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‘Imagine all the people sharing all the rights’:  
The application of the United Nations Convention on the  
Rights of Persons with Disabilities in the practice of the  
European Court of Human Rights with a focus on the right to  
vote

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*The title is inspired by the song called 'Imagine' written by John Lennon.*

## Summary

The thesis covers human rights violations against persons with disabilities, focusing on their right to political life and the right to vote, using the framework of critical disability theory. The aim of the thesis is two-folded: it analyses the use of the UN Convention on the Rights of Persons with Disabilities (CRPD) in the adjudication of the European Court of Human Rights (ECtHR) with a focus on the right to vote of persons with disabilities. The CRPD aims at the maximum level of protecting the human rights of persons with disabilities, including the fundamental right to vote. However, the application of international human rights treaties might meet difficulties on the regional level, especially if there are differences in the two systems approach. Firstly, the research covers whether the CRPD is used in the practice of the ECtHR and what level of interpretative effect it has. Secondly, it focuses on what added value the material protection of the right to vote in the CRPD brings and whether this is applied in the practice of the ECtHR. To answer the questions, I relied on the text of CRPD, the ECHR, and the ECtHR case-law. In addition to it, I analysed non-binding international documents as well, such as the CRPD Committee's case-law and General Comments complemented with scholarly materials. Based on the analysis, it can be established that the ECtHR frequently uses the CRPD, but it is hard to establish a steady practice. Regarding the right to vote, it can be said that there is a tremendous potential added value of the CRPD to the protection of the right to vote of persons with disabilities, which is currently not realized through the practice of the ECtHR.

Keywords: disability law, right to vote, legal capacity, guardianship, European Court of Human Rights, CRPD

**List of abbreviations**

CCPR Committee	Committee of Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
USA	United States of America
VCLT	The Vienna Convention on the Law of Treaties

## 1.Introduction

### 1.1.Research problem

The thesis covers human rights violations against persons with disabilities, particularly their right to political life and the right to vote. The first aspect of the research problem is the application of the Convention on the Rights of Persons with Disabilities<sup>1</sup> in the practice of the European Court of Human Rights<sup>2</sup>. The CRPD aims at the maximum level of protecting the human rights of persons with disabilities, including the fundamental right to vote. However, the application of international human rights treaties might meet difficulties on the regional level. The ECtHR is only bound by the The European Convention of Human Rights.<sup>3</sup> Consequently, it might not take into consideration the CRPD during its adjudication. Therefore, the practical implementation of the CRPD might meet burdens in regional human rights protection.<sup>4</sup> The other aspect of the research problem is the difference between the level of protection of rights of persons with disabilities between the CRPD and ECtHR. The CRPD offers stronger protection of the rights of persons with disabilities than the ECtHR. For example, it allows no restrictions on legal capacity and the right to access to political life<sup>5</sup>. Meanwhile, the ECHR and ECtHR accept a wide range of restrictions if they are established by law, are in the public interest and are proportionate.<sup>6</sup>Hence why reaching the CRPD's full potential might fail in the practice of the ECtHR. For instance, an applicant can win a case with the CRPD Committee but have the same case rejected in front of the ECtHR. Also, they might win a case in front of a domestic court relying on the CRPD but might get rejected relying on the ECHR.<sup>7</sup> Authors suggest that to introduce a CRPD-compatible approach, states should pay attention to the environmental circumstances of persons with disabilities, which require them to be treated as legally fully competent right holders by promoting their active participation in society.<sup>8</sup>

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<sup>1</sup> Hereinafter: CRPD

<sup>2</sup> Hereinafter: ECtHR

<sup>3</sup> Hereinafter: ECHR

<sup>4</sup> Lewis, O., Council Of Europe, In: Waddington, L., Lawson, A (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice, A Commentary*, Oxford University Press 2018, at 90.

<sup>5</sup> UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 24 January 2007, Article 12 and Article 29

<sup>6</sup> See e.g. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, Article 8

<sup>7</sup> Lewis, O. In: Waddington, Lawson (eds), at 90.

<sup>8</sup> Waddington, L., Priestly, M., *A human rights approach to disability assessment* *Journal of International and Comparative Social Policy* Vol. 37 No.1. (2021) 1–15, at 12.

The thesis will focus on how the possible implementation of the CRPD works in the practice of the ECtHR and how big the room for improvement is. It will focus on the right to vote as a crucial civil right, which is a commonly restricted human right mainly of persons with intellectual disabilities. Domestic systems bring up the aim of 'preserving the political community' or 'preserving the integrity of the election process' and protecting against fraud to deprive persons with intellectual disabilities from the right to vote.<sup>9</sup> This affects the evergreen value of equality and non-discrimination, making persons with intellectual disabilities to become second class citizens.

Therefore, the thesis' dual problem is whether the CRPD is applied by the ECtHR and if it is, how it is done followed by an analysis on the possible present and future protection the right to vote.

## 1.2. Purpose and aims of the thesis

The purpose of thesis will give a perspective on how the ECtHR can bring the most out of protecting a social group whose rights are routinely infringed, which can contribute to finding ways to reach the highest level of protection of the rights of persons with disabilities under the jurisdiction of the ECtHR.

