

**BEHIND LOCKED DOORS:
RIGHTS OF PERSONS WITH DISABILITIES IN THE KYRGYZ
REPUBLIC AND THE COMPELLING NEED FOR CRPD
RATIFICATION**

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Abstract

Behind locked doors. That is how current position and status of persons with disabilities in the Kyrgyz Republic can be characterized. They are under a cloak of invisibility, lacked either in their rooms or institutions. Disabled persons in Kyrgyzstan just like in any other States have been always treated as objects and burdens for their societies. This was especially due to the Soviet Union's influence on its policy making and law drafting process. Up until now persons with disabilities are been labeled as “invalids” not only in every day life but also in legal documents. Moreover, the fact that Kyrgyzstan is not party to UN Convention on Rights of Persons with Disabilities complicates and worsens the status quo of the disabled. Current thesis aims at highlighting and pinpointing the gaps and problems that exist in the legislation of the Kyrgyz Republic with regard the rights of persons with disabilities both from the legal and practical framework perspectives. This will be achieved by comparing *de jure* and *de facto* status of persons with disabilities to the existing international standards on disability rights, i.e. CRPD. Finally thesis aims at exploring a compelling need on why Kyrgyzstan shall ratify the CRPD.

Introduction

Disabled persons in Kyrgyzstan just like in any other States have been always treated as objects and burdens for their societies. This was especially due to the Soviet Union's influence on its policy making and law drafting process.¹ Up until now persons with disabilities are been labeled as “invalids” not only in every day life but also in legal documents. They are also covered by a cloak of invisibility, but with one difference from western states. If in Europe and US disabled people are lacked in institutions, most disabled persons in Kyrgyzstan are being lacked in their homes. This is because, generally speaking, Kyrgyz society is not inclusive oriented and the perceptions of Kyrgyz people including its laws and legislation are still being shaped according to the medical model of disability.

According to the statistics of the Ministry of Labor and Social Protection of Kyrgyz Republic the number of persons with disabilities constitutes 3% of the entire population, which in numbers would be 133,398 people.² These estimates are fairly substantial and challenging for such a relatively small country that is politically, legally and economically in Transit.

Kyrgyzstan is party to numerous international treaties and instruments on protection and promotion of human rights such as ICCPR, ICESCR and many other UN Treaties³. Despite the

1 See “There are no invalids in the USSR: A missing Soviet Chapter in the new disability history” S. Philips, *Disability Studies Quarterly*, 2009

2 See *National Program of State Support for the Disabled*, June 29, 1999

3 See International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly resolution 2200A (XXI) on December 16, 1966

Also See Convention on the Rights of the Child, adopted by the General Assembly resolution 44/25 on November 20, 1989

Also See Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly resolution 34/180 on December 18, 1979

Also See International Convention on the Elimination of all forms of Racial Discrimination, adopted by the General Assembly resolution 2106 (XX) December 21, 1965

Also See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their

fact that some of those international legal instruments ratified by the Kyrgyz Republic do contain certain provisions on the protection of rights of people with disabilities they are not exclusively designed to foster, promote and protect the rights of persons with disabilities. Even though in international arena there is a specific instrument on the protection of the rights of persons with disabilities, namely the UN Convention on the Rights of persons with disabilities; disabled persons in Kyrgyzstan are not being protected by this convention, due to the fact that Kyrgyzstan has not ratified it yet. Accordingly, one of the largest minorities of our population is being left without an effective human right protection mechanism which tremendously hinders equal and full enjoyment of their rights.

Current thesis aims at highlighting and pinpointing the gaps and problems that exist in the legislation of the Kyrgyz Republic with regard the rights of persons with disabilities both from the legal and practical framework perspectives. While highlighting those problems and gaps particular emphasis will be made on the definition of disability and reasonable accommodation issues. This will be achieved by comparing de jure and de facto status of persons with disabilities to the existing international standards on disability rights, i.e. CRPD. Finally thesis aims at not only identifying existing gaps and problems in legislation and in practice but also at exploring a compelling need on why Kyrgyzstan shall ratify CRPD. Accordingly the end product of this thesis will be detailed recommendations on how Kyrgyzstan shall develop and improve its existing legislation with regard the rights of persons with disabilities along with providing a detailed reasons on why it should ratify the CRPD Convention.

Current thesis consists of four chapters which are divided according to historical, legal

Families, adopted by the General Assembly Resolution 45/158, December 18, 1990

Also See Convention Against Torture and Other Inhuman or Degrading treatment or Punishment, adopted by the General Assembly Resolution 39/46, December 10, 1984

and jurisdictional logics.

The first chapter is aimed at defining the disability; by exploring the essential models of disability, its historical development and by looking at this orthodoxy through the prism of invisible movement. First and foremost the chapter will give a brief overview on what does disability mean by contrasting two different models of disabilities with one another, namely medical and social models. Furthermore, it will analyze the disability rights movement both from historical⁴ and legal perspectives making a particular emphasis on its end product- CRPD.

Second Chapter is designed in such a way as to present a general overview of the current position of Kyrgyzstan towards the rights of persons with disabilities. It will explore general political situation in Kyrgyzstan and various domestic mechanisms that exist in the Kyrgyz Republic on the protection of the rights of persons with disabilities (if there are any). Finally it will identify Kyrgyzstan's current obligations under the UN Convention on the Rights of Person's with disabilities.

Third chapter is aimed at analyzing the existing Kyrgyz laws on disability rights; particularly the analysis will be based on looking at how those laws define disability. Namely, I will explore whether those rules provide the definition of disability according to a medical model of social model of disabilities. Furthermore assess the effectiveness of existing laws and their implementations. Finally this chapter will look at how those rules are being enforced in practice, namely this constitutes the practical component of my work which was aimed to be achieved by conducting interviews and site visits.

Furthermore, current thesis will talk about compelling needs for Kyrgyzstan to ratify the CRPD particularly focusing on the uniqueness of the CRPD, its nature and contribution made to

4 By historical perspective I intend to demonstrate a hidden history of persons with disabilities and their struggle for the equality in invisibility.

the existing human rights system.

Finally the thesis is aimed at producing the detailed recommendations for the Kyrgyz Republic with regard the existing laws and regulations and its need for ratification of the CRPD.

Chapter 1: Defining Disability. What is it?

Medical impairment or social oppression?

The adoption of the United Nations Convention on the Rights of Persons with Disabilities (from now on referred as CRPD) was dated as a landmark event which enabled the “World’s largest minority”⁵, to defend and enjoy their rights along with others. The drafters of the CRPD portrayed this convention as a “paradigm shift”⁶ of approaches, namely from social welfare approach to a rights based approach. Moreover CRPD was a distinct Convention in its nature which also incorporated that paradigm shift of perceptions, namely if before disabled persons used to be perceived as an object of charity now they are being treated as holders of their rights. However, it was not an easy accomplishment, the process of adoption of the CRPD and the pre-dating activities can be described as a long lasting struggle.

Stigma, label and disadvantage have been always an integral part of a disability which had a destructive and diminishing effect⁷ on people with disabilities. While other minority groups have already been protected by legally binding UN Human Rights instruments⁸, lack of binding

5 See According to the statistics of World Bank disabled persons constitutes 10% of the entire population of the world which estimates to be equal to over 600 million people.
“*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*» Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008

6 See “The Road to Implementation of the Convention of the Rights of Persons with Disabilities”, New York, 30 March 2007, <http://www.un.org/disabilities/default.asp?id=160>

7 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008

8 See Convention on the Rights of the Child, adopted by the General Assembly resolution 44/25 on November 20, 1989

and enforceable treaty, deep stigma and constant discrimination⁹ had been precluding disabled people from the enjoyment of their rights for a long period of time. Furthermore, disability had been perceived by society as some crucial and medical impairment which was a cornerstone of the definition of disability up until 2006, which is defined as an important date when the legally binding treaty on the protection of disability rights had been adopted by international community. This process of long struggle for the binding instrument and for the shifts of perceptions had been long lasting process which according to majority of scholars can be described as a struggle in invisibility and darkness.¹⁰ Moreover, this campaign was not only the strive for the Convention, but rather an important effort to achieve a substantive equality of opportunities and rights.¹¹ Accordingly current chapter is aimed at equipping the reader with essential models, definition and movements of disability in addition to the CRPD. First and foremost the chapter will give a brief overview on what does disability mean by contrasting two different models of disabilities with one another. Furthermore, it will analyze the disability rights movement both from historical¹² and legal perspectives making a particular emphasis on its end product- CRPD.

See Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly resolution 34/180 on December 18, 1979

9 See *“Human Rights and Disability: the current use and future potential United Nations human rights instruments in the context of disability”* Gerard Quinn and Theresia Degener with Anna Bruce, Christine Burke, Dr. Joshua Castellino, Padraik Kena, Dr. Ursula Kilkelly, Shivaun Quinlivan, *United Nations New York and Geneva 2002*, p. 23

See *“Invisible Disability: Georgiana Kleege’s “Sight Unseen”*” Susannah B. Mintz, NWSA Journal, Vol 14, No.3 Feminist Disability Studies, (Autumn 2002) Johns Hopkins University Press, p. 160

10 See *“International Human Rights law and mental disability”* Lawrence O. Gostin, At Law, Hastings Center report, p. 11

See *“Finding the Gaps: A comparative analysis of disability laws in the United States to the United Nations Convention on the rights of persons with disabilities (CRPD)”* John R. Vaughn, National Council on Disability, May 12, 2008, p. 12

11 There are number of scholars like Gostin and French who also view this campaign as a strive for substantive equality.

See See *“Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities”* Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008

12 By historical perspective I intend to demonstrate a hidden history of persons with disabilities and their struggle for the equality in invisibility.

1.1. Medical Model of Disability

One of the primary and best ways of understanding disability is by looking at this phenomenon through the prism of various models¹³ that have been developed by scholars and historians. Although there are various different models¹⁴ of disabilities like moral model¹⁵, sociological, socially adopted and others¹⁶ there are two primary dichotomies that have been consistently contrasted with one another. Particularly they are medical v. social models of disabilities.

Historically and by long-established tradition disability always has been perceived as a sin or lack of faith, ipso facto as a moral model of disability¹⁷. However, due to the development of science and technologies this model then was substituted by a medical model, where a disability had been treated as a medical problem¹⁸ which is situated in person who possesses certain “physical, sensory, intellectual, psychosocial or other impairment or condition”¹⁹. This particular understanding and perception of disability is widely known as a medical model of disability. This model is centered on person’s impairments which make him disabled and incapable for social co-existence with others, not on person’s dignity and autonomy. It has a tendency to exclude such people from the inclusion to the community or society, by diminishing and destroying their sense

13 See “*Disability Reconsidered: The Paradox of Physical Therapy*” Susan E. Roush, Nancy Sharby, American Physical Therapy Association, 2011

14 See “*Could you hold the door for me: including disability in diversity*” R. Olkin, 2002

15 See “*Religion and Disability: some notes on religious attitudes and views*” M. Bryant, Perspectives on Disability, 1993.

16 See “*Disability, Society and the Individual*” J. Smart, Aspen Publications 2001.

17 See “*Religion and Disability: some notes on religious attitudes and views*” M. Bryant, Perspectives on Disability, 1993.

18 See “*The United Nations Convention on the Rights of persons with disabilities: new era or false dawn?*” Anna Lawson, Syracuse Journal of International law and Commerce, Volume 34:563, p. 9

19 See “*The United Nations Convention on the Rights of persons with disabilities: new era or false dawn?*” Anna Lawson, Syracuse Journal of International law and Commerce, Volume 34:563, p. 9

of social integration. It is ipso facto directed towards separating and segregating them from the outside world completely. Medical model of disability had gained its power after the industrial revolution. If before the industrial revolution disability used to be understood through the prism of religious, cultural and spiritual orthodoxy, namely as something caused by supernatural and spiritual powers²⁰, after the industrial revolution and the improvement of science disability was able to gain another status which is linked to the scientific explanations.²¹ That is to say, disability had gained its medical model, namely persons with disabilities were no longer perceived as somebody possessed by the devil or evil spirits, but rather they were treated as persons possessing a certain disease and abnormality.

Consequently, spiritual model was substituted by medical model of disability. At the heart of the medical model is located certain perception as abnormality and departure from the standard. In other words, persons with disabilities are treated as socially incapable, passive and defective creatures who has to be subjected to certain treatment and cure so that all those defects will be fixed and all deviations will be standardized so to enable them to co-exist with other normal people in the community.

The focal point of this model as it is referred by Rosemary Kayess is “.....on the affliction caused by the particular condition or impairment and the provision of cure, treatment, care and

20 See “*Understanding disability: from theory to practice*” Michael Oliver, 1996

Disability as being treated as some sort of a possession by dark spirits is also observed in Holy Scriptures as Bible and Quran . Particularly, in the New Testament of the Bible. Furthermore, such tendency was also observed in the historical writings of the historians from China, Russia and Central Asia, particularly in the writings of *Chochan Valikhanov on “History of Kyrgyzstan”*,

See “*Istoriya Kyrgyzstana I drevnih Kyrgyzov*” A. Osmonov, Bishkek 2002 “History of Kyrgyzstan and ancient Kyrgyz”

See “*Kratkie Rasskazy po istorii Kyrgyzstana*” A.K. Dotaliev, (*Short stories on history of Kyrgyzstan*), Dotaliev, 2009, p. 91

21 See Ibid 9, p. 35

protection to change the person so that they may be assimilated to the social norm.”²² In other words, this model is not difference friendly; it does not allow any deviations from the norm and expected standards. Under this model for disabled people to be integrated with the outer world, i.e. society, he/ she first has to be fixed and cured and only after that assimilated to the community. Accordingly, disabled persons are ill and therefore they are not able to live their lives fully as other people can.

Another term which is used by number of scholars to characterize medical model of disability is “personal tragedy”²³ of disabled persons. That is to say, people perceived them as a “great misfortune”²⁴ and a huge defect of the nature²⁵ who are “socially dead”²⁶ and who are for all times subjects of such immutable characteristics that will limit their activities in whatever they do. For these reasons persons with disabilities have been constantly treated as objects of charity and a huge financial and emotional burden to the community and society they live in. The most controversial part of this model is that it places both impairments and cure of those impairments on disabled persons themselves. In other words it sees no problem coming from the societal oppression and discrimination. Moreover, it places no requirement for society to accept disabled people as they are, but rather attaches their minds to the treatment and cure of disabilities.

