

ALINA ALEXANDRA RISSER*
Degree Candidate, The John Marshall Law School
alinarisser@gmail.com

**CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES,
AND THE EFFECT OF ITS ARTICLE 12
ON GUARDIANSHIP LEGISLATION WORLDWIDE**

Most people take it for granted that they can hop on a bus or take an “L” to go somewhere, browse the Internet, or watch TV. But for more than 1 billion people (15% of the global population) there may be major obstacles that put these activities out of reach.¹ The World Health Organization in its first global report on disability states that in developed countries people with disabilities are three times more likely to be denied healthcare than other people, children with disabilities are less likely to start or stay in school than other children, while employment rates are at 44%, compared with 75% for people without disabilities.² People with disabilities face everyday barriers including stigma, discrimination, they lack adequate healthcare and rehabilitation services, accessible transport, buildings and information, according to the report.³ In developing countries the situation even worse where people with disabilities are treated as second-class citizens.⁴

The Convention on the Rights of Persons with Disabilities is an international human rights treaty of the United Nations intended to protect the rights and dignity of people with disabilities. The Convention sets out minimum standards for protecting, and safeguarding a full range of civil, political, social, and economic rights for people with disabilities. The purpose of the Convention

*Alina Alexandra Risser, licensed attorney in Russia; J.D. Degree Candidate (2015), The John Marshall Law School, Chicago, Illinois.

¹World Health Organization, Disabilities and Rehabilitation, *World Report on Disability*, available at http://www.who.int/disabilities/world_report/2011/report/en/ (last visited April 24, 2015).

² *Id.*

³ *Id.*

⁴ *Id.*

was to view people with disabilities as full and equal members of society with human rights, rather than as mere objects of charity, medical treatment, and social protection. Parties to the Convention are required to promote, protect, and ensure the full enjoyment of human rights by people with disabilities.⁵

The Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly on December 13, 2006, and opened for signature on March 30, 2007. It came into force on May 3, 2008.⁶

As of May 2015, it has 119 Signatories and 114 Parties. The United States Senate failed to ratify the Convention on December 3, 2012.⁷ The United Nations Committee on the Rights of Persons with Disabilities monitors the Convention.⁸

The Convention was adopted to advance the development of other United Nations documents, such as:

⁵Article 12 “*Equal Recognition Before the Law*” of the Convention on the Rights of Persons with Disabilities; *see also* Paragraph III of the Federal Law N 46-FZ “*On the Ratification of the Convention on the Rights of Persons with Disabilities*,” adopted by the Federal Assembly of the Russian Federation on May 3, 2012, ConsultantPlus, Russian online legal research system, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=129200> (last visited April 24, 2015).

⁶United Nations Enable, Development and Human Rights for All, *Convention on the Rights of Persons with Disabilities*, available at <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015).

⁷Louis Jacobson, *38 Republicans Vote Against Ratification, but Treaty could Get Another Vote Next Year*, PolitiFact.com, Tampa Bay Times, December 4, 2012, available at <http://www.politifact.com/truth-o-meter/promises/obameter/promise/88/sign-the-un-convention-on-the-rights-of-persons-wi/> (last visited April 24, 2015).

⁸Article 34 “*Committee on the Rights of Persons with Disabilities*,” of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, available at <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015).

- “Declaration on the Rights of Persons with Disabilities” (Resolution 3447 (XXX) of December 9, 1975);⁹
- “World Programme of Action concerning Disabled Persons” (Resolution 37/52 of December 3, 1982);¹⁰
- “Standard Rules on the Equalization of Opportunities for Persons with Disabilities” (Resolution 48/96 of December 20, 1993).¹¹

The Convention is based on the principles and norms of:

- The Universal Declaration of Human Rights (adopted on December 10, 1948);¹²
- The International Covenant on Economic, Social and Cultural Rights (adopted on December 16, 1966);¹³
- The International Covenant on Civil and Political Rights (adopted on December 16, 1966);¹⁴

⁹ United Nations Human Rights, Office of the High Commissioner for Human Rights, Declaration on the Rights of Disabled Persons, *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfDisabledPersons.aspx> (last visited on April 24, 2015).

¹⁰ United Nations Enable, Development and Human Rights for All, *World Programme of Action Concerning Disabled Persons*, *available at* <http://www.un.org/disabilities/default.asp?id=23> (last visited April 24, 2015).

¹¹ *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, *available at* <http://www.independentliving.org/standardrules/StandardRules.pdf> (last visited on April 24, 2015).

¹² Article 10 “*Right to Life*,” Article 12 “*Equal Recognition Before the Law*,” Article 13 “*Access to Justice*,” Article 14 “*Liberty and Security of Person*” of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, *available at* <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015).