I hypothesize that there might be differences in how the CRPD and the ECtHR look at certain aspects of disability rights, which can provide possible challenges for the future of disability advocacy and set up barriers to reach the complete potential protection provided by the CRPD. This thesis aims to analyze CRPD's role in the practice of the ECtHR followed by the analysis of the possible level of protection of the right to vote of persons with disabilities by the ECtHR if the CRPD would be used at its full potential. The thesis will attempt to shed light on the effectiveness of the regional protection and promotion of persons with disabilities' rights through the lenses of the CRPD. Furthermore, it will evaluate whether the way the ECtHR allows restrictions on the right to vote of persons with disabilities could comply in any way with the CRPD's idea on the right to vote of persons with disabilities. It will also look at the possibilities for future improvements in this field. Therefore, the purpose is to analyse the effect of the CRPD on the ECtHR's disability adjudication and give solutions on how the possible discrepancies can be solved if possible. Another aim of the analysis is to problematize the contradiction between the liberal democratic view on human

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<sup>9</sup> R., Cera, Article 29, In: Della Fina, V., Cera, R., Palmisano, G. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities, A Commentary*, Springer, 2017, at 531.



rights of the ECtHR and the vast restrictions allowed on the fundamental right to vote of persons with disabilities. The provisions on political participation of the CRPD and its extent of application by the ECtHR will be analyzed.

### 1.3. Research questions

The hypothesis is that the ECtHR does not use the CRPD in its practice to maximize the protection of the rights of persons with disabilities and does not follow the CRPD's approach on the right to vote for persons with disabilities.

There are two main research questions of the present thesis. The first research question is whether or not the ECtHR applies the CRPD, and if it does, to what extent does the CRPD play an interpretative role, and how much weight does it have in the adjudication? The analysis is based on the disability related case-law of the ECtHR where CRPD was mentioned in any part of the judgment.

The CRPD accepts no restrictions on the right to vote of persons with disabilities.<sup>10</sup> It has vital importance, especially for persons with intellectual disabilities who commonly lose their right to vote as a consequence or as a part of losing their legal capacity. Therefore, the second research question of the thesis is if the protection of the right to vote of persons with disabilities in the ECtHR practice considers the added value of the CRPD's provisions about the protection of the right to vote and the practice of the CRPD Committee. This will focus on the level of actual protection and the potential protection of persons with disabilities right to vote under the adjudication of the ECtHR? Also, what is the added value of CRPD in regards to the right to vote? It will also look for whether there is a possibility to improve the protection of persons with disabilities under ECtHR jurisdiction.

### 1.4. Research material

The primary materials are most dominantly binding and non-binding legal materials. The binding documents cover ECHR, the CRPD and the case-law of the ECtHR, which is binding on the state which it concerns. The non-binding documents would be the General Comments of the CRPD and Communications of the CRPD Committee, which will be dominantly used in the second part of the analysis, focusing on the right to vote. Secondary materials would be

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<sup>10</sup> Article 29 a) of the CRPD states: “...states shall undertake to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others...”

commentaries on the ECtHR and the CRPD as well as articles of leading scholars in the field of disability. They will aim to ground the interpretation of the legal provisions and the case law.

### 1.5. Methodology

To answer the research questions, I use entirely qualitative data that earned through the research of written materials which consists of the above-mentioned binding and non-binding materials from the Council of Europe<sup>11</sup>, ECtHR, United Nations<sup>12</sup> and its CRPD Committee and the scholarly materials. The thesis focuses entirely on legal questions.

The first part of the thesis will analyze the application of the CRPD by the ECtHR during its adjudication. One of the thesis' main arguments is that the level of protection offered is higher in the CRPD than the ECHR; and that the ECtHR is not making the most out of the potential to protect the rights of persons with disabilities. To carry out this analysis, the thesis will look at the legal materials that consist of the text of the ECHR and the case-law of the ECtHR in light of its mandate, values, and interpretative tools. This analysis will focus primarily on the ECHR and the ECtHR case-law text using commentaries as secondary sources. To see the interpretative impact of the CRPD in the practice of the ECtHR an analysis on the disability-related case-law will be carried out. This will study the use of the CRPD by the ECtHR by focusing on each section of its judgement to see its impact in the adjudication. The division of the ECtHR cases will be divided into different thematical categories based on rights the applicant claim. Under each category, there will be an analysis of the ECtHR's practice on that specific topic based on the text of the case-law in the context of the mandate, tools and values of the ECtHR.

The second part of the thesis will analyze the provisions of the CRPD regarding the right to vote of persons with disabilities. Since this part of the thesis will rely on interpretation, the Vienna Convention on the Law of Treaties<sup>13</sup> will be a vital tool that states that treaties shall be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".<sup>14</sup> The VCLT further declares in Article 32 that the supplementary interpretational methods "are including the preparatory work of the treaty and the circumstances of its conclusion, *to confirm the*

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<sup>11</sup> hereinafter: CoE

<sup>12</sup> hereinafter: UN

<sup>13</sup> hereinafter: VCLT

<sup>14</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, Article 31. 1.

*meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31”*.<sup>15</sup> The analysis firstly looks at the content of state obligations of the CRPD under the right to vote, followed by to what extent it has a manifestation in the practice of the ECtHR. The also contains a contextual analysis of the right to vote in the view of non-discrimination and equality.

The thesis will mainly focus on judicial practice in the view of *lege lata*; however, it will provide suggestions on how to reach the full potential of the protection provided by the CRPD in the practice of the ECtHR.

## 1.6. Theory

In this thesis, the theory I rely on is critical disability theory, a theoretical scheme to analyze issues around disability.<sup>16</sup> It looks at how the values of liberalism are realized in the life of persons with disabilities.<sup>17</sup> This theory puts, in its centre, the way persons with disabilities experience their disabilities and reality as an outcome of social and political relations.<sup>18</sup> It challenges the idea that disability is something to cure or correct and refuses to treat persons with disabilities as "*tragic victims*".<sup>19</sup> The theory aims to realize accommodation and equality for persons with disabilities and overcome the practice of the previous social and medical models where they would offer certain benefits that might not be the actual need of persons with disabilities instead of overcoming the barriers that they face to reach their full potential; for instance in the field of education or employment.<sup>20</sup> This theory uses the 'indispensability' of rights to claim and realize the equality and inclusion of persons with disabilities and advocate for the diversity of society.<sup>21</sup> It means that rights cannot be replaced with any other tools or ideas to realize specific social goals<sup>22</sup>, including the inclusion and full autonomy of persons with disabilities.

Critical disability theory targets the promotion of personal autonomy and the liberal rights of persons with disability so that they can fully participate in society. It looks at how liberal

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<sup>15</sup> Ibid. Article 32. 1.

<sup>16</sup> Hosking, D. L., Critical Disability Theory, A paper presented at the 4th Biennial Disability Studies Conference at Lancaster University, UK, Sept. 2-4, 2008, at 1.

<sup>17</sup> Ibid., at 5.

<sup>18</sup> Reaume, G., Understanding Critical Disability Studies, Canadian Medical Association Journal, Vol. 186 No.16, (2014),1248–1249., at 1248

<sup>19</sup> Ibid., at 1248.

<sup>20</sup> Ibid., at 1248

<sup>21</sup> Hosking, at 12.

<sup>22</sup> Gewirth, A., Why Rights Are Indispensable, *Mind*, New Series, Vol. 95 No.379 (1986), 329-44., at 344.

rights theory fails to address the issues of persons with disabilities and realizing their rights in the context of equality.<sup>23</sup> The critical disability theory, therefore, would provide an excellent framework to analyze the level of impact of the CRPD in the regional human rights protection of the ECtHR. Furthermore, the principles of this theory can support the unrestricted and universal right to vote, which is one of the key perspectives of the CRPD as well as an inevitable part of the realization of personal autonomy and liberal democracy.

### 1.7. Outline

Chapter 2 of the thesis introduces the analysis of the first research question by looking at the differences between the system of the regional human rights protection offered by the ECtHR using the ECHR and the CRPD. The first subchapter analyzes the mandate of the ECtHR (2.1.1), and the second subchapter (2.1.2.) analyzes the interpretative tools of the ECtHR. The third subchapter (2.1.3.) will include a general introduction of the values of the ECtHR developed and used during its adjudication practice. This is followed by the introduction of CRPD's human rights approach with a slight focus on specific differences between the two systems (2.2.). This part helps to set the framework for the first research question. Chapter 3 will focus on the use of the CRPD by the ECtHR through a thematic analysis of its disability adjudication with the different thematic categories as subchapters. The chapter will include the following rights as subchapters: 3.1. Disability-based involuntary detention, 3.2. "Will and preferences" and access to justice, 3.3 Independent living, 3.4. Ill-treatment and denial of reasonable accommodation, 3.5. Right to life and freedom, 3.6. Right to vote. Each subchapter will include an analysis of the practice of the ECtHR of each right. Chapter 4 will then focus on the second research question by looking at different aspect of the right to vote and legal capacity. It will firstly include the general restrictions applied on the right to vote of persons with disabilities on international and domestic level (4.1). After this, the provisions of the CRPD on the right to vote will be introduced (4.2) based on the positive and negative state obligations and in the light of equality and non-discrimination. This is followed by a subchapter on legal capacity and individual decision-making skills in the view of the CRPD (4.3). There will be also a subchapter on the right to vote in the view of guardianship and assessment procedures (4.4.). Finally there will be a subchapter on the practice on the right to vote in international adjudication (4.5.) The thesis will be concluded by a summary of the

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<sup>23</sup> Hosking, at 12.

findings under the two research questions; the use of the CRPD in the practice of the ECtHR and the possible level of protection of the right to vote in the ECtHR's adjudication.

## 2. CRPD and ECHR – instruments and interpretation

The ECHR was signed in 1950 and entered into force in 1953. It had a vital impact on the human rights system in Europe since the drafters did not only list certain human rights in the document but also sets forth a monitoring system.<sup>24</sup> The ECtHR's aim, which was established in 1959 was *“To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”*<sup>25</sup>.