Thus, it can be concluded that the medical model of disability centers both defects and

22 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p. 5

23 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p. 5

See “*Understanding disability: from theory to practice*” Michael Oliver, 1996

24 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p.6

25 See “*The social model of disability and the disappearing body: toward a sociology of impairment*”, Hughes B., Peterson K, *Disability and Society*, volume 12, 2 p. 333

26 See *ibid* 14, p.5

fixing of those defects on persons with disabilities, not on community as a whole.²⁷ However, this model fails to accept the fact that most disabilities are not subject for repair, they are immutable²⁸ and constant. This model does not even consider this scenario; it gives no answer for what happens if persons with disabilities will not be cured. In my reading an understanding of this model, if there is failure of treatment then disabled person will be isolated and segregated from the society forever. Thus living according to this model means leaving no chance for disabled people to be integrated in the community. For this particular there was a crucial need for a shift of perceptions of the society towards the persons with disabilities, which leads us to a second model of disability.

1.2. Social Model of Disability/human rights model

Social model of disability is widely known to be the reconstruction of perceptions, per say the shifts of people's conscious from being centered on impairments of disabled people to placing them in a social environment. It is an umbrella term for a wider movement and theory of disability the emergence of which traces back to the 1960s in the UK.²⁹ The reference to this model of disability was firstly made by Paul Hunt at the Union of the Physically Impaired forum discussion who unequivocally define disability as "the disadvantage or restriction of activity

27 See "*On Equal terms – working with disabled people*", French Sally, 5 September 1994 the author defines medical model of disability in following terms: "has guided and dominated clinical practice with the resulting assumption that both problems and solutions lie within people with disabilities rather than within society."

28 See *City of Cleburne v. Cleburne living center* (1985) In this case Supreme Court of the US clearly emphasized that disabled people, namely mentally retarded possess such disabilities that are immutable in their nature and cannot be considered as a politically powerless because they are supported and represented by public which led to a legislative response.

29 See "*Fundamental principles of disability*" The Disability Alliance, Union of the Physically Impaired against segregation, November 1976 as a result of this discussion, Paul Hunt firstly reflected the social model of disability in his report.

caused by a contemporary social organization which takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities”³⁰. From the aforementioned we can conclude that this was the starting line for a new disability movement that triggered a new paradigm shift of perceptions. Social model is also referred as human rights model by the Office of the High Commissioner on Human Rights.³¹ Current model is primarily understood as being centered on inherent human dignity and difference principle. It also shifts the “problem” from being only centered on disabled people to society, namely “the problem of disability under this model stems from a lack of responsiveness by the State and civil society to the difference that disability represents”.³² Accordingly, disability is understood as a “social construct”³³ or “social oppression”³⁴, under what person with disabilities are being labeled and stigmatized which further disables them to be an integral part of the society. That is to say, it is not their impairment which is disabling them, but the society by imposing their labels and by being blind for differences. Current model presupposes that due to society’s stigma towards disabled and their treatment of them as less worthy and “unwillingness

30 See “*Fundamental principles of disability*” The Disability Alliance, Union of the Physically Impaired against segregation, November 1976

31 See “*Human Rights and Disability: the current use and future potential United Nations human rights instruments in the context of disability*” Gerard Quinn and Theresia Degener with Anna Bruce, Christine Burke, Dr. Joshua Castellino, Padraik Kena, Dr. Ursula Kilkelly, Shivaun Quinlivan, *United Nations New York and Geneva 2002*, p. 14

32 See *Human Rights and Disability: the current use and future potential United Nations human rights instruments in the context of disability*” Gerard Quinn and Theresia Degener with Anna Bruce, Christine Burke, Dr. Joshua Castellino, Padraik Kena, Dr. Ursula Kilkelly, Shivaun Quinlivan, *United Nations New York and Geneva 2002*, p. 14. Authors of this report also emphasize on the fact that “*Society has ignored or discounted the difference of disability in regulating the terms of entry into and participation in the mainstream, thus excluding – or effectively excluding – 10 per cent of any given population. This is not merely irrational from an economic point of view; it also violates the inherent dignity of all human beings.*”

33 See supra note 23, p. 15

34 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p.6

See “The Concept of Oppression and the development of a social theory of disability” Abberley, 1987

to accommodate differences”³⁵ persons with disabilities become socially inactive and passive. Thus this approach towards disability dramatically transforms the attitudes of the society from cure, treatment and protection set of mind towards the respect for human diversity and difference. Namely, it advocates tolerance and openness to diversity and any differences, be it black or white, women or men, able or disabled. Thus, aspirations for a social model of disability can be characterized as an attempt to create an inclusive community and society for everybody, which had been illustrated by the UN as the “next generation civil rights movements”.³⁶ I find this particular approach towards defining the disability most appropriate. Unlike the first model it takes into consideration the immutable nature and characteristics of disability. It fosters the rights of the disabled by breaking all the barriers and expectations of society imposed on them. As it was mentioned earlier international community adopted this particular model of disability by creating a legally binding instrument on protection of the rights of the disabled. However, it was not an easy task; it took roughly twenty five years for the disability movement to achieve this accomplishment. Accordingly, following subsections will lead the reader to the end-product of the disability movement; however it will be made through the prism of looking at it from the two models of equality. Afterwards I will examine this long process of struggle, which most of the times is characterized by international scholars as a “hidden history”³⁷ and “struggle in

35 See “*Disability Reconsidered: The Paradox of Physical Therapy*” Susan E. Roush, Nancy Sharby, American Physical Therapy Association, 2011” Authors particularly define the social model of disability in following way: “*at the core of the social models is the decreased value people living with impairments experience and the attitudes of the society that considers them to be “less than” their peers who are non-disabled*”

36 See *Human Rights and Disability: the current use and future potential United Nations human rights instruments in the context of disability*” Gerard Quinn and Theresia Degener with Anna Bruce, Christine Burke, Dr. Joshua Castellino, Padraik Kena, Dr. Ursula Kilkelly, Shivaun Quinlivan, *United Nations New York and Geneva 2002*, p.24

37 See “Understanding Disability: Inclusion, Access, Diversity, and Civil Rights”, Paul Jaeger, Cynthia Bowman, 2005, p. 12

invisibility”³⁸.

1.3. Invisible Human Right: from formal to substantive equality

History crystallizes the fact that disability has never been treated as a significant matter; rather it was a part of a great puzzle called “hidden history”³⁹. Disabled people for centuries were invisible citizens of this world about whom no books were written and no films were screened, but even if they were, then only in the context of personal tragedy. This phenomenon is described by a generic term “cloak of invisibility.”⁴⁰ Such a course of history was due to the main conflicting theories of equalities, namely formal and substantive. Many philosophers and scholars have been involved in a heated debate on what should prevail in our society: substantive equality of formal.⁴¹

Formal equality is known to be color blind, race blind, and gender blind overall blind for any differences that exist in our society. The proponents of formal equality firmly believe that everybody shall be treated formally equal without any exceptions. For instance Aristotle used to say that formal equality is “sameness among equals or treating equals equally or likes alike”⁴². Accordingly this model of equality allows no affirmative or positive actions it disregards the diversity and difference which eventually as it was proven by history leads to huge marginalization of particular group and to a great inequality. For a long period of time US Supreme Court was supporting the idea of formal equality in their decision-making process and

38 See “*Understanding the UN Convention on the Rights of Persons with Disabilities*” Marianne Schulze, A handbook on the Human Rights of persons with disabilities, July 2010, Handicap International

39 See supra note 33 p. 12

40 See “*Disability Equality and the existing Anti-discrimination paradigm – european discrimination law*” Fredman taken from “Disability Rights in Europe: From Theory to Practice”, 2005

41 See “*Ethica Nichomachea*” Aristotle, Book V

See “The Concept of substantive equality and Gender Justice in South Asia” Savitri Goonesekere
<http://www.unwomensouthasia.org/assets/The-Concept-of-Substantive-Equality-final-31-12-072.pdf>

42 See “*Ethica Nichomachea*” Aristotle, Book V

the greatest crystallization of it is when Supreme Court affirmed the constitutionality of the “separate but equal” doctrine in *Plessy v. Ferguson* case.

The case of *Plessy* was about questioning the constitutionality of the statute which required the railroad accommodations to be separated for whites and colored people with the condition that they will be equal. Supreme Court of the U.S. highlighted that laws requiring segregation of races do not in any way constitute an inferiority of one race towards another.⁴³ Namely, according to the Court if the law “stamps the colored race with a badge of inferiority it is because the colored race chooses to put that construction upon it”⁴⁴. Furthermore, the court tested the reasonableness of the statute. According to court’s opinion laws adopted “in good faith for the promotion of public good and not for the annoyance or oppression of a particular class”⁴⁵ are reasonable ones. Due to the fact that Louisiana statute was not adapted to “annoy or oppress”⁴⁶ colored but to promote a “public good”, the statute was reasonable. General Policy towards the persons with disabilities across the jurisdictions was formal equality.⁴⁷ Thus after *Plessy* we are able to reach the conclusion that it is not possible to attain equality by merely providing and subjecting people to formal equality, it has to be more than formality. That is to say equality shall not be difference and diversity blind; it rather has to respect the diversity and treat them substantively- which leads us to another model of equality- substantive equality.

Substantive equality unlike the formal one, requires the legislator and society overall while drafting the law to take into consideration the individual characteristics of every single case. As it was emphasized by scholars substantive equality “attempts to remedy these problems

43 See *Plessy v. Ferguson*, 163 U.S. 537 (1896)

44 See *Plessy v. Ferguson*, 163 U.S. 537 (1896)

45 See *Plessy v. Ferguson*, 163 U.S. 537 (1896)

46 See *supra* note 40

47 See “*Attitudes and access : advancing the rights of people with disabilities*” Malcolm Peat, Canadian Medical Association

by compensating for historical disadvantage, and by requiring alteration of the norm to better reflect human diversity⁴⁸. This model of equality requires states to take certain measures like devoting quotas, implementation of positive discrimination and affirmative action policies with an aim to encourage the groups that those policies concern to engage in civic activities.⁴⁹⁵⁰ The analysis of various jurisdictions enables us to see that it was a long run for disability movement to achieve this shift from formal equality to substantive. Nevertheless, the elements of substantive equality were already vivid in various statutes of the United Kingdom⁵¹, the United States⁵² and Australia back in the early 1990s.⁵³ The adoption of the acts prohibiting the discrimination against disabled persons was of great achievement both from the perspectives of disability and also from the perspectives of equality.

Consequently, by contrasting these two models of equalities one can accordingly deduce that the achievement of the actual equality of disabled people along with others is only palpable in the case of substantive equality. Since formal equality is only capable of guaranteeing the “equality before the law”⁵⁴, whereas substantive one is able of guaranteeing both the “equality before the law” and “equality in the law”⁵⁵.

48 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p.8

49 See supra note 43

50 See “Providing Equality: Substantive Equality and the positive duty to provide”, Fredman, South African Journal of Human Rights, 2005

51 See “*The Disability Discrimination Act*” as of 1995

52 See “*The Americans with Disabilities Act*” as of 1990

53 See “*Australian Disability Discrimination Act*” as of 1992

54 It is meant to be the subsequent provisions in various treaties and conventions which guarantees the equality before the law. See ICCPR, ICESCR, CRPD and others.

55 This term has been used by Vandenhoe to emphasize the disadvantages of formal equality, namely he was claiming that when it comes to enforcement and implementation of the law in every day life of the disabled persons then the law is only formal without any implication and intentions to be substantive.

See “Non-discrimination and equality in the view of UN Human Rights treaty Body”, Wouter Vandenhoe, Oxford 2005

Thus after exploring the genuine understanding of disability from historical, social and legal perspectives one is able to see how this term and overall phenomenon have been evolving and developing. In comparison with other minority groups like women or children persons with disabilities have been underprivileged since there was no internationally binding UN document which protected their rights. It took the UN roughly 50 years to come up with that document. Thus, it can be implied that disability rights have been under the shadow of other rights which by itself reaffirms the “cloak of invisibility” not only on social level but also on legal level. In the following I will give a brief overview of the development of the rights of persons with disabilities as a distinct human right in international level, namely on the level of the United Nations. Further, two conflicting views with regard the CRPD will be contrasted namely along with exploring the CRPD as a new and progressive instrument I will also present a critical evaluations of the CRPD by various scholars.

1.4. CRPD and Disability: a new paradigm shift or a restatement of already existing rights?

While the protection of the rights other minority groups like women and children have been already contested and rapidly developing, rights of persons with disabilities were under their shadow and an “invisible element of international human rights law”⁵⁶. There have been number attempts taken by the General Assembly in protection of the rights of the disabled; however most of them were unsuccessful. The final step taken by the GA is considered to be the most effective one so far, namely the creation of the Ad Hoc Committee on preparation of the draft of the

⁵⁶ See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p12

CRPD, where number of non-governmental organizations clearly emphasized that “Disability rights were a missing piece of the human rights framework”.⁵⁷ Up to that point there was a tendency of GA to develop the disability rights through reinterpreting already existing norms on human rights protection.⁵⁸⁵⁹⁶⁰ ⁶¹

Even though the adoption of the International Bill of Rights⁶² was a landmark and remarkable event for the history of the International Human Rights, none of those bills defined disabled persons as special and protected groups. If we look at the equality and non-discrimination clauses of these landmark human rights instruments then in none of them we are able to see that persons with disabilities are recognized to be protected by those conventions.⁶³ The only Convention where we can find the mention on disability is the Convention on the Rights of the Child, where certain rights and obligations of contracting states were written with regard the children with mental and physical disabilities.⁶⁴ However, this provision did contain neither the definition of disability nor the prohibition of discrimination based on disability. Accordingly, it is evident that the GA had been developing various efforts on protecting the rights of persons with disabilities, but all those efforts were made through the prism of already existing

57 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p.12

58 See “*International Convention on Elimination of all forms of racial discrimination*” adopted by the General Assembly resolution 2106 (XX) December 21, 1965

59 See International Convention on the Elimination of all forms of Racial Discrimination, adopted by the General Assembly resolution 2106 (XX) December 21, 1965

60 See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly Resolution 45/158, December 18, 1990

61 See Convention Against Torture and Other Inhuman or Degrading treatment or Punishment, adopted by the General Assembly Resolution 39/46, December 10, 1984

62 By international Bill of Rights it is expressed to be the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, International Covenant on economic social and Cultural Rights.