¹³ *Id.*

¹⁴ *Id.*

- The International Convention on the Elimination of all Forms of Racial Discrimination (adopted on December 21, 1965);¹⁵
- The Convention on the Elimination of All Forms of Discrimination against Women (adopted on December 18, 1979);¹⁶
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on December 10, 1984);¹⁷
- The Convention on the Rights of the Child (adopted on November 20, 1989);¹⁸ and
- The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted on December 18, 1990).¹⁹

The States Parties to the Convention must regularly submit reports on the measures taken to implement the obligations under the Convention, and on the progress in achieving its goals. Reports shall be submitted to specifically established United Nations Committee on the Rights of

¹⁵ Article 5 “*Equality and Non-Discrimination*” of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, *available at* <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015).

Article 6 “*Women with Disabilities*” of the Convention on the Rights of Persons with Disabilities.

¹⁷Article 15 “*Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment*” of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, *available at* <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015).

¹⁸ Article 7 “*Children with Disabilities*” of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, *available at* <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015).

¹⁹Article 18 “*Liberty of Movement and Nationality*” of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, *available at* <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015); *see also* European Commission, Employment, Social Affairs, & Inclusion, *Persons with Disabilities*, *available at* http://ec.europa.eu/justice/discrimination/disabilities/convention/index_en.htm (last visited April 24, 2015).

Persons with Disabilities, composed of independent experts. The Committee shall consider the report, and make suggestions and recommendations directed to the State Party.²⁰

Article 12 of the Convention affirms the equal recognition before law, and legal capacity of people with disabilities. According to the Article, States Parties should:

- Reaffirm that persons with disabilities have the right to recognition everywhere as a person before the law.
- Recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
- Take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
- Ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstance, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
- Take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have

²⁰ Article 34 "*Committee on the Rights of Persons with Disabilities*," Article 35 "*Reports by States Parties*," and Article 36 "*Consideration of Reports*" of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, *available at* <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015).

equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrary deprived of their property.²¹

Even though the term “legal capacity” is not defined in the Convention, it is the mechanism that ensures that a person’s decisions have legal effect.²² Article 12’s use of the term “legal capacity” includes not simply the capacity to have rights (or passive capacity) but also the capacity to act or exercise one’s rights, in other words to recognize one’s legal capacity to its fullest extent.²³ However, the importance of Article 12’s insistence on recognition of legal capacity of people with disabilities must be understood in the context of the historical treatment of people with disabilities, and their presumed inability to make decisions about their lives.²⁴ People with disabilities were treated as “objects” to be dealt with, rather than “subjects” with their own interests, and rights to exercise.²⁵ Existing highly restrictive laws on legal capacity demonstrate that people with disabilities need protections, not rights.²⁶ Without legal capacity a person cannot enter contracts, marry, or vote.²⁷ In many countries legal capacity could (and still can) be entirely removed on the

²¹ *Id.*

²² Alex L. Pearl, *Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward?* Leeds Journal of Law & Criminology, Vol. 1, No. 1, September, 2013, p. 3, available at http://criminology.leeds.ac.uk/files/2013/09/Article-12_Pearl.pdf (last visited April 25, 2015).

²³ Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making*, Human Rights Brief, American University Washington College of Law, Volume 19, Issue 2, Article 2, 2012, p. 1, available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=hrbrief> (last visited April 25, 2015).

²⁴ *Id.* at 2.

²⁵ Alex L. Pearl, *Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward?* Leeds Journal of Law & Criminology, Vol. 1, No. 1, September, 2013, p. 8, available at http://criminology.leeds.ac.uk/files/2013/09/Article-12_Pearl.pdf (last visited April 25, 2015).

²⁶ *Id.* at 9.

²⁷ *Id.*

basis of a medical diagnosis of intellectual, or even a physical impairment.²⁸ Without legal capacity people with disabilities become subject to guardianship proceedings, which operate on the basis of “substituted” rather than “supported” decision-making.²⁹ The concept of supported decision-making means that people with disabilities can still make their own choices, even though they have support, and assistance of specialists. Substituted decision-making occurs when a person’s rights to make his or her own choices are removed, and these rights pass to another person. Guardianship is the primary mechanism through which different countries have provided their protection to people who lack legal capacity, and it is a mechanism that the Convention on the Rights of Persons with Disabilities seeks to limit.³⁰

EUROPEAN UNION

“The European Union is fully committed to protecting and promoting the rights of people with disabilities in all areas of life, with all available means, from legislation to policies, and from research to funding. People with disabilities still face too many barriers in everyday life, which is why we have placed accessibility at the center of our strategy for building a barrier-free Europe. The European Commission wants to ensure that people with disabilities can enjoy their rights on an equal basis with all other citizens,” said former Vice-President Viviane Reding, European

²⁸ *Id.*

²⁹ *Id.*

³⁰ Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making*, Human Rights Brief, American University Washington College of Law, Volume 19, Issue 2, Article 2, 2012, p. 2, available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=hrbrief> (last visited April 25, 2015).

