just a simple continuation of the social model. It can be seen more as a reconciliation of medical and social models of disability, by taking into account the critiques of the social model and recognizing that people can be disabled by society as well as by their bodies.⁶⁹ Theresia Degener provides account of at least six main differences between the social and human rights models of disability, six main aspects why it is possible to argue that the CRPD effectively transforms the social model of disability into the human rights model. According to Degener, if the social model of disability was developed as an explanation of exclusion of disabled people from society, the human rights model seeks to provide moral principles and values for disability policy,⁷⁰ and ensures that no

⁶⁵ Ibid., p. 135.

⁶⁶ M. Berghs. *The New Humanitarianism: Neoliberalism, Poverty and the Creation of Disability*. - M. Gill and C. J. Schlund-Vials (ed). *Disability, Human Rights and the Limits of Humanitarianism*. Farnham: Ashgate 2014, p. 27.

⁶⁷ CRPD Committee, General comment No.6, *op. cit.*, para 8-11.

⁶⁸ Ibid., para 9.

⁶⁹ Shakespeare 2018, *op. cit.*, p. 135.

⁷⁰ T. Degener. *A New Human Rights Model of Disability*. – V.D. Fina, R. Cera, G. Palmisano (ed). *The United Nations Convention on the Rights of Persons with Disabilities: A commentary*. Cham: Springer International Publishing AG 2017, p. 43.

person with disability is denied legal capacity.⁷¹ She goes on to suggest that while the social model of disability supports anti-discrimination policy and focuses on civil rights, the human rights model covers civil and political rights, as well as economic, social and cultural rights.⁷² Degener also argues that the social model of disability rejects impairment entirely, while the human rights model recognizes that impairment has influence on people's lives and it is compatible with the human dignity.⁷³ Furthermore, Degener suggests that as the social model of disability neglects identity politics as an important factor of emancipation, the human rights model is open for cultural identification.⁷⁴ Like Shakespeare, Degener also compares disability efforts with gay pride, black pride and feminism and acknowledges the importance of identity politics.⁷⁵ Finally, as the two differentiating aspects between the social and human rights models, Degener names the ability of the human rights model to provide non-discriminatory preventive health policies and disability inclusive development and humanitarian aid.⁷⁶

In addition to the six characteristics reviewed above, inclusive equality as a new model of equality is another valuable improvement to the field of human rights brought about by the human rights model of understanding disability. The concept of equality and its complex understanding is vital for international human rights law, as equality alongside with non-discrimination and human dignity, is the cornerstone of all human rights.⁷⁷

In 2011, Marcia H. Rioux and Christopher A. Riddle provided comprehensive account of the evolution of the concept of equality from formal equality to equal opportunity model and further describe substantive equality as the model of equality, which is able to identify that equality cannot be reached only by removal of barriers without recognition of systematic discrimination of disadvantaged groups.⁷⁸ It took only seven years after their research to construct the new, more complex and extended notion of equality. This new understanding of 'inclusive equality' proposed in the CRPD could provide a good answer to the critique of the human rights model of disability. According to the critique, the human rights model of disability contains neoliberal individualistic rhetoric, which automatically excludes

⁷¹ Ibid., p. 56.

⁷² Ibid. p. 44.

⁷³ Ibid., p. 49.

⁷⁴ Ibid., pp. 49-50.

⁷⁵ Ibid. p. 50.

⁷⁶ Ibid. pp. 52-56.

⁷⁷ CRPD Committee, General comment No.6, *op. cit.*, para 4.

⁷⁸ M. H. Rioux and C. A. Riddle. Values in Disability Policy and Law: Equality. - M. H. Rioux (ed). Critical Perspectives on Human Rights and Disability Law. Leiden: Martinus Nijhoff Publishers 2011, pp. 42-52.

discussions about the collective nature of social inequality and the need for extensive social changes.⁷⁹ However, it can be argued that the new, inclusive equality takes into account many forms of marginalization on an individual level as well as the group level and provides the following extended understanding of equality: “(a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality.”⁸⁰

One of the biggest critiques of the human rights model of disability points to its failure to pay attention to the reality of the Global South. Helen Meekosha & Karen Soldatic heavily criticize the inability of the human rights model to reflect the dynamics of the Global South and to take into account the differences between the Global North and the Global South by referring to the Global North as the “civilized” part of the world and the Global South as “traditional”.⁸¹ Despite this critique, the authors acknowledge the vital role of human rights for the disability movement and reaffirm that: “there is no doubt that the ongoing internationalizing project of human rights remains of critical importance for disability activists and disabled people across the globe”.⁸²

1.4 Soviet Legacy of Understanding Disability in Georgia

Western countries started to reconsider approaches toward the disability from medical approaches to social since the 60’s of the 20th century, which triggered rigorous disability studies and the shift toward the human rights approach, while as part of the Soviet Union over 70 years (1918-1991), Georgia had to adhere to the Soviet Regime and implement policies according to the Soviet ideology. Consequently, the approaches, social policies and laws about disability were developed and practiced as required by the Soviet Regime. As in most

⁷⁹ M. Sherry. *The Promise of Human Rights for Disabled People and the Reality of Neoliberalism*. – M. Gill and C. J. Schlund-Vials (ed). *Disability, Human Rights and the Limits of Humanitarianism*. Farnham: Ashgate 2014, p. 19.

⁸⁰ Committee on the Rights of Persons with Disabilities, General comment No.6 (2018), CRPD/C/GC/6, 26.04.2018, para 11.

⁸¹ H. Meekosha & K. Soldatic. *Human Rights and the Global South: The Case of Disability*. *Third World Quarterly* 2011, Vol 32, No. 8, pp. 1388-1394.

⁸² *Ibid.* p. 1394.

post-soviet countries, the disability history in Soviet and post-Soviet Georgia has not been studied and the disability-related research started to appear only after the 2000s.⁸³

This lack of disability research can be explained by the Soviet ideology and approaches to disability. For example, a soviet psychiatrist Ivan Vvedinsky proposed the following definition of disability in 1959: “a condition of an organism transformed by disease or aging and characterized by enduring or irreversible functional disturbances that results in the permanent or prolonged, complete or partial, loss of one’s ability to work”.⁸⁴ Interestingly, being a psychiatrist might have played a role in coming up with such a definition and can serve a demonstration of how disability issues were dealt with and how disability was perceived in general. Based on the definition stated above, a person with disability is not even described as an individual, but an organism. Moreover, disability as a term was not in use in the Soviet Union. Disability was called invalidity (инвалидность), which is still the term used even in the official Russian translation of the CRPD.⁸⁵ Even though the Committee on the Rights of Persons with Disabilities stated in its concluding observations on the initial report of the Russian Federation that the official Russian translation of the term persons with disabilities as invalid does not reflect the human rights model enshrined in the CRPD,⁸⁶ the term remains in use.

Ability to work was very crucial to the Soviet ideology. Persons without employment including disabled veterans were branded as socially harmful elements, social deviants and were persecuted by special police units.⁸⁷ They were urged to leave cities and settle into residential homes located in remote areas of the Soviet Union.⁸⁸ If physically impaired persons were perceived as socially harmful elements because of their inability to work, people with mental health issues were viewed as dangerous, who were listed on Psychiatric Case

⁸³ M. Rasell and E. Iarskaia-Smirnova. Conceptualizing Disability in Eastern Europe and the Former Soviet Union. – M. Rasell and E. Iarskaia-Smirnova (ed). *Disability in Eastern Europe and the Former Soviet Union: History, Policy and Everyday Life*. New York: Routledge 2014, pp. 9-10.

⁸⁴ A. Luse and D. Kamerade. Between Disabling Disorders and Mundane Nervousness: Representations of Psychiatric Patients and their Distress in Soviet and post-Soviet Latvia. – M. Rasell and E. Iarskaia-Smirnova (ed). *Disability in Eastern Europe and the Former Soviet Union: History, Policy and Everyday Life*. New York: Routledge 2014, p. 101.

⁸⁵ Russian translation of the CRPD, *Konvenciã o Pravah Invalidov*.

⁸⁶ Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the Russian Federation, CRPD/C/RUS/CO/1, 09.04. 2018, para 7.

⁸⁷ B. Fieseler. Soviet-style Welfare. - M. Rasell and E. Iarskaia-Smirnova (ed). *Disability in Eastern Europe and the Former Soviet Union: History, Policy and Everyday Life*. New York: Routledge 2014, p. 22.

⁸⁸ *Ibid.*, p. 27.

Registers and kept in psychoneurological hospitals, out of public sight.⁸⁹ These attitudes toward disability were encouraged by the Soviet ideology, which viewed persons with disabilities as a threat to the state-cultivated image of happy and productive Soviet citizens.⁹⁰ It is not surprising that this attitude led to the well-known exclamation from a Soviet official in 1980: “There are no disabled people in the USSR!” when he was asked whether the Soviet Union would participate in the first Paralympic Games.⁹¹

After declaring independence in 1991⁹², Georgia inherited the Soviet legacy of approaches, stereotypes and policies about disability. Efforts to eliminate the outdated concepts in policy papers and laws and challenge the societal attitudes began at the onset of the 20th century and grew more active since 2014, after Georgia’s ratification of the CRPD. For example, the human rights action plans developed during 2014-2018 started to include more provisions about the harmonization of the Georgian legislation with the CRPD⁹³; disability was included as one of the protected grounds in the 2014 law on “Elimination of all forms of Discrimination”⁹⁴; the country started closing down children’s large residential institutions⁹⁵, adopted a government resolution to ensure accessible environments⁹⁶ and implemented the legal capacity reform.⁹⁷ Despite these changes and reforms, which are based on human rights model of disability, the grounds for obtaining a disability status are still solely based on the medical assessment. The Soviet categorization of persons with disabilities under “invalids” of I, II and III categories based on their degree of impairment, continues to prevail in contemporary Georgia with only the names of the category replaced with “profound”, “moderate” and “mild” respectively,⁹⁸ but the core approach and practice staying similar to the Soviet ones. This policy is problematic because it does not correspond to the CRPD and the human rights model, ignores the individual needs and capacities of each person with disability. Thus, by the time Georgia ratified the CRPD, the understanding of disability and disability policies were a continuation of the Soviet time approaches.

⁸⁹ A. Luse and D. Kamerade. Between Disabling Disorders and Mundane Nervousness, Representations of Psychiatric Patients and their Distress in Soviet and Post-Soviet Latvia. – M. Rasell and E. Iarskaia-Smirnova (ed), *op. cit.*, p. 102.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, p. 100.

⁹² Sakartvelos k'onst'it'utsia (Constitution of Georgia). Adopted 24.08.1995, entry into force 24.08.1995, Art 1(1).

⁹³ Public Defender (Ombudsman) of Georgia, Alternative report presented to the Committee on the Rights of Persons with Disabilities by National Human Rights Institute – Public Defender (Ombudsman), June, 2017, p. 7.

⁹⁴ *Ibid.*, p. 9.

⁹⁵ *Ibid.*, p. 17.

⁹⁶ *Ibid.*, p. 23.

⁹⁷ *Ibid.* p. 7.

⁹⁸ Georgian Non-Governmental Organizations Alternative Report on the Implementation of the Convention on the Rights of Persons with Disabilities in Georgia, 2014-2017. Georgia 2018, p. 10.

2. STANDARD OF ARTICLE 12 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

2.1 Debates over the Article 12 During the Ad Hoc Committee

The previous chapter argued that the most important feature of the CRPD is that it is the first legally binding human rights instrument, which was based on understanding that even the possibility to enjoy all human rights can also be socially constructed, and how external barriers can be the impediment for the realization of these rights.⁹⁹ The CRPD on the one hand proposes a number of new principles and rights such as Accessibility (Article 9), Independent Living (Article 19) and Reasonable Accommodation (Article 5) while on the other hand it offers new understanding or paradigm shift (mostly described so by disability law scholars) for one of the oldest legal concepts - legal capacity.¹⁰⁰

Introduction of the entirely new understanding of legal capacity with regard to persons with disabilities immediately generated numerous debates not only after the adoption of the CRPD, but during the Ad Hoc Committee work itself. It was the most debatable article, resolving of which could offer solutions for other issues in the CRPD.¹⁰¹ The importance and the novelty of the article was itself the reason for adopting the first General Comment (GC) of the CRPD regarding this article. For understanding the scope of the legal capacity proposed by the CRPD, it is most important to analyze Article 12 (legal capacity) itself in connection with the GC No.1. It is also necessary to take a close look at the observations by the CRPD Committee on initial reports of State Parties and the cases before the CRPD Committee. Finally, also make a reference to the ECtHR cases regarding similar issues where applicable in order to see whether there are similarities or differences between the CRPD committee views and ECtHR cases.

Equal recognition before the law itself is not the novelty for human rights instruments. On universal level, UDHR in its Article 6 acknowledges the right of equal recognition of all

⁹⁹ M.A. Stein and J.E. Lord. *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities*. - O. Mjöll Arnardottir and G. Quinn (ed). *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*. Leiden: Martinus Nijhoff Publishers 2009, p. 33.

¹⁰⁰ E. Flynn. *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities*. New York: Routledge 2016, p. 62.

¹⁰¹ T. Degener, A.Begg. *From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations*. – V.D. Fina, R. Cera, G. Palmisano (ed). *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*. Cham: Springer International Publishing AG 2017, p. 32.

persons before the law.¹⁰² With Article 16 the ICCPR reaffirms the same right.¹⁰³ On the regional level, ACHR acknowledges recognition of every person before the law,¹⁰⁴ as well as ACHPR¹⁰⁵. Corresponding articles in thematic conventions, such as CEDAW and its Article 15 establishes equality of women with men before the law.¹⁰⁶ However, during the CRPD negotiation process in 2005 the question of incorporating an article in the CRPD about equal recognition of persons with disabilities before the law and their enjoyment of legal capacity faced strong resistance. Objections came not only from developing countries, but from representatives of developed ones as well. According to Marianne Schulze, Australian-Austrian human rights advocate, who was the monitor, analyst, reporter and advocate during the CRPD¹⁰⁷ negotiations, certain developed countries used “hurtful language and advocated for paternalistic wording”.¹⁰⁸

Countries such as Russia, China and Syria were trying to convince the Ad Hoc Committee to add a footnote to Article 12 explaining that in Chinese, Russian and Arabic translation legal capacity would mean only holding the rights and not being entitled to exercise them.¹⁰⁹ This wording would have been incorporated in the CRPD if not for the active participation of NGOs and persons with disabilities in the negotiations. For example, the International Disability Caucus informed all delegates about the harm that the inclusion of the footnote could bring to the CRPD and the integrity of the text.¹¹⁰ Finally, it was possible to receive the consent of mentioned opposing countries by suggesting for them to use the legal capacity concept in the same way as it was already used in CEDAW.¹¹¹

Only one conclusion can be drawn from this debate: despite the acknowledgment of equality before the law of all persons in different international or regional treaties starting from the UDHR in 1948, recognition of persons with disabilities before the law and their enjoyment of legal capacity was still questioned in 2005 during the negotiations over the CRPD. Even after

¹⁰² Universal Declaration of Human Rights. Paris 10.12.1948, Art 6.

¹⁰³ International Covenant on Civil and Political Rights. New York 16.12.1966, entry into force 23.03.1976, Art 16.

¹⁰⁴ American Convention on Human Rights. San Jose 22.11.1969, entry into force 18.07.1978, Art 3.

¹⁰⁵ African Charter on Human and People’s Rights. Banjul 27.06.1981, entry into force 21.10.1986, Art 3.

¹⁰⁶ Convention on the Elimination of All Forms of Discrimination against Women. New York 18.12.1979, entry into force 03.09.1981, Art 15.

¹⁰⁷ M. Schulze. *Understanding The UN Convention On the Rights of Persons with Disabilities, A Handbook on the Human Rights of Persons with Disabilities*. New York: Handicap International 2010, p. 3.

¹⁰⁸ *Ibid.*, p. 84.

¹⁰⁹ T. Degener, A.Begg. *From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations*. – V. D. Fina, R. Cera, G. Palmisano (ed), *op. cit.*, p. 24.

¹¹⁰ *Ibid.* p. 36.

¹¹¹ *Ibid.*, p. 36.

the adoption of the treaty, the CRPD Committee had to draft its first GC specifically about the Article 12, as they found common failures in understanding the scope of the article in initial reports submitted by member States.¹¹²

2.2 Debriefing the Content of Article 12

The wording of paragraph 1, Article 12 of the CRPD underlines that recognition before the law of persons with disabilities is not a new concept provided by the CRPD, rather it “reaffirms that persons with disabilities have the rights to recognition everywhere as the persons before the law”.¹¹³ Without having equal recognition before the law or without having legal personality it is impossible to speak about the enjoyment of legal capacity. Thus, having a legal personality is a precondition for the next step: for being recognized as the rights holder and to be able to exercise these rights.

