

Title of the Essay – Workers with Disabilities in Georgia: the Current Situation and Perspectives

Synopsis (250-500 words) – In the recent years Georgia's development process is aimed at liberalizing the national economy. In order to enhance the development process in Georgia, European integration was announced as one of the key goal of government's activity. The crucial point for country's integration in western society composes the need for harmonization of internal legislation (*inter alia*, employment law) with European Union law. Consequently, the issue of compliance of Georgian employment law with international and also with EU standards represents the subject of significant legal research. Effective regulation of employment relations is one of the priorities of all states as good functioning of this segment vastly conditions the economic growth and welfare of people. Individual employment relations are based on the principle of equality. Parliament adopted a new Labour Code in 2006, which acquired the form of the Organic Law with the same title in 2010. The state once more underlined its particular interest in this sphere by such action. Acting Labour Code was substantially modified after reform in 2013. As we shall see, despite some improvements, the Georgian legislation didn't provide wide range guarantees for the vulnerable workers such as person with disabilities. Article refers to some international and European standards with regard to workers with disabilities. Consequently, this analysis may give opportunity for the improvement of the national legislation in this field.

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Describe your area of research – I am very much interested in the topics covered by general principles of Civil Law as well as Employment Law and Insurance Law

Signed



Date 27.06.2016

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**Workers with Disabilities in Georgia: the Current Situation and Perspectives\*\***

***1. Introduction***

Effective regulation of employment relations is a one of the priorities of all states as good functioning of this segment vastly conditions the economic growth and welfare of people.

Individual employment relations are based on the principle of equal rights of the parties. A legislator shall ensure the practice of this principle so as not to allow the misuse of rights. In particular, it should outline the scope of the free will of the parties and set up certain boundaries.

Prohibition of discrimination is a cornerstone of human rights. Right to equality and non-discrimination principle, which is clearly established in international and regional human rights treaties, occupies an important place in human rights. The right to equality obliges states to ensure protection of human rights without discrimination, *inter alia*, regardless of their disability.<sup>1</sup> The protection of the rights of the mostly vulnerable social group – disabled people – remains a global problem.

The aim of the essay is to examine international norms and standards relating to the rights of workers with disabilities and to evaluate the current situation in Georgia with regard to protection of their rights and interests.

***2. UN Convention on the Rights of Persons with Disabilities and its implementation and application in the national legal order***

UN Convention on the Rights of Persons with disabilities and its optional protocol adopted by the United Nations General Assembly on 13 December 2006 is one of the most important international documents in the field of rights of persons with disabilities.<sup>2</sup>

A State becomes a party to the Convention and Optional Protocol by signing and ratifying either instrument or by acceding to them. There are no legal obligations imposed on a signatory State immediately after the treaty is signed. However, by signing the Convention or Optional Protocol, States indicate their intention to take steps to be bound by the treaty at a later date. Signing also creates an obligation, in the period between signing and ratification or consent to be bound, to refrain from acts that would defeat the object and purpose of the treaty.<sup>3</sup>

In order to become a party to the Convention and the Optional Protocol, a State must demonstrate, through a concrete act, its willingness to undertake the legal rights and obligations contained in these two instruments. Under the Convention and the Optional Protocol, States may express their consent to be bound by Ratification or Accession. Consent to be bound by the Convention and the Optional Protocol is the act whereby States demonstrate their willingness to undertake the legal obligations under the instruments.<sup>4</sup>

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\*\* This essay is based on a paper presented at the 2<sup>nd</sup> International Conference on “Vulnerable Workers and Precarious Work in a Changing World”, Middlesex University London, 10-11 September 2012.

<sup>1</sup> M. Nowak, J. Klok, I. Schwarz, *Human Rights: A Handbook for Parliamentarians*, Office of the United Nations High Commissioner for Human Rights (in Georgian), Tbilisi, 2009, 7.