Commissioner for Justice, Fundamental Rights and Citizenship on June 5, 2014 in European Commission report on United Nations Convention on the Rights of Persons with Disabilities.³¹

Following formal ratification, it is the first time in history when the European Union has become a party to an international human rights treaty – the Convention on the Rights of People with Disabilities.³² It is the first comprehensive human rights treaty to be ratified by the European Union as a whole. The European Union becomes the 97th party to this treaty.³³

As of today, all 28 European Union Member States have signed the Convention, and 25 of them have ratified it, while the remaining 3 Member States (Finland, Ireland, and the Netherlands) are progressing towards ratification.³⁴ European Union Member States that have ratified the Convention need to periodically inform the United Nations Committee on the Rights of Persons with Disabilities about the measures taken to implement the Convention.³⁵

The European Commission’s June 5, 2014 report outlined the ratification of the Convention impacts in the European Union as follows³⁶:

³¹ European Commission, Press Release Database, Memo 14/396 published June 5, 2014, Brussels, Belgium, p.1, available at [http://europa.eu/rapid/press-release MEMO-14-396_en.htm](http://europa.eu/rapid/press-release_MEMO-14-396_en.htm) (last visited April 24, 2015).

³² European Commission, Press Release Database, *EU Ratifies UN Convention on Disability Rights*, Internet Protocol IP/11/4 published January 5, 2011, Brussels, Belgium, p.1, available at http://europa.eu/rapid/press-release_IP-11-4_en.htm (last visited April 24, 2015).

³³ *Id.*

³⁴ European Commission, Press Release Database, Memo 14/396 published June 5, 2014, Brussels, Belgium, p. 1, available at [http://europa.eu/rapid/press-release MEMO-14-396_en.htm](http://europa.eu/rapid/press-release_MEMO-14-396_en.htm) (last visited April 24, 2015).

³⁵ *Id.*; see also Article 34 “Committee on the Rights of Persons with Disabilities,” Article 35 “Reports by States Parties,” and Article 36 “Consideration of reports” of the Convention on the Rights of Persons with Disabilities.

³⁶ European Commission, Press Release Database, *EU Ratifies UN Convention on Disability Rights*, Internet Protocol IP/11/4 published January 5, 2011, Brussels, Belgium, p. 2, available at http://europa.eu/rapid/press-release_IP-11-4_en.htm (last visited April 24, 2015).

- The 2013 European Commission Recommendation on procedural safeguards for vulnerable people suspected or accused in criminal proceedings makes explicit reference to the Convention to ensure that the needs of people with disabilities are properly identified, and addressed during the proceedings, for example by providing them with information concerning their procedural rights in an accessible format.³⁷
- The new 2014 European Union Directives on public procurement make it necessary to take into account the needs of people with disabilities.³⁸
- The new 2014-2020 European Structural and Investment Funds Regulations make sure that investments are effectively used to promote equality, non-discrimination, and social accessibility for people with disabilities.³⁹

The Convention reflects the European Union's commitment to building by 2020 a barrier-free Europe for the estimated 80 million people with disabilities.⁴⁰ For example, on June 5, 2014 the European Commission launched the 2015 Access City Award Competition for cities accessible

³⁷ European Commission, Press Release Database, *The Right to ... - a Fair Trial! Commission Wants More Safeguard Proceedings*, Internet Protocol IP/13/1157 published November 27, 2013, Brussels, Belgium, p. 2, available at http://europa.eu/rapid/press-release_IP-13-1157_en.htm (last visited April 24, 2015).

³⁸ European Commission, Public Procurement Reform, EU Directive 2014/25/EU; Directive 2014/24/EU; Directive 2014/23/2014, available at http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm (last visited April 24, 2015).

³⁹ European Commission, 2014-2020 European Structural and Investment Funds Regulations, available at http://ec.europa.eu/regional_policy/index.cfm/en/information/legislation/regulations/ (last visited April 24, 2015).

⁴⁰ European Commission, Press Release Database, *EU Ratifies UN Convention on Disability Rights*, Internet Protocol IP/11/4 published January 5, 2011, Brussels, Belgium, available at http://europa.eu/rapid/press-release_IP-11-4_en.htm (last visited April 24, 2015), p.1; see also European Commission, Press Release Database, *Creating a Barrier-Free Europe: European Commission Seeks Better Access for 80 Million People with Disabilities*, Internet Protocol IP/10/1505 published November 15, 2010, Brussels, Belgium, pp. 1-3, available at http://europa.eu/rapid/press-release_IP-10-1505_en.htm?locale=en (last visited April 24, 2015).