63 See International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly resolution 2200A (XXI) on December 16, 1966, Universal Declaration on Human Rights and International Covenant on Civil and Political Rights.

64 See Article 23 of the Convention on the Rights of the Child, adopted by the General Assembly resolution 44/25 on November 20, 1989

human rights instrument⁶⁵.⁶⁶ ⁶⁷Due to the fact that existing treaties had contained almost nothing on disabilities the efforts taken by the GA were ineffective and unsuccessful. One of those vain attempts was taken by the Committee on Economic Social and Cultural Rights in its General Comment No.15 of the CESCR on Persons with disabilities. This General comment was eventually considered to be too broad and too recommendatory in its nature.⁶⁸ It was criticized by disability rights activities as being the “first United Nations document to broadly define disability based discrimination”.⁶⁹⁷⁰

First and foremost it did not present specific actions that have to be taken by States; rather it just simply stated that the obligations of States on promotion of the rights of persons with disabilities should be in progressive realization.⁷¹ Furthermore throughout the general comment we are able to see how Committee encouraged States to take appropriate measures to protect the rights of persons with disabilities, but it did not clarify what exactly is meant by appropriate measures. It later presented methods of implementations that States are supposed to take and

65 See General Comment No. 5 : Persons with Disabilities. Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994, E/1995/22 Office of the High Commissioner on Human Rights.

66 See General Comment No.18: Equality and Non-discrimination, adopted by Human Rights committee on 10 November 1989

67 See General Recommendation No.18: Disabled Women, adopted by the Committee on the Elimination of Discrimination against women, adopted at its 10th session in 1991.

68 See General Comment No. 5 : Persons with Disabilities. Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994, E/1995/22 Office of the High Commissioner on Human Rights.

69 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p.13.

70 ESCR Committee defined the disability based discrimination in following terms: “For the purposes of the Covenant, ‘disability-based discrimination’ may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights” See General Comment No. 5 : Persons with Disabilities. Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994, E/1995/22 Office of the High Commissioner on Human Rights.

71 See Section 9 of the General Comment No. 5 : Persons with Disabilities. Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994, E/1995/22 Office of the High Commissioner on Human Rights.

those methods are mostly designed on national/ domestic levels without any authoritative international body which observes and monitors those implementation techniques. This comment had been highly criticized by disability rights experts and organizations.⁷²

Furthermore, GA started its second phase or per say stage towards the protection of the rights of persons with disabilities. This time it was made through the “soft law” by passing various non-binding resolutions and declarations with regard disabled people.⁷³ Since 1950s UN GA along with other UN Human Rights Treaty based bodies were able to adopt plenty of resolutions^{74 75}, standard rules⁷⁶, principles,^{77 78} guidelines⁷⁹ studies and declarations that concerned persons with disabilities.^{80 81} Despite this tremendous amount of soft laws developed with regard the rights of persons with disabilities, and despite how good some of them would be all of them remained absolutely not binding on states, ipso facto not generating any state obligation to protect and promote the rights of persons with disabilities. Thus it led the

72 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p.13.

73 See See *Human Rights and Disability: the current use and future potential United Nations human rights instruments in the context of disability*” Gerard Quinn and Theresia Degener with Anna Bruce, Christine Burke, Dr. Joshua Castellino, Padraik Kena, Dr. Ursula Kilkelly, Shivaun Quinlivan, *United Nations New York and Geneva 2002*, p.29

74 See the General Assembly Resolution 32/133 on establishment of the United Nations Voluntary Fund on Disability

See “*Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities*” adopted by General Assembly Resolution 56/168 on 19 December 2001

75 See Resolution 1996/27 of the UN Commission on Human Rights on the “Human Rights of persons with disabilities”

76 See “*Standard Rules on the Equalization of Opportunities for Persons with Disabilities*” adopted by General Assembly resolution 48/96, on 20 December 1993

77 See “Principles for the protection of persons with mental illness and the improvement of mental health care”

78 See “Principles for the protection of persons with mental illness and the improvement of mental health care”

79 See *Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder* (1986)

80 See “Declaration on the Rights of mentally retarded persons” adopted by General Assembly resolution 2856 (XXVI) on 20 December 1971

81 See “Declaration on the Rights of Disabled Persons” adopted by General Assembly resolution 3447 (XXX) on 9 December 1975

See “World Program of Action concerning disabled persons”, adopted by General Assembly resolution 37/52 on 3 December 1982

international community to the final stage of the disability movement – the adoption of the CRPD.

“The constituency for an international convention on the rights of persons with disability developed in a unique international political environment for a human rights treaty.”⁸² This unique environment was due to the campaign led by the Mexican Government in 2001 for adoption of the convention on disability rights within the UN Millennium Development Goal.⁸³ Right after this initiative number of countries both with advanced and developing economies supported the Mexican campaign and started locating the adoption of the text of the Convention as one of the primary discourses in the agenda for the next GA meeting.⁸⁴ Thus during the next session of the General Assembly contracting parties by consensus, i.e. without employing the voting procedure adopted a resolution on the development of the text of the convention.⁸⁵ By the same resolution there was an Ad Hoc Committee⁸⁶ established to further foster the steps of the adoption of the instrument. It took eight meeting sessions for Ad Hoc Committee to develop, edit, discuss and finally present the text of the Convention for GA for adoption.⁸⁷ Thus after a long 5

82 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p. 17

83 See “*We the Peoples: the Role of the United Nations in the 21st Century*” adopted by General Assembly 9703 on 3 April 2000.

84 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p. 17. The author stated the following with this regard: “Bolivia, Chile, Columbia, Congo, Costa Rica, Cuba, Democratic Republic of the Congo, Dominican Republic, Ecuador, El Salvador, Guatemala, Jamaica, Mexico, Morocco, Nicaragua, Panama, Philippines, Sierra Leone, South Africa and Uruguay sponsored the Resolution on a comprehensive and integral international Convention to promote and protect the rights and dignity of persons with disabilities”

85 See General Assembly Resolution 56/168 on 19 December 2001

86 Along with Ad Hoc Committee the same Resolution established a Working Group who was responsible for the development of the text of the Convention.

87 See “*Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*” 3 July 2003

Also see “*Interim Report of the Ad Hoc Committee on a comprehensive and integral international Convention on the protection and promotion of the rights and dignity of persons with disabilities*”, 1 September 2006

years term international community witnessed the emergence of a new Instrument – CRPD which was the product of invisible right that was granted for the persons with disabilities.

So far CRPD is being considered as one of the “densest exposition of human rights”⁸⁸ ever developed by the UN System. It consists of 50 articles, each of which is titled and in addition to it Optional Protocol. CRPD is a mere reflection of the process when previously invisible right has gained its visibility and became an integral part of the International Human Rights system. It is the only UN Human Right Instrument which affirmed the existence of the “Right” of persons with disabilities and its protection.

Nevertheless, there are two conflicting views with regard the effectiveness and mandate of this instrument. Namely such authors as Rosemary Kayess and Philip French believe that “The GA mandate under which the CRPD was developed stipulated that the negotiating Committee was not to develop any new human rights, but was to apply existing human rights to the particular circumstances of persons with disability.”⁸⁹ Accordingly, they believe that CRPD does not generate as such a new right for the disabled; it rather re-affirms already existing rights that were guaranteed by other Human Rights instruments. This view overall doubts the entire the effectiveness and worthiness of the Convention, since the existing instruments have already been defined as containing no efficient and valid provisions on the rights of persons with disabilities.⁹⁰

On the other hand such scholars as Frederic Megret firmly believe that CRPD is a progressive instrument with a completely fresh and holistic approach taken towards the human

88 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p. 22

89 See “*Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*” Rosemary Kayess, and Phillip French. Human rights Law review, Oxford University Press, January 24, 2008, p. 20

90 See supra notes 69-77

rights.⁹¹ According to Frederic Megret Convention makes one to rethink on what are the basic human needs and what does really constitute a human being. Furthermore he believes that this rethinking mechanism automatically emerges certain changes, namely it alters the relationship between individuals and most importantly between state and the society. Thus from him, CRPD is a paradigm shift of perceptions not only on what disability means but also on what human being means. This particular view and reading of the convention clearly demonstrates that CRPD was able to adopt a social model of disability along with substantive equality. My reading of the CRPD also goes along with Frederic Megret. Reading the Convention it is easy to imply that it creates a new generation of rights with more progressive and holistic approach. Even though the Convention does not clearly define what disability is, it is easy to imply that this term is an evolving term for what can not be given a definite definition.

Conclusion on Chapter 1

Present chapter introduced the phenomenon of disability from various perspectives by looking at the history, religion, law, sociology and philosophy. Abiding element of these cross disciplines was the fact that stigma, label and disadvantage have always been an integral part of disability. It further looked at the disability from the prism of two primary models- medical and social. After contrasting them with one another I reached the conclusion that the best model which shall be adopted for any disability is – a social model. My primary argument was based on the finding that this approach, i.e. social model, towards disability dramatically transforms the attitudes of the society from cure, treatment and protection set of mind towards the respect for

91 See “The disabilities Convention: Towards a holistic concept of Rights” Frederic Megret, International Journal of Human Rights, 1 January, 2008

human diversity and difference. Namely, it advocates tolerance and openness to diversity and to any differences, be it black or white, women or men, able or disabled. Thus, I concluded that aspirations for a social model of disability can be characterized as an attempt to create an inclusive community and society for everybody, which had been illustrated by the UN as the “next generation civil rights movements”.⁹²

Furthermore, I looked at the long-lasting process or what I have also called “struggle” for disability rights and came to a conclusion that this struggle was invisible in its nature. After looking at this process I concluded the first chapter with an end product of that struggle, namely the UN Convention on the Rights of persons with disabilities. Even though there were many criticisms and skepticisms expressed towards the CRPD by contrasting two conflicting view I reached the conclusion that Convention generates a new generation of rights with more progressive and holistic approach given to them. Furthermore, I was able to reach the conclusion that CRPD adopted a social model of disability, namely shift of perceptions from cure and treatment to respect and acceptance of diversity along with substantive equality.

⁹² See *Human Rights and Disability: the current use and future potential United Nations human rights instruments in the context of disability*” Gerard Quinn and Theresia Degener with Anna Bruce, Christine Burke, Dr. Joshua Castellino, Padraik Kena, Dr. Ursula Kilkelly, Shivaun Quinlivan, *United Nations New York and Geneva 2002*, p.24

Chapter 2 Current obligations of the Kyrgyz Republic under the UN Convention on the Rights of Persons with disabilities.

27 years old young and beautiful lady, whose name I cannot reveal in current thesis graduated the American University in Central Asia from the department of International and Business law this summer. When I first met her I was pleasantly surprised and extremely impressed by her courage, joyfulness and passion towards the jurisprudence. When one looks at her, he will never even think for a second that she has a congenital physical impairment, however despite this fact she has cherished so many achievements in her life. Currently she is a Coordinator of the Association of Disabled Children Parent`s Program⁹³ and actively advocates the rights of disabled people in Kyrgyzstan. I believe there are many alike stories about courageous and passionate people who despite their immutable characteristics achieve success and break all stigmas and labels imposed on them by the community. Unfortunately, this lady is the one child out of 10 with disabilities who was able to go to school and take elementary and secondary education, and she is the one young woman out of 30 physically impaired who was able to graduate the university.⁹⁴ As we can see people with disabilities in Kyrgyzstan especially children are vulnerable and in many circumstances are denied access to education and access to social life due to the lack of substantial State obligation towards them. However, this overarching issue should not be perceived as a mono obligation in the face of State alone, rather it should be

93 See “24.kg.org - Kyrgyzstan”, n.d., <http://eng.24.kg/community/2008/06/20/5651.html?print=yes>. (last visited on March, 2012)

94 See “Http://24kg.org - Kyrgyzstan» Почувствуй Себя Равным”, n.d., <http://24kg.org/reportaji/123611-pochuvstvuj-sebya-ravnym.html>. (Last visited on March, 2012)

approached as a collective obligation of a society overall. Consequently, current Chapter will present a general overview of the current position of Kyrgyzstan towards the rights of persons with disabilities and most importantly will identify its current obligations under the UN Convention on the Rights of Person's with disabilities.

2.1. Status Quo, current political situation and statistics on persons with Disabilities in the Kyrgyz Republic

2.1. a. overall political situation

Kyrgyzstan is a mountainous country which is located in the heart of the Central Asia, the population of Kyrgyzstan is estimated to consist of over 5 million people⁹⁵. It gained its independence after the collapse of the Soviet Union in 1991. Since the independence of the Kyrgyz Republic the original Constitution as of 1993 has been changed for seven times.⁹⁶ The procedure of re adoption of the Supreme Law involved numerous demonstrations, scandals, political games and so called Revolutions, which eventually cost us 80 lives of innocent people. However the primary question that should be asked in my view is what for? Citizens of the Kyrgyz Republic went to main square demanding the new government which ought to produce positive social changes, they were aspired for a new level of freedom and democracy, they desired more independent and impartial Judiciary which will be able to promote and guarantee protection of fundamental rights and freedoms entrenched in the Kyrgyz Supreme Law, but recent Constitution of the Kyrgyzstan produced the reverse effect. For Venice Commission and other international monitoring bodies Kyrgyzstan might seem to give a positive impression on

⁹⁵ See <http://www.worldbank.org> this estimation is for 2010

⁹⁶ The word *change* reflects not mere amendments to the Constitution but the re adoption of the Constitution as a whole. The change was made my means of referendum and so called Tulip Revolutions.

Constitutional level by passing number of new laws⁹⁷, adopting new constitution⁹⁸ establishing a parliamentary regime of governance, introducing judicial reforms and setting up the Council for the selection of judges.

