



ECHR v. UNCRPD: ending restrictions on voting rights of persons with disabilities

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Abstract

This article examines the conflicting interpretations of two human rights systems – the UNCRPD and the ECHR – concerning the legal capacity of persons in the exercise of their right to vote, with the aim of finding common ground and promoting equal participation of persons with disabilities in society.

Keywords International Human Rights Law · ECHR · Disability Law · UNCRPD

1 Introduction

At the beginning of 2021 the European Court of Human Rights (ECtHR) decided two notable cases dealing with the political participation of persons with disabilities: *Strøbye and Rosenlind v. Denmark*,¹ and *Caamaño Valle v. Spain*.² In neither case did the Court find a violation of the applicants' right to vote during the period when they were under guardianship and prevented from exercising their right on account of lack of decision-making capacity. Adopting a very formalistic approach, the Court refused to rely on the Committee on Rights of Persons with Disabilities' (CRPD Committee) interpretation of the United Nations Convention on Rights of Persons with Disabilities (UNCRPD), calling for the abolition of legal and mental capacity considerations in limiting political participation of persons with disabilities. This article will guide the reader through the jurisprudence of the UN Treaty-based systems, the opposing

¹ *Strøbye and Rosenlind v. Denmark*, nos. 25802/18 and 27338/18, 2 February 2021, <http://hudoc.echr.coe.int/eng?i=001-207667>.

² *Caamaño Valle v. Spain*, no. 43564/17, 11 May 2021, <http://hudoc.echr.coe.int/eng?i=001-210089>.

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recent case law of the ECtHR, and further trends in Europe promoting the political participation of persons with disabilities. Through a critical analysis of the legal issues at stake, I propose that we must rethink legal understanding of mental disabilities and to strive as far as possible to promote equality in law and in practice for persons with disabilities.

2 The UNCRPD as interpreted by the CRPD Committee

Adopted in 2006 with entry into force in 2008, the UNCRPD belongs to the modern human rights catalogue, specifically addressing the rights of persons with disabilities. Grounded in the principles of the Charter of the United Nations and Universal Declaration of Human Rights and in the International Covenants on Human Rights,³ the Convention represents a revolutionary shift from the medical to the human rights model of disability.⁴ Its purpose 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”.⁵ Indeed, this non-discrimination clause is omnipresent in the Convention and a guiding interpretation principle in the CRPD Committee’s jurisprudence.

Art. 3 of the Convention sets the guiding principles of its interpretation: respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons; non-discrimination; and full and effective participation and inclusion in society. Art. 5 (2) of the Convention states that “States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.” Under Art. 12 of the Convention, “States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law”, “shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”, “shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”, and “shall 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.” It should be noted that Estonia, Ireland, Georgia, France, Norway, Poland, and the Netherlands made reservations to this article, some of which place limitations on legal capacity under national guardianship laws.⁶

The CRPD Committee interpreted the provision of Art. 12 of the Convention in its very first General Comment, adopted in 2014. Basing its statement on the general principles outlined in Art. 3 of the Convention and other human rights treaties providing for a person’s non-derogable right to equal recognition before the law, the

³Preamble to the UNCRPD, paras. (a) and (b).

⁴Degener T.: Disability in a Human Rights Context, 26 August 2016 [7], p. 14, <https://www.mdpi.com/2075-471X/5/3/35>.

⁵Art. 1(1) of the UNCRPD.

⁶https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4.

Committee noted that persons may never be deprived of their legal capacity based on their “disability or the existence of an impairment (including a physical or sensory impairment)”.⁷ In its exhaustive analysis, the Committee makes a distinction between legal capacity and mental capacity:

“Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.”⁸

In the Committee’s view, “‘unsoundness of mind’ and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency), [...] perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity”.⁹ In this context, the Committee makes an important point: “Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.”¹⁰ More recently, in its General Comment on Art. 5 of the UNCRPD, the Committee further noted that the denial of legal capacity based on a disability is discriminatory.¹¹

Regarding political rights of persons with disabilities, Art. 29 of the Convention states that “States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to [...] ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

- (i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
- (ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
- (iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice”.

⁷CRPD Committee: General Comment No. 1 (2014), Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014 [4], paras. 3–9. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en.

⁸*Ibidem*, para. 13.

⁹*Ibid.*

¹⁰*Ibid.*, para. 14.

¹¹CRPD Committee: General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018 [5], para. 47. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en.