Paragraph 2 of Article 12 of the CRPD calls upon member States to recognize legal capacity of persons with disabilities “on an equal basis with others in all aspects of life”.¹¹⁴ First of all, the purpose of this article and its revolutionary idea lies in describing persons of disabilities as agents, persons who can be responsible for their lives on equal basis with others and can make decisions concerning their lives on behalf of themselves. Thus, legal capacity according to the CRPD has two meanings: holding the rights on the one hand and exercising these rights on the other.¹¹⁵ Exercise of rights, or in other words, enabling persons with disabilities to enter into legal relationships, is the main requirement of Article 12. This is where the main contradiction and most problematic issues are found. Particularly, how persons with severe mental or intellectual disabilities can exercise their rights even if the first GC of the CRPD so boldly stresses that “perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.”¹¹⁶

The CRPD committee sees the solution to the above mentioned issue in making a distinction between the concepts of legal and mental capacity. According to the CRPD Committee ‘legal capacity’ is the “ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)”¹¹⁷, while mental capacity is “decision making skills”¹¹⁸ which are

¹¹² Committee on the Rights of Persons with disabilities, General comment No. 1(2014), CRPD/C/GC/1, 19.05.2014, para 3.

¹¹³ CRPD – Art 12(1).

¹¹⁴ Ibid., Art 12(2).

¹¹⁵ CRPD Committee, General comment No. 1, *op. cit.*, para 14.

¹¹⁶ Ibid., para 13.

¹¹⁷ Ibid.

different for different people and are based on various factors.¹¹⁹ This approach did not sound convincing for some scholars who criticized the solution heavily. For example, according to David Bilchitz, it is impossible to separate mental capacity from legal capacity, as capacity to engage in relationships with legal consequences requires certain mental abilities.¹²⁰ Bilchitz lists different areas where the approach of the CRPD Committee can lead to severe consequences for persons with disabilities. Particularly, failure to intervene to prevent committing suicide; participation in court trial when a person is not mentally competent to do so; sexual abuse based on “supposed” consent; and prevention from institutionalization when there is a lack of home based support.¹²¹ David Bilchitz provides an alternative solution according to which the worth of human existence lies not only within purposive value, but in experiential value too, where autonomous decisions and independence are not the main determinants for human rights, but also passivity and dependency, because some may be satisfied with limited goals and achievement, others may be interested only in basic needs such as food, housing, water and some people may focus on purposive values.¹²² However, the approach offered by Bilchitz relates to neither social model of disability, nor human rights model. It is clearly paternalistic and is more in line with the outdated medical model, which perceives disability as the reason to deny persons with disabilities certain rights and restrain their agency.

In their joint article Director of the Center for Disability Law and Policy, National University of Ireland Galway, Professor Eilionoir Flynn¹²³ and Dr. Anna Arstein-Kerslake, academic at Melbourne Law School and Establishment Committee Member of the Melbourne Disability Institute¹²⁴ describe the division between mental capacity and legal capacity proposed by the CRPD Committee as the “groundbreaking distinction”.¹²⁵ According to these scholars, the distinction between legal and mental capacity has a revolutionary potential in legal capacity law, which can lead to a system “that respects the right of all individuals to decision-making

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ D. Bilchitz. Dignity, Fundamental Rights and Legal Capacity: Moving Beyond the Paradigm set by the General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities. - South African Journal on Human Rights 2016, VOL. 32, NO. 2, p. 417.

¹²¹ Ibid., p. 420.

¹²² Ibid., p. 428-433.

¹²³ E. Flynn, biography - <http://www.nuigalway.ie/business-public-policy-law/school-of-law/staff/eilionoirflynn/>.

¹²⁴ A. Arstein-Kerslake, biography - <https://law.unimelb.edu.au/about/staff/anna-arstein-kerslake>.

¹²⁵ A. Arstein-Kerslake & E. Flynn. The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law. - The International Journal of Human Rights 2016, Vol. 20, No. 4, p. 475.

support, regardless of disability or decision-making ability”¹²⁶ and rejection of legal capacity generates “uneven power balance that can easily slide into disempowerment, abuse and neglect”.¹²⁷ Echoing the notion of enjoyment of legal capacity on an equal basis with others, Gerard Quinn sees the paragraph 2 of Article 12 as a tool for advancing personhood and as “the most important constructive function”¹²⁸ to “open up opportunities for free interaction in the life world through contract.”¹²⁹

The wording of the paragraph about enjoyment of legal capacity in every aspect of life means that the CRPD recognizes holding legal capacity not only on civil matters, but also on criminal responsibility.¹³⁰ Even if in its General Comment No 1, the Committee does not explicitly mention whether persons with psychosocial needs, mental or intellectual disability should stand the criminal trial, concluding observations on state reports allows for detecting quite a clear position of the Committee on this matter. For example, the Committee expresses concern that criminal justice system of New Zealand allows to declare persons with disabilities unfit to stand trial and on this basis deprive them of liberty.¹³¹ Furthermore, the Committee is concerned, that the system “does not recognize that a person with disabilities should only be deprived of liberty when found guilty of a crime, after criminal procedure has been followed, with all the safeguards and guarantees applicable to everyone.”¹³² The same issue is raised in concluding observations on Denmark’s report. Particularly, the Committee expresses worries that because of their impairment people with disabilities are being considered unfit to stand trial and instead of punishment are sentenced to treatment.¹³³ Thus, it can be argued that the Committee does not distinguish people based on their disability (mental, intellectual) in criminal justice system.

In general, denial is an easy solution when a person or a state cannot deal with the difficult issues they face. Restriction of legal capacity of the person who has difficulties in realization of their rights, whether based on mental, or intellectual disabilities, is the easiest way to

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ G. Quinn. Personhood & Legal Capacity, Perspectives on the Paradigm Shift of Article 12 CRPD. - HPOD Conference, Harvard Law School 20.02.2010, p. 18.

¹²⁹ Ibid.

¹³⁰ T. Minkowitz. Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and beyond. – Griffith Law Review 2014, Vol. 23, No. 3, p. 445.

¹³¹ CRPD Committee, Concluding observations on the initial report of New Zealand, CRPD/C/NZL/CO/1, 31.10.2014, para 33.

¹³² Ibid.

¹³³ CRPD Committee, Concluding observations on the initial report of Denmark, CRPD/C/DNK/CO/1, 30.10.2014, para 34.

handle the issue. What the CRPD as the document aiming to protect the rights of persons with disabilities provides in Paragraph 3 of Article 12 is “access... to the support they may require in exercising their legal capacity”.¹³⁴ According to paragraph 3 of the article, support should not be based on best interest, rather it “must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making”.¹³⁵ Emphasis that support never means substitute decision-making, rather it should be understood as the supported decision making, is also reiterated in observations for States reports on Article 12. As of 2018 the CRPD Committee has provided observations regarding 75 initial reports of State parties. Analysis of all documents (observations) issued by the CRPD Committee for the member States reports demonstrates that there was not a single document without calling upon the member States to abolish or replace full or partial guardianship/substitute decision making system with supported decision making mechanisms.¹³⁶

Requirement of the abolition of guardianship/substitute decision making system is based on the reality that the guardianship system often leads to harmful consequences for persons with disabilities. As there have been no communications brought in front of CRPD Committee on this issue yet, the ECtHR cases can provide some good examples to demonstrate how the substitute decision-making system can result in isolation of persons with disabilities and the loss of control over their lives even when they do not have severe mental or intellectual disabilities. In the case *Shtukurov v. Russia*¹³⁷, the applicant was recognized by court as legally incapable because of existing guardianship system in Russia and a guardian was appointed. As a result the applicant was unable to challenge his guardian’s decision to place him in a psychiatric hospital against his will.¹³⁸ The hospital administration prohibited him to communicate with lawyer,¹³⁹ or to have “any contact with the outside world and was treated with strong medicines”.¹⁴⁰ ECtHR found a violation of Article 5(1),¹⁴¹ 5(4),¹⁴² 6(1).¹⁴³ In *Stanev v. Bulgaria*¹⁴⁴ case, the guardianship system led the applicant to be placed in a

¹³⁴ CRPD – Art 12(3).

¹³⁵ CRPD Committee, General comment No. 1, *op. cit.*, para 17.

¹³⁶ Concluding observations on the member States reports. Between 2011-2018 the CRPD provided concluding observations on 75 member States reports. All documents were studied for the purpose of the thesis.

¹³⁷ *Shtukurov v. Russia*, judgment, App. no. 44009/05, ECtHR, 27.03.2008.

¹³⁸ *Ibid.*, para 21.

¹³⁹ *Ibid.*, para 22.

¹⁴⁰ *Ibid.*, para 25.

¹⁴¹ *Ibid.*, para 116.

¹⁴² *Ibid.*, para 125.

¹⁴³ *Ibid.*, para 76.

¹⁴⁴ *Stanev v. Bulgaria*, judgment, App. no. 36760/06, ECtHR, 17.01.2012.

“decaying, dirty and rarely heated in winter”¹⁴⁵ social care home with seventy-three other inhabitants, with a permission to have a bath only once a week.¹⁴⁶ The applicant could not choose his place of residence freely as the Bulgarian legislation allows for making such a choice only with the guardian’s agreement.¹⁴⁷ ECtHR found a violation of Article 5(1),¹⁴⁸ 5(4),¹⁴⁹ 5(5),¹⁵⁰ 6(1).¹⁵¹ In *Kedzior v. Poland*¹⁵² case, appointment of guardian led to declaration of the applicant as totally incapacitated by the request of the guardian.¹⁵³ Later, solely with the request of the guardian, the applicant was placed in the social care home where he remained for ten years.¹⁵⁴ His request to the domestic courts for restoration of legal capacity was rejected, as he did not have the guardian’s consent for lodging the request.¹⁵⁵ Here too the ECtHR found a violation of Article 5(1),¹⁵⁶ 5(4),¹⁵⁷ 6(1).¹⁵⁸

Paragraph 4 of the CRPD Article 12 provides minimum requirements and guidance, which should be taken into account to ensure proper support for exercising legal capacity by persons with disabilities. These requirements are: a) respect for the rights, will and preferences; b) freedom from conflict of interest; c) freedom from undue influence; d) promoting proportionality; e) being tailored to the person’s circumstances; f) application of the shortest time possible; g) regular review by independent and impartial authority or judicial body,¹⁵⁹ however, in the GC the CRPD Committee also decided to stress the primary purpose of support and among other requirements highlighted “respect of the person’s rights, will and preferences”.¹⁶⁰ In order to reaffirm the autonomy of persons with disabilities the CRPD Committee also clearly stipulated that the principle of “best interests” contradicts the purpose of Article 12 and it should be replaced by “best interpretation of will and preferences”.¹⁶¹

¹⁴⁵ Ibid., para 20.

¹⁴⁶ Ibid., para 23.

¹⁴⁷ Ibid., para 38.

¹⁴⁸ Ibid., para 160.

¹⁴⁹ Ibid., para 178.

¹⁵⁰ Ibid., para 191.

¹⁵¹ Ibid., para 248.

¹⁵² *Kedzior v. Poland*, judgment, App. no. 45026/07, ECtHR, 16.10.2012.

¹⁵³ Ibid., para 9.

¹⁵⁴ Ibid., para 13.

¹⁵⁵ Ibid., para 18.

¹⁵⁶ Ibid., para 71.

¹⁵⁷ Ibid., para 79.

¹⁵⁸ Ibid., para 91.

¹⁵⁹ CRPD, Art 12(4).

¹⁶⁰ CRPD Committee, General comment No. 1, *op,cit.*, para 20.

¹⁶¹ Ibid., para 21.

The importance of the paradigm shift from the best interests to the best interpretation of will and preferences is constantly repeated by the CRPD Committee in observations issued to State parties from 2011 to November 2018. The CRPD Committee does not differentiate with respect to size, location and economic or social situation of member States. The shift from the substitute decision-making system toward the supported decision-making, with respect of autonomy, will and preferences of persons with disabilities applies to all States. For example, in 2011 the CRPD Committee called upon Spain to replace substitute decision-making regime by supported decision making, “which respects person’s autonomy, will and preferences”.¹⁶² In 2014 the CRPD Committee recommended Azerbaijan to introduce supported decision-making structures with the same wording: “which fully respect the person’s autonomy, will and preferences.”¹⁶³ The same narrative of “respect autonomy, will and preferences” is repeated in concluding observations issued in 2018 on initial reports of Algeria¹⁶⁴, Slovenia¹⁶⁵, Haiti¹⁶⁶ and Poland¹⁶⁷.

Arstein-Kerslake and Eilionoir Flynn believe that the strong wording of the CRPD Committee on the respect for autonomy, will and preferences of persons with disabilities does not mean blanket restriction from the interference of the state. In some cases it is possible not to respect certain will and preference of person with disabilities, but according to them, such occasions or interference from the part of the state must be allowed by law only in “rarest situation”.¹⁶⁸ A different question may arise from this debate: if situations where the will and preferences of persons with disabilities can be ignored are still allowed, what distinguishes this system from the previous guardianship mechanism? Arstein-Kerslake and Eilionoir Flynn answer this question by providing explanations according to which, contrary to substituted decision-making, decision-making support requires good faith and effort to make a decision which reflects the person’s wishes; it is more rights-protective, fosters equality and its main goal is to restrict external decisions “which others think is in the person’s objective best

¹⁶² CRPD Committee, Concluding observations of the Committee on the Rights of Persons with Disabilities, Spain, CRPD/C/ESP/CO/1, 19.10.2011, para 34.

¹⁶³ CRPD Committee, Concluding observations on the initial report of Azerbaijan, CRPD/C/AZE/CO/1, 12.05.2014, para 27.

¹⁶⁴ CRPD Committee, Concluding observations on the initial report of Algeria, CRPD/C/DZA/CO/1, S21.09.2018, para 25.

¹⁶⁵ CRPD Committee, Concluding observations on the initial report of Slovenia, CRPD/C/SVN/CO/1, 16.04.2018, para 19.

¹⁶⁶ CRPD Committee, Concluding observations on the initial report of Haiti, CRPD/C/HTI/CO/1, 13.04.2018, para 23(b).

¹⁶⁷ CRPD Committee, Concluding observations on the initial report of Poland, CRPD/C/POL/CO/1, 21.09.2018, para 20.

¹⁶⁸ A. Arstein-Kerslake & E. Flynn, *op. cit.*, p. 483.

interests”,¹⁶⁹ and to “ arrive at a decision, as informed as it possibly can be, by the individuals’ own will and preferences.”¹⁷⁰

Regarding the capability of persons with disabilities (especially persons with severe disabilities) to own and control their own finances which is another frequently debated subject, the CRPD provides answers in the final paragraph 5 of Article 12. According to the provision, the States parties are obliged to ensure that persons with disabilities have the right and possibility to own and inherit property, they also have control over their financial affairs, access to bank loans, mortgages and that they are not deprived of their property.¹⁷¹ The CPRD Committee does not specify in GC whether owning and controlling their financial affairs applies to all persons with disabilities; however, in concluding observations to States Parties the CRPD Committee clarifies that all persons with disabilities (also those who were deprived of legal capacity) have rights to have access to bank services¹⁷² and financial affairs.¹⁷³

The concept of Article 12 as proposed by the CRPD was reproduced in regional legal systems. In 2015, nine years after the adoption of the CRPD, the Inter-American Convention on Protecting the Human Rights of Older Persons was adopted. While there were no separate statements on legal capacity in international or regional conventions before the CRPD, the Inter-American Convention on Protecting the Human Rights of Older Persons most likely took the CRPD as a guideline and included in Article 30 a statement about equal enjoyment of legal capacity by older persons “on an equal basis with others in all aspects of life.”¹⁷⁴ As in the CRPD, the above mentioned convention requires from the member States to take positive actions and provide older persons with all support they may need to exercise their legal capacity;¹⁷⁵ respect and take into consideration the will and preferences of older persons;¹⁷⁶ ensure their right to own and inherit property;¹⁷⁷ control their own finances and not to be arbitrarily deprived of their property.¹⁷⁸ To try and quantify the benefits of the idea firstly proposed by Article 12 of the CRPD for the elderly as well, it can be argued that up to

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ CRPD. Art 12(5).

¹⁷² CRPD Committee, Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 02.10.2015, para 37.

¹⁷³ CRPD Committee, Concluding observations on the initial report of Mongolia, CRPD/C/MNG/CO/1, 13.10.2015, para 21.