### 2.1. The mandate of the ECtHR and the main values used as interpretative and decision-making tools

#### 2.1.1. The mandate of the ECtHR

In order to grasp what the ECtHR considers to be its mandate, it is vital to highlight the principle of subsidiarity. The principle of subsidiarity is going hand in hand with the principle of primarity, which means that obligations of the protection of the rights enshrined by the ECHR lie within the domestic authorities; therefore, the ECtHR checks whether or not the member states have fulfilled their duties, which is the principle of subsidiarity.

According to this idea, the ECtHR's practice mandate is limited to those cases where the domestic courts cannot provide 'effective protection' of the rights that are enshrined in the ECHR.<sup>26</sup> In the Belgian Linguistics case, the ECtHR stated out, that *“the national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention and the review (...) concerns only the conformity of these measures with the requirements of the Convention.”*<sup>27</sup> The principle of subsidiarity however is also called an invitation to an *“increased diversity in the protection of human rights”*.<sup>28</sup> On one hand this can inspire the states to *“bring the rights home”*<sup>29</sup>, but on the other might

<sup>24</sup> Gerards, J, General Principles of the European Convention of Human Rights, Cambridge University Press, 2019, at 1.

<sup>25</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Article 19.

<sup>26</sup> Conversations between judges, European Court of Human Rights, at 7. , Strasbourg 2012, [https://www.echr.coe.int/Documents/Dialogue\\_2012\\_ENG.pdf](https://www.echr.coe.int/Documents/Dialogue_2012_ENG.pdf)

<sup>27</sup> Case "Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium" V. Belgium, 9 February 1967, ECtHR, App. Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 Belgian Linguistics Case, I.B.10.

<sup>28</sup> Spano, R, Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, Human Rights Law Review, Vol.14 No.3 (2014) 487–502, at 491.

<sup>29</sup> Ibid. at 491.

end up with having different answers to similar human rights issues country by country.<sup>30</sup> According to the ECtHR, in practice, the principle of subsidiarity means that the states have certain freedom on how to realize the rights in the ECHR, especially in more ‘sensitive’ matters. The ECtHR grants a margin of appreciation<sup>31</sup> for the states to realize subsidiarity.<sup>32</sup> Although, this does not mean ‘full discretion’. Based on the principle of primarity, the state has to ensure and realize a ‘minimum level of protection’, which is assessed by the ECtHR in relation to individual claims for human rights violations.<sup>33</sup>

Therefore, the ECtHR’s aim is to protect those human rights that are included by the ECHR and its Protocols within the jurisdiction of the State Parties. In this context, the obligation of the states is to effectively secure these rights, where the ECtHR’s task is to correct the mistakes and pitfalls that might occur in the domestic protection of human rights.<sup>34</sup>

The main duty of the ECtHR is to decide whether certain restrictions do establish human rights violations that cannot be excused in cases that arrive from different states with different legal systems.<sup>35</sup> *“One of the aims of the ECHR is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms”*<sup>36</sup>.

It is definitely note-worthy to highlight, that the ECtHR developed a principle that is frequently used in its case-law: *“the Court takes into account relevant international instruments and reports in order to interpret the guarantees of the Convention and to establish whether there is a common standard in the field concerned. It is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute to them.”*<sup>37</sup> Based on this, it can be confirmed that the ECtHR considers itself to be bound only by the ECHR. It has the authority to decide if it uses another international legal instrument besides ECHR and if it does, which one.

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<sup>30</sup> Ibid., at 491.

<sup>31</sup> Explained in chapter 2.1.

<sup>32</sup> Gerards, at 7

<sup>33</sup> Ibid., at 7.

<sup>34</sup> Ibid., at 9.

<sup>35</sup> Ibid., at 3.

<sup>36</sup> ECHR, Preamble

<sup>37</sup> See e.g. in A.-M.V. V. Finland § 74.

### 2.1.2. *The interpretative tools of the ECtHR*

By interpretative tools, those techniques are meant, which have been developed by the ECtHR itself. They all have in common that they reinforce the idea that human rights are not ‘frozen in time’, and in addition, they serve as an ‘aid’ to provide a clear reasoning and strengthen transparency.<sup>38</sup>

The idea of effectiveness is one of the most important principles of interpretation of the ECtHR, which the case-law has constantly referred to.<sup>39</sup> Based on the ECtHR’s practice, the main obligation to provide human rights is the obligation of the national legal systems, where the principle of effectiveness is a vital practical help to establish the member states’ exact positive obligations.<sup>40</sup>

In one of its early judgements, the ECtHR stated that the ECHR’s aim is “*intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.*”<sup>41</sup> In the case of *X and Y v. The Netherlands*, the impossibility of the right to file for criminal proceedings because of mental disability was declared a violation of right to private life, since the state has positive obligations in this regard in order to provide ‘practical and effective’ protection.<sup>42</sup>

Another important interpretative tool is the ‘living instrument’ doctrine, which means that the ECHR “*must be interpreted in the light of present-day conditions*”.<sup>43</sup> In its further practice, the ECtHR stated that the content of the ‘living instrument’ doctrine is the “*evolving norms of national and international law in its interpretation of Convention norms*”.<sup>44</sup> The ECtHR declares that certain acts of states “*could be classified differently in future.*”<sup>45</sup> This is vital to mention because looking at the ‘time difference’ between the CRPD and the ECHR as well as the changing approaches in regards to disability law, this might affect the future impact of the CRPD. It elaborates that the “*increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and*

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<sup>38</sup> Gerards, at 249.