When commenting on this provision, the Committee emphasised that “a person’s decision-making ability cannot be a justification for any exclusion of persons with disabilities from exercising their political rights, including the right to vote, the right to stand for election and the right to serve as a member of a jury”.¹² The Committee further noted in very clear terms that “exclusion from electoral processes and other forms of participation in political life are frequent examples of disability-based discrimination.”¹³ In this respect, the Committee reminded the State Parties that they should aim to adopt legal reforms to include persons with disabilities in the electoral process, with accessibility, reasonable accommodation and adequate support.¹⁴

Notwithstanding the abovementioned UN Treaty-based system interpretation, the two thousand-year-old Roman law concept of legal capacity still lurks in the legislations of many European states in one form or another.¹⁵ It is understandable why many States have difficulties abolishing it, as it is deeply entrenched in the legal thinking of legal professionals. Traditionally, slaves, women, and minorities were also denied legal capacity.¹⁶ This is now unthinkable thanks to the achievements of the human rights movement in the last seventy years, leading to the adoption of several binding international legal instruments giving every person equal recognition before the law.¹⁷ However, persons with disabilities continue to be denied many of their human rights based on their decision-making capabilities. The CRPD Committee forces lawyers to ask themselves important questions: are we truly able to assess the inner capabilities and thoughts of a human being objectively without adding our own understanding and expectations? Is the whole legal system designed to work only for the majority or certain-abled persons? Many European courts think that they can answer these questions, as will be explained in a separate segment below.¹⁸

3 The European Union action on rights of persons with disabilities

In 2011 the European Union (EU) ratified the UNCRPD, becoming the first regional economic organisation acceding to an international human rights treaty. Furthermore, all EU Member States have signed and ratified the Convention. Although not having a direct effect in EU law,¹⁹ if falling under EU competence, the provisions of the

¹²CRPD Committee: General comment No. 1, *supra* note 7, para. 48.

¹³General comment No. 6, *supra* note 11, para. 70.

¹⁴*Ibidem*.

¹⁵European Union Agency for Fundamental Rights (FRA): Legal capacity of persons with intellectual disabilities and persons with mental health problems, 2013 [10], pp. 27–33, <https://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf>.

¹⁶CRPD Committee: General comment No. 1, *supra* note 7, p. 8.

¹⁷See, for example, Art. 7 of the Universal Declaration of Human Rights, Art. 14(1) of the International Covenant on Civil and Political Rights, Art. 15(1) of the Convention on the Elimination of All Forms of Discrimination against Women, Para. 4 of the Preamble to the International Convention on the Elimination of All Forms of Racial Discrimination.

¹⁸See title 4.

¹⁹CJEU case of Z., Grand Chamber judgment, C-363/12, 18 March 2014, para. 90, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0363>.

UNCRPD as implemented by the EU become integral part of EU Member States' legal orders.²⁰ Indeed, the EU has already adopted several pieces of secondary legislation regulating the rights of persons with disabilities, such as access to air travel,²¹ bus and coach transport,²² accessibility of products and services,²³ accessibility of the websites and mobile applications of public sector bodies,²⁴ and electronic communication services,²⁵ all giving rise to potential EU enforcement action against EU Member States. The Court of Justice of the European Union (CJEU) ruled that EU secondary legislation must be interpreted in a manner consistent with international agreements concluded by the European Union, namely the UNCRPD.²⁶

There is no provision of EU law regulating the right to vote of persons with disabilities. In its 2015 concluding observations on the initial report of the EU, submitted under Art. 35(1) of the UNCRPD, the CRPD Committee was concerned by the exclusion of persons with disabilities across the EU from the election process due to deprivation of their legal capacity, and recommended to the EU to “take the necessary measures, in cooperation with its member States and representative organizations of persons with disabilities, to enable all persons with all types of disabilities, including those under guardianship, to enjoy their right to vote and stand for election, including by providing accessible communication and facilities”.²⁷ Since then no concrete legal action has taken place in this respect in the EU. However, there is an increasing

²⁰Chamon, M.: Negotiation, ratification and implementation of the CRPD and its status in the EU legal order. In D. Ferri, & A. Broderick (Eds.), *Research Handbook on EU Disability Law* (pp. 52–70). Edward Elgar Publishing. Research Handbooks in European Law series, 2020 [1], pp. 65–66 and 70, https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/60576559/Chamon_2020_Negotiation_Ratification_and_Implementation_of_the_CRPD_and_its_Status_in_the_EU_Legal_Order.pdf. Gubbels A., The UNCRPD in European Union Law, Contribution to Academy of European Law (ERA) EU-funded seminar: Equal participation in society of persons with disabilities, on 24–25 October 2019 [13], slide 8, p. 117, https://era-comm.eu/UNCRPD/kiosk/pdf/seminar_documents/s_c_419DV20.pdf.

²¹Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32006R1107>.

²²Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 Text with EEA relevance, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32011R0181>.

²³Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services (Text with EEA relevance), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0882>.

²⁴Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies (Text with EEA relevance), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.327.01.0001.01.ENG&toc=OJ.L.2016:327:TOC.

²⁵Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast)Text with EEA relevance, <https://eur-lex.europa.eu/eli/dir/2018/1972/oj>.

²⁶CJEU case of *Glatzel*, C-356/12, 22 May 2014, para. 70, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0356>. *HK Denmark*, C-335/11 and C-337/11, 11 April 2013, para. 29, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CA0335>.