<sup>2</sup> About the several instruments dealing with disabled persons, adopted by the UN General Assembly see H. Hannum (Ed.), *Guide to International Human Rights Practice*, Fourth Edition, Transnational Publishers, Lc., 2004, 236-237.

<sup>3</sup> See A. Byrnes et al., *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, N° 14 – 2007, 39-40, available at: <<http://www.ipu.org/PDF/publications/disabilities-e.pdf>>, [accessed on July 22, 2012].

<sup>4</sup> See *ibid.*, 40-41.

Georgia expressed its will to join them and signed the Convention and its supplementary protocol on 10 July 2009, but they were not in force before ratification of the Convention and the Optional Protocol by the Parliament of the Georgia in 2013.

The high importance of this Convention is attested by the fact that by ratifying it on 23 December 2010, the European Union became a party to an international treaty for the first time in its history. In the same year there were adopted the European Disability Strategy 2010-2020 for the EU countries. Implementation of this strategy is closely linked to the realisation of the rights guaranteed by the Convention. Respectively, as underscored in the above Strategy, its overall aim is to ensure implementation of the UN Convention across the EU, therefore the Strategy progress reports should be fully consistent with the reporting requirements for the Convention. This serves a further indication for Georgia - striving towards European integration - as to how crucial it is to ratify this Convention.<sup>5</sup>

European Court of Human Rights in “*Glor v. Switzerland*” case made explicit reference to the UN Convention on the Rights of Persons with Disabilities of 13 December 2006 as the basis for European and universal consensus on the necessity to protect persons suffering from a disability from discriminatory treatment. The Court indicated that universal standards of the Convention provide that discrimination on the basis of disability is inadmissible even if a State is not a contracting to the Convention party as the Convention specifies all basic rights guaranteed by international human rights acts to all human beings without discrimination.<sup>6</sup>

It should be stressed that the commitments provided in the Convention are scrutinized before ratification. Georgian authorities took some important steps with regard to the rights of persons with disabilities. One of them being the adoption by the Georgian government of the “2014-2016 Government Action Plan to ensure equal opportunities for people with disabilities” and creation of the advisory body to the Georgian Government called the “State Coordinating Council on the issues of persons with disabilities”. Within the framework of the Health Insurance State Program Government of Georgia adopted Regulation on the health insurance for persons with markedly expressed disabilities on 7 may 2012.

The UN Convention provides that the States Parties shall make every effort to employ persons with disabilities in the public sector (Article 27 (1)).<sup>7</sup> It should be noted that Georgia’s employment rate of people with disabilities in the public sector has increased over the last five years.

“Project of Employment People with Disabilities” was launched by Ministry of Justice of Georgia in 2008. Within this project Ministry has employed several people in the Notary Chamber of Georgia. Tbilisi City Hall Cleaning Municipal Service has employed 18 deaf people in 2009. National Agency of the Public Registry has employed 17 people. The Public Defender’s Office by the support of Open Society Institute has employed 2 people in 2010. Georgia Revenue Service within the “project of Employment People with Disabilities” has employed 20 people in 2012. It should be noted that a number of such projects keeps increasing year after year.

The Georgian Law “On State Pension” came in for criticism from Public Defender of Georgia. By the Article 6 employment of a person with disabilities in public sector shall entail his/her deprivation of pension. However, this restriction does not refer to persons with markedly expressed disabilities and disabled caused by blindness. But significant number of persons with disabilities has to refuse state pension in favour of public employment. This regulation puts

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<sup>5</sup> See Annual report of the Public Defender of Georgia on the situation of human rights and freedoms in Georgia, 2011, 203, available at: <<http://www.ombudsman.ge/files/downloads/en/hcqkqyhblwldxcayqiwg.pdf>>, [accessed on July 22, 2012].