for people with disabilities.⁴¹ The annual prize was to recognize cities for their efforts to make it easier for people with disabilities to have access to public areas, such as residential buildings, public transportation, or communication technologies.⁴² On December 3, 2014 in Brussels, Belgium the European Commission announced that the Swedish city Borås became the winner of the 2015 Access City Award.⁴³ Helsinki, Finland took the second prize, and the third prize was awarded to Ljubljana, Slovenia.⁴⁴ Additionally, the European Commission is currently working on the draft of “European Accessibility Act” to develop the Single Market for accessible products and services for people with disabilities.⁴⁵ The adoption of a legally binding European Accessibility Act will also reinforce the European Commission’s recently published legislative proposal on the accessibility of public websites.⁴⁶

Although many states within the European Union provide reasonable accommodation in employment and occupation, Article 5(3) of the Convention creates a stronger requirement, according to which States Parties must take all appropriate reasonable accommodation steps to promote equality in the enjoyment, and exercise by persons with disabilities of all human rights.⁴⁷

⁴¹ European Commission, Press Release Database, Daily News 05/06/14, *Brussels G7 Summit Continues with Talks on Global Economy, Trade, Energy and Development*, EXME 14/05.06, available at <http://europa.eu/rapid/midday-express-05-06-2014.htm> (last visited April 24, 2015).

⁴² *Id.*

⁴³ European Commission, Press Release Database, December 3, 2014, Brussels, Belgium, *European Day for People with Disabilities: the Swedish City of Borås Wins the Access City Award 2015 for Disabled-Friendly Cities*, available at http://europa.eu/rapid/press-release_IP-14-2321_en.htm (last visited April 24, 2015).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ European Disability Forum, The Representative Organization of Persons with Disabilities in Europe, *European Accessibility Act: EDF Calls on the European Commission to Deliver a Legislative Proposal on the Accessibility of Goods and Services*, available at http://www.edf-feph.org/Page_Generale.asp?DocID=13854&thebloc=33115 (last visited April 24, 2015).

⁴⁷ Article 5(3) “Equality and Non-Discrimination,” of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, available at <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015).

For example, in the British Equality Act 2010 there is a duty to make reasonable adjustments for persons with disabilities in areas outside of employment, including housing, and education. However, this is hardly sufficient to ensure equal rights in all areas of life, including civil, political, economic, social, and cultural.⁴⁸

It is very problematic that some European countries continue to deny or restrict the legal capacity of persons with disabilities. For example, according to the European Union Fundamental Rights Agency the majority of European Union Member States link the right to political participation to the legal capacity of the individual.⁴⁹ Article 12 of the Convention has a great potential to create positive change in shifting from substituted to supported decision-making in order to help people with disabilities to exercise their human rights. For example, Sweden has advanced legal and non-legal provisions for supported decision-making, where people with disabilities are being provided with personal ombudsmen who attempt to build personal relationship of trust with them.⁵⁰ Additionally, Sweden has the “god man” mentoring system, under which the appointed mentor does not affect the rights of persons with disabilities, and can only act with the person’s consent.⁵¹ Moreover, people with disabilities have legal remedies

⁴⁸ Jarlath Clifford, *The UN Disability Convention and Its Impact on European Equality Law, The Equal Rights Review*, Vol. Six, 2011, p. 24, note 33, available at http://www.equalrightstrust.org/ertdocumentbank/ERR06_jarlath_article.pdf (last visited April 25, 2015).

⁴⁹ *Id.* at 15.

⁵⁰ PO-Skåne, Swedish User-Run Service with Personal Ombud (PO) for Psychiatric Patients, available at <http://www.po-skane.org/ombudsman-for-psychiatric-patients-30.php> (last visited April 26, 2015); see also Choices, a platform on supported decision-making, *Swedish Personal Ombudsman Service (PO) for People with Mental Health Problems*, available at <http://www.right-to-decide.eu/2014/08/swedish-personal-ombudsman-service-po-for-people-with-mental-health-problems/> (last visited April 26, 2015).

⁵¹ Stanley S. Herr, *Self-Determination, Autonomy and Alternatives for Guardianship*, University of Maryland School of Law, pp.4-7, available at <http://ruralinstitute.umt.edu/transition/handouts/self-determination.herr.pdf> (last visited April 26, 2015).

against a mentor who acts outside his authority.⁵² Sweden’s model should be taken into consideration for countries that want to introduce supported decision-making legislation in order to properly comply with Article 12 of the Convention. The introduction of a “friend” or “mentor” appointed by the court has become common in a number of European countries, for example in Germany, Finland, and Austria.