¹⁷⁴ Inter-American Convention on Protecting the Human Rights of Older Persons. Art 30.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

49 million people aged 65 years and more who live in the United States only¹⁷⁹ can benefit from it and according to the World Health Organization, this number will double by 2050.¹⁸⁰

12 years since the adoption of the CRPD, the member States of the African Union also incorporated the essence of Article 12 of the CRPD in the newly (2018) adopted Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa. The Protocol is not just a repetition of the CRPD but it changes or adds some nuances derived from the regional needs and understandings.¹⁸¹ However, it does not alter the core concept of Article 12 of the CRPD. Moreover, it can be argued that the Protocol offers clearer statements and imposes obligations on member States in a more concrete language in order to ensure higher protection of legal capacity of persons with disabilities. Particularly, Article 7 (Equal recognition before the law) of the Protocol reaffirms the notion of equality not only "before the law"¹⁸², but "under the law"¹⁸³ too. Equality under the law is provided for in Article 5 (Equality and non-discrimination) of the CRPD (and not in Article 12) in order to ensure for persons with disabilities not only protection by the law (equality before the law), but also benefits from it (equality under the law).¹⁸⁴ It directly states that member States are responsible to ensure that non-State actors and other individuals do not infringe on the right of exercising legal capacity of persons with disabilities;¹⁸⁵ the article directly mentions the obligation to review or repeal policies and laws which restrict or limit the legal capacity of persons with disabilities;¹⁸⁶ it obliges the States to ensure that persons with disabilities hold identity documents or other legal papers which are necessary to exercise legal capacity.¹⁸⁷ To

¹⁷⁹ United States Department of Commerce, Economics and Statistics Administration, United States Census Bureau. The Population 65 Years and Older in the United States: 2016. ACS-38, 2018, table 2, p. 2.

¹⁸⁰ World Health Organization. Multisectoral Action for a Life Course Approach to Healthy Ageing: Draft Global Strategy and Plan of Action on Ageing and Health, A69/17. Date 22.04.2016, para 1.

¹⁸¹ For example, separate Article 11 (Harmful Practices) was added for elimination harmful practices against persons with disabilities in African; was added also separate Article 22 (Self-representation); Article 19 (Independent Living) of the CRPD, was adapting in Article 14 (Right to Live in the Community) taking into the account the regional and cultural preferences; Article 6 (Women with Disabilities) of the CRPD was modified and expanded based on needs of women and girls in African States in the Article 27 (Women and Girls with Disabilities).

¹⁸² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities. Art 7(1).

¹⁸³ Ibid.

¹⁸⁴ CRPD, Art 5(1).

¹⁸⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities. Art 7(2)(b).

¹⁸⁶ Ibid., Art 7(2)(e).

¹⁸⁷ Ibid., Art 7(2)(f).

quantify the effect again, according to the UN human rights office, this provision impacts 84 million Africans with disabilities.¹⁸⁸

2.3 Implication of Article 12 for other CRPD Articles

Applying the human rights approach in order to understand Article 12 of the CRPD is crucially important and as it “strongly influences the exercise of all other human rights and fundamental freedoms.”¹⁸⁹ It is directly linked with Article 13 (access to justice) as without legal capacity persons are denied access to justice. Restriction of legal capacity and access to justice is the reason why persons with disabilities can be kept in residential institutions against their will or informed consent, which is the infringement of Article 14 (liberty and security) and Article 25 (right to health, consent). As the CRPD Committee states in GC, denial of legal capacity and institutionalization of persons with disabilities against their will, without their consent and with consent of guardians/substitute decision makers are still pressing problems.¹⁹⁰ Without the interpretation of Article 12 based on the will and preferences of persons with disabilities, Article 19 (Living independently and being included in the community) can also be misinterpreted and misunderstood. Article 19 stipulates that “exercising freedom of choice and control over decisions affecting one’s life with the maximum level of self-determination and interdependence within society”¹⁹¹ and it requires that State Parties provide all support and services chosen by persons with disabilities in accordance to their needs and preferences.¹⁹²

Article 12 also includes direct implications for the right of persons with disabilities to vote and for Article 29 (political participation) of the CRPD. For example, Bulgarian legislation deprives persons with intellectual disabilities placed under guardianship, of the right to vote.¹⁹³ Moldova does the same and restricts the right to vote¹⁹⁴ for persons with disabilities who are under guardianship. In Ukraine the legislation prevents persons with disabilities with

¹⁸⁸ United Nations Human Rights Office of the High Commissioner. African States Affirm the Rights of Persons with Disabilities in a New Landmark Protocol. Media centre, Geneva 15.02.2018.

¹⁸⁹ Report of the Special Rapporteur on the rights of persons with disabilities. A/HRC/37/56, date 12.12.2017, para 25.

¹⁹⁰ CRPD Committee, General comment No. 1, *op. cit.*, para 40.

¹⁹¹ CRPD Committee, General comment No. 5 (2017) on living independently and being included in the community, CRPD/C/GC/5, 27.10.2017, para 8.

¹⁹² *Ibid.*, para 28.

¹⁹³ CRPD Committee, Concluding observations on the initial report of Bulgaria, CRPD/C/BGR/CO/1, 22.10.2018, para 61.

¹⁹⁴ CRPD Committee, Concluding observations on the initial report of the Republic of Moldova, CRPD/C/MDA/CO/1, 18.05.2017, para 52.

restricted legal capacity from exercising their right to vote.¹⁹⁵ Therefore, it can be argued that restriction of legal capacity of persons with disabilities heavily effects their right to exercise voting rights and fully participate in political life.

2.4 CRPD Case Study on Article 12

The CRPD case study is not rich with data yet, especially with respect to Article 12. As of 2018, the CRPD Committee has adopted a total of fifteen views in response to the received communications. Among them, six communications claimed the infringement of Article 12 by the contracting State party. However, in three communications the CRPD Committee concluded that the authors' claims were inadmissible for further examination with regard to Article 12.¹⁹⁶ Thus, there are only three communications where the CRPD Committee had to assess whether the State party violated Article 12 or not.

In *Makarov v. Lithuania*¹⁹⁷ case, the author's wife was not provided by the State with sufficient legal support and her participation in court hearings as the witness was not ensured due to her disability. In the adopted view the Committee declared that under Article 12(3) State parties have an obligation to take appropriate measures to ensure access by persons with disabilities to the support they may require in exercising their legal capacity.¹⁹⁸ The breach of Article 12(3) in the presented case also violated Article 13(1) because by not providing sufficient support for exercising legal capacity, the State also infringed on her right to access justice. In the adopted views the Committee also acknowledged that States parties have certain margin of appreciation to assess reasonableness and proportionality of support, but if evaluation made by the court is "clearly arbitrary or amounted to a denial of justice",¹⁹⁹ it cannot be taken into account as an objective evaluation.

¹⁹⁵ CRPD Committee, Concluding observations on the initial report of Ukraine, CRPD/C/UKR/CO/1, 02.10.2015, para 54.

¹⁹⁶ Communication No.7/2012, Marlon James Noble v. Australia, date of communication 12.04.2012, views adopted by the CRPD Committee 10.10.2016; Communication No.13/2013, Michael Lockrey v. Australia, date of communication 08.04.2013, views adopted by the CRPD Committee 30.05.2016; Communication No.1/2010, Szilvia Nyusti and Peter Takacs v. Hungary, date of communication 11.03.2010, views adopted by the CRPD Committee 21.06.2013.

¹⁹⁷ Communication No.30/2015, Makarov v. Lithuania, date of communication 02.03.2015, views adopted by the CRPD Committee 18.08.2017.

¹⁹⁸ *Ibid.*, para 7.6.

¹⁹⁹ Communication No.5/2011, Marie-Louise Jungelin v. Sweden, date of communication 18.02.2011, views adopted by the CRPD Committee 02.10.2014, para 10.5.

In the case *Noble v. Australia*,²⁰⁰ the author of the communication was charged in 2001 with two counts of sexual penetration of a child under the age of 13 and three instances of indecently treating a child aged between 13 to 16.²⁰¹ In 2002 he was assessed by a psychiatrist in order to conclude whether he was mentally impaired or not. Based on the assessment the Court found that the author was unfit to plead and was subjected to custody under the *Mentally Impaired Defendants Act*.²⁰² Therefore, the Court did not assess guiltiness of the author. Another psychological assessment ten years later concluded that he was able to stand before the trial and the author's legal representative requested from the Court to establish if the author was guilty for the criminal charges he had been accused of ten years before, or terminate the prosecution in case the author was acquitted.²⁰³ However, the Public Prosecutor refused to continue further prosecution of the case due to the fact that the author had spent substantial time in custody and that the quality of the evidences for conviction was low.²⁰⁴

According to the CRPD Committee view on the above mentioned case, the Australian legislation failed to provide equal opportunity for persons with disabilities to exercise their legal capacity before the courts if they were found mentally unfit to stand before the trial.²⁰⁵ The Committee also notes that during the entire 10-year period the judicial system had been focused on the mental capacity of the person without giving him the possibility to plead not guilty and to challenge the evidences against him.²⁰⁶ Therefore, the decision about being unfit to stand before the court due to his intellectual and mental disability and not providing adequate support to do so resulted in the denial of his right to exercise his legal capacity to plead not guilty and fully deprived him of the opportunity to challenge his status as a sexual offender.²⁰⁷ The Committee did not assess Article 12(2)(3) and 13(1) separately, rather the assessment was done jointly for both articles and the Committee found violation of both of them.²⁰⁸

While the two cases reviewed above indicate the tight linkage and the importance of Article 12 (Equal recognition before the law) for the exercise of Article 13 (Access to justice), the

²⁰⁰ Communication No.7/2012, *Marlon James Noble v. Australia*, date of communication 12.04.2012, views adopted by the CRPD Committee 02.09.2016.

²⁰¹ *Ibid.*, para 2.1.

²⁰² *Ibid.*, para 2.4.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*, para 8.4.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, para 8.6.

²⁰⁸ *Ibid.*, para 8.5 – 8.6.

case *Zsolt Bujdosó and others v. Hungary*²⁰⁹ discussed below demonstrates how restriction of legal capacity influences the right to vote (Article 29). Six persons of the mentioned communication were placed under partial or general guardianship, which according to the Hungarian legislation is the basis for removing persons from the electoral register.²¹⁰ Harvard Law School Project on Disability submitted to the Committee a quite interesting third party intervention regarding the case. According to the intervener, denying the right to vote because of disability is direct discrimination based on “unacceptable and empirically unfounded stereotype that all persons with disabilities are incapable.”²¹¹ The intervener expressed its negative observations about the individual assessment of each person to determine whether they were capable of making competent choices and provided the following argument: “Assessments of voting capacity rest on the assumption that it is permissible to protect the integrity of the political system from individuals who are unable to formulate a valid political opinion. According to that argument, individuals who are objectively found to lack the capacity to vote are by definition unable to vote competently. However ... the legitimacy of that aim is itself questionable, since it is not for the State to determine what constitutes a valid political opinion.”²¹² The intervener also offered statistics with respect to the situation in Hungary, according to which as of 2011, approximately 71,862 persons were denied the right to vote out of which only 1,393 persons had severe forms of intellectual disability.²¹³

In the above discussed communication the Committee once again reminded the State that under Article 12(2) of the CRPD, States parties must recognize legal capacity of persons with disabilities on an equal basis which includes all aspects of life with no exception and have a positive duty to provide all necessary measures to guarantee that persons with disabilities are actually able to exercise their legal capacity.²¹⁴ The Committee found the violation of Article 29 of the CRPD independently and in conjunction with Article 12. The Committee also provided a very important statement that assessing an individual’s capacity to determine their ability to vote is discrimination and that “this measure cannot be purported to be legitimate. Nor is it proportional to the aim of preserving the integrity of the State party’s political system.”²¹⁵

²⁰⁹ Communication No.4/2011, *Zsolt Bujdosó and others v. Hungary*, communication date 14.09.2011, views adopted by the CRPD Committee 09.09.2013.

²¹⁰ *Ibid.*, para 2.

²¹¹ *Ibid.*, para 5.4.

²¹² *Ibid.*, para 5.7.

²¹³ *Ibid.*, para 5.10.

²¹⁴ *Ibid.*, para 9.5.

²¹⁵ *Ibid.*, para 9.6.

Three years before the CRPD Committee adopted its views in *Buydoso and others v. Hungary* communication, the ECtHR in 2010 had the opportunity to assess the deprivation of the right to vote for persons with disabilities in the case of *Alajos Kiss v. Hungary*²¹⁶. Similar to *Buydoso and others* case, *Kiss* lost the right to vote due to having been placed under the partial guardianship. In this case, the ECtHR found the violation of Article 3 of Protocol No.1 of the ECHR.²¹⁷ The judgment was based on the argument that the Hungarian law imposed “an automatic, blanket restriction on the franchise of those under partial guardianship”.²¹⁸ According to the ECtHR, Hungary violated Article 3 of Protocol No.1 to the ECHR precisely because the State used “indiscriminate removal of voting rights, without an individualized judicial evaluation.”²¹⁹ The reasoning of the ECtHR itself is not in full compliance with the idea of Article 12 (equal recognition before the law) and Article 29 (political participation) of the CRPD. According to the ECtHR reasoning it could be argued that for the ECtHR it would be acceptable to deprive a person of the right to vote in case of individual examination, which is incompatible with the CRPD.

2.5 Reservations and Declarations on Article 12

In addition to all aspects discussed in the previous chapter, it is also important to take a look at the reservations and declarations made by member States on the CRPD and the approach of the CRPD Committee toward them in order to precisely understand Article 12 of the CRPD.

The Vienna Convention on the Law of Treaties, in Article 2, provides explanation of the term of reservation as a unilateral statement made by a State for the purpose to “exclude or to modify the legal effect of certain provision of the treaty.”²²⁰ Articles 19-23 of the same convention further explain permissible scopes within which the reservation can be made and to what extent. However, Article 19 of the Vienna Convention lists three grounds in which reservations are prohibited. These grounds are: a) when the treaty itself provides an article on prohibition of reservations; b) when the treaty provides that only specified reservations can be made; or c) reservation is incompatible with the object and purpose of the treaty.²²¹ Unlike ‘reservations’, the meaning of ‘declaration’ is not defined in Vienna Convention on the Law of Treaties. However the UN provides a glossary of terms (general guide) relating to treaty

²¹⁶ *Alajos Kiss v. Hungary*, judgment, App. no.38832/06, ECtHR, 20.05.2010.

²¹⁷ *Ibid.*, para 44.

²¹⁸ *Ibid.*, para 43.

²¹⁹ *Ibid.*, para 44.

²²⁰ Vienna Convention on the Law of Treaties. Vienna 23.05.1969, entry into force 27.01.1980, Art 2.

²²¹ *Ibid.*, Art 19.

actions, where ‘declarations’ are explained as “interpretation of a particular provision,” which clarifies the state’s position and the purpose of declarations is not to exclude or modify the legal effect of a treaty.²²²

In compliance with the Vienna Convention on the Law of Treaties, Article 46 of the CRPD prohibits the use of reservations by member States, which are “incompatible with the object and purpose”²²³ of the CRPD. Nevertheless, 11 states (Canada, Egypt, Estonia, France, Ireland, Kuwait, Netherland, Norway, Poland, Singapore, Syria) made reservations and declarations on Article 12, which to some extent narrow down the scope of the article, as explained in the General Comment No.1 of the CRPD Committee. As of 2018 the CRPD Committee issued its concluding observations only to two of the 11 countries listed above: Canada and Poland and called upon both States to withdraw their reservations and declarations on Article 12.

In its declaration Poland postulated that the State interpreted Article 12 as allowing incapacitation of the person if the person suffers from a “mental illness, mental disability or other disorder”²²⁴ and is “unable to control his or her conduct”. In 2018, the CRPD Committee adopted concluding observations on Poland’s initial report and recommended to withdraw its declaration on Article 12 and “recalling its general comment No.1 (2014) on Equal Recognition Before the Law, to repeal all discriminatory provisions under the Civil Code and other legal acts, allowing for deprivation of legal capacity of persons with disabilities, considering that legal capacity includes the capacity to be both, a holder of rights and an actor under the law.”²²⁵ The same call was issued to Canada in 2017 on their reservation made on Article 12 (4). In its concluding observation, the CRPD Committee recommended to withdraw reservation on Article 12(4) and required to “carry out a process to bring into the line with the Convention federal, provincial and territorial legislation that allows for the deprivation of legal capacity of persons with disabilities.”²²⁶ With these statements the CRPD Committee once again underlined that incapacitation of persons with disabilities was not permissible under the CRPD and any reservation which allowed

²²² The definition of the term ‘declaration’ is provided in the Glossary of the UN Treaty Collection official page.

²²³ CRPD, Art 46, para 1.

²²⁴ Interpretative declaration made by Poland, upon ratification the CRPD. UN Treaty Collection, Depository. Status as at: 28-12-2018.

²²⁵ CRPD Committee, Concluding observations on the initial report of Poland, CRPD/C/POL/CO/1, 21.09.2018, para 20.

²²⁶ CRPD Committee, Concluding observations on the initial report of Canada, CRPD/C/CAN/CO/1, 08.05.2017, para 8.

incapacitation of persons with disabilities was incompatible with the purpose and object of the treaty.