²⁷CRPD Committee: Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015 [3], paras. 68–69, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEU%2fCO%2f1&Lang=en.

political will to do so for the next elections in the European Parliament. In 2018 the European Parliament stressed that “that the EU should adopt appropriate measures to ensure that all persons with disabilities can exercise all the rights enshrined in European Union treaties and legislation, such as [...] voting in European elections and consumer rights in line with the Convention, and encourage non-coercive measures and supported-decision making in line with the UNCRPD”.²⁸ Within its new Strategy for the Rights of Persons with Disabilities 2021–2030, the European Commission noted that it “will work with Member States, including through dedicated discussions in the European Cooperation Network on Elections and the European Parliament, to guarantee political rights of persons with disabilities on equal basis with others”.²⁹ Most recently, both the European Union Agency for Fundamental Rights (FRA)³⁰ and the European Economic and Social Committee³¹ noted a positive trend in EU Member States, reducing restrictions on the right to vote of persons with disabilities. Three types of legal regimes were identified: legal systems putting no restrictions on the right to vote of persons with disabilities (11 Member States), legal systems subjecting this right to the assessment of a judge (7 Member States) and those legal systems which still impose automatic restrictions (9 Member States).³²

4 The ECtHR case law on the right to vote of persons with disabilities

In this section, I will analyse the Court’s two recent judgments in the case of *Strøbye and Rosenlind v. Denmark* and *Caamaño Valle v. Spain*, in which the Court accepted as justified the disenfranchisement of the applicants for longer periods when the domestic legislation allowed for the ban from voting in the general elections for persons under legal guardianship. I will point to some important issues arising from those judgments which should further be clarified by the Court. Before turning to these two cases, it is important, however, to spend a few words on the Court’s case law on Article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

4.1 Article 3 of Protocol No. 1 – general principles

Art. 3 of Protocol No., 1 granting a right to free elections, states that “the High Contracting Parties undertake to hold free elections at reasonable intervals by se-

²⁸European Parliament resolution of 30 November 2017 on implementation of the European Disability Strategy (2017/2127(INI)) (2018/C 356/17 [9], para. 137, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0474&rid=3>.

²⁹https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_813.

³⁰FRA: Who will (not) get to vote in the 2019 European Parliament elections? Developments in the right to vote of people deprived of legal capacity in EU Member States, 2019 [11], p.3, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-right-vote-ep-elections-legal-capacity_en.pdf.

³¹European Economic and Social Committee, Real rights of persons with disabilities to vote in European Parliament elections, Rapporteur: Krzysztof Pater, SOC/554 [8], para. 5.2.1, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/information-reports/real-right-persons-disabilities-vote-european-parliament-elections-information-report>.

³²*Ibidem*, para. 5.1.2–5.1.4. See also: <https://fra.europa.eu/en/publication/2014/indicators-right-political-participation-people-disabilities/legal-capacity>.

cret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". 45 out of 47 members of the Council of Europe (all states except for Switzerland and Monaco) ratified Protocol No. 1.³³ In the 1987 case of *Mathieu-Mohin and Clerfayt* the Court noted an evolution in the interpretation of Art. 3 of Prot. No. 1 to the effect that this provision did not simply concern inter-State obligations, but encompassed individual rights: "the right to vote" and the "right to stand for election to the legislature".³⁴ These rights are not absolute and there "is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere" which is generally wide.³⁵ The Court has consistently emphasised that:

"It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, p. 23, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. For example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned (see *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI, and *Melnychenko v. Ukraine*, no. 17707/02, § 56, ECHR 2004-X). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, mutatis mutandis, *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004-V).³⁶

Regarding the requirement of "the free expression of the people in the choice of the legislature" and "preserving the very essence of the right to vote", the Court observed in *Sitaropoulos and Giakoumopoulos v. Greece*, that some factors may influence the justification of restrictions on the voting rights of expatriates:

"firstly, the presumption that non-resident citizens are less directly or less continually concerned with their country's day-to-day problems and have less

³³ <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyenum=009>.

³⁴ *Mathieu-Mohin and Clerfayt*, no. 9267/81, 2 March 1987, para. 51, <http://hudoc.echr.coe.int/eng?i=001-57536>.

³⁵ *Ibidem*, para. 52.

³⁶ *Hirst v. The United Kingdom* (no. 2) [GC], no. 74025/01, 6 October 2005, para. 61, <http://hudoc.echr.coe.int/eng?i=001-70442>. *Ždanoka v. Latvia* [GC], no. 58278/00, 16 March 2006, paras. 104–105, <http://hudoc.echr.coe.int/eng?i=001-72794>. *Sitaropoulos and Giakoumopoulos v. Greece*, [GC], no. 42202/07, 15 March 2012, para. 79, <http://hudoc.echr.coe.int/eng?i=001-109579>.

knowledge of them; secondly, the fact that non-resident citizens have less influence on the selection of candidates or on the formulation of their electoral programmes; thirdly, the close connection between the right to vote in parliamentary elections and the fact of being directly affected by the acts of the political bodies so elected; and, fourthly, the legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country... ”³⁷