<sup>6</sup> See Annual report of the Public Defender of Georgia on the situation of human rights and freedoms in Georgia, 2010, 301, available at: <<http://www.ombudsman.ge/files/downloads/en/rthhchgdjhxcwaxajhpx.pdf>>, [accessed on July 22, 2012].

<sup>7</sup> See also the UN General Assembly Resolution 48/96 on “Standard Rules on the Equalization of Opportunities for Persons with Disabilities”, 20 December 1993, Rule 7, available at: <<http://www.un.org/disabilities/documents/gadocs/standardrules.pdf>>, [accessed on July 22, 2012].

persons with disabilities of different categories in unequal conditions. As a result, persons with disabilities, employed in public sector are discriminated against those working in private sector. Instead of facilitating the employment, the State infringes a person with disabilities' right to the pension, granted to compensate the needs arising from his/her disability.<sup>8</sup> The Public Defender addressed the Parliament of Georgia with the recommendation to introduce amendments to the Law of Georgia "On State Pension" in order to ensure equalization of employment opportunities for persons with disabilities. It is noteworthy that that Parliament of Georgia introduced amendments to the above mentioned law and this article has been withdrawn.

Finally, it can be said that despite the fact that the Convention has not yet been ratified, Georgia develops overall policy with regard to persons with disabilities' employment and carries out appropriate arrangements in compliance with European and international standards. However, Georgian authorities must undertake all necessary activities to ratify these documents. In order to improve the status of persons with disabilities, the State must recognize their rights and mechanisms of protection as guaranteed by the UN Convention on the Rights of People with Disabilities of 13 December 2006. The Convention for the largest minority provides for equal with others rights and opportunities and covers many spheres of life, such as access to physical environment, participation in political and public activities, the right to education, prohibition of discrimination, inhumane treatment, disability-based exploitation and violence etc.

### ***3. Prohibition of discrimination on the ground of disability by the Constitution of Georgia***

There is no one article in the Georgian Constitution which deals with the disabled people. For example, it is established in Article 52 of the Constitution of the Republic of Lithuania that the State shall guarantee to citizens the right to receive old age and disability pensions as well as social assistance in the event of unemployment, sickness, widowhood, loss of the breadwinner, and in other cases provided for by laws.<sup>9</sup>

As we mentioned above, there is no provision in the Georgian Constitution directly stating that it is forbidden to discriminate on the ground of disability. There is only the general thesis that everyone is free by birth and is equal before law regardless of race, color, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence.<sup>10</sup>

However, this regulation can not be interpreted as allowing the discrimination in Georgia on the ground of disability. In this situation it is possible to apply the decision of the Constitutional Court of Lithuania, in which it confirmed that "Normative acts are considered those that contain universally binding rules of general nature. Here, what is most significant, is not the particular wording of a certain rule, but the fact that the text should provide understanding beyond doubt that the instruction is given to certain subjects under certain conditions to act in appropriate way."<sup>11</sup> Also we can make reference an Article 39 of the Constitution of Georgia which states that the Constitution shall not deny other universally recognised rights, freedoms and guarantees of an individual and a citizen, which is not referred to herein but stem inherently from the principles of the Constitution.

In this context it is interesting Article 14 of the European Convention on Human Rights which prohibits "discrimination on any ground such as sex, race, colour, language, religion,

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<sup>8</sup> See Annual report of the Public Defender of Georgia on the situation of human rights and freedoms in Georgia, 2010, 303.

<sup>9</sup> The Constitution of the Republic of Lithuania, Article 52, available at: <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>, [accessed on July 22, 2012].

<sup>10</sup> The Constitution of Georgia (Adopted on 24 August 1995), Article 14, available at: [http://www.parliament.ge/files/68\\_1944\\_951190\\_CONSTIT\\_27\\_12.06.pdf](http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf), [accessed on July 22, 2012].