Other European countries such as the United Kingdom, Germany, Czech Republic, Hungary, France, Ireland, Portugal, Slovakia, and Slovenia have started their guardianship reforms to meet the requirements of supported decision-making under Article 12. Scotland’s progressive Mental Health Act, and the United Kingdom’s Mental Capacity Act have both developed a Code of Practice to assist on interpreting these Acts, which is particularly useful when it comes to outlining decision-making capabilities.⁵³ There is also a strong focus on supported decision-making in Germany.⁵⁴ There is no plenary guardianship, however limited guardianship is possible for court specified duties.⁵⁵ In the majority of cases, guardians are responsible for oversight of medical treatment, and financial management, and wards continue to retain full legal capacity.⁵⁶ In 2012, the Czech Republic enacted a new Civil Code introducing supported decision-making, and stating that restrictions of legal capacity are a last resort.⁵⁷ In Lithuania, Bulgaria, and Hungary

⁵² *Id.*

⁵³ Soumitra Pathare, MD, and Laura S. Shields, MsC, *Supported Decision-Making for Persons with Mental Illness: A Review*, Public Health Reviews, Vol. 34, No. 2, p. 16, available at http://www.publichealthreviews.eu/upload/pdf_files/12/00_Pathare.pdf (last visited April 26, 2015).

⁵⁴ Guardianship by Country: Resource for Second World Congress on Adult Guardianship, available at http://www.international-guardianship.com/pdf/GBC/GBC_Germany.pdf (last visited April 26, 2015).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*; see also MDAC, Mental Disability Advocacy Center, *Czech Republic Enacts Legal Capacity Law Reform*, February 21, 2012, available at <http://www.mdac.org/en/news/czech-republic-enacts-legal-capacity-law-reform> (last visited April 26, 2015).

Mental Disability Advocacy Center continues to foster the law reform process, and help these countries' guardianship legislation to become uniformed with the Article 12's requirements.⁵⁸

RUSSIAN FEDERATION

On May 3, 2012 the President of the Russian Federation Dmitry Medvedev signed, and entered into force the Federal Law N 46-FZ "On the Ratification of the Convention on the Rights of Persons with Disabilities."⁵⁹ The Federal Law N 46-FZ is very short, but historically important not only for people with disabilities, but also for all of those who understand that the modern society cannot ignore 10 percent of its population. It states: "Ratify the Convention on the Rights of Persons with Disabilities of December 13, 2006, signed on behalf of the Russian Federation in New York on September 24, 2008."⁶⁰ The Convention was subject to ratification in accordance with its Article 43 provisions, and under paragraph 2 of Article 15 of the Federal Law N 101-FZ "On International Treaties of the Russian Federation."⁶¹

⁵⁸ MDAC, Mental Disability Advocacy Center, *MDAC's Recent Legal Capacity Advocacy Activities in Lithuania, Bulgaria and in Hungary*, October 15, 2012, available at http://mdac.info/en/16/10/2012/MDAC_s_recent_legal_capacity_advocacy_activities_in_Lithuania_Bulgaria_and_in_Hungary (last visited April 26, 2015).

⁵⁹ Federal Law N 46-FZ "On the Ratification of the Convention on the Rights of Persons with Disabilities," adopted on May 3, 2012, ConsultantPlus, Russian online legal research system, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=129200> (last visited April 24, 2015).

⁶⁰ *Id.*

⁶¹ Article 43 "Consent to be Bound" of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, available at <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015); see also Paragraph 2 of the Article 15 of the Federal Law N 101-FZ "On International Treaties of the Russian Federation," adopted on July 15, 1995, ConsultantPlus, Russian online legal research system, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=160092> (last visited April 24, 2015).

Existing Russian legislation, which is focused on protection of people with disabilities, is not contrary to the rules of the Convention. It is based on the same human rights principles, and norms. For example, Federal Law N 181-FZ “On Social Protection of Disabled People in the Russian Federation,” specifies international disability principles, and norms applicable to Russian conditions.⁶² The Russian disability law is regulated by the following acts:

- Federal Law N 2300-1 “On Consumer Rights Protection,” adopted on February 7, 1992;⁶³
- Federal Law N 5-FZ “On Veterans,” adopted on January 12, 1995;⁶⁴
- Federal Law N 442-FZ “On Social Services of Citizens in the Russian Federation,” adopted on December 28, 2013;⁶⁵
- Federal Law N 123-FZ “Technical Regulations on Fire Safety Requirements,” adopted on July 22, 2008.⁶⁶

⁶² Chapter I of the Federal Law N 181-FZ “*On Social Protection of the Disabled People in the Russian Federation*,” adopted on November 24, 1995, ConsultantPlus, Russian online legal research system, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=166137> (last visited April 24, 2015).

⁶³ Federal Law N 2300-1 “*On Consumer Rights Protection*,” adopted on February 7, 1992, ConsultantPlus, Russian online legal research system, available at <http://www.consultant.ru/popular/consumerism/> (last visited April 24, 2015).

⁶⁴ Federal Law N 5-FZ “*On Veterans*,” adopted on January 12, 1995, ConsultantPlus, Russian online legal research system, available at <http://www.consultant.ru/popular/veteran/> (last visited April 24, 2015).

⁶⁵ Federal Law N 442-FZ “*On Social Services of Citizens in the Russian Federation*,” adopted on December 28, 2013, ConsultantPlus, Russian online legal research system, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=166044> (last visited April 24, 2015).