Declarations on the interpretation of legal capacity as only acquiring a right, without having the right to exercise it, was also made by Egypt²²⁷ and Syria²²⁸. Kuwait made a declaration on Article 12 and subjected it to the conditions of Kuwaiti national law.²²⁹ With respect to Egypt and Syria, even though the CRPD Committee has not yet adopted concluding observations for these countries, most probably the Committee will also call on them to withdraw the reservations, as it did in the cases of Canada and Poland. As for Kuwait, it will be interesting to see whether the CRPD Committee adopts the same approach as the CEDAW Committee. In its concluding observations on Kuwaiti report the CEDAW Committee raised concerns on arbitrary detention of women in mental health facilities and placing women in Kuwait under their husbands' guardianship.²³⁰

Estonia does not interpret Article 12 as allowing incapacitation when the person lacks ability to understand his or her actions, but allows restriction of active legal capacity in accordance with the domestic law.²³¹ The Estonian Constitution still includes Article 57 which explicitly says that a citizen of Estonia "who has been declared by a court to lack legal capacity is ineligible to vote."²³² As of 2018 the CRPD Committee has not provided concluding observations on the initial report by Estonia, but it is expected that the Committee will call for Estonia to withdraw the declaration, considering its concluding observation on Lithuania's initial report, where the Committee recommended Lithuania to "repeal provisions in the law and the Constitution denying the right of persons with disabilities to vote and stand for election."²³³

France has also referred to modalities of disability for exercising active legal capacity with regard to Article 29 - the right to vote.²³⁴ France has not received concluding observations by

²²⁷ Interpretative declaration made by Egypt, upon signature the CRPD. UN Treaty Collection, Depository. Status as at: 28-12-2018.

²²⁸ Declaration made by Syrian Arab Republic, upon signature the CRPD. UN Treaty Collection, Depository. Status as at: 28-12-2018.

²²⁹ Interpretative declaration made by Kuwait, UN Treaty Collection, Depository. Status as at: 28-12-2018.

²³⁰ CEDAW, concluding observations on the fifth periodic reports of Kuwait, *op. cit.*, para 38.

²³¹ Declaration made by Estonia, UN Treaty Collection, Depository. Status as at: 28-12-2018.

²³² Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). Adopted 28.06.1992, entry into force 03.07.1992, Art 57.

²³³ CRPD Committee, Concluding observations on the initial report of Lithuania, CRPD/C/LTU/CO/1, 11.05.2016, para 58(a).

²³⁴ Declaration made by France, UN Treaty Collection, Depository. Status as at: 28-12-2018.

the CRPD Committee on its initial report yet, however, a similar situation is addressed in the Committee's concluding observations on Malta's initial report, where it recommends Malta to withdraw its reservation on Article 29, "so that persons with disabilities can exercise the right to vote."²³⁵ The CRPD Committee does not allow any space for distinguishing people based on the severity of their disability and requires Malta to: "provide the necessary support for persons with psychosocial or intellectual disabilities, so that they can participate in such processes on an equal basis with others."²³⁶ Therefore, any interpretation of Article 12 which can be understood as a restriction of active political and public life based on the modalities of disability is not compatible with the CRPD.

The documents analyzed in this chapter provide key indicators for the implementation of Article 12 in practice. Due to the novelty and complexity of the issue, the CRPD Committee has not yet issued any specific directives concerning the implementation of the article on national levels. Rather, it chooses to reiterate the main purposes and the most meaningful nuisances of the new model of legal capacity. It is quite correctly pointed out by Anna Arstein-Kerslake and Eilionoir Flynn that "the exact parameters of what a 'universal legal capacity model' would be in practice are still unclear".²³⁷ However, adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Right of Persons with Disabilities in Africa 10 years after the entry into force of the CRPD, and proclaiming in its Article 7 (Equal recognition before the law) the same idea firstly proposed by the CRPD; also the adoption and the 2017 entry into force of the Inter-American Convention on Protecting the Human Rights of Older Persons and using in its Article 30 (Equal recognition before the law) the same concept of legal capacity toward older persons as it was used in the CRPD allows for the conclusion that despite numerous difficulties in implementation, the proposed concept of legal capacity has already made a significant difference in the world.

²³⁵ CRPD Committee, Concluding observations on the initial report of Malta, CRPD/C/MLT/CO/1, 17.10.2018, para 42(a).

²³⁶ *Ibid.*, para 42(b).

²³⁷ A. Arstein-Kerslake & E. Flynn, *op. cit.*, p. 472.

3. THE GEORGIAN LEGAL CAPACITY REFORM

3.1 Ruling of The Constitutional Court of Georgia

In 2014, the Constitutional Court of Georgia (the Court) made its decision (the Decision) in the case filed in 2012 by Irakli Kemoklidze and David Kharadze against the Parliament of Georgia.²³⁸ For the purposes of the Court's decision analysis, it would be relevant to take into consideration two major facts concerning the case. Firstly, Georgia ratified the CRPD in December 2013, almost ten months before the Decision was made. Secondly, the Committee had issued its General Comment No1 in April, 2014, six months before the Decision. These facts placed additional burden on the Court to take a progressive decision in line with international human rights standards. However, it is hard to conclude whether the Court took into account the above mentioned two major facts while making the decision as it does not mention any of these developments in its reasoning. There are only two paragraphs in the judgment where the Court enlists the international and regional legal instruments: in the first paragraph the Court elaborates on taking into account the will of the person and the individual intellectual capacity when limiting the legal capacity and it makes reference to the Council of Europe documents, such as: Recommendations of Committee of Ministers No.818 (1977), adopted 08.10.1977; No. R(83)2, adopted 22.02.1983; No. R(99)4, adopted 23.02.1999; Rec(2004)10, adopted 22.09.2004; CM/Rec(2011)4, adopted 21.09.2011) while it omits other international instruments such as CRPD.²³⁹ In another paragraph the Court expands on the prohibition of torture and other cruel treatment, it enlists the following international instruments: Universal Declaration of Human Rights (Article 5); International Covenant on Civil and Political Rights (Article 7); The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; ECHR (Article 3)²⁴⁰ and again it does not make any reference to the CRPD.

In the Constitutional Court case discussed in this chapter, the claimants requested from the Court to declare as unconstitutional the articles of the Civil Code of Georgia, Civil Procedure Code of Georgia and the Law on Psychiatric Care, which recognized persons as mentally incapacitated due to intellectual development problems and mental illness and thus annulled the declaration of intent by persons with restricted legal capacity. According to the claimants, recognition of persons with disabilities as legally incapable and restriction of their rights in

²³⁸ The Judgment of the Constitutional Court of Georgia, N2/4.532,533, Irakli Kemoklidze and David Kharadze against the Parliament of Georgia, date 8.10.2014.

²³⁹ Ibid., reasoning part, para 37.

²⁴⁰ Ibid., para 178.

particular spheres of life were incompatible with the following articles of the Constitution of Georgia:

- i) Article 14 (equal recognition before the law)²⁴¹ - recognizing a person as legally incapacitated after which they are banned from taking independent decisions in all spheres of life is the unjustified interference with the rights protected under this article;²⁴²
- ii) Article 16 (right to personal development)²⁴³ - exclusion of a legally incapacitated person from taking independent decisions about their life and replacing their will with the will of the guardian contradicts the right to personal development protected under this article;²⁴⁴
- iii) Article 17(1)(2) (inviolability of human dignity, freedom from torture or inhuman treatment)²⁴⁵ - existing laws allow doctors to restrict certain rights of legally incapacitated persons, which also includes the right to humane treatment, which contradicts the right to be free from torture and inhuman treatment protected under this article;²⁴⁶
- iv) Article 18(1)(2)(protection of liberty of a person, freedom from arbitrary deprivation of liberty),²⁴⁷ - pursuant to the existing laws, there is no requirement for obtaining consent from the legally incapacitated person to place them in the psychiatric facility. This means that even in cases when the legally incapacitated person is able to take a rational decision, putting them into the psychiatric facility is arbitrary and takes place without their consent. Arbitrary placement in a psychiatric facility contradicts the rights protected under this article;²⁴⁸
- v) Article 24(1)(right to receive and disseminate information)²⁴⁹ - according to the existing law, a legally incapacitated person is restricted to request information stored about her/him from a private medical facility. This contradicts the rights protected under this article;²⁵⁰

²⁴¹ Article 14: Everyone is born free and is equal before the law regardless of race, color of skin, language, sex, religion, political or other opinions, national, ethnic and social affiliation, origin, property, or social status, place of residence.

²⁴² The Judgment of the Constitutional Court of Georgia, descriptive part, para 11.

²⁴³ Article 16: Everyone shall have the freedom to develop their own personality.

²⁴⁴ The Judgment of the Constitutional Court of Georgia, descriptive part, para 12.

²⁴⁵ Article 17(1): Human honor and dignity shall be inviolable. (2) No one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment.

²⁴⁶ The Judgment of the Constitutional Court of Georgia, descriptive part, para 19.

²⁴⁷ Article 18(1) Human liberty shall be inviolable. (2) Imprisonment or other restrictions of personal liberty shall be inadmissible without a court decision.

²⁴⁸ The Judgment of the Constitutional Court of Georgia, descriptive part para 16.

²⁴⁹ Article 24(1) Everyone shall be free to receive and disseminate information.

²⁵⁰ The Judgment of the Constitutional Court of Georgia, descriptive part para 18.

- vi) Article 36(1)(right to marry)²⁵¹ - the right to marry is a personal right and based on its nature it should be impossible for the guardian to give the consent for marriage on behalf of the ward. Accordingly, interference into this right on the basis of intellectual or mental disability violates the rights protected under this article;²⁵²
- vii) Article 41(1)(right to access the information stored in state institutions)²⁵³ - pursuant to the existing law, the legally incapacitated person was restricted to request the information stored about her/him from the governmental medical facility. This interferes with the rights protected under this article, which are similar to the rights protected under Article 24 of the Constitution of Georgia. The only difference is that while under Article 24 a person is eligible to request information from the private entity, Article 41 guarantees the right to request information from the Government;²⁵⁴
- viii) Article 42(1)(right to apply to the court)²⁵⁵ - according to the existing law, the legally incapacitated person was deprived of the right to apply to the court and the restriction of this right makes it possible for the guardian, family member, or medical facility personnel to abuse their power and refuse the legally incapacitated person the opportunity to restore his/her legal capacity. This contradicts the rights protected under this article;²⁵⁶

The claimants mainly argued that the lawmaker had used an indiscriminate approach toward persons with mental illness or intellectual disability in order to deprive them from legal capacity.²⁵⁷ At the same time, the claimants also accepted that the full removal of legal capacity and the replacement of the will of the disabled persons were possible in cases where the person was fully lacking the capacity to act on her/his behalf. However, it must be noted that as the severity of mental illness or intellectual disability varies from case to case, most persons with mental illness or intellectual disability may have the capacity to make decisions on their behalf.²⁵⁸

²⁵¹ Article 36(1) Marriage shall be based on the equality of rights and free will of spouses.

²⁵² The Judgment of the Constitutional Court of Georgia, descriptive part para 14.

²⁵³ Article 41(1) Every citizen of Georgia shall have the right of access to information as determined by law, as well as to official documents about him/her stored in state institutions, unless they contain state, professional, or commercial secrets.

²⁵⁴ The Judgment of the Constitutional Court of Georgia, descriptive part, para 18.

²⁵⁵ Article 42. (1) Everyone shall have the right to apply to the court for protection of his/her rights and freedoms.

²⁵⁶ The Judgment of the Constitutional Court of Georgia, descriptive part, para 13.

²⁵⁷ Ibid., para 8.

²⁵⁸ Ibid., para 9.

During the hearing of this case, a specialist explained existing international mechanisms for the limitation of legal capacity: total limitation and functional limitation.²⁵⁹ The specialist also clarified that at the time of the hearing Georgia was practicing only total limitation of legal capacity and there were no other mechanisms in existence. The absence of such kind of a mechanism was not due to technical reasons, but the lack of a proper legal framework.²⁶⁰ Importantly, the representative of Levan Samkharauli National Forensics Bureau (Forensics Bureau)²⁶¹ spoke in favor of total limitation of legal capacity during the hearing.²⁶² It should be stressed because the Forensics Bureau continues to be the only facility designated by law to assess the extent of person's capacity.²⁶³ This means that even today the level of disabled persons' capacity is assessed by the facility, which is against having this kind of assessment requirements at all.

Free University of Tbilisi also presented their opinion of Amicus Curiae at the hearing. The Amicus Curiae also stressed the necessity of discontinuing the un-differential practice of legal capacity restriction. Instead it requested from the legislator to allow for partial limitation of legal capacity based on the individual assessment²⁶⁴ and thus avoid transferring of all rights of the person to the guardian.²⁶⁵ The Amicus Curiae, as well as the claimants, argued that there should be a differential treatment towards persons with disabilities; they did not request the full prohibition by the legislator of the total deprivation of legal capacity. The Amicus Curiae suggested differential treatment of “peoples with disabilities according to their capacities, simply because imposing the same restriction on freedoms of persons of different capabilities cannot be justified.”²⁶⁶

The Court assessed compliance with the Constitution under each appealed article separately. For the purposes of the presented paper and taking into account the volume of the

²⁵⁹ Ibid., para 32.

²⁶⁰ Ibid., para 33.

²⁶¹ Legal Entity under the Public Law Levan Samkharauli National Forensics Bureau is a government forensics agency. The main task of the Forensics Bureau is to carry out research and prepare reports on the Civil, Criminal or Administrative cases by request of courts, prosecutors, investigators, private or other entitled persons. It was established by the law. Sakartvelos k'anoni sajaro samartlis iuridiuli p'iris - levan samkharaulis sakhelobis sasamartlo eksp'ert'izis erovnuli biuros shekmnis shesakheb (Georgian Law about Creation of LELP Levan Samkharauli National Forensics Bureau). Adopted 31.10.2008, entry into force 12.11.2008.

²⁶² Ibid., para 34.

²⁶³ Sakartvelos k'anoni psikosotsialuri sach'iroebidan gamomdinare eksp'ert'izis chat'arebis shesakheb (Law of Georgia On Psychosocial Needs Assessment). Adopted 20.03.2015, entry into force 31.03.2015, Art 3(v).

²⁶⁴ The Judgment of the Constitutional Court of Georgia, descriptive part, *op. cit.*, para 37.

²⁶⁵ Ibid., para 38.

²⁶⁶ Ibid., para 40.

Constitutional Court judgment, only the most essential reasoning of the Court will be analyzed further.

It is not surprising that the first two main questions which the Court tried to address deal with the legality of recognition of a person as legally incapacitated and the legality of the guardianship system in general. According to the reasoning of the Court, the existing law, which completely removes legal capacity from the person; deprives the person of the opportunity to act fully independently;²⁶⁷ prohibits them to enter into the contract and to express the intent for entering into the contract, is the “interference into the personal autonomy, into the right of personal development.”²⁶⁸

The Constitutional Court ruled that the recognition of a person as legally incapacitated is a substantial change of the person’s legal status, leading to harsh legal and practical consequences.²⁶⁹ Nevertheless, the Court declared that in itself the recognition of the person as legally incapacitated is not contradictory to the Constitution as it aims to protect the legitimate rights and interests of legally incapacitated persons themselves.²⁷⁰ However, the Court did not refrain from discussing the proportionality of the interference into the right to personal development in relation to the aim of protecting the rights and interests of legally incapacitated persons.²⁷¹ The Court argued that the main points to be taken into account during assessments of legal capacity deprivation include: the form, nature and the intensiveness of the interference.²⁷²

According to the Court’s reasoning, the right to personal development “as natural freedom is so fundamental that interference into it with the aim of protection of this person, should be used only when this constitutes an extremely necessary measure to protect the interests of this person.”²⁷³ Further reasoning of the Court directly echoes the CRPD Committee’s approaches. Particularly, the Court outlines that “Deriving from the personal autonomy, a human has a full right to perform the actions incompatible with the views of an average member of the society, if this person realizes the meaning of these actions at least to a certain degree. During the

²⁶⁷ The Judgment of the Constitutional Court of Georgia, reasoning part, *op. cit.*, para 13.

²⁶⁸ *Ibid.*, para 9.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*, para 12.

²⁷¹ The Judgment of the Constitutional Court of Georgia, reasoning part, *op. cit.*, para 17.

²⁷² *Ibid.*

²⁷³ *Ibid.*

realization of the right to personal autonomy, it is impossible to exclude accidentally making the decisions, which are against the personal interests. Such kind of “mistakes” are made even by the people with high intellectual capabilities”.²⁷⁴

It needs to be emphasized again that at the time of case the hearing (2012-2014), the Georgian legislation recognized only “full legal capacity and full legal incapacitation”.²⁷⁵ In contrast to the approaches towards legal capacity practiced in the neighboring states (for example: Armenia, Azerbaijan, Russia) and even those of other Council of Europe states (for example: Ukraine, Belarus), or the Bulgarian Constitutional Court decision on the identical matter in the same year,²⁷⁶ the Georgian Constitutional Court required from the legislator to change the legislative framework so that it would directly respond to the needs and capacities of an individual.²⁷⁷ Taking such an attitude to the matter can be described as a very positive aspect of the decision.