<sup>11</sup> The Constitutional Court of the Republic of Lithuania Ruling On the compliance of the resolution of the Seimas of the Republic of Lithuania "On the main directions of land reform", 17 June 1993, with the Constitution of the Republic of Lithuania, 19 January 1994, Vilnius, available at: <http://www.lrkt.lt/dokumentai/1994/n4a0119a.htm>, [accessed on July 22, 2012].

political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

The list is an open-ended one. The list set out in that provision [being] illustrative and not exhaustive.<sup>12</sup> Among the grounds of discrimination which the European Court has accepted as covered by Article 14 are sexual orientation, disability and professional status.<sup>13</sup>

Protocol 12 to the European Convention on Human Rights entered into force on 1 April 2005. By the Article 1 “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

The 12<sup>th</sup> Protocol came in for criticism from some quarters because it did not expand the list of explicitly protected grounds (in particular, to include sexual orientation, disability and age).<sup>14</sup> The Explanatory Report to the Protocol defends the failure to add to the list of grounds expressly protected grounds by Article 14 as follows:

This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today’s societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included. It is recalled that the European Court of Human Rights has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision.<sup>15</sup>

#### ***4. Prohibition of discrimination against people with disabilities in employment relations***

##### **4.1. Prohibition of employment discrimination based on disability and other guarantees for persons with disabilities according to the Labour Code of Georgia**

It is interesting how the idea of prohibition of discrimination against people with disabilities in employment relations was reflected in Georgian Labour Codes for years. It should be mentioned that the prohibited grounds have been changed for many times and passes some development stages. For example, Georgian Soviet Labour Code do not allowed discrimination due to sexual, racial, ethnic and religious belonging. New legislation broadened the circle of the prohibited grounds by the colour, language, political and other opinion, ethnic and social category, origin, property and position and residence. Acting Labour Code of Georgia added to this list: age, sexual orientation, limited capabilities and family conditions.<sup>16</sup> Choice made by the Georgian lawmaker is a progressive step on the way of harmonization of national legislation with international standards.

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<sup>12</sup> See T. Campbell, K.D. Ewing, A. Tomkins (Eds.), *Sceptical Essays on Human Rights*, Oxford University Press, 2001, 215. See also: L. Izoria, K. Korkelia, K. Kublashvili, G. Khubua, *Commentaries on the Constitution of Georgia, Fundamental Rights and Freedoms* (in Georgian), Article 14, “Meridiani” Publishers, Tbilisi, 2005, 44; E. Gotsiridze, *Commentaries on the Constitution of Georgia, Chapter 2, Citizenship of Georgia; Fundamental Human Rights and Freedoms* (in Georgian), Article 14, GIZ, 2013, 63.

<sup>13</sup> M. W. Janis, R.S. Kay, A.W. Bradley, *European Human Rights Law: Text and Materials*, Third Edition, Oxford University Press, 2008, 470-471.

<sup>14</sup> *Ibid.*, 517.

<sup>15</sup> See the Explanatory Report to Protocol No. 12, point 20, available at: <<http://conventions.coe.int/treaty/en/reports/html/177.htm>>, [accessed on July 22, 2012].

<sup>16</sup> See G. Amiranashvili, *Prohibition of Discrimination in Employment Relation*, in: V. Zaalishvili (Ed.), *Employment Law (Collection of Articles) I* (in Georgian), “Meridiani” Publishers, Tbilisi, 2011, 149.

It is noteworthy that in English translation of the Labour code of Georgia it is used the term “handicap”. According to M. Sargeant, “There is no definition of ‘handicap’ in the Code, but this may be a result of it being defined elsewhere. Certainly there is a necessity to define when a person is disabled and continues to be so. For information, the UK Equality Act 2010 defines someone as having a disability if that person has a physical or mental impairment and that the impairment has a substantial and long term adverse effect on that person’s ability to carry out normal day to day activities, Thus the tests for whether a person has a disability are, firstly, that there must be a physical or mental impairment; secondly, that it must have a substantial adverse effect; thirdly, that it must have a long-term adverse effect and, finally, that this adverse effect must relate to the ability to carry out normal day to day activities.”<sup>17</sup> In fact, article 2 of the law of Georgia “On Social Protection of Persons with Disabilities” defines persons with disabilities as persons with substantial physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and efficient participation in society on an equal basis with others. It can be noted that the definition of persons with disabilities given by the Georgian lawmaker should be more precise.