However the reality is obvious Kyrgyz People do not have a Constitutional Court anymore⁹⁹. It was dismissed by the so called decree of the provisional government whose constitutionality is under a big question itself. Newly adopted Constitution instead introduces the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic which formally substitutes previous Constitutional Court but with a substantial decrease of its power.¹⁰⁰ Accordingly, in my view recently adopted Constitution threatens the liberty of one of the most important institutes under Democratic Governance, namely Constitutional Court. Taking into consideration the fact that Kyrgyzstan is not party to any regional mechanisms of human rights protection the existence of weak judiciary, especially the Constitutional Court substantially disables the protection and promotion of human rights on domestic level, especially the protection of the rights of persons with disabilities bearing in mind that Kyrgyzstan has not yet ratified the CRPD. Thus the political situation of the Kyrgyz Republic overall does not create a positive atmosphere for persons of disabilities to defend and promote their rights.

97 See *Zakon Kyrgyzskoi Respubliki "Osoвете po oтboru Sudei"* (Law of the Kyrgyz Republic "On the Council for the selection of Judges") as of June 13 2011, No. 40 , available at: <http://www.sud-system.kg> (last visited On June, 2012)

See *Konstitucionnyi zakon Kyrgyzskoi Respubliki "O Statuse Sudei"* (Constitutional law of the Kyrgyz Republic "On the Status of judges") as of July 9, 2008, # 14, available at: <http://www.sud-system.kg> (last visited On June, 2012)

98 See *Konstituciya Kyrgyzskoi Respubliki* (Constitution of the Kyrgyz Republic) as of June 27 2011, available at: informational databases system TOKTOM, <http://www.toktom.kg>, unofficial translation is available at: <http://www.venice.coe.int/docs/2010/CDL%282010%29058-e.asp>

99 See *Dekret Vremennogo Pravitelstva Kyrgyzskoi Respubliki* (the Decree No. 1 of the Provisional Government of the Kyrgyz Republic as of April 8 2010), available at: informational databases system TOKTOM, <http://www.toktom.kg>

100 See article 97 of the Constitution of the Kyrgyz Republic as of June 27 2010

2.1. b. Statistics

According to the statistics of the Ministry of Labor and Social Protection of Kyrgyz Republic the number of persons with disabilities constitutes 3% of the entire population, which in numbers would be 133,398 people.¹⁰¹ This number is fairly substantial and challenging for such a relatively small country that is politically, legally and economically in Transit. This number according the ministry of labor and social protection of the Kyrgyz Republic is having a tendency to increase which is demonstrated by following table:

Disability	2007	2008	2009	2010
Children with limited health ability	20660	20842	21194	22359
Persons with limited health abilities from the birth	21903	23009	21194	25396
Persons with limited health abilities from generic disease	68887	73130	76330	82623
Persons with limited health abilities acquired as a result of military service or labour injuries	3511	3295	3085	3020
Overall number of persons with limited health abilities	114961	120274	124751	133398

Source: "strategiya razvitiya socialnoi zashity naseleliya Kyrgyzskoi Respubliki na 2012-2014 gody: utverjdennaya postanovleniem pravitelstva Kyrgyzskoi Respuliki" "Strategy on development of the social protection of the population of the Kyrgyz Republic for 2012-2014": approved by the order of the government of the Kyrgyz Republic.¹⁰²

From the above table it is evident that the number of disabled persons in the territory of

¹⁰¹ See *National Program of State Support for the Disabled, June 29, 1999*

¹⁰² See the official web-site of the ministry of labor and social protection:
<http://www.mlsp.kg/index.php/component/content/article/27-strategiya/61-strategiya-na-2012-2014gg>

the Kyrgyz Republic is being increased each year, especially children with disabilities.

However, Kyrgyzstan as an independent and sovereign state bares minimal obligations to provide basic and even elementary rights and protection of those rights for their citizens. Persons with disabilities due to their very limited capacities are in need of those protections significantly. Kyrgyzstan is party to numerous international treaties and instruments on protection and promotion of human rights such as ICCPR, ICESCR and many other UN Treaties¹⁰³..Despite the fact that some of those international legal instruments ratified by the Kyrgyz Republic do contain certain provisions on the protection of rights of people with disabilities they are not exclusively designed to foster, promote and protect the rights of persons with disabilities. However there is a relatively young UN Convention that was entered into force in 2008 which is specifically designed for the protection of the rights of persons with disabilities, namely UN Convention on the Rights of Persons with Disabilities.¹⁰⁴ The Kyrgyz Republic has not ratified it yet, but it has signed it last year, consequently the mere question here is whether a signature to the treaty emerges certain obligations of the State towards that treaty. In order to answer above stated question there is a crucial need for recalling the principle of sovereignty under Public International law.

103 See International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly resolution 2200A (XXI) on December 16, 1966

Also See Convention on the Rights of the Child, adopted by the General Assembly resolution 44/25 on November 20, 1989

Also See Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly resolution 34/180 on December 18, 1979

Also See International Convention on the Elimination of all forms of Racial Discrimination, adopted by the General Assembly resolution 2106 (XX) December 21, 1965

Also See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly Resolution 45/158, December 18, 1990

Also See Convention Against Torture and Other Inhuman or Degrading treatment or Punishment, adopted by the General Assembly Resolution 39/46, December 10, 1984

104 See Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

Public International law is one of the fascinating and unique fields of law due to the complexity of its sources. Namely, under article 38 of the Statute of the International Court of Justice there are wide range of sources of IPL, particularly international treaties, customary international law which in itself presents the duality of state practice and *opinio juris*, furthermore ICJ defines “general principles of law recognized by civilized nations”¹⁰⁵ as another source of law along with judicial decisions and etc.¹⁰⁶ When we talk about rights of rights of person’s with disabilities then we mean one particular source of public international law, which is treaty. Accordingly, current thesis will predominantly deal with treaty as a source of Public International law. The treaty that is being discussed is the UNCRPD that Kyrgyzstan has not ratified yet but has signed it. Being a signatory to the treaty does not bind the State to follow its provisions, this regulation derives from the notion of national sovereignty which is considered to be one of the underlying and fundamental principles of the Public International Law and the Charter of the United Nations.¹⁰⁷

Principle of sovereignty is one of the underlying principles under international law which dictates that treaties, any sorts of decisions and judgments cannot be imposed on states without their consent.¹⁰⁸ Thus rule had been originally confirmed by the ICJ decision in *Lotus* case where the Permanent International Court of Justice clearly established that any restrictions

105 See Statute of the International Court of Justice, adopted in 1945 (article 38 (1))

106 See *Handbook of International Law*, Anthony Aust, (Cambridge University Press 2005), p. 49-56, 6-7

107 See Charter of the United Nations, entered into force on 24 October 1945 (article 2)

See Vienna Convention on the Laws of the Treaties as of May 23, 1969

See Malcolm Shaw, *International law*, (Cambridge University Press Fifth Edition 2003)

108 See *France v. Turkey* (Lotus case) Judgment No. 9, 7 September 1927 Permanent Court of International Justice in this landmark judgment International Court of Justice decided that the “restrictions upon the independence of states cannot be presumed ”

on state “independence cannot be presumed”¹⁰⁹ Furthermore the principle of sovereignty had been considered as a part of Customary International law in *Nicaragua case*.¹¹⁰ In other words under article 34 of the Vienna Convention on the Laws of the Treaties prescribes that only States that have ratified the treaty are bound to observe its provisions. In other words to be bound by every single provision and to implement them by creating certain mechanisms on domestic level, State has to ratify it, however when State is signatory to the Convention then it takes an obligation under article 18 of the Vienna Convention on the Laws of the Treaties not to defeat the object and purpose of the treaty.¹¹¹ Accordingly, it leads us to the question- what is the main object and purpose of the CRPD?

2.2. Not defeat main object and purpose of the treaty. What is the main object and purpose of the CRPD?

Article 1 of the Convention specifically points out that the purpose of the Convention is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”¹¹². CRPD is the first UN Human Right Instrument which separates the purpose of the convention from preamble. Reading the article 1 we can see following concepts that were clearly spelled out:

109 See *International Law: Cases and Materials*, Larry Damrosch (West Group Fourth Ed. 2001) *Lotus case* p. 64

110 See also *Case Concerning the military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, International Court of Justice. In this judgment ICJ clearly stated that under customary international law there is a state obligation not to violate other state’s sovereignty.

111 See article 18 of the Vienna Convention on the Laws of the Treaties as of May 23, 1969

112 See article 1 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

- Promote, protect and ensure
- “full and equal enjoyment”
- inherent dignity

The first combination of words is very unique in its nature, because traditionally International Human Rights law uses the trilogy of “promote, protect and fulfill”¹¹³ which usually refers to following:

“Promote: States through their actions have to support the upholding of rights. Protect: States have to ensure that no-one is denied their human rights. Fulfill: States have to proactively engage in actions that strengthen people’s access to rights. Structures of exclusion and segregation increase the State’s obligation to be pro-active.”¹¹⁴ However, by substituting fulfill with ensure the Convention makes the states obligation even more demanding by requiring them not only to engage in the activities of disabilities, but also to provide them “with all possible state actions”.¹¹⁵ Thus CRPD extends the state obligation with this regard.

What we can conclude from above is that the mere purpose and object of the Convention is constructed for promotion of equality and respect for dignity. But on the other hand these are two notions that are prone to be interpreted differently, therefore I believe there has to be given an interpretation within the realm and meaning of the current convention. The interpretation procedures of the treaties are also regulated by the Vienna Convention on the Laws of the Treaties. According to what there is an ordinary mean of treaty interpretation regulated by article

113 See “Understanding Disability: Inclusion, Access, Diversity, and Civil Rights”, Paul Jaeger, Cynthia Bowman, 2005, p. 34

114 See “Understanding Disability: Inclusion, Access, Diversity, and Civil Rights”, Paul Jaeger, Cynthia Bowman, 2005, p. 34

115 See *ibid* 111

Also see “*From exclusion to equality: realizing the rights of persons with disabilities*” Handbook for Parliamentarians on the Convention on the Rights of persons with disabilities and its optional protocol, United Nations, Geneva, 2007

31 which has to be in good faith, given and ordinary meaning and in context with both article and the convention.¹¹⁶ Observing this procedure CRPD Committee has defined and interpreted the notion of equality and dignity in following terms: “Inherent dignity refers to the worth of every person. When the dignity of persons with disabilities is respected, their experiences and opinions are valued and are formed without fear of physical, psychological or emotional harm”¹¹⁷ Accordingly, human dignity in the realm and meaning of CRPD is about the worthiness of a person as a human being, it requires respect from others towards your believes, thoughts and generally towards your life. Major component of dignity is to be valued and respected by others and most importantly without any physical or moral impairment.

Furthermore, as a primary object and purpose of the treaty Convention defines the “full and equal enjoyment of all human rights” by the persons with disabilities. “Equality means creating societal conditions that respect difference, address disadvantages and ensure that all women, men, girls and boys participate fully on equal terms”.¹¹⁸ Consequently within the main purpose of the Convention is to eradicate any forms of discrimination against disabled people and foster respect for difference. Another interpretation of equality was provided by the Office of the High Commissioner on Human Rights equality shall be understood as “creating societal conditions that respect difference, address disadvantages and ensure that all women, men, girls and boys participate fully on equal terms”¹¹⁹ It was also interpreted as requiring states to take

116 See article 31 of the Vienna Convention on the Laws of the Treaties as of May 23, 1969

Also See “Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities” Legal Report #2, Dr. Jean Allain, Center on Human Rights for People with Disabilities

117 See “Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors” Professional training series No. 17, Office of the High Commissioner for Human Rights, New York, Geneva 2010

118 See “Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors” Professional training series No. 17, Office of the High Commissioner for Human Rights, New York, Geneva 2010

119 See “Monitoring the Convention on the Rights of persons with disabilities: Guidance for Human rights

additional measures if necessary to provide full and equal enjoyment of rights for the disabled. Thus, such interpretation of the equality is implied to be substantive, namely respecting differences by adopting affirmative action policies.

Finally, one of the primary purposes of this convention is the protection of inherent human dignity which was also interpreted by the Office of the High Commissioner as: “refers to the worth of every person. When the dignity of persons with disabilities is respected, their experiences and opinions are valued and are formed without fear of physical, psychological or emotional harm”¹²⁰ However, this interpretation of dignity does not give a clear answer for what does it mean. Human dignity is an evolving concept which is being interpreted by various courts differently. Accordingly, the interpretation of the inherent human dignity within the CRPD will also be left for the discretion of the domestic Courts to define.¹²¹ Therefore I find it important for the purposes of the present Convention to discuss two different cases with regard the inherent human dignity that was delivered by two different jurisdictions. This comparison will enable us to see how variously dignity is being used and approached by diverse jurisdictions.

Dignity is a concept that is extremely hard to define and there is no absolute and universal definition of what dignity means. Despite the fact that respect for dignity is articulated in number of international treaties, its function and application varies from State to State and from courts to courts.¹²² The decision of Canadian Supreme Court in *Law*¹²³ and of ECtHR in *Pretty*¹²⁴ is

monitors”, professional training series No.17, Office of the High Commissioner on Human Rights, New York and Geneva 2010

120 See “Monitoring the Convention on the Rights of persons with disabilities: Guidance for Human rights monitors”, professional training series No.17, Office of the High Commissioner on Human Rights, New York and Geneva 2010

121 See “Selected legislation and Jurisprudence: UN Convention on the Rights of persons with Disabilities” Martinus Nijhoff, European Journal of Health Law, 14, 2007

122 See International Covenant on Civil and Political Rights December 16, 1966, General Assembly Resolution 2200A (XXI), Universal Declaration of Human Rights December 10, 1948, General Assembly Resolution 217 A (III), European Convention for the Protection of Human Rights and Fundamental Freedoms

undoubtedly a mere reflection of it. The comparison of the function of the dignity argument employed in *Law* and *Pretty* leads us to the fact that they had different impacts and prompted divergent consequences in following terms.