The reasoning about the guardianship is similarly progressive. It sounds very up to date too, considering that the continued practice of the guardianship system in all member states have been a constant subject of critique by the Committee. According to the Constitutional Court of Georgia: “the presumption that the guardian acts in a good faith cannot outweigh the neglect of the possibility, even if minimal, of the free expression of the will of the person, if this person has not lost the ability to express this will.”²⁷⁸ The Court goes on to suggest that “guardian, despite how faithfully he acts and despite how close he is, socially or biologically, with the person under guardianship, can still never be able to replace his will entirely.”²⁷⁹

In contrast to such progressive viewpoints, the Court surprisingly allows for exceptions as well. Particularly, the Court proposes that the full deprivation of legal capacity can be allowed only when the person lacks the ability to make decisions in all aspects of his life.²⁸⁰ However, the Court offers relatively more progressive opinions regarding the guardianship system. Namely, the Court requires from the legislator to limit the scope of guardians only to those

²⁷⁴ Ibid.

²⁷⁵ Ibid., para 26.

²⁷⁶ Judgment of the Bulgarian Constitutional Court No. 12, date July 17, 2014, case No.10/2014.

²⁷⁷ The Judgment of the Constitutional Court of Georgia, reasoning part, *op. cit.*, para 27.

²⁷⁸ Ibid., para 34.

²⁷⁹ Ibid., para 35.

²⁸⁰ Ibid., para 42.

spheres, where the ward needs assistance in decision-making and prohibit replacement of the will of the ward with that of the guardian.²⁸¹

The court also stresses that the restriction of the right to marry and other related rights of legally incapacitated persons are not compatible with the Constitution. The Court describes it as a disruption of social inclusion of persons with disabilities and as an increased stigmatization of the already vulnerable social group.²⁸² The Court emphasizes that the decision on co-habiting and family relations is highly individual and is more based on psycho-social and emotional factors, which are not examined during recognition of the person as legally incapacitated.²⁸³ According to the Court, due to the fact that the person's capacities in social spheres such as marriage and related activities are not assessed during the process of recognizing him/her as legally incapacitated, the practice of depriving them of the right to marry is disproportionate and therefore unconstitutional.²⁸⁴

The Court's reasoning regarding the right to a due process of a mentally incapacitated person is in accordance with the CRPD standards. The Court gives due consideration to the possibility of a conflict between the will of the guardian and the ward. In case of such conflict of interests, the Court finds it important to grant the legally incapacitated person the right to apply to the court directly as well as the right to being heard personally in the court.²⁸⁵ The Court also acknowledges the likelihood of arbitrariness, manipulation and abuse of power by personnel of psychiatric facilities in cases where the legally incapacitated person is stripped of all the rights to bring the claim directly and personally before the court.²⁸⁶

The Court argued for the right of legally incapacitated persons to apply to the court by stressing that: "the right of access to the courts by the legally incapacitated person should not be depending on the will of guardian, family member and psychiatric facility. They should be granted access to the court, which includes not only the right to access the court, but also the right to bring personal arguments in front of the court".²⁸⁷ This reasoning was applied by the Appeal Court of Tbilisi as well. In 2016 the Appeal Court of Tbilisi made the decision regarding the L.T case and cited the above quotation to argue that the legally incapacitated

²⁸¹ Ibid., para 40.

²⁸² Ibid., para 72.

²⁸³ Ibid., para 90.

²⁸⁴ Ibid., para 92.

²⁸⁵ Ibid., para 146.

²⁸⁶ Ibid., para 151.

²⁸⁷ Ibid., para 153.

person had the right to apply independently to the courts and request full restoration of her/his legal capacity.²⁸⁸

Another important part of the reasoning, which needs to be addressed as well has to do with the expression of the will of a legally incapacitated person about her/his placement into a psychiatric facility (cases related to this issue are often brought to ECtHR). The Court offered a forward-looking argument in this regard as well. Namely, the Court discussed whether the guardian's consent on the placement into the psychiatric facility could be considered as the consent made by the legally incapacitated person and concluded that institutionalization of the person at a medical facility was a high intensity interference with personal liberty,²⁸⁹ consequently, and for the purposes of the relevant articles of Constitution (Article 18 – human liberty),²⁹⁰ only the consent of the guardian could not be viewed as the consent of the person himself. Thus, the Court adopted a very clear and mainstreamed human rights approach where fundamental rights could not be given away – alienated (by contract, by legal guardianship).

The following chapter will review specific legislative amendments made by the Parliament of Georgia with regard to legal capacity. The international and regional legal instruments and the Georgian Constitutional Court Decision on legal capacity analyzed in previous chapters provides for a clear assessment of the successes of the revised Georgian legislation, the gaps where it fails to meet the CRPD standards and the remaining impediments it needs to address to achieve full compliance with the CRPD.

3.2 Changes in Legislation

3.2.1 Changes in Georgian Civil Code and Civil Procedure Code

After the decision of the Constitutional Court on the case of Irakli Kemoklidze and David Kharadze v. Georgian Parliament, in February 2015 the Parliamentary Committee on Legal Issues developed legislative amendments in order to implement the so-called Legal Capacity Reform. Altogether the proposed amendments addressed sixty seven legal acts.²⁹¹ Considering the volume of the reform and the purpose of the presented paper, the following chapter will examine only those legislative modifications, which reconceptualised the idea of legal capacity of persons with disabilities in Georgia and restored their civil and political rights, which were previously denied.

²⁸⁸ The Decision of the Tbilisi Appeal Court N2b/2803-16, date 02.08.2016.

²⁸⁹ The Judgment of the Constitutional Court of Georgia, reasoning part, *op. cit.*, para 199.

²⁹⁰ *Ibid.*

²⁹¹ Initiated by the Legal Committee of the Parliament of Georgia, draft law #07-3/415/8, date 26.02.2015.

Unlike the Constitution of the Republic of Estonia, which directly prohibits voting for incapacitated persons,²⁹² the Constitution of Georgia does not contain similar restrictions. Therefore, the main change which caused the paradigm shift from the existing legal capacity system towards the new understanding were introduced in the Civil Code of Georgia and the Civil Procedure Code of Georgia along with minor modifications of other legal acts. These key amendments and the ways they have been applied by Georgian domestic courts are discussed in more detail below.

Despite the statement of the Constitutional Court of Georgia that in general declaring a person as legally incapacitated was not directly against the Constitution,²⁹³ the legislator adopted a more progressive approach and fully abolished the practice of recognizing a person as legally incapacitated on the basis of disability, particularly “retardation” and “mental illness”, as practiced before the 2015 legal capacity reform.²⁹⁴ Instead, the legislator stipulated that “a person in need of psychosocial support (the ‘support-recipient), or a person who has fixed psychological, mental/intellectual disorders which, when interrelating with other impediments, may prevent him/her from participating in public life fully and effectively on equal terms with others” has legal capacity.²⁹⁵

With the proposed abolition of incapacitation in the country, the Parliament brought the Georgian legislation into full compliance with the requirement of the CRPD on this matter, particularly, the requirement of Article 12 and the paradigm shift to the new approach to legal capacity. The Georgian definition of a person with psycho-social needs is also in accordance with the CRPD. It directly echoes Article 1 of the CRPD according to which “Persons with disabilities include those who have 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”.²⁹⁶

²⁹² The Constitution of the Republic of Estonia, *op. cit.*, Art 57.

²⁹³ The Judgment of the Constitutional Court of Georgia, reasoning part, *op. cit.*, para 12.

²⁹⁴ Sakartvelos samokalako k'odeksi (Civil Code of Georgia). Adopted 26.06.1997, entry into force 24.07.1997, version 11.12.2014-20.03.2015, Art 12.

²⁹⁵ Sakartvelos samokalako k'odeksi (Civil Code of Georgia). Adopted 26.06.1997, entry into force 24.07.1997, final consolidating version, Art 12.

²⁹⁶ CPRD, Art 1.

Before the legal capacity reform the legislation imposed a blanket restriction on the declaration of intent by the incapacitated person,²⁹⁷ which meant that they were fully denied the right to enter into any kind of civil contract despite their intellectual ability to do so. The legal capacity reform cancelled this provision and replaced it with an approach, which distinguishes persons according to their intellectual and mental capacity to act on behalf of themselves. Consequently, the contract concluded by the support-recipient is deemed legal if she or he can benefit from the contract, regardless of the supporter approving the contract or not. However, in all other cases the legality of such contracts depends on the supporter's approval.²⁹⁸ This amendment prevents denial of the right to enter into civil contracts for persons with disabilities on the one hand, while it also protects the support-recipient from concluding non-profitable agreements on the other.

There have been no studies into how the supporters adhere to the law, if there are any instances of interference in the will of support-recipient, or if supporters attempt to interpret the will of support-recipients. Therefore, it is yet difficult to comment on the practical implementation of the amendment described above.

In addition to these rights, the legislator also established certain obligations for support-recipients. Namely, while prior to the 2015 reform the regulations did not impose any obligations on “retarded” or “mentally ill” persons in case of damage caused by them,²⁹⁹ the new legislation introduced such kind of obligations. The only exception to this rule is when the supporter is designated specifically in order to prevent the support-recipient from causing damage to others.³⁰⁰

The Georgian legislation also permitted a blanket ban on the right of incapacitated persons to marriage³⁰¹ before the legal capacity reform. After 2015 the recognition of the right to marriage became dependent on the existence of a marriage contract, i.e. the Georgian legislation recognizes the marriage of the support-recipient only if the person concludes the marriage contract.³⁰² This requirement was heavily criticized by the Public Defender of Georgia. According to their 2016 report on the legal capacity reform, it contradicts the idea of

²⁹⁷ Civil Code of Georgia, version 11.12.2014-20.03.2015, *op.cit.*, Art 58(1).

²⁹⁸ Civil Code of Georgia, final consolidating version, *op. cit.*, Art 58¹.

²⁹⁹ Civil Code of Georgia, version 11.12.2014-20.03.2015, *op. cit.*, Art 995(1).

³⁰⁰ Civil Code of Georgia, final consolidating version, *op. cit.*, Art 995.

³⁰¹ Civil Code of Georgia, version 11.12.2014-20.03.2015, *op. cit.*, Art 1120(I)(E).

³⁰² Civil Code of Georgia, final consolidating version, *op. cit.*, Art 1120(I)(E).

the Constitutional Court ruling, which suggested that the restriction of any right should be preceded by an individual assessment of the person.³⁰³ Moreover, the Public Defender argues that the amendment fails to take into consideration whether the person's right to marriage or property disposal has been restricted by the court judgment and that the amendment sets the obligation of the marriage contract for any support-recipient person.³⁰⁴

The inconsistency between the revised legislation and its practical implementation is evident. With even the Public Defender suggesting that marriage contracts should be concluded only in cases assessed and determined by the Courts, one can argue that Georgian legislation adopts quite a protective approach towards family relationships when it comes to property rights and it is hard to insist on its noncompliance with the international standards. The articles imposing these obligations on spouses provide that during conclusion of a marriage agreement, when one of the spouses is the support-recipient it is required to involve not only the supporter in the process, but also engage the government bodies for guardianship and custody.³⁰⁵ Such a high level involvement can play a significant role in preventing any kind of arbitrariness and wrongdoings by supporters; however, as there have been no studies as yet about the effects of this regulation, it is difficult to argue whether such restriction has a positive or negative influence on the lives of persons with disabilities.

The reform also changed the Civil Code provisions on adoption. The previous version of the Civil Code directly stated that only persons with full legal capacity could enjoy the right to adoption.³⁰⁶ After the reform this issue was entirely regulated by the Georgian law "On Adoption and Foster Care".³⁰⁷ The status of support-recipients with regard to the right to be a foster parent was revised twice. According to the initial changes in 2015, support-recipients in general were prohibited from acting as foster parents unless otherwise determined by courts.³⁰⁸ This provision was not in full compliance with the CRPD and carried a more restrictive nature. However, it turned out to be even more progressive than the modifications introduced later. Particularly, in 2017 the parliament made a step backwards and, again through blanket provisions, restricted the right of support-recipients to foster parenting,

³⁰³ Public Defender (Ombudsman) of Georgia 2016, *op. cit.*, p. 33.

³⁰⁴ *Ibid.*

³⁰⁵ Civil Code of Georgia, final consolidating version, *op. cit.*, Art 1172(2).

³⁰⁶ Civil Code of Georgia, version 11.12.2014-20.03.2015, *op. cit.*, Art 1245.

³⁰⁷ Sakartvelos k'anoni shvilad aq'vanisa da mindobit aghzrdis shesakheb (Law of Georgia On Adoption and Foster Care). Adopted 04.05.2017, entry into force 24.05.2017.

³⁰⁸ Sakartvelos k'anoni shvilad aq'vanisa da mindobit aghzrdis shesakheb (Law of Georgia On Adoption and Foster Care). Adopted 18.12.2009, entry into force 31.12.2009, expiration date 24.04.2017. Art 7(1).

simply declaring that they could not have this right.³⁰⁹ This statement in fact reinstates the situation which existed before the legal capacity reform. It imposes blanket restrictions and denies any possibilities for support-recipients to enjoy the rights related to foster care.

The issue of adoption is even more complicated. The above mentioned law on “Adoption and Foster care” is silent about the right of support-recipients to adoption. While the law itself does not seem to explicitly restrict this right, the Decree of the Minister of Labour, Health and Social Affairs of Georgia lists a number of diseases which are used as the basis for denying the right of adoption not only to support-recipients, but the restrictive list can be extended to include persons with physical disabilities as well. Particularly, the Decree states that persons who have psychological and behavioral disorders;³¹⁰ profound neurological and muscular diseases causing movement and coordination disorders;³¹¹ and those with any kind of trauma, which have led to obtaining a disability status affecting the capacity to raise a child, cannot be adoptive parents.³¹² Despite the heavily discriminatory nature of this Decree towards all types of disabilities the Public Defender of Georgia also fails to address the adoption issues in its report, stating that the legislative amendments “mainly resolved all the previous problems” concerning adoption³¹³ and reporting only on foster care issues.³¹³ The Decree clearly imposes blanket restrictions on a number of disabled persons to be adoptive parents. It is based on the medical model and entirely contradicts the social or human rights approaches to disability. Moreover, it strengthens the stereotypes in the society that disabled persons cannot take care of children.

Another issue, which was also left beyond the evaluation of the Public Defender, has to do with the articles of Georgian Civil Code concerning guardianship and custody. According to the version of the Civil Code practiced before the reform, incapacitated people were placed under guardianship.³¹⁴ This provision was removed³¹⁵ and replaced with a new article according to which persons with psycho-social needs are assigned a supporter instead of a guardian.³¹⁶ It is controversial, however, that another article allowing appointment of

³⁰⁹ Law of Georgia On Adoption and Foster Care 2017, *op. cit.*, Art 71(a).

³¹⁰ *Ibid.*, 8(11) (g.z).

³¹¹ Sakartvelos shromis, janmrtelobisa da sotsialuri datsvis minist'ris brdzaneba N01-73/n, Shvilad aq'vanis shesakheb regulatsiis danarti N1 (Order N01-73/n of Minister of Labour, Health and Social Affairs of Georgia, Regulation on Child Adoption, Appendix 1). Adopted 27.11.2017, entry into force 01.01.2018, Art 8(11) (g.g).

³¹² *Ibid.*, 8(11) (g.t).

³¹³ Public Defender (Ombudsman) of Georgia 2016, *op. cit.*, p. 34.

³¹⁴ Civil Code of Georgia, version 11.12.2014-20.03.2015, *op. cit.*, Art 1276.

³¹⁵ Civil Code of Georgia, final consolidating version, *op. cit.*, Art 1276.

³¹⁶ *Ibid.*, Art 1277¹.

guardians remains unchanged. This article states that “guardianship and custody shall also be established for protecting the personal and property rights, and interests of an adult who is unable to exercise her/his rights and to perform her/his duties independently because of her/his health condition.”³¹⁷

Thus, it can be argued that while on the one hand the legislator abolished guardianship in general by appointing supporters to those who need them, it retained the permission to place adult persons under guardianship due to their health conditions. Based on the analysis of the Court cases and Public Defender reports, it is difficult to comment on the actual implementation of this article, as none of the available research points to any cases of assigning a guardian to a person with the health conditions described in the article. Despite the inconsistency, and looking at a broader picture it can be argued that the legislator completely removed the system of guardianship for persons with disabilities and by doing so, met one of the main requirements of the CRPD which placed Georgia among very few countries whose legislation has shifted from substituted decision making to supported decision making system. Estonia, for example, continues to practice the guardianship system.³¹⁸ However, it should also be stressed that the abolition of guardianship in Georgia and the resulting progressive legislative amendments do not necessarily mean their correct implementation in practice, which will be discussed in more detail below.

The idea of the paradigm shift from substituted decision making to supported decision making system in the Georgian legislation is very well demonstrated in Article 1293 of the Civil Code of Georgia: “A supporter shall assist a support receiver when she/he concludes a transaction to fully comprehend conditions and legal consequences of the transaction if it is defined under a court decision”.³¹⁹ The article also protects support-recipients from possible harmful consequences in cases when she/he is unable to express her/his will for more than one month. In such occasions and only as an exception, the Court allows the supporter to act on behalf of the receiver of support.³²⁰ This statement cannot be perceived as illegitimate or unreasonable interference in the will of the person. Contrary to the revised provision, the previous version of the same article allowed the guardian to conclude all types of transaction in all occasions on behalf of the person under guardianship.³²¹

³¹⁷ Ibid., Art 1275(2).