⁶⁶ Federal Law N 123-FZ “*Technical Regulations on Fire Safety Requirements*,” adopted on July 22, 2008, ConsultantPlus, Russian online legal research system, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=159028> (last visited April 24, 2015).

Article 15 of the Convention requires States Parties to take appropriate measures to ensure that people with disabilities have access to transportation, information, and communications, *etc.*⁶⁷ Based on the provisions of Article 15, the new Federal Law N 384-FZ “Technical Regulations on the Safety of Buildings and Structures,” sets out minimum requirements for accessibility of buildings for people with disabilities.⁶⁸ Residential buildings, transport, and social infrastructure must be designed in accordance with this law.⁶⁹

However, in Russia children with disabilities still lack opportunities for early childhood care, and general education. To accommodate the needs of children with disabilities to an inclusive pre-school, and general education, the President of the Russian Federation Vladimir Putin signed the Decree “On the National Strategy for the Protection of the Children for 2012-2017”.⁷⁰ Based on the Decree, the “inclusive education as a national strategy” means that Russian educational institutions should be accessible to people with disabilities,⁷¹ especially because Russia has already

⁶⁷ Article 9 “Accessibility” of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, *available at* <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015).

⁶⁸ The Federal Law N 384-FZ “*Technical Regulations on the Safety of Building and Structures,*” dated December 30, 2009, ConsultantPlus, Russian online legal research system, *available at* <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=148719> (last visited April 24, 2015); *see also* Letter of the Ministry of Regional Development of the Russian Federation N 11681-IP/08, dated May 16, 2012, ConsultantPlus, Russian online legal research system, *available at* http://www.consultant.ru/document/cons_doc_LAW_135809/ (last visited April 24, 2015).

⁶⁹ Article 12 of the Federal Law N 384-FZ “*Technical Regulations on the Safety of Building and Structures,*” dated December 30, 2009 ConsultantPlus, Russian online legal research system, *available at* <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=148719> (last visited April 24, 2015); *see also* Letter of the Ministry of Regional Development of the Russian Federation N 9875-IP/08, dated April 26, 2012, ConsultantPlus, Russian online legal research system, *available at* <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=EXP;n=536866> (last visited April 24, 2015).

⁷⁰ The President of the Russian Federation Decree N 761 “*On the National Strategy for the Protection of the Children for 2012-2017,*” dated June 1, 2012, Garant, Russian online legal research system, *available at* <http://base.garant.ru/70183566/> (last visited April 24, 2015).

⁷¹ *Id.*

ratified the Convention⁷². Article 24 of the Convention states that “States Parties recognize the right of persons with disabilities to education... States Parties shall ensure an inclusive education system at all levels...”⁷³ An inclusive education involves collaborative learning of people with disabilities together with people without disabilities, the process during which people with disabilities can adapt to the environment.⁷⁴

Today the distance learning becomes more and more popular among people with disabilities because it gives them an opportunity to take part in educational process, without leaving home. Distance learning can extend the circle of friends, but cannot substitute for true human interaction. Inclusive education is the most important step in this direction. Moreover, in addition to psychological and social adaptation, inclusive education allows people with disabilities to receive better knowledge and skills to meet the needs of modern employers.⁷⁵

At the same time, the Convention contains many new provisions, which require implementations of new Russian laws. Article 12’s concept of legal capacity requires an appropriate law reform because Russia does not have a partial guardianship, which would be an alternative for supported decision-making for people with disabilities.⁷⁶ Instead, Russia relies on

⁷² Article 24 “*Education*” of the Convention on the Rights of Persons with Disabilities, United Nations Enable, Development and Human Rights for All, *available at* <http://www.un.org/disabilities/default.asp?id=150> (last visited April 24, 2015).

⁷³ *Id.*

⁷⁴ The President of the Russian Federation Decree N 761 “*On the National Strategy for the Protection of the Children for 2012-2017*,” dated June 1, 2012, Garant, Russian online legal research system, *available at* <http://base.garant.ru/70183566/> (last visited April 24, 2015).

⁷⁵ *Id.*

⁷⁶ Article 3 “*Establishment, Implementation and Termination of the Guardianship*,” Article 10 “*Procedures for Appointing Guardians*,” and Article 11 “*Appointment of Guardians*” of the Federal Law N 48-FZ “*On Guardianship*,” dated April 24, 2008, ConsultantPlus, Russian online legal research system, *available at* http://www.consultant.ru/document/cons_doc_LAW_170504/ (last visited April 26, 2015).