First of all in *Law* the mere function of the dignity was to serve as an object of the violation just within the meaning of section 15 of the *Charter*¹²³, whereas in *Pretty* dignity was employed as the very essence of the entire *Convention*. In *Law* Supreme Court made it clear that section 15 should be interpreted in a purposive manner, namely in order to establish the discrimination, claimant has to show by four contextual factors that an impugned law violated his essential human dignity. ECtHR in *Pretty* rather envisages the dignity as a core value and fundamental essence of the whole convention. This difference leads to the conclusion that under ECHR the dignity is treated as an underlying and basic essence of the Convention, namely respect for human dignity applies to all provisions and articles of the Convention whereas under *Canadian Charter* dignity as an underlying concept is treated only within the boundaries of section 15 of the Canadian Charter of Rights and Freedoms.

Furthermore the mere function of dignity in *Law* was used to identify the groups and classifications of people whose rights under section 15 might have been infringed. In *Pretty* the dignity was used as an attempt against the law that prevented the exercise of *Pretty*'s choice to avoid an undignified and distressing life. These two different approaches towards the function of dignity results with the fact in *Law* dignity is just an identifier of a class and group of people in other words "appropriate comparator", whereas in *Pretty* dignity is an essential value and important basis of the entire Convention.

123 See *Law v. Canada*

124 See *Pretty v. United Kingdom*

125 Canadian Charter of rights and freedoms

Thus in my view inherent human dignity in the context of the CRPD also has to be viewed as an essential and integral part of the entire Convention and I believe that it was implied to be so. Such an approach taken towards the dignity in the context of CRPD would enable this minority group to fully and equally with others enjoy their rights guaranteed by the convention and by other intentional human rights treaties.

2.3. Conclusion on chapter 2

These are the vital terms that Kyrgyz Republic has an obligation to adhere even though it has not ratified the Convention yet. However, all those concepts under the main purpose and object of the treaty require states to fulfill very vague and broad obligations without any specific explanations and guidance given which due to the rapid increase of disability in the Kyrgyz Republic tremendously hinders disabled persons rights to be effectively protected and fulfilled. Therefore, there is still a compelling need for the Kyrgyz community to ratify the Convention. In further chapters I will give an overview of the present situation in Kyrgyzstan with regard the persons with disabilities both from the de jure and de facto perspectives. After a thorough analysis of the Kyrgyz Legislation on disability laws and how they are applied in practice current thesis will present compelling reasons on why Kyrgyzstan should ratify CRPD.

Chapter 3 Disability Rights in Law and in Practice in the Kyrgyz Republic: vital truth

Disabled persons in Kyrgyzstan just like in any other States have been always treated as objects and burdens for their societies. This was especially due to the Soviet Union's influence on our policy making and law drafting process.¹²⁶ Up until now persons with disabilities are been labeled as “invalids” not only in every day life but also in legal documents. They are also covered by a cloak of invisibility, but with one difference from western states. If in Europe and US disabled people are lacked in institutions, most disabled persons in Kyrgyzstan are being lacked in their homes. This is because, generally speaking, our society is not inclusive oriented and the perceptions of our people including our laws are still being shaped according to the medical model of disability. Primary purpose of current chapter is to reveal that truth and reality.

3.1. Analysis of the Kyrgyz Legislation on Disability Rights on its conformity with international standards

As it was established previously current international standards on disability rights (CRPD) adopts a new understanding of disability which is according to a social model of disability being centered on respect of human diversity and shifting the problem from the disabled to society. It emerges the question of whether this model of disability had been adopted by the Kyrgyz Republic. To answer this question there is a need to refer and analyze number of existing laws where disability has been referred to. Primary law with this regard is the Law on

¹²⁶ See “There are no invalids in the USSR: A missing Soviet Chapter in the new disability history” S. Philips, Disability Studies Quarterly, 2009

guarantees of rights for people with limited health abilities.¹²⁷ This law defines people with limited health abilities as those who possess some long term health abnormalities caused by defects and traumas. Accordingly, it is apparent that the definition is based on medical model by still concentrating on defects and abnormalities of person. Throughout the legislation of the Kyrgyz Republic, particularly in Criminal Code of the Kyrgyz Republic, Law on Library, Law on Culture we can meet various terms like “invalids”¹²⁸, “persons with limited abilities”, “children with special needs”. However, there is no clarity on how we should understand these terms; either they are synonyms, or mutually exclusive terms. Nevertheless there is one abiding factor; all of those terms are defined according to the medical model of disability. In some cases the law even defines disability in an extremely humiliating way like for instance in law on Education Standards in School Education.¹²⁹ This law contrasts “invalids” in this case children with disabilities with normally developing children. Such attitudes taken towards the disability in law drafting process is widespread all around the statutes and orders. This reflects the reality and the fact that existing legislation of the Kyrgyz Republic is in tremendous conflict with adopted international standards on definition of disabilities. Furthermore, inconsistencies between terms also generate a possibility for decrease of the level of protection of disability rights. Existing laws do not provide a variety of disabilities; rather it has a tendency of generalizing them all. Such an approach taken by the Kyrgyz Republic directly hinders the protection of the rights of persons with disabilities. Thus there is an urgent need for Kyrgyzstan to ratify the CRPD, as such readopting a social model of disability.

127 See “*Zakon Kyrgyzskoi Respubliki o garantiakh prav lic s ogranichennymi vozmozhnostyami*” “Law of the Kyrgyz Republic on guarantees of rights for people with limited health abilities” as of 3 April 2008

Also note that it uses the term people with limited abilities not persons with disabilities

128 “*Ugolovniy Kodeks Kyrgyzskoi Respubliki*” Criminal Code of the Kyrgyz Republic

129 See “*Gosudarstvennyi Obrazovatelnyi standard shkolnogo obrazovaniya Kyrgyzskoi Respubliki*”, Governmental education standard on schooleducation of the Kyrgyz Republic.

Another important standard that was developed by the CRPD was that State shall provide reasonable accommodations for persons with disabilities for their full and equal enjoyment of their human rights along with other members of the society.¹³⁰ Reasonable accommodation has been interpreted by the office of the high commissioner in following way: *“reasonable accommodation” means necessary and appropriate modification and adjustments that is interactive, individualized and subject to the person’s consent to ensure to persons with disabilities the enjoyment and exercise of all human rights and fundamental freedoms on a basis of equality with others.*”¹³¹ The analysis of the laws of Kyrgyz Republic enables us to see that even though there numbers of laws¹³² that talk about reasonable accommodation, most of them do not take into consideration diversity of disabilities. For instance the Law on Basics of Town Planning just requires the development of breaks. Thus it only takes into consideration the physical disability while ignoring other disabilities like sensory, psycho-social and others. Moreover the same law uses the terms like invalid and other low-mobile group of people to define persons with disabilities.

The law on Mass Media requires the audio logical translation to be provided for persons with disabilities only if that particular television company broadcasts its news in more than 3 regions¹³³. There is only one such television company in our Country- namely the national

¹³⁰ See “The UN Convention on the Rights of Persons with Disabilities” Martinus Nijhoff, Modern Law Review, 2009

¹³¹ See “*Understanding the UN Convention on the Rights of Persons with Disabilities*” Marianne Schulze, A handbook on the Human Rights of persons with disabilities, July 2010, Handicap International, p. 42

¹³² See “*Postanovlenie Gosstroj Inspeksii KR o proektirovanii sredy jiznedeyatelnosti s uchetom potrebnosti invalidov I drugih malomobilnykh grup naseleniya. Order of the governmental commission on development of infrastructure with due regard of the needs of invalids and other low-mobile group of people* Also see *The Law on Mass Media of the Kyrgyz Republic as of June 2 2008* *Law on Radio and Television as of July 2, 1992*

“*Zakon Kyrgyzskoi Respubliki Ob Osnovah Gradostroitel'nogo zakonodatel'stva Kargyzskoi Respublik*” Law of the Kyrgyz Republic on basics of Town Planning as of July 13 2011

¹³³ See the Law on Mass Media of the Kyrgyz Republic

Television Company. Thus reasonable accommodations in the field of access to information also fail to fulfill the enjoyment of the rights of persons with disabilities. Accordingly existing laws that provide reasonable accommodation for persons with disabilities are mostly oriented for persons who have physical impairments those laws fail to capture the variety of types of disabilities that exist in our society. Furthermore, following subsections of current chapter will also demonstrate the fact that most of these Laws are not being enforced in practice at all. This is due to lack of any enforcing and implementing mechanisms.

Another primary objective of the CRPD is the prohibition of discrimination on the basis of disability and guaranteeing equality for them. As it was mentioned earlier persons with disabilities have never been considered as protected groups by any Human Rights Instruments, this achievement has only been adhered after the adoption of the CRPD. Existing legislation of the Kyrgyz Republic also fails to include prohibition of disability based discrimination. For example Labor Code of the Kyrgyz Republic does not consider persons with disabilities as protected group from discrimination¹³⁴. Furthermore it does not specify any measures to be taken to provide a reasonable accommodation for persons with disabilities. Such an approach taken by one of the most important Codes of the Country profoundly demonstrates the fact that persons with disabilities are still being treated as a second class group of people. Thus from the perspectives of non-discrimination the existing legal framework of the Kyrgyz Republic also fails to meet the internationally recognized standards.

3.2 Site visits

In order to explore how the rights of disabled people are being exercised, if yet exercised

¹³⁴ See Article 2 of the Labor Code of the Kyrgyz Republic

at all I conducted several visits to various Institutions both in Capital city Bishkek and in Issyk-Kul region. From the above subchapter I was able to highlight various inconsistencies of Kyrgyz legislation to existing international standards. Now it is time to assess how rights of persons with disabilities are being applied in practice.

While my Master's studies at CEU within the mental disability course I had a unique opportunity to visit Ray of Hope institution in Budapest. Tracing back to my previous experience and certain skills that I have gained there the local visits that I have conducted in Kyrgyzstan extremely differs from the one that I had in Budapest. First and foremost is the access to any sort of information, namely staff members were rude and disrespectful, furthermore I was not able to go inside to one of the institutions which was particular interest of mine. Nevertheless, this chapter is intended to reveal the findings of the visit and assess the conformity of the overall conditions of the institutions and the exercise of the rights of the residents to existing international standards on disability rights. The first Institution that I have visited was the Republican Center of Psychiatric Health which is located in Bishkek. It reflects the mere illustration of what does "total institution" mean, the notion developed by a famous sociologist Ervin Goffman.¹³⁵ It is a place behind closed doors, surrounded by huge gates¹³⁶ and inhabited by around 600¹³⁷ residents in it who do the same sort of activities¹³⁸ with the same people and in a

See Ervin Goffman, "On the characteristics of Total institutions", 1959 Penguin in his work Goffman argues that these total institutions are absolute opposites of modern social lifestyle where *"the individual tends to sleep, play and work in different places with different co-participants, under different authorities, and without an over-all rational plan"*

¹³⁶ Please refer to annex where you the photo of this institution have been located.

¹³⁷ See <http://www.med.kg/Articles/ViewSection.aspx?ArticleID=241> However, due to the fact that this institution is a national center and recognizing that it still follows a Soviet era live routine and rules, it was extremely hard for me to substantial amount of information from the inhabitants.

¹³⁸ From the visit it was found that the daily routine of the Institution is comprised of only indoor activities, if we even can call them activities. Those so called activities include breakfast, lunch and dinner and between them

same way according to a tightly fixed and imposed schedule from above, namely from staff members. From the visit it was established that almost all activities that are conducted there are simple daily routine activities like having breakfast, lunch and dinner, between them residents go back to their rooms, get medical treatment and once or twice a day are allowed to go out to courtyard and that is it. Accordingly, the Institution does not employ any sort of activities which are directed for improvement of residents' thought and thinking, they just follow the system which was developed by Soviet Era where the primary purpose of Institutions was to cure the defect¹³⁹ not to accept it and try to integrate disabled people into community. Furthermore, one of the major findings was that the residents of the institution can not freely go outside and at their discretion. They are only allowed to leave their rooms only after the approval of the staff. Thus such an approach taken by the Institution and the lack of any monitoring mechanisms lead to the fact that the residents' rights are being harshly violated. Therefore, to improve the conditions of persons with disabilities who live in institution and to protect their rights there is a crucial need for the Kyrgyz Republic to ratify the CRPD Convention. The Ratification of the CRPD would then generate the right to live in the community, which would greatly impact on the protection of rights of persons with disabilities.

The right to live in the community is a hybrid right which includes economic, social and cultural components in itself¹⁴⁰. Regulated by the article 19 of the CRPD it was established as a "foundational platform"¹⁴¹ for all existing rights in the Convention due to the fact that it touches

medical treatments and nothing more.

139 See "There are no invalids in the USSR: A missing Soviet Chapter in the new disability history" Sarah D. Phillips, *Disability Studies Quarterly*, 2009, p. 6-9 The author in detailed describe the overall condition of disabled people during Soviet Era, where they were subjected to a strong stigma and label and were treated as useless people society.

140 See "The European Union and the right to Community Living" Open Society Foundations

141 See "The right of people with disabilities to live independently and be included in the Community" The former Council of Europe Commissioner for Human Rights, Thomas Hummerberg, Comm DH/ Issue paper 2012

upon the important freedom of human being, namely the capacity/ choice to make own decisions both about future life plans and daily life. As it is addressed by various authors, particularly Thomas Hummerberg article 19 of the CRPD contains a positive philosophy behind it, which embodies the “neutralization of devastating isolation”.¹⁴² It also reflects one of the core objectives behind protection of the rights of persons with disabilities, which is the removal of the cloak of invisibility.¹⁴³ Right to live in the community means the enjoyment of the rights by persons with disabilities fully as they are enjoyed by persons without disabilities and living in the community is the only way of accomplishing it. This right combines various principles and notions in itself, namely the issue of interdependence, respect for individual autonomy, inherent dignity, and equality before the law.¹⁴⁴ Most importantly it comprises of a three part analysis which is a freedom of choice, individual support and accessibility of services. Due to the fact that this report is about the institution, legal analysis will be based on the first component only. The issue of choice goes hand in hand with the notion of individual autonomy and inherent human dignity. As it was established by the ECHR in *Botta v. Italy* freedom to choose stands for a physical and psychological integrity of a person to develop his or her personality and relationship with others without the interference.¹⁴⁵ The same approach was taken in *Stanev* case where ECHR emphasized the lack of opportunity to develop relationship with other and to develop ones personhood and lack of choice constitutes a violation of article 5 of the ECHR¹⁴⁶. Consequently, it is apparent that choice also means providing alternatives for human flourishing and full

142 See *ibid* 4 page 8, also see “Getting a life: living independently and being included in the Community” office of the High Commissioner for Human Rights, Regional Office for Europe.