Furthermore, Labour Code of Georgia provides some other norms, which guarantee rights of person with disabilities. For example, Article 17 regulates overtime work and establishes that it is prohibited to employ the pregnant or a female who recently gave birth, person with limited capabilities for overtime work without consent of such person.<sup>18</sup> Article 18 of the Code limits the night work of workers with disabilities and foresees prohibition of employment of an under aged person, pregnant or newly baby-born or breast-feeding female in the evening hours (from 22:00 p.m. until 6:00 a.m.) as well as person taking care of a child under three years or with limited capabilities without his/her consent.

#### **4.2. Prohibition of pre-employment discrimination**

The Convention on the Rights of Persons with Disabilities adopted by the United Nations General Assembly on 13 December 2006 requires Governments to ensure the legal right of persons with disabilities to prohibit discrimination based on disability in all forms of employment (article 27 (1)).

The Convention’s provisions on work and employment cover persons with disabilities in all stages of employment, including those seeking employment, those advancing in employment, and those who acquire a disability during employment and who wish to retain their jobs.<sup>19</sup>

An employer must guarantee equality of chances for the all candidates who wishing to occupy the vacant places. Employer’s negative decision based on a person’s disability seen as discriminatory and it harasses the candidate. However, in certain circumstances, during the negotiations about employment, with lawful interest of the answer, employer can ask to applicant about the disability status.<sup>20</sup>

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<sup>17</sup> See M. Sargeant, *Article 2. Labour Relations*, in: A. Borroni (Ed.), *Commentary on the Labour Code of Georgia*, Publishing “World of Lawyers”, Tbilisi, 2014, 31.

<sup>18</sup> Also according to Article 124 of the German Social Security Code, the persons with disabilities and equal persons, upon their request, should be exempted from overtime work: S. Kavtaradze, *Overtime regulations according to Georgian and German Law*, in: B Zoidze (Ed.), *Employment Law (Collection of Articles) I* (in Georgian), “Meridiani” Publishers, Tbilisi, 2013, 106-107. With respect to overtime work, in the group of special protected persons the behavior of person with disabilities is quite logical and positive, because such persons subject to special protection in labor relations according to their legal status and the specificity of the employment relationship: M. Bajiashvili, *Peculiarities of the working time according to the Georgian Labor Code (In Comparison to German Employment law)*, in: B Zoidze (Ed.), *Employment Law (Collection of Articles) I* (in Georgian), “Meridiani” Publishers, Tbilisi, 2013, 94.

<sup>19</sup> See A. Byrnes et al., op. cit., 87.

<sup>20</sup> See T. Kereselidze, *Legal Consequences of Discriminatory Question of Employer to Candidate before Conclusion of Employment Contract*, in: V. Zaalishvili (Ed.), *Employment Law (Collection of Articles) I* (in Georgian), “Meridiani” Publishers, Tbilisi, 2011, 206.

For example, if a disabled applicant's ability is fully or partially dismantled in that profession, which is necessary for the vacant position, then the employer's question about this status is needful for achieving a legitimate purpose. In this respect, the difference will not be discrimination.<sup>21</sup> In other hand, question about the disease, which is linked with disability, contains ground of indirect discrimination and therefore inadmissible.<sup>22</sup>

Americans with Disabilities Act [ADA] which defines by what kind of questions can be determined compliance of the candidate.<sup>23</sup> Despite the fact that at the pre-employment stage an employer should not ask questions to candidate related to his/her disability, there are a lot of questions which are permissible. For example, an employer may ask whether applicant is able to perform the essential functions of the job.<sup>24</sup>