<sup>39</sup> *Ibid.*, at 4.

<sup>40</sup> *Ibid.*, at 5.

<sup>41</sup> *Airey v. Ireland*, ECtHR 9 October 1979, App. No. 62891/73, § 24.

<sup>42</sup> *X and Y v. the Netherlands*, ECtHR 26 March 1985, App. No. 8978/80, § 28-30.

<sup>43</sup> *Tyrer v. the United Kingdom*, ECtHR 25 April 1978, App. No. 5856/172, § 31.

<sup>44</sup> *Demir and Baykara v. Turkey*, ECtHR (GC) 12 November 2008, App. No. 34503/97, § 68.

<sup>45</sup> *Selmouni v. France*, ECtHR, (GC) 28 July 1, Application No. 25803/94 § 101



*inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.*"<sup>46</sup>

Another important interpretative tool that the ECtHR uses is the 'European consensus', which was also developed through case-law. It refers to a 'certain level of uniformity' regarding the domestic legal structures of the member states.<sup>47</sup> The ECtHR relied on the lack of European consensus a lot, e.g. when it came to abortion. It stated that since there is no European consensus on the definition of the beginning of life, the States should enjoy a certain margin of appreciation.<sup>48</sup> To establish 'European consensus', it is enough to have "*clear and uncontested evidence of a continuing international trend.*"<sup>49</sup> Furthermore, the ECtHR can also accept a new version of an interpretation of an aspect of a right enhanced in the ECHR if there is a 'clear European consensus' on it<sup>50</sup>. It also emphasized that during the adjudication, the 'European consensus' should prevail, which can ensure the "equal level of protection" and keep the integrity of the ECHR.<sup>51</sup> This method can also be used to avoid using new interpretation methods if it does not fit the given national legal system. This can be considered a promotion of the diversity of the protection of human rights.<sup>52</sup>

The ECtHR also developed the so-called "autonomous interpretation" as an interpretative tool, meaning that when there is a difference in the definition of certain legal categories in different legal systems, the ECtHR chooses whether to use its interpretation or the national one.<sup>53</sup>

The margin of appreciation doctrine allows a certain level of freedom to decide on the domestic regulation that ensures the enjoyment of human rights in the ECHR.<sup>54</sup> It depends on the specific right; for instance, when it comes to the prohibition of torture, the ECtHR has to make thorough scrutiny. The same practice is noted when it comes to any positive obligation regarding the right to life.<sup>55</sup> The margin of appreciation aims to allow the ECtHR to assess how strictly it will assess the domestic legislation regarding the positive and negative obligations that states have under the ECHR.<sup>56</sup> The ECtHR differentiates three main

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<sup>46</sup> Ibid. § 101.

<sup>47</sup> Council of Europe, Interpretative mechanisms of ECHR case-law: the concept of European consensus, <https://www.coe.int/en/web/help/article-echr-case-law>

<sup>48</sup> Evans v. United Kingdom, ECtHR 7 March 2006, App. No. 6339/05, § 46.

<sup>49</sup> Goodwin v. the United Kingdom, ECtHR (GC) 11 July 2002, App. No. 28957/95, § 85

<sup>50</sup> Gerards, at 91.

<sup>51</sup> Ibid., at 65.

<sup>52</sup> Ibid., at 94.

<sup>53</sup> Ibid., at 67.

<sup>54</sup> Ibid., 168.

<sup>55</sup> Ibid., 169.

<sup>56</sup> Ibid., 196.

categories: narrow, certain and wide margin of appreciation; however, they do not include any set of specific procedural burdens on the applicant or the state.<sup>57</sup> The ECtHR's focus is mainly on whether or not the state's infringement is "unreasonable or disproportionate" when it comes to the wide margin of appreciation".<sup>58</sup> When there is a narrow margin, it is up to the state to prove whether the restriction was the outcome of thorough and objective assessment, whereas ('certain') margin of appreciation refers to medium-level scrutiny.<sup>59</sup> If there is no 'common ground' regarding the subject matter, the ECtHR will usually rely on a wide margin of appreciation.<sup>60</sup> When it comes to morally and ethically 'sensitive' questions<sup>61</sup> or when there are competing rights of individuals of the ECHR involved in the case<sup>62</sup>, the ECtHR rely on that the national authorities are "*better placed*" to assess the interference with a certain human right and grants wide margin of appreciation.<sup>63</sup>

### 2.1.3. *The core values of the ECtHR*

Based on the practice of the ECtHR, there are four core values of the ECHR, which are democracy, pluralism, dignity and autonomy<sup>64</sup>. It is vital to highlight dignity and autonomy, especially when it comes to disability rights. Despite, dignity itself is not included by the ECHR<sup>65</sup>, the case law puts an emphasis on this value. The ECtHR declared that "*the very essence of the Convention is respect for human dignity and human freedom*"<sup>66</sup>. Besides mentioning it as a core value, throughout the practice, the ECtHR did not pursue to define the actual content of human dignity.<sup>67</sup> In regards to autonomy, the ECtHR declared that "*the notions of self-determination and personal autonomy are important principles underlying the interpretation of its guarantees.*"<sup>68</sup> It "*can embrace multiple aspects of a person's physical and social identity*".<sup>69</sup>

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<sup>57</sup> Ibid., at 165.