The Court has always been very careful in the examination of cases where there was a total ban on voting rights or obstacles preventing the exercise of this rights altogether. In *Aziz v. Cyprus* the Court found a violation of Art. 3 of Prot. No. 1 on the ground that the Turkish-Cypriot community living in the government-controlled part of Cyprus were discriminated against by the Greek-Cypriot community, and completely prevented for several years from voting in the parliamentary elections.³⁸ In *Hirst v. The United Kingdom (No. 2)*, an automatic and indiscriminate ban on voting rights for prisoners was considered to fall outside the States’ margin of appreciation.³⁹ Likewise, in *Alajos Kiss v. Hungary*, which concerned the automatic disenfranchisement of an applicant put under guardianship by way of a constitutional provision, the Court held that a blanket prohibition on voting rights for a person under guardianship, “irrespective of his or her actual faculties”, was not acceptable.⁴⁰ The Court further noted that “if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.”⁴¹ The Court explained that “such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.”⁴² The Court concluded that the “treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny.”⁴³ It, therefore, required an individualised judicial decision for any restriction on the right to vote.

4.2 The case of *Strøbye and Rosenlind v. Denmark*

The 2021 case of *Strøbye and Rosenlind v. Denmark* concerns the disenfranchisement of two applicants following the deprivation of their legal capacity which for

³⁷ *Sitaropoulos and Giakoumopoulos v. Greece*, *supra* note 36, para. 69.

³⁸ *Aziz v. Cyprus*, no. 69949/01, 22 June 2004, paras. 26–30 and 38, <http://hudoc.echr.coe.int/eng?i=001-61834>.

³⁹ *Hirst v. The United Kingdom*, *supra* note 36, para. 82.

⁴⁰ *Alajos Kiss v. Hungary*, 38832/06, 20 May 2010, para. 42, <http://hudoc.echr.coe.int/eng?i=001-98800>.

⁴¹ *Ibidem*, para. 42.

⁴² *Ibid.*

⁴³ *Ibid.*, para. 44.

the first applicant took place in 1984 and for the second applicant in 2009. Interestingly, by a statutory amendment adopted in 2016, the applicants were entitled to vote in European Parliament elections and in local and regional elections, but not in general elections, which was prohibited under the Constitution. A further legislative amendment of 2019 provided for the possibility of depriving a person only partially of his or her legal capacity. Consequently, such a person would retain the right to vote in general elections. When faced with the CRPD Committee's views on the matter, the Danish Minister of Justice replied that the Committee's opinions are not binding upon Denmark.⁴⁴ The applicants complained to the ECtHR under Article 3 of Protocol No. 1, taken alone or read in conjunction with Article 14 of the ECHR.

The Court reiterated that in matters concerning the right to vote under Article 3 of Protocol No. 1 the margin of appreciation afforded to State Parties is wide.⁴⁵ It looked at the parliamentary and judicial review of the necessity of a general measure, together with the principle of subsidiarity on which the Convention system is based.⁴⁶ The Court had no problem in finding that the measure complained of had been lawful and pursued a legitimate aim.⁴⁷ The Court further took the view that the contested measure had been proportionate, being satisfied that the disenfranchisement had not been applied automatically, but was based on an individual assessment.⁴⁸ In the proportionality evaluation the Court considered that only 0.046% of the Danish population had been subject to the contested measure.⁴⁹ Considering that the total population of Denmark is about 5,8 million, the percentage indicated amounts to around 2700 people. Although for the Court this seemed a relatively small number, it is difficult to accept that 2700 people can completely be excluded from political life. There is no information as to whether this group of people have been put and are kept under guardianship in accordance with the Convention. Referring in the proportionality assessment to a small percentage of the population affected by the contested measure is therefore problematic.

The Court held that there had been no European consensus on the issue, with many countries still barring persons deprived of their legal capacity from voting.⁵⁰ Paradoxically, in the Grand Chamber case of *Hirst v. The United Kingdom*, the Court did not put much emphasis on the common European approach and noted that "this cannot in itself be determinative of the issue".⁵¹

The next argument put forward by the Court was that although the margin of appreciation would have been narrower if the restriction concerned a particular vulnerable group such as persons with mental disabilities (as in the case of *Alajos Kiss*),

⁴⁴ *Strøbye and Rosenlind v. Denmark*, *supra* note 1, para. 60.

⁴⁵ *Ibidem*, para. 91.

⁴⁶ *Ibid.*, para. 92.

⁴⁷ *Ibid.*, paras. 95–97.

⁴⁸ *Ibid.*, paras. 98–100.

⁴⁹ *Ibid.*, para. 102.

⁵⁰ *Ibid.*, para. 111.

⁵¹ *Hirst v. The United Kingdom*, *supra* note 36, para. 81.1. Harris, D.J., O'Boyle, M., Bates, E.P., Buckley, C.M.: *Law of the European Convention on Human Rights*, Second Edition, Oxford University Press (2009) [14], p. 718.

this would have been the case only if there was a blanket restriction and not an individualised decision.⁵² Although the concept of “vulnerability” is problematic and it may, depending on how we understand it, perpetuate inequality,⁵³ the Court seems to imply that vulnerability exists only when there are blanket restrictions on the right to vote. It may well be that a person under guardianship is less vulnerable when appearing before a judge together with a lawyer (if that is the Court’s assumption here), as opposed to being automatically deprived of the right to vote by law. However, the fact remains that important decisions about a person’s life are taken by third parties without considering the person’s will and preferences,⁵⁴ which are an inherent part of their human dignity. This rather calls for a narrow margin of appreciation afforded to State Parties in such matters, irrespective of whether there is a general ban or an individual decision.