³¹⁸ Riigikogu General Part of the Civil Code Act, *op. cit.*, Art 8(3).

³¹⁹ Ibid., Art 1293(3).

³²⁰ Ibid., Art 1293(4).

³²¹ Civil Code of Georgia, version 11.12.2014-20.03.2015, *op. cit.*, Art 1293.

The Parliament also established a legislative mechanism to monitor supporters. According to the revised legislation, the government authority for guardianship and custodianship is obliged to supervise activities of supporters and verify compliance of their actions with the scope determined by the court decision.³²² Supervision takes place every six months or more frequently as determined by the court.³²³ Furthermore, the legislator clarified the potential outcomes of monitoring reports and supervisions³²⁴ in more detail and specified situations where the supporter is considered to have failed to perform her/his duty adequately.³²⁵ These articles can be perceived as preventive measures from unlawful interference and actions by supporters and they do not contradict the standards of the CRPD.

In addition to the Civil Code, the main conceptual changes were also introduced in the Civil Procedure Code of Georgia. Particularly, the current understanding of the capacity to sue and be sued was revised. Prior to 2015 guardians and guardianship/custodianship authorities had the right to act on behalf of their wards.³²⁶ After the reform support-recipients are required to be represented by legal representatives in courts only in cases where the Courts has appointed a supporter for them to participate in court hearings.³²⁷ A completely new paragraph was added to the Civil Procedure Code in order to regulate the issue of recognizing a person as a support-recipient. The main significance of this addition lies in the fact that it grants the person seeking the status of support-recipient the right to apply to courts directly and request the status, or if previously recognized as incapacitated, also directly request from the courts to reconsider their status and, where possible, fully restore their legal capacity.³²⁸ Another important and progressive statement was added to the Code with regard to the mandatory participation of person with disabilities in court hearings during her/his recognition as the support-recipient.³²⁹ This modification was possible only due to the total abolition of the guardianship system in Georgia. The Estonian legislation where the guardianship system remains active, does not mandatorily require participation of persons with disabilities in court hearings of legal capacity cases; thus, persons with disabilities in Estonia can be excluded

³²² Civil Code of Georgia, final consolidating version, *op. cit.*, Art 1305¹(2)(3).

³²³ *Ibid.*, 1305²(a)(b).

³²⁴ *Ibid.*, 1305⁴.

³²⁵ *Ibid.*, 1305⁵.

³²⁶ Sakartvelos samokalako sap'rotseso k'odeksi (Civil Procedure Code of Georgia). Adopted 14.11.1997, entry into force 31.12.1997. version as for 26.12.2014, Art 81(5).

³²⁷ Sakartvelos samokalako sap'rotseso k'odeksi (Civil Procedure Code of Georgia). Adopted 14.11.1997, entry into force 31.12.1997. Final consolidating version, Art 81(3¹).

³²⁸ *Ibid.*, Art 363¹⁴(1).

³²⁹ *Ibid.*, Art 363¹⁸(1).

from hearings,³³⁰ which mostly results in incorrect appointment of guardianships.³³¹ However, this provision was somewhat blurred by article 1508²(1) in the Georgian Civil Code³³² pursuant to which, the guardian has an obligation to address the court on behalf of the ward in order to recognize her/him as support-recipients and request individual assessment of her/his capacity. This article was perceived as contradictory to the Civil Procedure Code and a barrier for incapacitated persons to apply directly to the court. The Public Defender of Georgia described this provision as an impediment for realization of the right to access justice: “possibility for a legally incapable person to address the court with the request or revising his/her status is not clearly expressed.”³³³ However, in August 2016 the Tbilisi Appeal Court clarified that the described provision of the Civil Code of Georgia did not automatically restrict the right of the incapacitated person to individually apply to the Court.³³⁴ Thus, the requirement of the CRPD to grant access to justice to all persons of disabilities has also been fulfilled at least at a minimum level. Again, the lack of rigorous research into the issues of access to justice for persons with disabilities does not allow making more profound conclusions other than the minimum level evaluation.

3.2.2 Main Changes in Various National Laws of Georgia

One of the most important documents among numerous legal acts revised in frames of the legal capacity reform is the “Election Code of Georgia”. Before the reform, legally incapacitated persons were denied the right to vote.³³⁵ After 2015, persons with psycho-social needs have been granted the right to vote as a general rule, however, with one exception still permitted: a person who is recognized as a support-recipient and is at the same time placed in a medical institution cannot have the right to vote.³³⁶ The CRPD does not allow any restriction of the right to vote. As a comparison, the Estonian legislation is entirely inconsistent with the CRPD standards. According to the Estonian legislation, a person who is deprived of “his or her active legal capacity with regard to the right to vote shall not have the

³³⁰ M. Karolin. Täisealiste isikute huvide kaitse eestkoste menetluses Eesti kohtusüsteemi näitel. Tallinn, Master’s Thesis, Tallinn University of Technology, 2017, p. 74; K. Kark. Piiratud teovõimega täisealise isiku huvide katise eestkoste seadmisel Eesti kohtupraktikas. Tallinn, Master’s Thesis, University of Tartu, 2013, p. 71.

³³¹ Ibid.

³³² Civil Code of Georgia, final consolidating version, *op. cit.*, Art 1508²(1).

³³³ Public Defender (Ombudsman) of Georgia 2016, *op. cit.*, p. 36.

³³⁴ Decision of Tbilisi Appeal Court, No. 2b/2803-16, date 02.08.2016.

³³⁵ Sakartvelos saarchevno k’odeksi (Organic Law of Georgia Election Code of Georgia). Adopted 27.11.2011, entry into force 10.01.2012. Version as for 29.05.2014-20.03.2015, Art 3(a.g).

³³⁶ Ibid. Final consolidated version.

right to vote.”³³⁷ Moreover, such person “does not have the right to stand as a candidate.”³³⁸ Thus, the Georgian laws have taken much more progressive steps to grant the voting right to persons with psycho-social needs. The practical implementation of this right in Georgia has not been studied either by the Public Defender or local non-governmental organizations.

The right to participate in a referendum was revised in the Georgian legislation in the same manner as it was done in the Election Code. Namely, pursuant to the Law on Referendums, the support-recipient who is at the same time placed in a medical stationary facility cannot participate in a referendum.³³⁹ The Estonian Referendum Act also builds on the provisions in the Estonian Election Act and posits that a person shall not participate in a referendum, if s/he has been deprived of her/his active “legal capacity with regard to the right of vote.”³⁴⁰

Although the provisions in the Georgian legislation on voting rights have become more compatible with the CRPD as a result of the legal capacity reform, the right to work in public service remains restricted. Specifically, the Law on Public Service states that a person cannot hold a public service position, if she or he has been declared by the court as the support-recipient.³⁴¹ Also, the status of a support-recipient is listed as one of the obligatory grounds for dismissal from the position in public service.³⁴² The same restrictions apply to positions in local government bodies.³⁴³ Interestingly, similar limitations are imposed by the Estonian Local Government Organization Act as well. Pursuant to the act, only individuals with full legal capacity can be members of municipal administrations³⁴⁴ and the grounds for terminating the municipal council membership includes deprivation of legal capacity with regard to the right to vote.³⁴⁵ The example of both states demonstrates how legal capacity is connected to other rights, including the right to work in this particular case and how the approaches of both states are discriminatory, as they put blanket restriction on persons with psycho-social needs to hold positions in local governments and in public service in general.

³³⁷ Riigikogu valimise seadus (Riigikogu Election Act). Adopted 12.06.2002, entry into force 02.03.2003, Art 4(2).

³³⁸ Ibid., Art 4(5).

³³⁹ K'anoni reperendumis shesakheb (Organic Law of Georgia On Referendums). Adopted 15.05.1996, entry into force 12.06.1996, Art 2(2)(a).

³⁴⁰ Rahvahääletuse seadus (Riigikogu Referendum Act). Adopted 13.03.2002, entry into force 06.04.2002, Art 2(3)(1).

³⁴¹ Sakartvelos k'anoni sajaro samsakhuris shesakheb (Law of Georgia, On Public Service). Adopted 27.10.2015, entry into force 11.11.2015, Art 27(2)(e).

³⁴² Ibid., Art 107(1)(g).

³⁴³ K'anoni adgilobrivi tvitmmartvelobis shesakheb (Organic Law of Georgia Local Self-Government Code). Adopted 05.02.2014, entry into force 19.02.2014, Art 43(1)(g), Art 56(2)(e).

³⁴⁴ Kohaliku omavalitsuse korralduse seadus (Riigikogu Local Government Organization Act). Adopted 02.06.1993, entry into force 02.06.1993, Art 48²(1).

³⁴⁵ Ibid., Art 18(1)(9).

Another significant legislation change restricting the rights of persons who are seeking support is the Law of Georgia On Psychosocial Needs Assessment which is a completely new document. The aim of the law was to designate an entity to assess those seeking the status of a person with psycho-social needs and establish the assessment methodology.³⁴⁶ The purpose of the presented thesis is not to analyze the performance of multidisciplinary teams and the quality of their assessments, therefore, the paper will examine only the major legal issue with the proposed new law. According to it, only one government entity “Legal Entity of Public Law Levan Samkharauli National Forensics Bureau” is authorized to conduct assessment of psycho-social needs of the person.³⁴⁷ The law does not provide any opportunity to appeal the assessment results of the Bureau. As the Courts completely rely only on the assessment of the Bureau in their decision-making, the lack of opportunities to appeal the assessment results and no availability of alternative assessment puts the person with psycho-social needs in a vulnerable position.

The issues of abortion and sterilization have also been overlooked by the legislator as well as the Public Defender. The Law of Georgia on Health Care offers no regulations regarding abortion and sterilization in cases where the patient is the support-recipient,³⁴⁸ while the Estonian Termination of Pregnancy and Sterilization Act offers different approaches towards both issues. Particularly, the act takes into account the consent of a woman with restricted legal capacity;³⁴⁹ however, in case of sterilization the will of the woman with restricted legal capacity does not play any role.³⁵⁰ Moreover, the Estonian legislation fails to address situations where a woman with restricted legal capacity may wish sterilization but the guardian may be objecting it.³⁵¹

³⁴⁶ Sakartvelos k'anoni psikosotsialuri sach'iroebidan gamomdinare eksp'ert'izis chat'arebis shesakheb (Law of Georgia On Psychosocial Needs Assessment). Adopted 20.03.2015, entry into force 31.03.2015, Art 1.

³⁴⁷ Ibid., Art 6.

³⁴⁸ Sakartvelos k'anoni janmrtelobis datsvis shesakheb (Law of Georgia on Health Care). Adopted 10.12.1997, entry into force 31.12.1997.

³⁴⁹ Raseduse katkestamise ja steriliseerimise seadus (Termination of Pregnancy and Sterilisation Act). Adopted 25.11.1998, entry into force 21.12.1998, Art 5(2)(3).

³⁵⁰ Ibid. Art 19-25.

³⁵¹ V. Djomin. Piiratud teovõimega isikute hivide kaitse steriliseerimise otsustamisel. Tallinn, Master's Thesis, University of Tartu, 2016, p. 75.

3.3 National Court Practices

For adequate analysis of the implementation of the legal capacity reform in Georgia, it is crucial to also examine the rulings of Georgian Common Courts and understand how they interpret and apply the new legislative changes in practice. It is important to mention that only the Supreme Court judgments are publicly available in Georgia and there is no open access to the rulings of the first instance courts. Therefore, in order to expand the scope of the presented research and add to the findings of the analysis of the national legislation and the 2016 report by the Public Defender, copies of court judgments regarding legal capacity had to be officially requested from each court of the Common Court system. Notably, the number of judgments to be shared by the courts entirely depends on the Court administration itself.³⁵² A total of 247 (two hundred forty-seven) judgments from 11 (eleven) different courts located in different regions of Georgia or in major cities were collected for the research.³⁵³ Out of the received judgments, 67 (sixty seven) of them are from the same period also covered in the Public Defender report: from April 2015 to January 2016.³⁵⁴ The remaining 180 (one hundred eighty) judgments have been issued between February 2016 and the end of 2018. They provide an opportunity to look at what has changed or has persisted during the three years after the Public Defender issued its first recommendations to the Courts to improve their approach to the recognition of persons as support-recipient.

According to the report, the Public Defender reviewed altogether three hundred forty-one judgments collected from every court in Georgia (April 2015- January 2016). The evaluation of these judgments carried out by the Public Defender yielded the following findings:

- i) The majority of the rulings on recognition of individuals as support-recipients include only the resolution part, which makes it impossible to identify the need for support;³⁵⁵
- ii) The few judgments containing the reasoning part were just templates and without substance;³⁵⁶
- iii) The courts tend to have appointed supporters for all types of deals, even for minor deals;³⁵⁷

³⁵² E.g. Rustavi City Court provided only 10 judgments, explaining in the letter N489, dated 19.03.2019 that providing more judgments would “paralyze the work of the Court office”.

³⁵³ *Infra*. Appendix 1. Table of Georgian Cases. No response was received from Kutaisi Appeal Court. The Gori District Court offered no written statement about the technical problems preventing them to provide the judgments, however, a representative of the Courts explained over the phone that due to the large amount of the requested material, it was impossible to provide them electronically or mail them to an address outside Georgia.

³⁵⁴ Public Defender (Ombudsman) of Georgia 2016, *op. cit.*, p. 7.

³⁵⁵ *Ibid.*, p. 9.

³⁵⁶ *Ibid.*

- iv) There was no unified form for the resolution part of the judgments.³⁵⁸

Based on these findings, the Public Defender issued the following recommendations to the Common Courts of Georgia:

- i) To pay more attention to the reasoning part of the judgements;³⁵⁹
ii) To consider individual needs as the basis for rulings and reject complete substitution;³⁶⁰
iii) To develop a template for the resolution part of the judgment.³⁶¹

Based on the analysis of 247 (two hundred forty-seven) court judgments issued from April 2015 to December 2018 (study period), the main findings and recommendations offered by the Public Defender are considered mostly relevant and appropriate; however, it can also be argued that the Courts themselves may not be solely blamed for neglecting individual needs of persons and that the reasons for doing so are derived from the assessment reports produced by the Forensics Bureau.³⁶² This assumption will be discussed in more detail below.

In its report the Public Defender also heavily criticizes the “alarming”³⁶³ court rulings and suggests that the legislative amendments only superficially replaced the term “legally incapable” with “support recipient” and failed to introduce any substantial improvements in the lives of persons with disabilities.³⁶⁴ While it is true that the court rulings can be described as flawed and somewhat inadequate at the beginning, the important improvements in the rights of persons with disabilities brought by the legal capacity reform should not be underestimated. The reform terminated the legal practice of differentiating between people based on their psycho-social capacities and established that every person has equal rights under the law and before the law to meaningfully participate in court hearings and not be viewed as just a passive object of the justice system. Therefore, a close examination of the legal acts allows for a conclusion that despite flaws, substantial legislative modifications that were introduced in Georgia have conceptually changed the legal status of persons with disabilities in the country.

³⁵⁷ Ibid.

³⁵⁸ Ibid.

³⁵⁹ Ibid., p. 40

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Judgments of Batumi City Court: N2/2648-18, date 21.11.2018; N2/3362-18, date 12.12.2018; N2/3364-18, date 12.12.2018; N2/3595-18, date 30.11.2018; N2/3841-18, date 21.11.2018.

³⁶³ Public Defender (Ombudsman) of Georgia 2016, *op. cit.*, p. 23.

³⁶⁴ Ibid.

Unlike those covered in the Public Defender report, the judgments made later differ from court to court while they also share certain key characteristics. These differences grew even more evident in 2018. For example, no improvements were observed at Zugdidi District Court during the study period and consequently all of their rulings are same each year prior to 2018. All of the thirty judgments of Zugdidi District Court from the study period are some of the most restricting in nature compared to rulings from Tbilisi, Batumi, Kutaisi, Akhalkalaki and Telavi. Particularly, they restrict the legal capacity of persons with psycho-social needs in every aspect of life. After 2016 the Telavi District Court stopped the practice of restricting legal capacity in areas such as the right to personal life, the right to free movement, the right to free speech, the right to assembly, etc.³⁶⁵ The scope of restrictions by judges continued decreasing in 2018 and as of the date of the presented thesis, there are no more statements persons with psycho-social needs requiring support in “every aspect of life”. The same observation can be made about the judgments of the Tbilisi City Court: they became less restricting in 2018 than those made since 2015.

Judgments of Batumi City Court from 2018 are probably the most complete rulings and entirely different from those made by other courts. While their judgments contain only the resolution part and are mainly 2-4 pages in length, the Batumi City Court judgments are inclusive of the descriptive, the reasoning and the resolution parts in full volume. Availability and analysis of these judgments made it possible to fully understand the procedures carried out by the courts when deciding on the case of supported decision-making.