<sup>58</sup> Ibid., at 166.

<sup>59</sup> Ibid., at 167.

<sup>60</sup> Ibid., at 173.

<sup>61</sup> Ibid., at 177

<sup>62</sup> Ibid., at 187.

<sup>63</sup> Chassagnou and Others v. France, ECtHR (GC) 29 April 1999 25088/94, § 13.

<sup>64</sup> Gerards, at 186.

<sup>65</sup> Della Fina, V., Article 3, In: Della Fina, Cera, Palmisano (eds), at 122.

<sup>66</sup> Pretty v. United Kingdom, ECtHR, 29 July 2002, Application No. 2346/02, § 65.

<sup>67</sup> Gerards, at 62.

<sup>68</sup> Jehovah's Witnesses of Moscow and Others v. Russia, ECtHR 10 June 2010, Application No. 302/02, § 135.

<sup>69</sup> R.B. v. Hungary, ECtHR, 12 April 2016, Application No. 64602/12, § 78.

## 2.2. The CRPD and its human rights approach

Before the adoption of the CRPD, the main documents focusing on the rights of persons with disabilities were the United Nations General Assembly Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care in 1991 and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1993.

The CRPD and its Optional Protocol entered into force in 2008 after being ratified for the 20<sup>th</sup> time and for the 10<sup>th</sup> time the Optional Protocol, so it is a very young international convention compared to the ECHR.<sup>70</sup> It “*emerged from the failure from the non-thematic human rights instruments to adequately protect human rights.*”<sup>71</sup> The main aim of the CRPD is to provide human rights *on an equal basis with others* without any discrimination. Persons with disabilities were considered “objects” rather than right-holders; therefore, the CRPD’s goal was to re-establish the idea of “*universality, indivisibility, interdependence and interrelatedness of human rights*”<sup>72</sup>. It is completing the UN treaties by containing those civil, political and social rights that are already existing, alongside other rights and fields that require a more applied disability approach in order to ensure that persons with disabilities can live independently and participate in all aspects of life (e.g. Right to independent living and accessibility).<sup>73</sup> The CRPD is a “global human rights treaty”<sup>74</sup>, so its aim is global, and its scope is broad which 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.*”<sup>75</sup> It uses a human rights approach, which means that persons with disabilities should be treated as right-holders and the focus is on their interaction with the social and physical barriers they meet when they try to realize their human rights. The CRPD denies the medicalization and the individualization processes regarding disability that has been a historical practice.<sup>76</sup> The issue with this is that the medical professionals are always present when it comes to the disability assessment regarding the social security systems. Therefore, the CRPD would like to put a system into force where they do not disregard the environment of the person with disabilities and avoid the use of rigid medical categorization. CRPD focuses on the interactions of the individual with society and their

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<sup>70</sup> <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/entry-into-force.html>

<sup>71</sup> Della Fina, V., Article 1., In Della Fina, Cera, Palmisano (eds), at 93.

<sup>72</sup> Ibid., at 93.

<sup>73</sup> Ibid., at 93-94.

<sup>74</sup> Waddington, Priestley, at 2.

<sup>75</sup> CRPD, Article 1.

<sup>76</sup> Waddington, Priestley, at 12.

possible needs to ease this interaction. It can be promoted, for instance, with the increased possibilities of participation of the persons with disabilities and their organizations.<sup>77</sup> The CRPD is a core document of international human rights law, and it has the exact status of other international human rights treaties.<sup>78</sup> It lays down three main types of obligations: to promote, protect, and ensure the human rights of persons with disabilities. It uses a very comprehensive vocabulary, where the words have precise meanings, such as ‘universal design’, ‘reasonable accommodation’, ‘discrimination based on disability’.<sup>79</sup> Positive and negative obligations are also given in a concrete form under each Article<sup>80</sup>. The CRPD Committee also consistently relies on the human rights approach to keep a steady practice. In comparison, the ECtHR relies more on its own assessment of the ECHR, which might vary on a case by case basis.<sup>81</sup> The main point of the human rights approach is to see that disability is a “social construct” and disability – no matter what kind - should not be treated as a ground for deprivation of any human rights, and the diversity of persons with disabilities should be taken into account.<sup>82</sup>

It is important to stress the role of dignity in the CRPD. The CRPD uses the word “dignity” more than any other UN Human Rights Treaties. The ECtHR considers it also as a core value in its practice, however its meaning and content was developed during its adjudication.<sup>83</sup>

In the previous analysis, it can be established that even though the CRPD is a global human rights treaty, the language and system is more concise and less reliant on how different trends might change.

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<sup>77</sup> Ibid., at 4-5.

<sup>78</sup> Kayess, R., French, P. Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities, *Human Rights Law Review*, Volume 8, No.1 (2008), 1–34, at 20.

<sup>79</sup> Ibid., at 26.