143 See “The ITHACA Toolkit for monitoring Human Rights and General Health Care in mental health and social care institutions” Institutional Treatment, Human Rights and Care assessment

144 Camilla Parker, “Forgotten Europeans – Forgotten Rights: The Human Rights of Persons Placed in Institutions”, Office of the High Commissioner for Human Rights European Regional Office, Brussels, 2011.

145 See *Botta v. Italy*

146 See *Stanev v Bulgaria*, Application No. 36760/06, judgment 17 January 2012.

enjoyment of their rights in the community. Application of this law to a Republican Center of Psychiatric Health clearly shows that in case of KR ratification of the CRPD there would be a clear violation of article 19 of the CRPD. First of all the nature of activities and their objectives are aimed at isolating the residents from the outer world at all

Entire institution is based on habilitation objectives, rather than rehabilitation which does not provide residents with a development of their personhood, instead all activities and treatments are substantially contributing for making their conditions even more chronically stable and by doing so they are limiting their autonomy. Residents are being kept isolated, most of them are placed in the rooms with 6 sometime 8 people which contradicts to the requirement of 4 people in one room set by the Thomas Hummerberg in his recent issue paper.¹⁴⁷¹⁴⁸ Finally residents are deprived of alternatives, they are involved in activities which are constant and imposed, and they do not have choice with whom to live and with whom to develop relationship.

Another Institution that I have visited was the Ak-Suu care home for women. There were around 200 residents living at this care home and all of them were women. This institution is located about 40 minutes drive from Karakol (Capital city of the Issykkul Region) Overall condition of the Institution was very weak. Looking at this institution from the perspective of the CRPD would be implied to violate almost all provisions there.

The Institute was habilitation institution and all activities are performed in a way of paternalism rather than empowerment, because activities are repetitive and residents are not provided with more choices. Furthermore, all residents of the care home care under full

147 See “The right of people with disabilities to live independently and be included in the Community” The former Council of Europe Commissioner for Human Rights, Thomas Hummerberg, Comm DH/ Issue paper 2012

148 See “Getting a life: living independently and being included in the Community” office of the High Commissioner for Human Rights, Regional Office for Europe.

guardianship and during the visit it was established that medical treatments in the Institution are most of the time conducted without free informed consent of residents.

Being under full guardianship means to lose legal capacity almost absolutely, it hinders the individual's right to enjoy basic fundamental freedoms and rights which constitute the essence of human being like right to marry, right to find family, and various political and civil rights.¹⁴⁹ The deprivation of legal capacity leads to a situation when person loses control over his life and his decision-making powers are transferred to a third party. He is placed in the state of incapacitation where all decisions including financial means and medical treatments are being decided by the guardian. As it is emphasized by various authors the deprivation of legal capacity results with number of barriers both legal and practical, one of the those barriers is the fact that once the medical report on person's incapacity was made and the guardian was appointed it is very hard to revoke it. The jurisprudence of ECHR reflects that in most European Countries decisions on appointment of guardians are made arbitrarily and in violation of article 6 and 8 of the ECHR.¹⁵⁰ Due to the fact that the issue of legal capacity affects substantial segment of population of various states, the new developments are being introduced with this regard.¹⁵¹ As it was emphasized by Thomas Hammarberg there is a "paradigm shift" which has to be adopted in terms of the right to legal capacity and rights of persons with disabilities generally, namely a shift from treating people with disabilities as objects to subjects and from paternalism to empowerment. This paradigm shift is introduced within the context of article 12 of the CRPD

149 See "Advancing Legal capacity Jurisprudence" Oliver Lewis, European Human Rights law review

150 *Shtukurov v. Russia*, Application no. 44009/05, para 90; and *Salontaji-Drobnjak v. Serbia*, Application no. 36500/05, para 144

Also see *Salontaji-Drobnjak v. Serbia*, 13 October 2009, para 144

151 See "Who Gets to decide: right to legal capacity for persons with intellectual and psychosocial disabilities"

which guarantees equal “recognition before the law”¹⁵² of persons with disabilities and persons without disabilities. As it was stressed by Thomas Hammberg this equality has to be understood and perceived something beyond then a simple formal equality. Similar approach was taken by the ECHR in number of its judgments where the differential treatment in analogous situations was found in violation of the Convention.¹⁵³ Consequently, under CRPD right to legal capacity is perceived differently with a particular emphasis on personhood and adjusting the overall environment to the needs of persons with disabilities not fixing persons with disabilities. Furthermore, this approach facilitates individual freedom and creates conditions to empower and to motivate persons with disabilities. It can be observed by the introduced notions of access to support and reasonable accommodation. Namely CRPD introduced support system to replace the guardianship which has a potential of substantially changing public attitude towards the rights of persons with disabilities. The above stated facts regarding the rights of residents of Ak-Suu care home for women to legal capacity demonstrates the old system of guardianship and outcome based approach. This is due to the fact that Kyrgyzstan is not a CRPD party, which again creates a second compelling need for Kyrgyz Community to ratify the CRPD Convention.

My final visit was specifically directed towards the rights of children with disabilities with a particular emphasis given to their right to education. As the last site visit with a group of other people I went to Belovodskiy care home for children. There are around 300 children residents at this institution who only have an access for education within the boundaries of the institution, namely it is not inclusive.

There are estimated 500 to 600 million people with disabilities around the world, among

152 See article 12 of the UN Convention on the Rights of Persons with Disabilities

153 See *Thlimmenos v. Greece*, Application no. 34369/97, 6 April 2000.

Also see *Glor v. Switzerland*, Application no. 13444/04, 30 April 2009

them 150 million are children, only 15% of 150 million were estimated to have been involved in education programs in their lives¹⁵⁴. The right to education is one of the fundamental human rights in existing international law. The development of these right traces back to the UDHR, INESCR¹⁵⁵ but the most important treaty in terms of the development of right to education in the context of disability law is article 24 of the CRPD. Within this provision the notion of inclusive education was introduced, which basically emphasizes that all children shall learn together in the mainstream environment. This approach was taken to combat discrimination which is a common place in educational systems throughout the world. The development of inclusive education also can be observed within the framework of the ECHR. In its recent decision involving Roma Children in “special schools” ECHR decided that this was the case of discrimination.¹⁵⁶ Furthermore, in *Autism Europe v. France* Committee on Social Rights criticized France for not being able to provide both legal and practical measures for equal enjoyment of right to education.¹⁵⁷ Another important case in terms of right to education was decided by the Committee on Social Rights in the case of *MDAC v. Bulgaria* where it concluded that the differentiated education constitutes the violation of article 17 of the European Social Charter.¹⁵⁸ Accordingly the decisions of various human rights institutions illustrate that for education to be non-discriminative and with a spirit of welcoming community and diversity there is a need to develop and adopt inclusive education in various jurisdictions. This would enable children with

154 See Jonsson, Ture, Wiman, Ronald. *Education, Poverty and Disability in Developing Countries*. Poverty Reduction Sourcebook, June 2001, p. 11

155 See Article 28 of the Convention on the Rights of the Child, World conference on Education for All, See The Salamanca Statement on Principles, Policy and Practice in Special Needs Education of UNESCO

Also see General Comment No. 9 of the committee on the Rights of the Child

156 See “Inclusion Europe | Ensuring the Right to Education to Stop Segregation”, n.d., <http://www.einclude.eu/en/articles/73-ensuring-the-right-to-education-to-stop-segregation>.

157 See *Autism Europe v. France*

158 See *MCAD v. Bulgaria*

disabilities and their parents to fully enjoy their rights guaranteed by the CRPD. Furthermore, within the context of inclusive education it is required for states to fulfill three part obligation, namely not to interfere with the right to education, furthermore not to discriminate and finally provide maximum available resources to achieve the realization of this right which at minimum consists of social and economic access.¹⁵⁹ Furthermore, right to education also guarantees children with disability full access to traditional teaching program and development of personhood, talents and skills. Accordingly, right to education is also tightly connected with the notion of individual autonomy and inherent human dignity. The situation in this Institution in terms of right to education absolutely contradicts to the system of inclusive education. Children are not only separated from mainstream environment but also not being taught properly. Furthermore, there are not enjoying their right to develop their personhood, talents and skills, these children are segregated and remain invisible which contradicts to the mere spirit of the CRPD. This constitutes a third compelling reason for Kyrgyzstan to ratify the UN Convention on the rights of persons with disabilities.

3.3. Facts from every day life

Another factual finding with regard the rights of persons with disabilities were made in my every day life. The photos from annexes are great illustrations of how those rights look in reality. If you look at pages no 82 you will be able to see photos taken from various parts of Bishkek- which is a capital city of the Kyrgyz Republic. The first group of photos reflects the overall condition of public transport in Bishkek. The primary type of public transportation in Kyrgyzstan is mini buses, which are called in Kyrgyzstan “*marshrutkas*”. They constitute 90

¹⁵⁹ See “IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251 OF 15 MARCH 2006 ENTITLED “HUMAN RIGHTS COUNCIL” The right to education of persons with disabilities” Report of the special rapporteur on the right to education.

percent of the entire public transportation in Bishkek¹⁶⁰. Thus it is obvious, there are not designed for persons with disabilities. First and foremost these “*marshrutkas*” are small and are not capable of providing an access for wheelchairs. Moreover, they are not even capable of safely transporting persons with sensory and minor physical disabilities due to the fact that they are over packed. Ordinary “*marshrutkas*” are designed for transporting about 13 people per each, however in reality these mini buses transport around 20-23 people in each which tremendously hinders rights of persons with disabilities. Moreover the Law of the Kyrgyz Republic “On Transportation”¹⁶¹ does not contain any provisions on providing reasonable accommodation for persons with disabilities. These findings clearly demonstrate the fact that Kyrgyzstan is not taking reasonable and appropriate measures to guarantee the rights of persons with disabilities.

The second group of photos demonstrates the overall infrastructural conditions of buildings in the capital city. The law on Town Planning of the Kyrgyz Republic requires the State to develop accessibility of buildings for persons with disabilities by building ramps and taking other measures.¹⁶² However, when it comes to implementation of this law it is not being enforced at all. If we look at groups of photos in appendix on page 83 it is evident that most buildings of the capital city are not accessible for persons with disabilities. The buildings that are depicted in photos are major Universities, Official Buildings (Mayor`s office, Ministry of Education, Health and Justice), cultural buildings (National Ballet and Opera House, Philharmonic building) and various drug stores. In all of those photos it is evident that they do not provide ramps for disabled persons, thus demonstrating State`s inability to provide reasonable accommodations for persons

¹⁶⁰ See the official web-site of the ministry of labor and social protection:

<http://www.mlsp.kg/index.php/component/content/article/27-strategiya/61-strategiya-na-2012-2014gg>

¹⁶¹ See “Zakon Kyrgyzskoi Respubliki o transpotre” the Law of the Kyrgyz Republic in “Transportation” as of July 8. 1998, No. 89

¹⁶² See “Zakon Kyrgyzskoi Respubliki Ob Osnovah Gradostroitel'nogo zakonodatel'stva Kargyzkoi Respublik” Law of the Kyrgyz Republic on basics of Town Planning as of July 13 2011

with disabilities. The primary reason behind it is the lack of enforcement mechanism and institute who will be responsible for implementing the law. Therefore the ratification of CRPD would enable to create that mechanism by providing an opportunity for persons to file individual complaints to the Committee and by taking an active participation in reporting proceedings.

Conclusion on chapter 3

Thus from this chapter I was able to demonstrate that from both legal and practical framework perspectives the rights of persons with disabilities in Kyrgyzstan are not being respected, fulfilled and protected. The law uses various terms like “invalids”¹⁶³, “persons with limited abilities”, “children with special needs”. However, there is no clarity on how we should understand these terms; either they are synonyms, or mutually exclusive terms, in other words I was able to show that there is a huge inconsistency in the Kyrgyz Legislation in terms on definition of disability.

Furthermore, most laws fail to take into consideration the diversity of disabilities. Finally, current chapter highlighted the violations of the rights of persons with disabilities in practice by providing the reader with reports on site visits and photos.

163 “*Ugolovniy Kodeks Kyrgyzskoi Respubliki*” Criminal Code of the Kyrgyz Republic

Chapter 4: CRPD and Kyrgyzstan: what are the Compelling Reasons for Ratification?

4.1. Better implementation mechanisms

CRPD is a relatively young Convention and before its adoption there was no International Treaty directed for the protection of the rights of persons with disabilities. However there were attempts taken by numerous UN Treaty Bodies to extend the notion of disability within the scope of particular treaty. Nevertheless those attempts were ineffective and unsuccessful due their non-binding character. For instance General Comment No.15 of the CESCR on Persons with disabilities is too broad and too recommendatory in its nature.¹⁶⁴ First and foremost it does present specific actions that have to be taken by States; rather it just simply states that the obligations of States on promotion of the rights of persons with disabilities should be in progressive realization.¹⁶⁵ Furthermore throughout the general comment we are able to see how Committee encourages States to take appropriate measures to protect the rights of persons with disabilities, but it does not clarify what exactly is meant by appropriate measures. It later presents methods of implementations that States are supposed to take and those methods are mostly designed on national/ domestic levels without any authoritative international body which observes and monitors those implementation techniques. The only institute proposed by the Committee for the monitoring procedure, or it would be more clear if I say advised was the

¹⁶⁴ See General Comment No. 5 : Persons with Disabilities. Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994, E/1995/22 Office of the High Commissioner on Human Rights.