The Labour code of Georgia was not expressly provided for prohibition of discrimination in pre-contractual relations. Direct interpretation of the wording of Article 2.3 allowed concluding that any type of employment discrimination are prohibited only within employment relationship – originating from the moment of conclusion of the respective employment contract. Consequently, the elimination of discrimination was not applied to pre-contractual relationship - recruitment (hiring) process.<sup>25</sup>

Discrimination (Employment and Occupation) Convention (No. 111) adopted on 25 June 1958 by the General Conference of the International Labour Organisation was ratified by the Parliament of Georgia on 1995. Committee of Experts on the Application of Conventions and Recommendations noted that the Labour Code adopted in 2006 by referring to discrimination “in employment relations” (in section 2(3)) was not appeared to prohibit discrimination that occurs during selection and recruitment, including job advertisements. Noting that under section 5(8) of the Labour Code the employer is not required to give reasons for his or her decision when a candidate is not hired; the Committee was concerned that this provision may effectively bar candidates from successfully bringing discrimination cases. The Committee recalled that, by ratifying the Convention, the Government has undertaken to address direct and indirect discrimination in respect to all aspects of employment and occupation, including access to employment and particular occupations (Article 1(3)).<sup>26</sup>

It should be stressed that by the substantial amendments to the Labor Code of Georgia in 2013 this gap has been filled, but it is expedient to determine frames of interview questions, in order to prevent unequal treatment of employment seekers and limit employer's opportunity to reject a candidate based on his/her disability. During pre-contractual relations, an employer should have the right to ask an employment seeker only the questions pertinent to occupying the position.<sup>27</sup>

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid., 207.

<sup>23</sup> See G.F. Casellas, *The U.S. Equal Employment Opportunity Commission Notice*, available at: <<http://www.eeoc.gov/policy/docs/preemp.html>>, [accessed on July 22, 2012]. Also it should be mentioned the UK Disability Discrimination Act, which is adopted in 1995. This Act foresees prohibition of discrimination against applicants and employees with disabilities. See Disability Discrimination Act, Part II, available at: <<http://www.legislation.gov.uk/ukpga/1995/50/>>, [accessed on July 22, 2012].

<sup>24</sup> Guidelines for Pre-Employment Inquiries Technical Assistance Guide - Interviews and Applications for Employment, DLLR's Office of Fair Practices, available at: <<http://www.dllr.state.md.us/oeope/preemp.html>>, [accessed on July 22, 2012].

<sup>25</sup> Z. Shvelidze, *Transition from Soviet to Liberal Labour Law: Labour Standards in Georgia*, July 2012, 10, available at: <<http://ilera2012.wharton.upenn.edu/RefereedPapers/ShvelidzeZakaria%20ILERA%20updated.pdf>>, [accessed on 27 July 2012].

<sup>26</sup> Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 98th Session, 2009, 378, available at: <[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_103484.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_103484.pdf)>, [accessed on 27 July 2012].

<sup>27</sup> See S. Chachava, *Georgian Labour Law Gap Analyses and Recommendations*, Georgian Young Lawyers' Association, Tbilisi, 2011, 6, available at: <[http://old.gyla.ge/uploads/publications/2011/qartuli\\_shromis\\_samartlis\\_analizi\\_eng.pdf](http://old.gyla.ge/uploads/publications/2011/qartuli_shromis_samartlis_analizi_eng.pdf)>, [accessed July 22, 2012].

## *5. Summary*

Summarising the above, we can conclude that the Georgian legislation related to employment of people with disabilities still needs further development. It would be advisable to rely on the international and European standards because the adoption of effective rules and their implementation has an essential importance for the persons with disabilities. Finally, we can say that the current situation in Georgia with regard to social integration of persons with disabilities is satisfactory, but further works should be done in order to ensure rights for disabled people.