<sup>80</sup> Harpur, P, Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities, *Disability & Society* Volume 27, No.1 (2012), at 7.

<sup>81</sup> Lawson, A., Beckett, A. E. (2021) The social and human rights models of disability: Towards a complementarity thesis, *The International Journal of Human Rights*, Vol. 25. No. 2, 348-379, at 358.

<sup>82</sup> CRPD Committee, General comment No. 6 (2018) on equality and non-discrimination, 26 April 2018 § 9.

<sup>83</sup> UN Committee on the Rights of Persons with Disabilities, General Comment No. 6. On Equality and Non-discrimination, CRPD/C/GC/6, Adopted 9 March 2018, § 6.

### 3. The CRPD in the practice of ECtHR

The ECHR states that its mandate covers the interpretation and application of the ECHR and its Protocols.<sup>84</sup> Even if the interpretation of other international legal documents might fall outside of the mandate of the ECtHR, it still refers to some of them during its practice. It could be because the ECtHR considers the ECHR a ‘living instrument’, which means that it can be applied to contemporary legal issues that might not be touched upon by the ECHR per se. The ECtHR has the force to interpret the ECHR but does not have any exact guide. Therefore it relies on the values and tools developed through its practice allowing international treaties as well to be a help to the ECtHR when it comes to interpretational issues.<sup>85</sup> Even though the mandate does not cover the interpretation of international documents apart from ECHR, the decisions usually contain a part called ‘relevant international law’, which contains articles from international documents topical to the case and influential to the judicial decision making. In Oliver Lewis’ words, this “leaves the scholar in the conundrum” regarding how much of an interpretative role the CRPD plays in the ECtHR’s practice.<sup>86</sup> The ECtHR commonly cites the CRPD as a part of relevant international law among the factual elements of the case without referring to it in other parts of the judgment or expressively stating out how much of a role it played in the decision-making.<sup>87</sup>

The analysis will focus on the judgments where the ECtHR mentions the CRPD and its possible effect in those judgements where it is mentioned. The analysis covers the following steps:

1. Whether or not the CRPD or other CRPD Committee document is mentioned among the relevant international law.<sup>88</sup> Relevant international law can be found under the facts of the case. This is important because it clarifies the context and the background material.<sup>89</sup>
2. The use of CRPD in The Court’s assessment. The Court’s assessment can be found under the part called Law which is following the Facts. The section of Law has two parts: Admissibility and Merits. Under Merits, The Court’s assessment can be found

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<sup>84</sup> ECHR Art. 32.

<sup>85</sup> Della Fina, V., Article 1., In: Della Fina, Cera, Palmisano (eds), at 92.

<sup>86</sup> *Ibid.*, at 95.

<sup>87</sup> *Ibid.*, at 102.

<sup>88</sup> This is sometimes mentioned as relevant international text, relevant international treaties, relevant United Nations document or relevant international materials. E.g. *Plesó v. Hungary* § 37; *Bataliny v. Russia*, § 54, *Dorđević v. Croatia* § 79., *Kocherov v. Russia*, § 57.

<sup>89</sup> Della Fina, V., Article 1., In Della Fina, Cera, Palmisano (eds), at 102.

and under The Court's assessment, the ECtHR firstly elaborates the 'general principles' relevant to the case. Secondly, a section of the 'application of these principles on the factual elements of the case' can be found. It is important to focus on The Court's assessment as this uncovers if the CRPD had any impact in the decision-making of the ECtHR and to what extent the CRPD was used in the ECHR interpretation. The analysis highlights whether the CRPD itself or some other CRPD Committee document is mentioned in the assessment.

3. The Merits include the submission of the parties as well. The analysis will further focus on if the CRPD is mentioned by a third-party intervener or the applicant and whether the ECtHR has reacted to that. It will also mention if the CRPD was cited by any domestic regulation or decision made by a domestic authority.
4. If the ECtHR established a violation of the ECHR.

The cases will be put into thematical categories.<sup>90</sup> The reason for the categories is that applicants of the cases in the HUDOC-database, which cite the CRPD, claimed those rights under the ECHR that belong under certain rights of the CRPD. Since the use of the CRPD is in the focus, I decided to categorize the cases based on the CRPD. Therefore, the categories will be the following:

1. Disability-based involuntary detention,
2. Will and preferences and access to justice,
3. Living independently and being included in the community,
4. Ill-treatment and denial of reasonable accommodation in prisons or in regards to civilian obligations,
5. Right to life and freedom,
6. Right to vote.

### 3.1. Involuntary detention

In the case of *Plesó v. Hungary*, the case was about a man with schizophrenia who was ordered to receive obligatory psychiatric treatment. His psychiatrist said he could not take care of himself, although he received financial aid and lived with his family members.<sup>91</sup> Among the factual elements, the ECtHR included Article 12 of CRPD as a relevant

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<sup>90</sup> Oliver Lewis used the following categories:

Disability- based detention, (2) Will and preferences, (3) Living independently and being included in the community, (4) Access to justice, (5) Ill- treatment and denial of reasonable accommodation in prisons, (6) Right to life and freedom, book reference, at 108.