¹⁶⁵ See Section 9 of the General Comment No. 5 : Persons with Disabilities. Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994, E/1995/22 Office of the High Commissioner on Human Rights.

establishment of “National Coordinating Committees on Disability or Seminar Bodies”¹⁶⁶ Accordingly, those established national coordinating committees would be the only monitoring body for the implementation of a non-existing provision in ECESCR on the rights of persons with disabilities. Committee then goes further and discusses specific rights that are recommendatory for States to promote for the full enjoyment of the rights of persons with disabilities. Among those rights are: elimination of discrimination, against disabled people, equality of rights for men and women,¹⁶⁷ rights relating to work,¹⁶⁸ social security, protection of the family and of mothers and children,¹⁶⁹ the right to an adequate standard of living,¹⁷⁰ right to physical and mental health and education¹⁷¹. However the manner how these rights were described and State obligation towards them apparently show that in the field of disability they will not be effectively enforced and implemented. Kyrgyzstan is binding on this sort of obligation which in fact does not constitute that much contribution for the rights of persons with disabilities in Kyrgyz Community. There has to be a new sort of obligation that would enable to prosper and promote the rights of persons with disabilities in the Kyrgyz Republic. Due to the new developing nature of this field and adoption of International Treaty specific in disability there is a compelling need for Kyrgyzstan to ratify the UNCRPD. Currently persons with disabilities in Kyrgyzstan are treated as a burden for our society in other words they are treated like objects but

166 See Section 14 of the General Comment No. 5 : Persons with Disabilities. Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights, on 9 December 1994, E/1995/22 Office of the High Commissioner on Human Rights.

167 See Article 3 of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly resolution 2200A (XXI) on December 16, 1966

168 See articles 16-18 of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly resolution 2200A (XXI) on December 16, 1966

169 See article 10 of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly resolution 2200A (XXI) on December 16, 1966

170 See article 11 of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly resolution 2200A (XXI) on December 16, 1966

171 See Articles 12-14 of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly resolution 2200A (XXI) on December 16, 1966

not subjects or holders of their rights. Existing laws are old and mostly concentrated on social benefits like pensions and etc, however it is not about money it is how other people treat you and it is about inherent dignity. UNCRPD does contain those innovative provisions which are exclusively directed on promotion of respect for their inherent dignity and it is designed to promote those mechanisms that can help Contracting States achieve those goals.

Accordingly, current convention presents and contains more developed, detailed and various methods of implementation. Namely, Convention clearly identifies certain prescribed State obligations which are generally prescribed by article 4 of the convention and spreads all around the treaty document entirely. Center on Human Rights for People with disabilities in their legal report Number 2 categorized following implementation methods as prescribed obligations of State Parties.¹⁷² Particularly under CRPD States have to undertake following actions as a methods of implementation of the treaty:

- adoption of the national legislation on implementation of the treaty on domestic level;¹⁷³
- states also have to repeal legislation which contradicts to the Convention or to its provisions;¹⁷⁴
- states are obliged to provide minimum protection and promotion of the

172 See “Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities” Legal Report #2, Dr. Jean Allain, Center on Human Rights for People with Disabilities

See also “Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors” Professional training series No. 17, Office of the High Commissioner for Human Rights, New York, Geneva 2010

173 See Article 4 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

and also see “Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities” Legal Report #2, Dr. Jean Allain, Center on Human Rights for People with Disabilities

174 See Article 4 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

Convention rights for the persons with disabilities;¹⁷⁵

- states further are obliged to train personnel in different areas particularly in the sphere of accessibility¹⁷⁶, in the field of access to Justice¹⁷⁷, personal mobility¹⁷⁸, education¹⁷⁹ and Health;¹⁸⁰
- under the Convention states also take responsibility to afford children with disabilities and other specific groups that are prone to be under double invisibility¹⁸¹ with explicit assistance and support in aforementioned fields¹⁸²
- Another method of implementation includes States consultations with local NGOs or other organizations which represent persons with disabilities in particular community.¹⁸³
- furthermore states are also in obligation for the improvement and implementations of awareness raising campaigns¹⁸⁴
- along with other obligations contracting parties are also responsible for the modification of infrastructures;¹⁸⁵
- CRPD also requires contracting states to engage persons with disabilities and their

175 See article 4 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

176 See article 13 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

177 See Article 20 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

178 See article 24 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

179 See article 25 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

180 See Article 25 (d) of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

181 By double invisibility it is meant to be specific groups within the disabled that are under double cloak of invisibility like women, children and etc.

182 See supra notes 26-31

183 See supra nor 26

184 See article 8 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

185 See article 9 and 24 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

during the monitoring procedures¹⁸⁶

Accordingly, current convention presents and contains more developed, detailed and various methods of implementation. Namely, Convention clearly identifies certain prescribed State obligations which are generally prescribed by article 4 of the convention and spreads all around the treaty document entirely. These detailed methods of Convention implementation does emerge prospective positive expectations on its effectiveness.

This is of great importance for Kyrgyzstan due to the fact that it does not have any enforcement mechanism on protection of the rights of persons with disabilities. Moreover, disabled persons currently are not even able to apply to the Constitutional Chamber of the Supreme Court due to the fact that it was not even formed. Furthermore Kyrgyzstan is not protected by any regional mechanisms of human rights protection such as European Court of Human Rights. Accordingly, the ratification of the CRPD would dramatically change the position of disabled persons by allowing them to apply to the Committee on the Rights of Persons with disabilities and it would also create an effective human right enforcement mechanism.

For Kyrgyz society the year of 2012 is being full of conferences and peaceful demonstrations demanding Kyrgyz Parliament for the ratification of the CRPD.¹⁸⁷ However different branches of Government seem to impose this responsibility towards one another, in other words there is a clear contradiction between executive and legislative authorities. Despite the fact that number of Kyrgyz Politicians¹⁸⁸ in their public speeches announced several times

186 See article 33 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

187 “Http://24kg.org - КЫРГЫЗСТАН » Почувствуй Себя Равным”, n.d., <http://24kg.org/reportaji/123611-pochuvstvuj-sebya-ravnym.html>.

188 See press conferences held by Kyrgyz Deputies and Ministers “24.kg”, n.d., <http://eng.24.kg/community/2008/06/20/5651.html?print=yes>.

about their intention to ratify the Convention by the end of 2012 it has to be assessed critically and negatively due to several reasons. First of all under the social development strategy of the Kyrgyz Republic which is designed till 2014 there is no single word about the Convention and moreover about its ratification. Furthermore Kyrgyz Government believes that it is not economically ready to fulfill its obligation after the ratification, which is in my opinion is not a justification. Convention does not require Contracting States to implement all provisions immediately; they have to be implemented with progressive realization.¹⁸⁹

Under the legislation of the Kyrgyz Republic there are not so many effective laws on protection the rights of persons with disabilities. Namely following are the laws that are closely related to the disability issues. However deep analysis of the existing legislation¹⁹⁰ enables us to see number of substantial gaps in enforcement, implementation and promotion of human dignity. Furthermore, these laws are mostly outdated in terms of their compliance with international law standards and obligations. Namely following laws currently are the cornerstone protection mechanisms for the persons with disabilities.

- *Constitution of the Kyrgyz Republic as of June 2010*
- *Law of the Kyrgyz Republic “On the rights and guarantees of persons with disabilities”*
- *Law of the Kyrgyz Republic “On features of labor regulation for people with disabilities”*
- *Law of the Kyrgyz Republic “On social protection” as of January 27 1991*

189 See Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly resolution 61/611, December 13, 2006

190 Detailed analysis of the existing legislation will be conducted in the next Chapter. Analysis will be on comparative basis, namely whether these laws contain incompatible provisions to the UN Convention on the Rights of Persons with Disabilities.

- *Law of the Kyrgyz Republic “On protection of the health of citizens of the Kyrgyz Republic”*
- *“Law of Kyrgyz Republic On Psychiatric Care and Guaranteeing the Rights of Persons Receiving Such Care”*

However aforementioned laws are not effective and are not enforced in practice due to the fact that they were designed by old methods and were not updated since the creation of the State of Kyrgyzstan. There is a compelling need for the Kyrgyz Republic to ratify the CRPD and by doing so Kyrgyzstan will get specific and detailed guidance on how to implement the Convention and will be provided with effective methods of Convention implementation.

4.2. New mode of understanding of what it means to be human

Since the creation of the UN there has been adopted number of international treaties that prescribed common international norms on human rights, particularly, ICCPR, ICESCR and UDHR which by its nature has a declaratory character. The main purpose and objectives behind these instruments were the creation of internationally accepted, universal standards of human rights. Reading these norms we are able to see that they suggest a minimal definition of what it means to be human, namely that human is alive¹⁹¹, superior¹⁹², socially integrated¹⁹³, mentally developed and free ¹⁹⁴creature. However, the main question that has to be asked is whether this definition is universally accepted and shared one? My personal opinion with this regard is negative, namely I do not consider that international human rights norms prescribe the universal

191 See Article 6 of the International Covenant on Civil and Political Rights

192 See Article 1 of the International Covenant on Civil and Political Rights

193 See Article 14-27 of the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly resolution 2200A (XXI) on December 16, 1966

194 See Article 8,9,10 of the International Covenant on Civil and Political Rights

definition of what it means to be human, and rather they suggest relatively universal prescription.

In the world of culturally diverse societies, there cannot be a commonly shared view on universality of human rights, in other words I totally with Jack Donnelly's argument that culture is one of the main reasons that make human rights relative, rather than universal¹⁹⁵. Accordingly, the understanding of the core assumption of what it means to be a human being varies from culture to culture, but formally they have been conventionalized in number of international treaties. However, I believe they were not able fully depict a genuine perception of what constitutes a human being. UNCRPD in contrast presents the unique shift from traditional perception of human being towards more complex and dynamic, in other words it creates a new mode of the understanding of what it means to be a human being.

According to Frederic Megret Convention makes us to rethink on what are the basic human needs and what does really constitute a human being. Furthermore he believes that this rethinking mechanism automatically emerges certain changes, namely it alters the relationship between individuals and most importantly between state and the society. He further claims that the notion of what it is to be human was never clear and in most of the circumstances even controversial and subject to manipulations by dominant actors.¹⁹⁶ For him the understanding of human being is not only about individualistic approach, he rather acknowledges that it is a tight relationship of one particular person with society. It indeed author's mind is about creating essential conditions and certain benefits to show person's essence and his worthiness.¹⁹⁷ I totally agree with the author and share his view on the fact that UNCRPD indeed has this approach and

195 See "The relative Universality of Human Rights" Jack Donnelly, Human Rights Quarterly 29 (2007) 281-306

196 See "The Disabilities Convention: Towards a Holistic Concept of Rights", Frederic Megret, The International Journal of Human Rights, January 2008

197 See "The Disabilities Convention: Towards a Holistic Concept of Rights", Frederic Megret, The International Journal of Human Rights, January 2008 p. 3

this new shift in the perception of human being. Furthermore, such approach towards the meaning of human being further develops the intensity of relationship between dignity¹⁹⁸ and human rights. As it was mentioned earlier relatively clear understanding of what it means to be a human being was hardly achieved by international community. However even though we do have international human rights treaties they cannot be considered to be universal and absolute.

UNCRPD contrary presents somehow a new understanding¹⁹⁹ of what it means to be human and what are essential and core factors that determine it. I find noteworthy to recall the words of UN Secretary General Kofi Annan about the adoption of the Convention and particularly emphasize on the part where he believes that there is a tremendous shift overall on the concept of human rights, he namely illustrates that the adoption of the UNCRPD as “the dawn of a new era – an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long”²⁰⁰ Persons with disabilities in Kyrgyzstan now are being perceived as a burden and object. They are not believed to be considered as subjects of their own rights which is a direct contradiction to the whole idea behind the Convention. Generally speaking, persons with disabilities in Kyrgyzstan do not have those essential conditions and benefits to live their lives fully and in dignified manner, they are not holders²⁰¹ of their rights.

As it was emphasized by the Office of the High Commissioner on Human Rights in

198 See “UN Enable - Promoting the Rights of Persons with Disabilities - Human Rights of Persons with Disabilities”, n.d., <http://www.un.org/esa/socdev/enable/rights/humanrights.htm>.

199 See “UN Enable - Promoting the Rights of Persons with Disabilities - Human Rights of Persons with Disabilities”, n.d., <http://www.un.org/esa/socdev/enable/rights/humanrights.htm>.

200 See “Lauding Disability Convention as ‘dawn of a New Era,’ UN Urges Speedy Ratification”, n.d., <http://www.un.org/apps/news/story.asp?NewsID=20975&Cr=disab>.

201 See “Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities” Legal Report #2, Dr. Jean Allain, Center on Human Rights for People with Disabilities

“Monitoring the Convention on the Rights of Persons with Disabilities” current Convention presents completely new model of rights promotion in the field of disability. It was also highlighted that persons with disabilities under the new Convention will be considered as holders of their rights and they presented a very comprehensive contrasting table which opposed the model of disability perception against traditional mode of understanding, namely disability as a charity. According to the High Commissioner under the traditional approach i.e. charity, promotion of the rights of disabilities was always considered as something optional, whereas under the new model it has to be considered as an obligation.²⁰² Furthermore under charity approach persons with disabilities were dependent and subject to external control which was reshaped by the new human rights model into autonomous and independent objectives.²⁰³ In charity model the notion persons with disabilities as subject and holders of their was disempowered, unlike this position under human rights model persons with disabilities and society generally are empowered to consider these group of people as holders of their rights²⁰⁴. The mere objectives of the charity approach was not to restore the society perception on disability issues, but rather it was about fixing and restoring the weaknesses and disadvantages of disabled people.²⁰⁵ In contrast to this idea according to the Commissioner Convention calls for fixing the surrounding environment of persons with disabilities. I also share an aforementioned view and absolutely convinced that it is not about fixing their weaknesses and moreover I believe that it not even right to call those characteristics as weaknesses. Furthermore, physical or moral impairments that persons with disabilities have are immutable in their nature which means they

202 See “Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for Human Rights Monitors” Professional training series No. 17, Office of the High Commissioner for Human Rights, New York, Geneva 2010

203 See supra note 52

204 See supra note 52

205 See supra note 52

cannot be changed. Therefore I believe instead of wasting time and moreover reminding these people about their problems over and over again we rather have to start fixing stereotypes existing in our minds and reshaping a new community where persons with disabilities will not be marginalized and singled out. Another common feature for charity approach was the notion of segregation, i.e. detaching people with disabilities from external world, which under human rights model is not acceptable rather it is believed to be promoted through integration.²⁰⁶ Another common notion for the charity approach was limitation of persons with disabilities in their different activities, discrimination and institutionalization.²⁰⁷ Human rights model has completely new notions and vision with this regard, namely persons with disabilities have to be encouraged in facilitating their activities, treatment of this group people should be based not on discrimination but rather on equality and instead of institutionalization human rights approach believe that there has to be an inclusion.²⁰⁸

As it was mentioned earlier persons with disabilities in Kyrgyzstan now are being perceived as a burden and object. They are not believed to be considered as subjects of their own rights which is a direct contradiction to the whole idea behind the Convention. Generally speaking, persons with disabilities in Kyrgyzstan do not have those essential conditions and benefits to live their lives fully and in dignified manner, they are not holders²⁰⁹ of their rights.