Finally, both the domestic courts and the ECtHR did not give any meaningful reasoning concerning the blanket restriction in respect of the applicants’ voting rights between 1984 and 2019 and between 2009 and 2019, respectively, when they were completely prevented from voting based on a domestic provision. In this respect they were in a similar situation as the applicant in the case of *Alajos Kiss*.⁵⁵ In their defence the Government argued that despite the legislative amendments allowing for the right to vote of persons deprived of their legal capacity in European Parliament, regional and local elections, a constitutional amendment allowing their participation in general elections was impractical. While acknowledging this contradiction, the Court noted that over the years the national Parliament had carefully examined the issue of disenfranchisement and some progress has been made.⁵⁶ However, the Court continues with the dubious statement that “the fact that the development obtained required thorough legal reflection and time, cannot, in the Court’s view, be held against the Government to negate the justification and proportionality of the restriction at issue. The Court also takes account of the changing perspective in society, which makes it difficult to criticise that the legislation only changed gradually.”⁵⁷ With this statement the Court seems to argue that the right to vote is subject to a progressive realisation, although it is well established in legal theory and practice that this right belongs to the catalogue of civil and political rights imposing obligations on States with immediate effect.⁵⁸ It is true that the applicants were given the right to vote by subsequent legislative amendments, but the Court failed to explain why it had been justified to

⁵²*Ibid.*, para. 113.

⁵³Gilson E.: Vulnerability, Ignorance, and Oppression, *Hypatia* vol. 26, no. 2, Spring, 2011 [12], pp. 309–310, https://www.academia.edu/701615/Vulnerability_Ignorance_and_Oppression?auto=citations&from=cover_page.

⁵⁴CRPD Committee: General Comment No. 6, *supra* note 11, para. 49.

⁵⁵*Alajos Kiss*, *supra* note 40, paras. 42 and 44.

⁵⁶*Strøbye and Rosenlind v. Denmark*, *supra* note 1, paras. 118–119.

⁵⁷*Ibid.*, para. 119.

⁵⁸Committee on Economic, Social and Cultural Rights: General Comment No. 3: The Nature of State Parties’ Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990 [2], para. 9, <https://www.refworld.org/pdfid/4538838e10.pdf>. Shaw M. N.: *International Law*, Sixth Edition, Cambridge University Press, Cambridge (2008) [18], pp. 265–266.

have a total ban during the period before, when the very essence of the right to have any kind of influence on the political bodies in the country had been nullified.

4.3 The case of *Caamaño Valle v. Spain*

The second case under examination, *Caamaño Valle v. Spain*, concerned the applicant's daughter's disenfranchisement by an individual court decision, which the applicant alleged to be in breach of Art. 3 of Protocol No. 1 in conjunction with Article 14 of the Convention and Article 1 of Protocol No. 12. Based on the medical-psychiatric expert reports and an oral hearing, the first-instance judge established that the applicants' daughter was "highly influenceable and not aware of the consequences of any vote that she might cast".⁵⁹ Subsequently, in 2018, the domestic law was amended to the effect that all persons with disabilities were granted the right to vote, including the applicant's daughter.⁶⁰

The Commissioner for Human Rights intervened in the proceedings, noting that "when a large category of persons – such as the nearly 100,000 persons in Spain with intellectual and psychosocial disabilities – was excluded from the electoral process, not only were they deprived of any possibility of influencing the political process and the chance of shaping the policies and measures that directly affected their lives, but society as a whole was deprived of a legislature that reflected its full diversity."⁶¹ She further stressed that Art. 3 of Protocol No. 1 should be interpreted in the light of Art. 29 of the UNCRPD.

The Court reaffirmed the principles arising from its case law that "the Convention is an international treaty that is to be interpreted in accordance with the relevant standards and principles of public international law and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969."⁶² The Court reiterated that it is competent to interpret and apply the ECHR only,⁶³ noting that "other instruments can offer wider protection than the Convention [such as the UNCRPD], but the Court is not bound by interpretations given to similar instruments by other bodies, having regard to the possible difference in the contents of the provisions of other international instruments and/or the possible difference in role of the Court and the other bodies [...]. The Court understands that the Convention should be interpreted, as far as possible, in harmony with other rules of international law."⁶⁴ Regarding Art. 3 of Protocol No. 1 the Court repeated that this is not an absolute right and States Parties have a wide margin of appreciation.⁶⁵ Citing the case of *Alajos Kiss*, the Court stressed that the margin of appreciation is narrower when the restriction on the right to vote applies to vulnerable groups who suffered discrimination historically.⁶⁶ At the

⁵⁹ *Caamaño Valle*, *supra* note 2, para. 8.