plenary guardianship that serves to completely remove fundamental human rights.⁷⁷ Moreover, Russian guardianship practice lacks basic procedural rights, such as to give a notice of a court hearing to an adult, whose legal capacity is in question.⁷⁸ In addition, even though an adult has the “right” to an attorney during guardianship proceedings, there is no accompanying Russian legislation making formal provision for an attorney to be provided universally or paid for by the State.⁷⁹ Sadly, guardianship in Russia is a mechanism to socially isolate people with disabilities. Once an adult is placed under guardianship, even without the adult’s consent, he or she can be put into a mental institution for the rest of his or her life.⁸⁰ No appeals are available.⁸¹ For example, in *Case of Shtukaturv v. Russia*, after a very short court hearing to remove Mr. Shtukaturv’s legal capacity, he was institutionalized against his will.⁸² Mr. Shtukaturv did not have knowledge of the hearing, and therefore did not have an opportunity to present evidence.⁸³ Mr. Shtukaturv was

⁷⁷ Article 15 “Rights and Responsibilities of Guardians,” Chapter 3 “Legal Status of Guardians and Wards,” Chapter 4 “Legal Status of Ward’s Property” of the Federal Law N 48-FZ “On Guardianship,” dated April 24, 2008, ConsultantPlus, Russian online legal research system, available at http://www.consultant.ru/document/cons_doc_LAW_170504/ (last visited April 26, 2015).

⁷⁸ MDAC, Mental Disability Advocacy Center, *Guardianship and Human Rights in Russia*, Analysis of Law, Policy and Practice, pp. 6-7, available at http://www.mdac.info/sites/mdac.info/files/English_Guardianship_and_Human_Rights_in_Russia.pdf (last visited April 26, 2015).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ The Federal Law N 48-FZ “On Guardianship,” dated April 24, 2008, ConsultantPlus, Russian online legal research system, available at http://www.consultant.ru/document/cons_doc_LAW_170504/ (last visited April 26, 2015).

⁸² *Case of Shtukaturv v. Russia*, Application No. 44009/5, European Court of Human Rights, March 27, 2008, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85611#{"itemid":\["001-85611"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85611#{) (last visited April 26, 2015); see also Alex L. Pearl, *Article 12 of the United Nations Convention on the Rights of Persons with Disabilities and the Legal Capacity of Disabled People: The Way Forward?* Leeds Journal of Law & Criminology, Vol. 1, No. 1, pp. 10-11, September, 2013, available at http://criminology.leeds.ac.uk/files/2013/09/Article-12_Pearl.pdf (last visited April 25, 2015).

⁸³ *Id.*

subject to “full incapacitation” for an indefinite period of time.⁸⁴ At the mental institution Mr. Shtukurov was denied access to the telephone, prohibited from seeing visitors, or even his lawyer, had writing materials withheld from him, and his diary was confiscated.⁸⁵ He also claimed that he was treated with strong medications against his will.⁸⁶ Since Mr. Shtukurov lacked legal capacity under Russian law, he also lacked legal standing to bring court proceedings.⁸⁷ The only way Mr. Shtukurov could challenge the removal of his legal capacity was through his guardian, who opposed this action.⁸⁸ The European Court of Human Rights held that Mr. Shtukurov’s participation in the court process was violated under the European Convention of Human Rights. The Court held that “the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation.”⁸⁹

In Russia there is no statutory obligation on guardians to promote independence, seek community-based, and less restrictive living arrangements for wards.⁹⁰ A ward is completely prohibited from voting, working, marrying, and managing his or her finances.⁹¹ In Russia there are no alternatives to plenary guardianship for people with disabilities who need assistance in making certain decisions.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Case of Shtukurov v. Russia*, Application No. 44009/5, Paragraph 94, European Court of Human Rights, March 27, 2008, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85611#{\"itemid\":\[\"001-85611\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85611#{\) (last visited April 26, 2015).

⁹⁰ MDAC, Mental Disability Advocacy Center, *Guardianship and Human Rights in Russia*, Analysis of Law, Policy and Practice, pp. 6-7, available at http://www.mdac.info/sites/mdac.info/files/English_Guardianship_and_Human_Rights_in_Russia.pdf (last visited April 26, 2015); see also the Federal Law N 48-FZ “*On Guardianship*,” dated April 24, 2008, ConsultantPlus, Russian online legal research system, available at http://www.consultant.ru/document/cons_doc_LAW_170504/ (last visited April 26, 2015).

⁹¹ *Id.*

Russia needs to improve its guardianship mechanisms to help people with disabilities to fully enjoy their fundamental human rights. Currently, Mental Disability Advocacy Center urges the Russian government to reform its guardianship laws, implement training for all professionals working in the guardianship system, and provide more information to adults under guardianship. Therefore, in accordance with the request of the Government of the Russian Federation the Russian Assembly is currently preparing a draft of the new Federal Law “Amendments to Laws of the Russian Federation on Social Protection of People with Disabilities in Connection with Ratification of the United Nations Convention on the Rights of Persons with Disabilities.”⁹²

UNITED STATES

In a vote on December 4, 2012 the United States Senate failed to reach the necessary 2/3 margin required to ratify the United Nations Convention on the Rights of Persons with Disabilities. Negotiated by the President George W. Bush, and signed by President Barack Obama in July of 2009, the Convention was presented to the Senate on May 17, 2012. The final vote was 61-38. With 99 Senators present, ratification would have required 66 votes.⁹³ The Convention is very similar to the Americans with Disabilities Act of 1990 because these documents both prohibit discrimination against people with disabilities in employment, transportation, public

⁹² Federal Service for Military-Technical Cooperation for Russian Federation, Underlying Federal Laws and Other Regulatory Acts Relating to MTC, *available at* <http://www.fsvts.gov.ru/materialsf/EA3A0C622F0AF8B5C325783D0065A75D.html>(last visited April 24, 2015).