First of all, the judgments from Batumi City Court demonstrate that the applicants requesting to determine the scope of support do not offer their wishes regarding specific areas of support. Secondly, the judgements shed some light as to what extent the support-recipient is practically engaged in court hearings. Two out of the five judgements indicated that the support-recipient could not attend the court hearings due to their health condition and therefore their participation was ensured via Skype call.³⁶⁶ The remaining three judgments noted that the support-recipients were unable to communicate due to their health conditions.³⁶⁷ Thirdly, all of the five judgments include information about the medical

³⁶⁵ Judgments of Telavi District Court: N2/295-15, date 02.02.2016; N2/567-15, date 28.07.2016; N2/528-15, date 01.06.2016.

³⁶⁶ Judgments of Batumi City Court N.2/3595/2018, date 30.12.2018; N2/3841-2018, date 21.11.2018.

³⁶⁷ Judgments of Batumi City Court N2/2648-2018 date 21.11.2018; N2/3362-2018, date 12.12.2018; N2/3364-2018, date 12.12.2018.

diagnosis of the support-recipients, which allows for better understanding the severity of disability. Here, it should be pointed out that inclusion of information about the diagnosis cannot be perceived as the disclosure of personal information, as all of the one hundred seventy-eight judgments shared by different courts were provided in an encoded manner without the possibility to identify the individuals. Fourthly, the Batumi City Court judgments clarify the role that the court plays in the assessments performed by the Forensics Bureau and the extent to which the court relies on these assessments in their decision-making. Fifth, the reasoning parts of the judgments reiterated the article from the Civil Procedure Code, which underlines the right of persons with psycho-social needs to directly apply to the court without the consent of their supporters. Finally, the resolution parts of the Batumi Court rulings comprehensively describe all obligations of the supporter towards the support-recipients.

The prevailing issue with all of the judgments including those from Batumi City Court remains with the designated scope of support. Close analysis of the five judgments from Batumi City Court suggests that the court heavily relies on the Forensics Bureau assessments and determines the scope of support as suggested by the Forensics Bureau. However, not entirely and makes some exceptions. Particularly, in three cases, the Forensics Bureau suggested the need of a supporter in all aspects of life while in the remaining two assessments the Forensics Bureau listed certain areas of life where support was required. However, in all of the five judgments, the court refrained from repeating the wording of the Forensics Bureau and did not mention that the applicants needed support in “all aspects of their lives”.

Batumi City Court judgments from 2018 expose another important problem not within the legal reform or the court system as such, but in the psychiatric assessments. Particularly, it is now evident that the court practice in determining the scope of support directly derives from the Forensics Bureau assessments and that the courts are reluctant to act on their own initiative or question suggestions of mental health professionals. Thus, the main concern has to do with the professionals who have been tasked with the responsibility to assess capacities of applicants. Important questions such as: awareness of these professionals about modern approaches to disability; the current standing of Georgian psychiatry in relation to the soviet practices in this field; assessment instruments and methodology, etc. have not been studied or researched either.

Differences in approaches adopted by psychiatrists and social workers can be detected in the Supreme Court judgment from May 2018,³⁶⁸ which is the only Supreme Court judgment concerning the legal capacity of a disabled person. In the case the support-recipient applicant claimed that there was no legal basis for declaring her/him as the support-recipients. The descriptive part of the ruling suggests that during the appeal stages the supporter and the support-recipient were both applicants and they were both requesting cancelation of support. However, the Social Service Agency insisted on recognizing the person as the support-recipient. After the psycho-social assessment of the applicant in 2016, the experts had diverging opinions: the psychiatrists demanded that the applicant received support in every aspect of life, while the social worker argued that the applicant needed support only in health care services including taking medication and that s/he could handle other matters, such as collecting and spending the disability pension without support. In its judgment, the Supreme Court stressed the importance of the psycho-social needs assessment report during decision-making. It stated that the “Courts assessment and decision should be based on the report of qualified specialists.”³⁶⁹ Considering that the Forensics Bureau is the only office designated to assess the psycho-social needs of a person, the statement of the Supreme Court may imply that all instance court decisions should be heavily and exclusively based on the Forensics Bureau report.

The judgment of the Supreme Court does not offer much to discern as to what extent their judges understand the very essence of the legal capacity reform. Generally speaking, the judgment seems to be very modest and conservative, however, it is hard to argue about the correctness of the decision without sufficient information about the actual background situation and the severity of the mental disorder of the applicant. Nevertheless, the case demonstrates the clear need for the availability of alternative assessments of psycho-social needs.

It is important to compare the above-mentioned Supreme Court judgment with the Tbilisi Appeal Court decision on the full restoration of legal capacity.³⁷⁰ In its decision the latter demonstrated a high-level human rights approach to the issue, however, it is noteworthy that in this case the Forensics Bureau did not insist that the applicant needed support. Thus, it remains a matter of speculation as to what extent the Appeal Court would share the opinions

³⁶⁸ Judgment of Supreme Court of Georgia, Nas982-914-2017, date 14.05.2018.

³⁶⁹ Ibid.

³⁷⁰ Decision of Tbilisi Appeal Court, N2b/2803-16, date 02.08.2016.

of mental health professionals had they adopted a different position. Both of these cases are a testament of the need for further interdisciplinary research of these issues which would examine and analyze not only the legal documents and Court judgments and decisions, but the Forensics Bureau reports in connection with the Social Service agency as well as recommendations of social workers and experiences of support-recipients and their supporters.

In order to better understand how the Common Courts, interpret the obligations of supporters and the government bodies for guardianship and custody, it was important to review and compare corresponding statements in Court judgments, also considering that the Courts tend to adopt different approaches to the question. For example, in 2015 as well as 2016 and 2018 Akhalkalaki District Court judgments indicate that the supporters are obliged to establish the will and choice of support-recipients and help them make decisions according to her/his will and choice, which implies distribution of information to the support-recipients in an affordable and understandable format.³⁷¹ This statement is repeated word by word in judgments of Ambrolauri District Court,³⁷² Zugdidi District Court³⁷³ and Kutaisi City Court.³⁷⁴

Until 2018 the Batumi City Court also maintained the same approach; however, in 2018 different statements started to emerge. Namely, the following are suggested as some of the obligations of supporters: to take complete care of the support-recipient; defend her/his legitimate interests; be a good care giver and provide all necessary assistance.³⁷⁵ In addition, the Court also underlines obligations of the government bodies for guardianship and custody and states the following: the government entity for guardianship and custody matters is obliged to defend and empower support-recipients and help supporters in implementing her/his duties in order to enable them to offer effective assistance to support-recipients in making decisions according to their own choices.³⁷⁶ A similar statement about the obligations of the government guardianship and custody bodies can be found in Tbilisi City Court

³⁷¹ The judgments of Akhalkalaki District Court N2/108-15, date 15.09.2015; N2/215-16, date 22.11.2016; N2/176-18, date 26.12.2018.

³⁷² The judgments of Ambrolauri District Court N2/68-18, date 26.09.2018; N2/89-18, date 17.10.2018; N2/99-2018, date 11.2018.

³⁷³ The judgments of Zugdidi District Court N2/550-17, date 17.07.2017; N2/1405-17, date 20.02.2018; N2/1168-18, date 13.12.2018.

³⁷⁴ The judgments of Kutaisi City Court N2/2190-2015, date 23.12.2015; N2/2193-2015, date 23.12.2015; N2/2198-2015, date 23.12.2015.

³⁷⁵ The judgment of Batumi City Court N 2-3595/2018, date 30.11.2018.

³⁷⁶ Ibid.

judgments between 2015-2018; however, no specific emphasis is placed on the duties of supporters to assist support-recipients in the interpretation of her/his will and make their own decisions based on it. Instead, these court judgments only point out that supporters must act in accordance with the interests of recipients of support. Notably, Telavi District Court judgments are similar to Tbilisi City Court rulings in this regard.

Importantly, the statements about the obligations of supporters or the responsibility of relevant government bodies to assist support-recipients with the interpretation of her/his will and decision-making based on their own will and choice is in accordance with the CRPD requirements; however, it is unclear as to what guides the courts to appoint supporters in every aspect of life of support-recipients, without exception. The ways the judges interpret this issue and the justifications they employ to propose these two contradictory approaches in one judgment requires further research and analysis.

The practice and performance of supporters is another area which has not been studied yet and which continues to be neglected by the legislation. Analysis of the court judgements (with exception of the 2018 Batumi City Court rulings) does not offer sufficient data to comment on the type of relationship established between the support-recipient and the supporter. According to the five judgments of Batumi City Court, all of the five individuals appointed as supporters are relatives of the support-recipient. Whether or not a family member or a relative should act as a supporter is a controversial issue. The subject of payment for supporter's services and whether they should be funded by the government or other sources is a similarly debated issue. The CRPD does not specify how the practice and administration of supporters should be handled. Consequently, different models were introduced in different countries. Georgia does not yet have a clear vision on how to proceed with these matters, or what international practice could be the most suitable solution for the country. This is also a question that needs a separate in-depth academic study and research.

CONCLUSION

The purpose of the presented paper was to assess and determine whether the implementation of Article 12 (Equal recognition before the law) of the CRPD in Georgian legislation including the Common Court practice and procedures in this regard, were in compliance with the standards set out in the CRPD and particularly Article 12.

In order to better understand the values underpinning the CRPD the thesis analyzed the historical development in the approaches to disability and the shift from the medical model to the social model of disability, and finally to the human rights approach. While the outdated medical model perceived disability as a deviation from normality which needed to be cured, the social movements of persons with disabilities emerging in the UK in the 1960's started to actively challenge this approach. Similar to other social movements (women's liberation, gay rights, anti-racism), the disability movement too questioned the deeply rooted tendency in the society to describe difference as pathology and deviation from normality. The movement called for replacing the medical model of understanding disability with the social model, according to which it is the society and the legal, social and physical environment which disable people and exclude them from social and political life. The CRPD employs and expands on the social model of disability by bringing forward the human rights approach, which recognizes persons with disabilities as holders of rights and duties. Understanding the evolution of disability approaches is important to appreciate the building blocks of the CRPD and clearly illustrate the directions and requirements that the CRPD puts forward to ensure effective protection of the rights of persons with disabilities worldwide.

The first research question aimed to analyze the paradigm shift brought by Article 12 and its implications for the lives of persons with disabilities. For this purpose, the paper firstly examined the content of Article 12 and then studied the CRPD Committee documents regarding this particular article and its requirements. Article 12 is one of the most revolutionary provisions of the CRPD as it ensures legal capacity of persons with disabilities on an equal basis with others internationally, in a legally binding international human rights treaty. The main aim of the article is to recognize persons with disabilities as agents, individuals who are responsible for their lives and who can make their own decisions concerning their lives regardless of the type or severity of disability. The main conceptual requirements for the CRPD member States to ensure correct implementation of Article 12 are the following: (i) mental health issues or learning disabilities must not be used as justification

for denying legal capacity to persons with disabilities; (ii) legal capacity of all persons with disabilities means both: to hold rights and duties and the ability to exercise them; (iii) a shift from the “best interest” paradigm to “respect the rights, will and preferences” of persons with disabilities; (iv) abolition of guardianship system and introduction and establishment of supported decision-making which respects the person’s autonomy, will and preferences; (v) ensuring that persons with disabilities have the rights and possibility to own and inherit property and have control over their financial affairs including accessing bank services.

These key requirements are reiterated multiple times in the General Comment No.1 (Article 12) of the CRPD; they are emphasized in each concluding observation on State parties’ annual reports on the implementation of the CRPD and frequently stressed in cases examined by the CRPD Committee.

The second research question looked at how Georgia has implemented Article 12 of the CRPD after its ratification in 2014 and in what ways the country has applied the international standards of Article 12 in practice. For this purpose, the following documents were analyzed: the 2014 Georgian Constitutional Court ruling on legal capacity; the March 2015 Georgian legislation revisions regarding legal capacity and the relevant Common Court practice between the years of 2015-2018. Importantly, despite the fact that in its judgment the Constitutional Court does not mention the ratification of the CRPD by Georgia, the approaches offered in the judgment are mostly in line with the CRPD standards.

While the Constitutional Court has stated that deprivation of legal capacity in general is not against the Constitution of Georgia, it also argued that the national legislation, which completely removed legal capacity from persons with disabilities, disproportionately interfered in personal autonomy and the right to personal development. The Court commissioned the legislators to revise the legislation so that it would respond to the needs and the capacities of an individual. The Court made a much more progressive statement regarding guardianship and stressed that regardless of social or biological kinship with the disabled person, guardians could never replace the will of the ward. The Court requested from the legislator to prohibit any such occasions. The Court also declared certain articles of the Georgian legislation limiting or depriving persons with disabilities of the right to marriage as unconstitutional. According to the Court, marriage is based on diverse psychosocial and emotional factors, which are not examined during recognition of persons as legally incapacitated. By acknowledging the severe consequences (deprivation of liberty based on will of the guardian

or psychiatric facilities) of removing the right of access to justice, the Court emphasized that persons with disabilities should have direct access to courts. Recognizing the importance of prohibiting interference in personal liberty, the Court established that the consent of the guardian to place a person in a medical facility could not be considered as the consent made by the person himself/herself.

Following the ratification of the CRPD in 2014 and the Ruling of the Constitutional Court in the same year, the Parliament of Georgia introduced the following conceptual amendments into the legislation in 2015: (i) the practice of recognizing persons with disabilities as legally incapable on the basis of disability (learning disabilities, mental health issues) was fully abolished; (ii) a new definition of “person in need of psycho-social support” was introduced; (iii) persons with psycho-social needs were granted the right to marriage, however only through a marriage contract; (iv) the guardianship system was removed and replaced with a new, supported decision making system; (v) persons with psycho-social needs were granted the right to apply to the courts directly in order to request support in decision-making or a full restoration of their legal capacity; (vi) participation of persons with disabilities in court hearings concerning their legal capacity has been mandatorily required; (vii) all persons with disabilities were granted the right to vote in elections and referendums regardless of the type or severity of disability (except for persons who reside in medical facilities during the elections or the referendum).

Considering all the key legislative modifications listed above, it can be argued that the first hypothesis of the paper proved to be true; namely that the Georgian legislative amendments made in 2015 concerning the legal capacity of persons with disabilities have met the minimum main requirement of the international standard set out in the CRPD. However, it was also suggested in the second hypothesis that despite these important legislative modifications, a number of significant impediments for the effective implementation of the reform in practical level remain to be addressed in due time and manner in order for persons with disabilities to be able to actually benefit from the reform and meet the CRPD standards to the fullest extent. More specifically, the main gaps which should be tackled in the first place are those which deny persons with disabilities the right to adoption and foster care and the right to hold public service positions. The law on “Psychosocial Needs Assessment” should also be revised in order to allow opportunities for seeking alternative assessment of capabilities of persons with psycho-social needs.

Major inconsistencies and gaps have been revealed with regard to the Common Court practice rather than the legislation. Despite the recommendations made by Public Defender in 2015, most of the Courts continue excluding the reasoning parts from their judgments. The close analysis of the judgments found that only one Court provides comprehensive reasoning parts in its rulings, which proved to be a valuable source of information for assessing the court practice. They helped to establish the extent to which persons with disabilities are personally involved in court hearings concerning their legal capacity; understand how the designated support areas vary from court to court but not from person to person and examine the ways some courts employ to refrain from specifying the obligations of supporters as interpreters of the will and choices of support-recipients and impose broad obligations on relevant government bodies to help supporters to perform their tasks effectively.

Due to the fact that only one Appeal Court judgment and one Supreme Court judgment was available for analysis, it is difficult to comment on the practice of high courts with regard to legal capacity. These two cases are not identical either in statements or their outcome. While the Appeal Court has adopted a progressive and more innovative approach to the matter, the Supreme Court seems to have favored a more conservative stance; however, as explained earlier, looking at only these two judgments does not allow for more scrutiny and specific observations.

Finally, the paper also envisages the potential lessons that the study of the Georgian experiences can offer to other countries not only in the post-soviet region but (as it was demonstrated in the third chapter of the paper) to other countries as well, including Estonia. For this purpose, the paper also provides some suggestions in response to the third question on lesson learning. By elaborating on Article 12 of the CRPD and the work of the CRPD Committee and analyzing the scope of the 2015 legal capacity reform in Georgia the paper offers valuable understanding of what can be considered as compliant with the CRPD; what works and what may potentially fail in practice and how the gaps and inconsistencies can be tackled with implementing proper legislation, procedures and court practice.

The study has repeatedly exposed the need for further interdisciplinary research of a range of issues. Firstly, a clear system of supported decision-making has not been established yet; it needs to provide answers to numerous questions including: how the relations between the supporter and support-recipient should be regulated? Should the supporter be paid and if so by whom? Should this support be based on a written agreement? Should only trained

professionals be allowed to be supporters or is it better to let family members and relatives continue supporting their family members and so on. Secondly, reasons behind the similarity of almost all assessments of persons with psycho-social needs performed by the Forensics Bureau need to be researched and addressed, as these assessment reports are essential documents for Courts to make decisions. The difficulties faced by the representatives of Forensics Bureau while fulfilling their duties and the justifications they employ for their assessments should be thoroughly examined. Finally, the views and approaches the judges adopt towards the issue of legal capacity of persons with disabilities should become a subject of close scrutiny: as judges are the main users and interpreters of the legislation, examining and analyzing their understanding of the national and international legislation and how they apply their knowledge in decision-making will be crucial to advance the rights of persons with disabilities further.