⁶⁰ *Ibidem*, paras. 19 and 28.

⁶¹ *Ibid.*, para. 47.

⁶² *Ibid.*, para. 52.

⁶³ *Ibid.*, para. 53.

⁶⁴ *Ibid.*, para. 54.

⁶⁵ *Ibid.*, para. 55.

⁶⁶ *Ibid.*

same time, the Court found that there had been no consensus among the States Parties which would give persons with mental disabilities an unconditional right to vote, citing the EU Agency for Fundamental Rights (FRA) reports of 2014 and 2019.⁶⁷

In the proportionality evaluation of the violation complained of the Court considered that the guardianship had not automatically led to loss of voting rights, whereby a (revisable) decision was adopted by a judge in most serious cases only.⁶⁸ The Court accepted the findings of the domestic courts that the applicant's daughter had a "lack of cognitive skills to understand the meaning of a vote and was prone to be influenced very easily". Regrettably, the Court provided no concrete details as to how the lack of cognitive skills and being influenced easily had been established. It would have been useful to see the content of the expert's opinions, as well as the relevant statements made by the applicant's daughter and her family and friends. As noted by the CRPD Committee, mental capacity is not an "objective, scientific and naturally occurring phenomenon", but rather a social and political construct.⁶⁹ It can be argued that we are all subject to the influence of family, friends and others when taking political decisions, not necessarily in our own best interest.⁷⁰ The use of such arguments to the detriment of persons with disabilities is therefore hard to accept.

The Court further examined the complaint from the "perspective of democratic society as a whole", as under Art. 3 of Protocol No. 1 States Parties should "ensure the free expression of the opinion of the people".⁷¹ In this respect the Court held that under the margin of appreciation doctrine, States Parties may require a "free and self-determined electoral choice by the voters, thus prohibiting persons with certain mental disabilities from participating in the elections".⁷² According to the Court, the applicant's daughter had been deprived of her right to vote not simply because she belonged to a certain group but because of her personal circumstances, leading to the conclusion that there was no violation of Art. 3 of Protocol No. 1. As to the complaint under Art. 14 of the Convention which prohibits "different treatment, without objective and reasonable justification, of individuals in analogous, or relevantly similar, situations", the Court found that the difference in treatment had been justified by the applicant's daughter's limited mental capacity.⁷³

Certainly, no domestic decision justified the restriction on the applicant's daughter's voting rights based on her belonging to a vulnerable group, but the practical effect of the domestic legislation and decisions was to discriminate against persons under guardianship who, as the Court affirmed itself, belonged to a vulnerable group.

⁶⁷ *Ibid.*, paras. 27–28, 59.

⁶⁸ *Ibid.*, para. 66.

⁶⁹ CRPD Committee: General Comment No. 1, *supra* note 7.

⁷⁰ Inclusion Europe: Good Practices for Accessible Elections in Europe Produced as part of the project "Accommodating Diversity for Active Participation in European Elections" in May 2011 [16], p. 10, https://inclusion-europe.eu/wp-content/uploads/2015/04/Policy_Recommendations_EN.pdf.

⁷¹ *Caamaño Valle*, *supra* note 2, para. 74.

⁷² *Ibidem*, para. 77.

⁷³ *Ibid.*, paras. 80–83.

This called for a more careful and meticulous examination by the Court as clear from its previous case law.⁷⁴

It is worth noting the dissenting opinion of Judge Lemmens who regretted the majority decision. He aligned himself with the CRPD Committee's views and pointed out that a more acceptable solution would have been to provide support to persons with disabilities in the exercise of their legal capacity.⁷⁵ He further disagreed with the majority views on the consensus among the States Parties on the issue, stressing that almost all States Parties to the Council of Europe had ratified the UNCRPD, and the EU Fundamental Rights Agency Reports had actually pointed to a "slow but steady" trend of States to align themselves with the UNCRPD.⁷⁶ The fact that States do not "live up to the obligations to which they have committed themselves by ratifying the CRPD"⁷⁷ is a different question. He regretted that the majority did not consider the opinion of the independent bodies of the Council of Europe, the Human Rights Commissioner and the Venice Commission, advocating for an approach more in line with the UNCRPD.⁷⁸ The Judge lastly criticised the majority's interpretation of Art. 3 of Protocol No. 1 in its second aspect, requiring "a diversity of opinions of the electorate as a whole", not only the assessment of the opinion of a single voter.⁷⁹

5 Finding common ground

With the focus on the "actual capabilities" of persons exercising their voting rights, the ECtHR very much continues to promote the medical model of disability in the face of significant developments brought by the UNCRPD, the EU and the Council of Europe organs promoting the human rights model of disability. Even more, the Court and many Member States of the Council of Europe refuse to accept the relevant jurisprudence of the CRPD Committee. On this point it is worth mentioning that the International Court of Justice (ICJ) relied on the jurisprudence of the Human Rights Committee established by the International Covenant on Civil and Political Rights, noting that:

"Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which

⁷⁴*Guberina v. Croatia*, no. 23682/13, 22 March 2016, paras. 70 and 73, <http://hudoc.echr.coe.int/eng?i=001-161530>. *Glor v. Switzerland*, no. 13444/04, 30 April 2009, paras. 71–76, <http://hudoc.echr.coe.int/eng?i=001-92525>.