⁹³ Louis Jacobson, *38 Republicans Vote Against Ratification, but Treaty could Get Another Vote Next Year*, PolitiFact.com, Tampa Bay Times, December 4, 2012, *available at* <http://www.politifact.com/truth-o-meter/promises/obameter/promise/88/sign-the-un-convention-on-the-rights-of-persons-wi/> (last visited April 24, 2015).

accommodation, communications, and governmental activities.⁹⁴ Why such an opposition to ratify the Convention if these documents are so similar?

The United States Constitution in its Article II, Section 2 states “[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur...”⁹⁵ Therefore, the President of the United States can only sign international treaties, but cannot ratify them without the Senate, unlike in Russia where the President can do both.⁹⁶ Section I, Chapter 4, Article 86 of the Constitution of the Russian Federation states that the President shall “... hold negotiations and sign international treaties and agreements of the Russian Federation; and sign ratification instruments...” However, as the Chief Executive of the United States, the President has the authority to create international agreements with other nations without Senate approval.⁹⁷ These international agreements are called executive agreements. They can prevail over conflicting state laws, but never over federal statutes or United States Constitution.

The main difference between the American system and European system in dealing with international treaties is that once the international treaty has been ratified in Europe, it trumps the national law, including a country’s Constitution.⁹⁸ Article VI of the United States Constitution states “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States,

⁹⁴ The American with Disabilities Act of 1990, as Amended, *available at* <http://www.ada.gov/pubs/adastatute08.htm> (last visited April 24, 2015).

⁹⁵ Article II, Section 2 of the United States Constitution, *available at* <http://constitutioncenter.org/constitution/full-text> (last visited April 24, 2015).

⁹⁶ Section I, Chapter 4, Article 86 of the Constitution of the Russian Federation, *available at* <http://www.constitution.ru/en/10003000-01.htm> (last visited April 24, 2015).

⁹⁷ Article II, Section 1 of the United States Constitution, *available at* <http://constitutioncenter.org/constitution/full-text> (last visited April 24, 2015).

⁹⁸ Section I, Chapter 1, Article 15, Paragraph 4 of the Constitution of the Russian Federation, *available at* <http://constitutioncenter.org/constitution/full-text> (last visited April 24, 2015).

shall be the supreme law of the land; and the judges in every state shall be bound thereby...” For example, Section I, Chapter 1, Article 15, Paragraph 4 of the Constitution of the Russian Federation states “The commonly recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.”⁹⁹ Other European countries, for example Estonia, have similar supremacy clauses of international treaties.¹⁰⁰ For example, Article 123 of the Constitution of the Republic of Estonia states “The Republic of Estonia shall not conclude international treaties which are in conflict with the Constitution. If laws or other legislation of Estonia are in conflict with international treaties ratified by the [Parliament], the provisions of the international treaty shall apply.”¹⁰¹ Contrary to the European nations, the United States Constitution is “the supreme law of the land,”¹⁰² and that is probably why there is such hesitation in ratifying international treaties, including the Convention on the Rights of Persons with Disabilities. Once the ratification happens, then the United States national laws may be potentially questioned on the basis of the treaty commitment.

CONCLUSION

The Convention safeguards that people with disabilities can enjoy their rights on an equal basis with all other people. It also ensures that people with disabilities can fully participate in everyday life, and helps their social integration. Ratification of the Convention provides people

⁹⁹ *Id.*

¹⁰⁰ Chapter IX, Article 123 of the Constitution of the Republic of Estonia, *available at* https://www.eesti.ee/eng/topics/riik/pohiseadus/ix_valissuhted_ja_valislepingud (last visited April 24, 2015).

¹⁰¹ *Id.*

¹⁰² Article VI of the United States Constitution, *available at* <http://constitutioncenter.org/constitution/full-text> (last visited April 24, 2015).

with disabilities additional protections. Article 12 is the major article of the Convention because without legal capacity all other rights in the Convention become meaningless, and cannot be exercised by people with disabilities. However, in bringing national guardianship legislation to become uniformed with Article 12 requirements it would be easier for progressive social countries to shift from substituted to supported decision-making than for countries that are not geared towards creating a social safety net for its citizens.