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102. The judgment of Akhalkalaki District Court N2/215-16, date 22.11.2016.

103. The judgment of Akhalkalaki District Court N2/176-18, date 26.12.2018.

104. The judgment of Ambrolauri District Court N2/68-18, date 26.09.2018.
105. The judgment of Ambrolauri District Court N2/89-18, date 17.10.2018.
106. The judgment of Ambrolauri District Court N2/99-2018, date 11.2018.
107. The Judgment of the Batumi City Court N2/2648-18, date 21.11.2018.
108. The Judgment of the Batumi City Court N2/3841-18, date 21.11.2018.
109. The Judgment of the Batumi City Court N2/3595-18, date 30.11.2018.
110. The Judgment of the Batumi City Court N2/3362-18, date 12.12.2018.
111. The Judgment of the Batumi City Court N2/3364-18, date 12.12.2018.
112. The Judgment of the Constitutional Court of Georgia, N2/4.532,533, Irakli Kemoklidze and David Kharadze against the Parliament of Georgia date 8.10.2014.
113. The judgment of Kutaisi City Court N2/2190-2015, date 23.12.2015.
114. The judgment of Kutaisi City Court N2/2193-2015, date 23.12.2015.
115. The judgment of Kutaisi City Court N2/2198-2015, date 23.12.2015.
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120. The judgment of the Zugdidi District Court N2/550-17, date 17.07.2017.
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APPENDICIES

APPENDIX 1. Table of Georgian Cases

Akhalkalaki District Court

1. Case Applicant R.E., support recipient T.T'., date 29.09.2015.
2. Case N2/96-15, date 24.06.2015.
3. Case 2/108 -15, date 14.09.2015
4. Case N2/106-15, date 29.09.2015.
5. Case N2/107-15, date 29.09.2015.
6. Case N2/155-15, date 16.11.2015.
7. Case N2/192-15, date 13.01.2016.
8. Case N2/195-15, date 27.04.2016.
9. Case N2/136-16, date 15.06.2016.
10. Case N2/70-16, date 30.06.2016.
11. Case N2/188-15, date 08.08.2016.
12. Case N2/148-16, date 11.10.2016.
13. Case N2/177-16, date 21.10.2016.
14. Case N2/141-16, date 11.10.2016.
15. Case N2/178-16, date 21.10.2016.
16. Case N2/188-16, date 22.11.2016.
17. Case N2/215-16, date 22.11.2016.
18. Case N2/206-16, date 01.12.2016.
19. Case N2/212-16, date 19.12.2016.
20. Case N2/233-16, date 19.12.2016.
21. Case N2/224-16, date 19.12.2016.
22. Case N2/279-16, date 12.01.2017.
23. Case 2/6-18, date 15.05.2018.
24. Case 2/45-18, date 15.05.2018.
25. Case 2/116-18, date 21.09.2018.
26. Case 2/135-2018, date 01.10.2018.
27. Case 2/166-2018, date 11.12.2018.
28. Case 2/163-2018, date 21.12.2018.
29. Case 2/176-18, date 26.12.2018.

Ambrolauri District Court

30. Case N2/16-16, date 25.07.2016.
31. Case N2/25-16, date 15.06.2016.
32. Case N2/19-16, date 15.07.2016.
33. Case N2/17-16, date 25.07.2016.
34. Case N2/24-16, date 15.06.2016.
35. Case N2/62-16, date 25.07.2016.
36. Case N2/5-16, date 11.05.2016.
37. Case N2/91-16, date 23.09.2016.
38. Case N2/6-16, date 11.05.2016.
39. Case N2/26-16, date 15.06.2016.
40. Case N2/104-16, date 16.12.2016.
41. Case N2/61-16, date 25.07.2016.
42. Case N2/86-16, date 23.09.2016.
43. Case N2/103-16, date 16.12.2016.
44. Case N2/46-16, date 25.07.2016.
45. Case N2/18-18, date 22.06.2018.
46. Case N2/62-2018, date 24.08.2018.
47. Case N2/90-2018, date 17.10.2018.
48. Case N2/68-2018, date 26.09.2018.
49. Case N2/61-18, date 31.08.2018.
50. Case N2/65-2018, date 24.08.2018.
51. Case N2/89-2018, date 17.10.2018.
52. Case N2/99-2018, date 11.12.2018.
53. Case N2/67-2018, date 26.09.2018.
54. Case N2/100-2018, date 11.12.2018.
55. Case N2/66-2018, date 04.07.2018.
56. Case N2/66-2018, date 24.08.2018.
57. Case N2/104-2018, date 11.12.2018.
58. Case N2/49-2018, date 24.08.2018.
59. Case N2/128-2018, date 11.12.2018.
60. Case N2/105-2018, date 11.12.2018.

Batumi City Court

61. Case N2-3684/15, date 22.02.2016.
62. Case N2-2011/2015, date 14.03.2016.
63. Case N2/3953-2015, date 27.04.2016.
64. Case N2-3558/15, date 23.05.2016.
65. Case N2-4199/15, date 12.07.2017.
66. Case N2/1926-15, date 08.10.2015.
67. Case N2/2019-2015, date 02.11.2015.
68. Case N2-2049/15, date 11.11.2015.
69. Case N2-3043/15, date 25.12.2015.
70. Case N2/2648-2018, date 21.11.2018.
71. Case N2-3595/2018, date 30.11.2018.
72. Case N2/3362-2018, date 12.12.2018.
73. Case N2/3364-2018, date 12.12.2018.
74. Case N2-3841/2018, date 21.12.2018.

Kutaisi Citi Court

75. Case N2/2185-2015, date 23.12.2015.
76. Case N2/2186-2015, date 23.12.2015.
77. Case N2/2187-2015, date 23.12.2015.
78. Case N2/2188-2015, date 23.12.2015.
79. Case N2/2189-2015, date 23.12.2015.
80. Case N2/2190-2015, date 23.12.2015.
81. Case N2/2191-2015, date 23.12.2015.
82. Case N2/2192-2015, date 23.12.2015.
83. Case N2/2193-2015, date 23.12.2015.
84. Case N2/2194-2015, date 23.12.2015.
85. Case N2/2195-2015, date 23.12.2015.
86. Case N2/2196-2015, date 23.12.2015.
87. Case N2/2197-2015, date 23.12.2015.
88. Case N2/2198-2015, date 23.12.2015.
89. Case N2/2199, date 23.12.2015.
90. Case N2200-2015, date 23.12.2015.

Poti Citi Court

91. Case N2/330, date 04.02.2016.
92. Case N2/338, date 04.02.2016.
93. Case N2/345, date 04.02.2016.
94. Case N030210515001131873, date 04.03.2016.
95. Case N2/363, date 04.03.2016.
96. Case N2/416, date 04.03.2016.
97. Case N030224015001146135, date 22.04.2016.
98. Case N030224015001167182, date 22.04.2016.
99. Case N030224016001313431, date 09.08.2016.
100. Case N2/177-16, date 09.08.2016.
101. Case N2/318-2017, date 20.12.2018.
102. Case N2/330-2018, date 20.12.2018.
103. Case N2/1331-2017, date 27.12.2018.
104. Case N2/597-2018, date 28.12.2018.
105. Case N2/558-2018, date 28.12.2018.
106. Case N2/169-2018, date 28.12.2018.
107. Case N2/120-2018, date 28.12.2018.
108. Case N2/143-2018, date 28.12.2018.
109. Case N2/396-2017, date 31.12.2018.
110. Case N2/1341-2017, date 31.12.2018.

Rustavi City Court

111. Case N2- -16, judge M. Gigauri, date November 2016.
112. Case N2- -16, judge M. Gigauri, date November 2016.
113. Case N2- -16, judge M. Gigauri, date November 2016.
114. Case N2- -16, judge M. Gigauri, date November 2016.
115. Case N2- -16, judge M. Gigauri, date November 2016.
116. Case N2- -17, judge M. Gigauri, date January 2018.
117. Case N2- -18, judge E. Kancheli, date July 2018.
118. Case N2- -18, judge N. Oniani, date October 2018.
119. Case N2- -18, judge E. Kancheli, date October 2018.
120. Case N2- -18, judge D. Gogatishvili, date November 2018.

Supreme Court of Georgia

121. Case Nas982-914-2017, date 14.05.2018.

Tbilisi City Court

122. Case N2/-----14, judge A. Kokhreidze, date 27.05.2014.

123. Case N2/-----15, applicant L., representative M., judge I. Kopaliani, date 17.12.2015.

124. Case N2/-----15, applicant R., representative U., judge I. Kopaliani, date 17.12.2015.

125. Case N2/-----15, applicant I., representative K., judge I. Kopaliani, date 22.12.2015.

126. Case N2/-----15, applicant L., representative K., judge I. Kopaliani, date 23.12.2015.

127. Case N2/-----15, applicant L., representative M., judge I. Kopaliani, date 23.12.2015.

128. Case N2/-----15, applicant N., representative K., judge I. Kopaliani, date 23.12.2015.

129. Case N2/-----15, applicant N., representative N., judge I. Kopaliani, date 24.12.2015.

130. Case N2/-----15, applicant T., representative M., judge I. Kopaliani, date 28.10.2015.

131. Case N2/-----15, applicant M., representative M., judge I. Kopaliani, date 12.11.2015.

132. Case N2/-----15, applicant I., representatives E., M., judge T. Urtmelidze, date 02.12.2015.

133. Case N2/-----15, applicant V., representative B., judge I. Kopaliani, date 17.12.2015.

134. Case N2/-----15, applicant T., representative N., judge I. Kopaliani, date 17.12.2015.

135. Case N2/-----15, applicant M., representative M., judge I. Kopaliani, date 17.12.2015.

136. Case N2/-----15, applicant T., representative M., judge I. Kopaliani, date 17.12.2015.

137. Case N2/-----15, support recipient brother of the applicant, judge I. Kopaliani, date 21.01.2016.

138. Case N2/-----15, support recipient child of the applicant, judge I. Kopaliani, date 21.01.2016.
139. Case N2/-----15, representative mother of the support recipient, judge I. Kopaliani, date 21.01.2016.
140. Case N2/-----15, applicant S.S., judge I. Kopaliani, date 21.01.2016.
141. Case N2/-----15, judge I. Kopaliani, date 01.02.2016.
142. Case N2/-----16, judge I. Kopaliani, date 02.02.2016.
143. Case N2/-----16, judge A. Kokhreidze, date 02.02.2016.
144. Case N2/-----16, judge I. Kopaliani, date 03.02.2016.
145. Case N2/-----16, judge I. Kopaliani, date 16.02.2016.
146. Case N2/-----16, judge I. Kopaliani, date 10.03.2016.
147. Case N2/-----16, judge I. Kopaliani, date 14.03.2016.
148. Case N2/-----15, judge I. Kopaliani, date 15.03.2016.
149. Case N2/-----16, judge I. Kopaliani, date 17.03.2016.
150. Case N2/-----16, support recipient relative, judge A. Kokhreidze, date 28.03.2016.
151. Case N2/-----16, support recipient spouse, judge A. Kokhreidze, date 28.03.2016.
152. Case N2/-----16, support recipient child, judge A. Kokhreidze, date 28.03.2016.
153. Case N2/-----16, support recipient mother, judge A. Kokhreidze, date 28.03.2016.
154. Case N2/-----16, judge I. Kopaliani, date 04.04.2016.
155. Case N2/-----15, judge K.Kuchava, date 07.03.2017.
156. Case N2/-----15, third part Isani-Samgori Service Center of Social Service Agency, judge K.Kuchava, date 28.03.2017.
157. Case N2/-----15, third part Didube-Chugureti Service Center of Social Service Agency, judge K.Kuchava, date 28.03.2017.
158. Case N2/-----17, judge I. Kopaliani, date 24.10.2017.
159. Case N2/-----17, judge I. Kopaliani, date 12.09.2017.
160. Case N2/-----15, judge T.Beraia, date 12.09.2017.
161. Case N2/-----15, judge K.Kuchava, date 31.10.2017.
162. Case N2/-----17, judge I. Kopaliani, date 28.04.2017.
163. Case N2/-----18, judge I. Kopaliani, date 05.10.2017
164. Case N2/-----18, judge I. Kopaliani, date 05.04.2018.
165. Case N2/-----18, judge K. Kuchava, date 22.11.2018.
166. Case N2/-----18, judge T.Beraia, date 16.11.2018.
167. Case N2/-----18, judge I. Kopaliani, date 13.09.2018.
168. Case N2/-----18, support recipient child, judge A. Kokhreidze, date 29.06.2018.

169. Case N2/-----18, support recipient spouse, judge A. Kokhreidze, date 29.06.2018.
170. Case N2/-----18, judge T.Beraia, date 28.09.2018.

Tbilisi Appeal Court

171. Case N2b/2803-16, date 02.08.2016.

Telavi District Court

172. Case N2/157-15, date 29.12.2015.
173. Case N2/201-15, date 29.12.2015.
174. Case N2/262-15, date 29.12.2015.
175. Case N2/323-15, date 21.01.2016.
176. Case N2/339-15, date 22.01.2016.
177. Case N2/295-15, date 02.02.2016.
178. Case N2/370-15, date 18.02.2016.
179. Case N2/2/377-15, date 18.02.2016.
180. Case N2/528-15, date 01.06.2016.
181. Case N2/2/-16, date 13.06.2016.
182. Case N2/567-15, date 28.06.2016.
183. Case N2/31-16, date 14.07.2016.
184. Case N2/96-16, date 14.07.2016.
185. Case N2/10-16, date 20.07.2016.
186. Case N2/87-16, date 20.07.2016.
187. Case N2/100-16, date 20.07.2016.
188. Case N2/266-16, date 18.10.2016.
189. Case N2/318-15, date 18.10.2016.
190. Case N2/254-16, date 18.10.2016.
191. Case N2/261-16, date 18.10.2016.
192. Case N2/193-16, date 26.10.2016.
193. Case N2/296-16, date 15.11.2016.
194. Case N2/262-16, date 15.11.2016.
195. Case N2/263-16, date 15.11.2016.
196. Case N2/365-16, date 28.11.2016.
197. Case N2/103-16, date 21.12.2016.
198. Case N2/248-16, date 21.12.2016.
199. Case N2/291-16, date 11.01.2017.

200. Case N2/293-16, date 11.01.2017.
201. Case N2/302-16, date 11.01.2017.
202. Case N2/303-16, date 11.01.2017.
203. Case N2/625-16, date 26.01.2017.
204. Case N2/656-16, date 26.01.2017.
205. Case N2/549-16, date 30.01.2017.
206. Case N2/566-16, date 30.01.2017.
207. Case N2/567-16, date 30.01.2017.
208. Case N2/49-18, date 25.04.2018.
209. Case N2/107-18, date 13.06.2018.
210. Case N2/164-18, date 13.06.2018.
211. Case N2/321-18, date 09.08.2018.
212. Case N2/554, date 09.08.2018.
213. Case N2/279-18, date 12.10.2018.
214. Case N2/537, date 12.10.2018.
215. Case N2/592-18, date 12.10.2018.
216. Case N2/443-18, date 12.12.2018.
217. Case N2/457, date 12.12.2018.

Zugdidi District Court

218. Case N2/544-15, date 15.09.2015.
219. Case N2/572-15, date 17.09.2015.
220. Case N2/574-15, date 17.09.2015.
221. Case N2/661-15, date 17.09.2015.
222. Case N2/668-15, date 06.10.2015.
223. Case N2/697-15, date 06.10.2015.
224. Case N2/729-15, date 06.10.2015.
225. Case N2/742-15, date 23.10.2015.
226. Case N2/967-15, date 03.12.2015.
227. Case N2/968-15, date 03.12.2015.
228. Case N2/997-15, date 14.12.2015.
229. Case N2/799-15, date 22.12.2015.
230. Case N2/921-15, date 22.12.2015.
231. Case N2/941-15, date 22.12.2015.
232. Case N2/957-15, date 22.12.2015.

233. Case N2/550-17, date 17.07.2017.
234. Case N2/1773-17, date 01.02.2018.
235. Case N2/1855-17, date 01.02.2018.
236. Case N2/1767-17, date 01.02.2018.
237. Case N2/1898-17, date 20.02.2018.
238. Case N2/1532-17, date 20.02.2018.
239. Case N2/1816-17, date 20.02.2018.
240. Case N2/1405-17, date 20.02.2018.
241. Case N2/1881-17, date 28.02.2018.
242. Case N2/1347-17, date 10.04.2018.
243. Case N2/1955-17, date 10.04.2018.
244. Case N2/34-18, date 05.10.2018.
245. Case N2/1586-18, date 13.12.2018.
246. Case N2/1383-17, date 13.12.2018.
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