⁷⁵*Caamaño Valle*, *supra* note 2, Dissenting Opinion of Judge Lemmens, para. 7.

⁷⁶*Ibidem*, paras. 8–9.

⁷⁷*Ibid.*, para. 9.

⁷⁸*Ibid.*, para. 10.

⁷⁹*Ibid.*, para. 12.

both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.”⁸⁰

The same line of argument may well be applicable, *mutatis mutandis*, to the jurisprudence of the CRPD Committee. In the two 2021 cases examined above, however, the ECtHR insists that it is only competent to interpret the Convention, while the States emphasise the non-binding nature of the opinions and case law of the CRPD Committee. The Court’s reluctance to accept the CRPD Committee’s views is somewhat peculiar as it has previously showed readiness to interpret the Convention in line with other international instruments binding upon States Parties. This was the case, for example, of States Parties’ obligations arising out of their membership in the European Union,⁸¹ diplomatic immunity,⁸² and international humanitarian law,⁸³ whereby the Court sought to reach a harmonious interpretation. Indeed, the Court relied on the UNCRPD when deciding upon the obligation to provide reasonable accommodation to persons with disabilities in education,⁸⁴ tax matters,⁸⁵ and detention.⁸⁶ And yet in cases concerning deprivation of legal capacity it continues to refuse to do so, although it would be possible for States to provide reasonable accommodation to persons with mental disabilities in elections as well.⁸⁷ This selective reliance on the UNCRPD, depending on the case, is somehow illogical and confusing. The problem mainly lies in the fact that many States still hold onto their legal guardianship regimes, with which the Court does not want to interfere.

One possible solution, in line with the CRPD Committee views, would be to start from the premise that everyone has legal capacity, to be exercised with support where necessary. In limited cases, individual rights could be restricted, not because of lack of legal or mental capacity but because of serious reasons calling for such a restriction (like age, serious crime, lack of connection with the country). In the ECtHR case law, the prohibition of discrimination is not absolute and may be justified in certain cases, provided there is an “objective and reasonable” justification, and when disability is used as a ground for discrimination, the State must provide very weighty reasons for such a restriction. Similarly, the CRPD Committee accepted that any denial of

⁸⁰ICJ case of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, merits, judgment, 30 November 2010, ICJ, paras. 66–67, <https://www.icj-cij.org/en/case/103>.

⁸¹*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30 June 2005; paras. 152–158, <http://hudoc.echr.coe.int/eng?i=001-69564>. See, *a contrario*, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, 21 January 2011, <http://hudoc.echr.coe.int/eng?i=001-103050>.

⁸²*Al-Adsani v. The United Kingdom* [GC], no. 35763/97, 21 November 2001, para. 54, <http://hudoc.echr.coe.int/eng?i=001-59885>.

⁸³*Hassan v. The United Kingdom* [GC], no. 29750/09, 16 September 2014, para. 102, <http://hudoc.echr.coe.int/eng?i=001-146501>.

⁸⁴*Çam v. Turkey*, no. 51500/08, 23 February 2016, paras. 53, <http://hudoc.echr.coe.int/eng?i=001-161149>.

⁸⁵*Guberina v. Croatia*, *supra* note 74, paras. 70 and 73.

⁸⁶*Z.H. v. Hungary*, no. 28973/11, 8 November 2012, para. 43, <http://hudoc.echr.coe.int/eng?i=001-114276>.

⁸⁷Inclusion Europe Good Practices, *supra* note 70. Plena Inclusión Madrid, *Guía práctica sobre el derecho al voto. Elecciones 4 de mayo de 2021*, April 2021, <https://plenainclusionmadrid.org/recursos/guia-practica-derecho-voto-elecciones-lectura-facil/> [17]. See also the work of ENABLE Scotland, <https://www.enable.org.uk/get-support-information/membership/campaigns/our-campaigns/enablethetvote/>, and many more other projects at <https://zeroproject.org/>.

reasonable accommodation must be based on objective criteria.⁸⁸ The question arises whether the mental capabilities of a person can be objectively assessed. The CRPD Committee's answer to this question is no.

We all generally subscribe to certain values and perceptions about the world which do not always coincide with the values and perceptions of other people, especially when we are faced with language, concepts, and attitudes different from what we are used to in our daily lives. Historically, this resulted in negative attitudes and stereotypes against persons with disabilities which are still deeply rooted in society. Legal professionals should, therefore, make every effort possible to understand persons with disabilities and overcome communication barriers.