Consequently, it constitutes another compelling reason of why the Kyrgyz Republic has to ratify the Convention.

206 See supra note 52

207 See supra note 52

208 See supra note 52

209 See “Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities” Legal Report #2, Dr. Jean Allain, Center on Human Rights for People with Disabilities

4.3. Effort to unite existing dichotomies

Current international human rights system can be characterized as a complex institute which has number of divisions or “dichotomies”²¹⁰ in itself. Those divisions are approached from different perspectives and usually united within one group against another. In general human rights dichotomies are usually categorized in following manners:

- Depending on types of rights; for example qualified rights v. non-qualified rights²¹¹ like right to life v. freedom from torture. Furthermore depending on types of rights it can be divided as civil/political rights v. social and economic rights. Additional example is positive rights v. negative rights. Under this category when right is positive then it imposes a positive obligation upon State or it requires a State intervention to implement the right; for instance right to education requires developing facilities, schools and programs. Unlike positive rights negative ones imposes upon states negative obligations, in other words it requires non-intervention from State into individual's life. For instance freedom from torture, it requires States not to practice it requires to abstain States from inhumane and degrading treatment at any times.

- Another example of dichotomy would be depending on the rights implementation level intensity for instance some rights require states to implement them immediately, whereas others are implemented by progressive realization.

- Final example would be the dichotomy based on method of implementation of rights some methods strictly require adoption of laws, whereas others adoption of policies.

210 Term used in numerous human rights articles to characterize different categories/types of rights that exist in current International Human Rights system.

See “The Disabilities Convention: Towards a Holistic Concept of Rights”, Frederic Megret, *The International Journal of Human Rights*, January 2008

See “Equality, I Spoke That Word/As If a Wedding Vow”: Mental Disability Law and How We Treat Marginalized Persons, MICHAEL L. PERLIN AND JOHN DOUARD

See “*The right to health as a human right in international law*” Toebas, Brigit C.A. 1999

211 See European Convention on Human rights

These dichotomies are prone to create hierarchies between rights. Indeed I agree and I believe that by creating a division between human rights and sorting them into different categories lead to a hierarchy which then actually create problems of implementation, application and promotion. For example let us consider the dichotomy between civil/ political and social/economic rights. This particular division is evident there are two different UN Treaties that are based in accordance with civil/ political and social/economic rights dichotomy. When we consider both of these treaties and rights in them during emergency situations, we can apparently observe that there is a clear hierarchy between those rights, and moreover that civil and political rights outweigh over social and economic rights. Emergency situations according to CCPR's general comment No.29 can be invoked only when there is a threat to life on the whole nation caused by natural catastrophes, armed conflict and other alike situations.²¹² During State of Emergency Contracting Parties can limit rights of their citizens for the sake of national security and peace. However, there are certain rights that are found to be "non-derogable" i.e. under any circumstances these rights cannot be limited. When we take a closer look at those rights, we will see that almost all them are from the category of civil and political rights. Namely those rights are: right to life²¹³, prohibition of torture or inhumane or degrading treatment²¹⁴, prohibition of slavery and servitude²¹⁵, prohibition of imprisonment because of inability to fulfill a contractual obligation²¹⁶, principle of legality in the field of criminal law²¹⁷, recognition of everyone as a person before the law²¹⁸ and freedom of thought, conscience and religion²¹⁹. This dichotomy

212 See General Comment No.29: States of Emergency (article 4): 31/08/2001 CCPR/C/21/Rev.1/Add.11

213 See article 6 of the International Covenant on civil and Political Rights

214 See article 7 of the International Covenant on civil and Political Rights

215 See article 8 of the International Covenant on civil and Political Rights

216 See article 11 of the International Covenant on civil and Political Rights

217 See article 15 of the International Covenant on civil and Political Rights

218 See article 16 of the International Covenant on civil and Political Rights

219 See article 18 of the International Covenant on civil and Political Rights

creates some sort of a favoritism and hierarchy between rights. Due to the fact that the list of non-derogable rights is exhaustive and it does not contain anything more it created a lot of controversies and debates on expanding the list of non-derogable rights. Consequently we can observe a conflict between rights and therefore somehow to resolve this conflict CCPR in its general Comment No.29 tried to expand the protection of rights application during the times of emergency.²²⁰ as it is illustrated about existing dichotomies created hierarchy between rights and indirectly created a favoritism among them and located one right superior then the other. This example was brought to show how dichotomies can create certain challenges and it was also illustrated to show that current international human rights system needs a unity. Surprisingly CRPD has taken an effort to unite different types and dichotomies of rights in one Convention which makes it unique and innovative. Therefore I find it important to demonstrate some examples within the CRPD where rights from different dichotomies were combined which represents a new approach towards the existing human rights system which represents a fragmented system where rights are categorized and divided into certain dichotomies.

As it was already discussed above one of the dichotomies of rights divided on the basis of their type is positive v. negative rights dichotomy. Under this category when right is positive then it imposes a positive obligation upon State or it requires a State intervention to implement the right; for instance right to education requires developing facilities, schools and programs. Unlike positive rights negative ones imposes upon states negative obligations, in other words it requires non-intervention from State into individual's life. For instance freedom from torture, it requires States not to practice it and it requires abstaining States from inhumane and degrading treatment

220 See General Comment No.29: States of Emergency (article 4): 31/08/2001 CCPR/C/21/Rev.1/Add.11

at any times. In other words it was described in *Roe v. Wade*²²¹ where negative rights have been illustrated as “leave alone rights”²²². Under traditional human rights system Treaty is prone to contain mostly either positive or negative rights and it is very rare when both rights are combined within one particular Convention. CRPD demonstrated another vision with this regard, throughout the convention we are able to see that it combines both negative and positive rights on the one hand it obliges states to provide reasonable accommodation for persons with disabilities and on the other hand it requires state from obtaining to make forced sterilization. Therefore CRPD is unique in its nature due to the fact that it contains both of these rights.

Furthermore CRPD has united civil and political/ social and economic rights dichotomies in one treaty document which also makes this convention unique with this regard. For example on the one hand it requires States to guarantee for disabled persons classical civil and political rights. Furthermore, to implement those rights it requires States to taken certain actions like adopting sign languages and facilitating accommodations; which on the other hand constitute the guarantee of social and economic rights. Such combination of two dichotomies in CRPD greatly contributes to the protection of the rights of persons with disabilities.

Another unique feature of this Convention according to various scholars is that it no longer divide State/society obligations, rather it unites them, thus constituting a “paradigm shift” of not only State’s perception but of the entire society. This is clearly reflected throughout the entire Convention, which requires States to take action to raise awareness of the society²²³ and take effective measures on fighting against stigmas and discrimination against persons with disabilities. Thus, “The Disabilities Convention may not be the only one to require states to

²²¹ See “Public Grief and the right to be left alone”, Philip Patterson

²²² See *Roe v. Wade*

²²³ See article 8 of the Convention on the Rights of the Persons with Disabilities, adopted by the UN General Assembly

change prevailing social attitudes, but it does impose a much broader and more detailed obligation to do so than any of its predecessors.”²²⁴ This feature is of particular importance for Kyrgyzstan due to a high stigma and stereotypes that our society towards persons with disabilities.

²²⁴ “The Disabilities Convention: Towards a Holistic Concept of Rights”, Frederic Megret, *The International Journal of Human Rights*, January 2008

Conclusion and Recommendations

Behind locked doors. That is how I would characterize current position and status of persons with disabilities in the Kyrgyz Republic. They are under a cloak of invisibility, lacked either in their rooms or institutions. Current thesis aimed at highlighting and pinpointing the gaps and problems that exist in the legislation of the Kyrgyz Republic with regard the rights of persons with disabilities both from the legal and practical framework perspectives. This was achieved by comparing de jure and de facto status of persons with disabilities to the existing international standards on disability rights, i.e. CRPD. Finally thesis aimed at exploring a compelling need on why Kyrgyzstan shall ratify CRPD.

In first chapter I introduced the phenomenon of disability from various perspectives by looking at the history, religion, law, sociology and philosophy. Based on findings it was concluded that the abiding element of these cross disciplines was that stigma, label and disadvantage have always been an integral part of disability. I further looked at the disability from the prism of two primary models- medical and social. After contrasting them with one another I reached the conclusion that the best model which shall be adopted for any disability is – a social model. My primary argument was based on the finding that this approach, i.e. social model, towards disability dramatically transforms the attitudes of the society from cure, treatment and protection set of mind towards the respect for human diversity and difference. Namely, it advocates tolerance and openness to diversity and to any differences, be it black or white, women or men, able or disabled. Thus, it was concluded that aspirations for a social model of disability can be characterized as an attempt to create an inclusive community and society for everybody,

which had been illustrated by the UN as the “next generation civil rights movements”.²²⁵

Furthermore, first chapter described the overall process of disability rights movement and their greatest achievement in the face of the UN Convention on the Rights of persons with disabilities. Even though there were many criticisms and skepticisms expressed towards the CRPD by contrasting two conflicting view I reached the conclusion that Convention generates a new generation of rights with more progressive and holistic approach given to them. Furthermore, it was also concluded CRPD adopted a social model of disability, namely shift of perceptions from cure and treatment to respect and acceptance of diversity along with substantive equality.

After defining the disability the primary purpose of the second chapter was to look at current situation in Kyrgyzstan with regard this issue, making particular emphasis on statistics and its current obligations under international law with regard rights of persons with disabilities. Current statistics of the Kyrgyz Republic on disability was approached along with assessing the overall political situation in Kyrgyzstan. Thus it was concluded that the level of disability is improving every year and that constant political changes in our Government overall create a negative atmosphere for rights of persons with disabilities to defend their rights. Furthermore within the boundaries of the second chapter, Kyrgyzstan’s current obligations with regard the CRPD have been analyzed. Those obligations were not to defeat the main object and purpose of the CRPD. However, all those concepts under the main purpose and object of the treaty require states to fulfill very vague and broad obligations without any specific explanations and guidance given which due to the rapid increase of disability in the Kyrgyz Republic tremendously hinders

225 See *Human Rights and Disability: the current use and future potential United Nations human rights instruments in the context of disability*” Gerard Quinn and Theresia Degener with Anna Bruce, Christine Burke, Dr. Joshua Castellino, Padraik Kena, Dr. Ursula Kilkelly, Shivaun Quinlivan, *United Nations New York and Geneva 2002, p.24*

disabled persons rights to be effectively protected and fulfilled. Accordingly, for the rights under CRPD to be enforced there is a need to ratify the Convention. However, most politicians in Kyrgyzstan believe that the rights of persons with disabilities can be protected without the ratification of the CRPD, mainly the existing laws on disability rights are enough and effective. Therefore I went further and analyzed the Kyrgyz existing legislation on disability rights and its implementation in Kyrgyzstan and came to following conclusions.

In Chapter 3 I was able to demonstrate that from both legal and practical framework perspectives the rights of persons with disabilities in Kyrgyzstan are not being respected, fulfilled and protected. The law uses various terms like “invalids”²²⁶, “persons with limited abilities”, “children with special needs”. However, there is was no clarity on how these terms should be understood. Generally speaking I was able to show that there is a huge inconsistency in the Kyrgyz Legislation in terms on definition of disability. Furthermore, it was found that most laws fail to take into consideration the diversity of disabilities. Moreover they fail to provide basic guarantees like reasonable accommodation, equal and full enjoyment of rights, and protection against discrimination. Finally, current chapter highlighted the violations of the rights of persons with disabilities in practice by providing the reader with reports on side visits and photos.

Thus it was established that existing laws in Kyrgyzstan with regard rights of persons with disabilities are not effective, enforceable and consistent with existing international standards. Furthermore there are no mechanisms on implementation and enforcement of those rights which make those laws ineffective. Moreover, persons with disabilities are not even able to defend their constitutional rights in Constitutional Chamber of the Supreme Court due to the fact that it is not functioning now. All these aforementioned findings lead to following recommendations:

226 “*Ugolovniy Kodeks Kyrgyzskoi Respubliki*” Criminal Code of the Kyrgyz Republic

1. There is a compelling need for Kyrgyzstan to Ratify the UN Convention on the Rights of persons with disabilities.
2. There is also a compelling need for Kyrgyzstan to Ratify an Optional Protocol for CRPD of Committee. This will enable persons with disabilities in Kyrgyzstan to file individual complaints for it.
3. Existing laws of the Kyrgyz Republic still define disability according to medical model. Thus these laws shall be amended as to define disability as a social construct not as a medical impairment
4. The legislation shall achieve the consistency with regard the terminology. Namely all terms like “invalid”, “persons with limited abilities”, “persons with limited health abilities”. “People with low mobility”, “children with special needs” shall be transformed into a new term- “persons with disabilities”. Namely there have to changes made in following laws:
 - “Law on Guarantees of Rights for persons with limited abilities” – this law shall be changed in part of definition of disability and there shall be provisions added on inclusive education for children with disabilities
 - “Law on the bases of Town Planning”- changes shall be made in parts of providing reasonable accommodation for persons with disabilities
 - “Law on Transportation”- reasonable accommodation requirements shall be added
 - “Law on Mass media”- changes shall be made in parts of providing the audio logical translation for viewers
 - “Law on Education”- inclusive education shall be provided for children with disabilities

5. There shall be laws adopted and programs/ campaigns developed on awareness rising to combat labeling and stereotyping persons with disabilities.

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Annex