In its General Comment No. 18, the Human Rights Committee noted that “the principle of equality sometimes requires States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination”.⁸⁹ This view is shared by the ECtHR which held that in order to correct “factual inequalities” States Parties might be required to take positive action in the form of reasonable accommodation.⁹⁰ Unfortunately, the applicants in the Danish and the Spanish cases examined above do not seem to have raised any complaint to this effect. However, if such complaints were ever raised before the Court, it could be argued that there are practical solutions capable of being put in place to provide support to persons with disabilities in the exercise of their right to vote, which the States could make use of as part of their positive action to diminish or eliminate discrimination. These include providing accessible information about the election procedure, awareness-raising campaigns, training of polling station staff, and support networks.⁹¹

For the sake of consistency and clarity of international law, as well as legal security, the ECtHR should strive to follow the United Nations' approach of the human rights model of disability, prioritising the free and informed consent of persons with disabilities as active members of society. The Court took some progressive steps in terms of political participation of persons with disabilities, as it made clear that it will no longer accept blanket restrictions on the right to vote of persons under guardianship regimes, requiring an individual judicial assessment. Many European countries, the European Union, and the Council of Europe organs are increasingly moving towards ensuring the political participation of persons with disabilities. This will hopefully lead one day to a more uniform application of the UNCRPD in Europe and a change in the ECtHR's currently restrictive case law.

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⁸⁸CRPD Committee, General comment No. 6, *supra* note 11, para. 27.

⁸⁹Human Rights Committee, General Comment No. 18: Non-Discrimination, 10 November 1989 [15], para. 10, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6622&Lang=en.

⁹⁰*Çam v. Turkey*, *supra* note 84, paras. 54, 65–69.

⁹¹See *supra* note 87.

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References

1. Chamon, M.: Negotiation, ratification and implementation of the CRPD and its status in the EU legal order. In: Ferri, D., Broderick, A. (eds.) *Research Handbook on EU Disability Law*. Edward Elgar Publishing, Research Handbooks in European Law Series, pp. 52–70 (2020). https://cris.maastrichtuniversity.nl/ws/portalfiles/portal/60576559/Chamon_2020_Negotiation_Ratification_and_Implementation_of_the_CRPD_and_its_Status_in_the_EU_Legal_Order.pdf
2. Committee on Economic, Social and Cultural Rights: General Comment No. 3: The Nature of State Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990. <https://www.refworld.org/pdfid/4538838e10.pdf>
3. Committee on Rights of Persons with Disabilities (CRPD Committee): Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEU%2fCO%2f1&Lang=en
4. CRPD Committee: General comment No. 1 (2014), Article 12: Equal recognition before the law, CRPD/C/GC/1, 19 May 2014. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en
5. CRPD Committee: General comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, 26 April 2018. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en
6. CRPD Committee: Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fEU%2fCO%2f1&Lang=en
7. Degener, T.: Disability in a Human Rights Context, 26 August 2016. <https://www.mdpi.com/2075-471X/5/3/35>
8. European Economic and Social Committee: Real rights of persons with disabilities to vote in European Parliament elections, Rapporteur: Krzysztof Pater, SOC/554. <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/information-reports/real-right-persons-disabilities-vote-european-parliament-elections-information-report>
9. European Parliament resolution of 30 November 2017 on implementation of the European Disability Strategy (2017/2127(INI)) (2018/C 356/17). <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017IP0474&rid=3>
10. European Union Agency for Fundamental Rights (FRA): Legal capacity of persons with intellectual disabilities and persons with mental health problems, 2013. <https://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf>
11. FRA: Who will (not) get to vote in the 2019 European Parliament elections? Developments in the right to vote of people deprived of legal capacity in EU Member States, 2019. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-right-vote-ep-elections-legal-capacity_en.pdf
12. Gilson, E.: Vulnerability, ignorance, and oppression. *Hypatia* **26**(2) (2011). https://www.academia.edu/701615/Vulnerability_Ignorance_and_Oppression?auto=citations&from=cover_page
13. Gubbels, A.: The UNCRPD in European Union Law, Contribution to Academy of European Law (ERA) EU-funded seminar: Equal participation in society of persons with disabilities, on 24–25 October 2019. https://era-comm.eu/UNCRPD/kiosk/pdf/seminar_documents/s_c_419DV20.pdf
14. Harris, D.J., O'Boyle, M., Bates, E.P., Buckley, C.M.: *Law of the European Convention on Human Rights*, 2nd edn. Oxford University Press, London (2009)
15. Human Rights Committee: General Comment No. 18: Non-Discrimination, 10 November 1989. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6622&Lang=en

16. Inclusion Europe: Good Practices for Accessible Elections in Europe Produced as part of the project “Accommodating Diversity for Active Participation in European Elections” in May 2011. https://inclusion-europe.eu/wp-content/uploads/2015/04/Policy_Recommendations_EN.pdf
17. Plena Inclusión Madrid, *Guía práctica sobre el derecho al voto. Elecciones 4 de mayo de 2021*, April 2021. <https://plenainclusionmadrid.org/recursos/guia-practica-derecho-voto-elecciones-lectura-facil/>
18. Shaw, M.N.: *International Law*, 6th edn. Cambridge University Press, Cambridge (2008)

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