<sup>91</sup>*Plesó v. Hungary*, ECtHR, 2 October 2012, Application No. 41242/08, §§ 6-25.

international law.<sup>92</sup> It was not mentioned as part of the Merits. The ECtHR has declared a human rights violation because it was not convinced that the mental health issue was severe enough that the applicant had to be put in compulsory confinement.<sup>93</sup>

In the *Stanev v. Bulgaria* case, where the matter was the lawfulness of detention of persons with intellectual disabilities, the ECtHR mentioned Article 12 and 14 CRPD as a part of relevant international law as a part of Facts.<sup>94</sup> The ECtHR mentioned in the Merits under The Court's assessment, that because of the "*emerging in national legislation and the relevant international instruments*", Article 6 § 1 of the ECHR should be interpreted in a way that it grants the right to file for restoration for persons who are partially deprived of their legal capacity.<sup>95</sup> It referred to the CRPD in general at the very end of the judgement in the section of the application of the general principles under The Court's assessment: "*The Court is also obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible*".<sup>96</sup> The ECtHR declared the violation of the rights claimed by the applicant. It considered that the degrading circumstances in the detention and the inability to file a case because of his guardianship made the applicant feel "*helplessness and anxiety*".<sup>97</sup>

In *DD v. Lithuania*, where the applicant was placed in a home after being legally decapitated, the ECtHR mentioned Article 12 and 14 of CRPD under the section of relevant international law as a part of Facts.<sup>98</sup> However, it did not mention the CRPD in the Merits. The ECtHR declared the violation of Article 5 §4 because of the impossibility for the applicant to file for the court revision of the decision for her detainment because she was partially legally decapitated,<sup>99</sup> but it did not declare violation because of the psychiatric detainment.<sup>100</sup>

The case of *Mockutė v. Lithuania* involved an applicant who was receiving psychiatric treatment against her will after having symptoms of depression following her becoming a member of a religious group.<sup>101</sup> The case mentioned the Preamble and Article 22 of the

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<sup>92</sup> *Ibid.*, § 37.

<sup>93</sup> *Ibid.*, § 69.

<sup>94</sup> *Stanev v. Bulgaria*, ECtHR, 6 November 2012 Application No. 36760/06, § 72.

<sup>95</sup> *Ibid.*, §245.

<sup>96</sup> *Ibid.*, § 244.

<sup>97</sup> *Ibid.*, § 263.

<sup>98</sup> *DD v Lithuania*, ECtHR, 14 February 2012, App. No. 13469/06, § 84.

<sup>99</sup> *DD v. Lithuania*. §§ 166-167.

<sup>100</sup> *Ibid.* §§ 157-158.

<sup>101</sup> *Mockutė v. Lithuania*, ECtHR, 27 February 2018, Application no. 66490/09, §§ 1-6

CRPD as relevant international law as a part of Facts.<sup>102</sup> The ECtHR considered the CRPD in the Merits under the section of The Court's assessment in connection to the analysis on whether there was an interference with the applicant's right to respect of private life. Furthermore, the judgment mentioned under the section of the application of the principles to the present case that the CRPD states that signatory states "*have a duty to protect persons with disabilities from unlawful attacks on their honour and reputation*".<sup>103</sup> In the end, the ECtHR declared a violation of Article 9.<sup>104</sup>

In *Fernandes Oliveira v. Portugal*, the applicant was claiming the violation of Article 2 and Article 6 as his son committed suicide in a psychiatric hospital where he has been hospitalized based on his own will.<sup>105</sup> The ECtHR mentioned Article 10, 12, 14, 25, and the CRPD Committee's interpretation of Article 14 and 25 in General Comment of Article 12 and its Guidelines on Article 14 under Facts as a part of relevant international law.<sup>106</sup> Despite this, the ECtHR did not mention the CRPD in the Merits under The Court's assessment, although it established the violation of Article 2 of ECHR.

The case of *Sykora v. the Czech Republic* was in relation to the alleged violation of Article 8 because of medical treatment against the applicant's will who has a psycho-social disability and stopped medication because of its effect on his eyesight.<sup>107</sup> Article 12 and 14 of the CRPD was mentioned again in the part of relevant international law.<sup>108</sup> Although the Harvard Law School Project requested the use of the CRPD in a third-party submission under Merits, the ECtHR did not mention the exact reference made by the amicus brief.<sup>109</sup> The ECtHR did not mention the CRPD further under the Merits as a part of The Court's assessment but established the violation of Article of the ECHR.<sup>110</sup>

In *Bataliny v. Russia*, the lawfulness of the psychiatric detention of the applicant was contested.<sup>111</sup> Based on the applicant's claims, he was beaten up by the nurses and other hospital patients.<sup>112</sup> The ECtHR stated Article 15 of CRPD, among other international law, as a factual element in regards of medical treatment and experimenting, but it was not

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<sup>102</sup> Ibid. § 73.

<sup>103</sup> Ibid., § 97.

<sup>104</sup> Ibid., §§ 129-131.

<sup>105</sup> *Fernandes Oliveira v. Portugal*, ECtHR, 31 January 2019, Application No. 78103/14, § 3.

<sup>106</sup> Ibid., § 69.

<sup>107</sup> Ibid., § 6.

<sup>108</sup> *Sykora v. Czech Republic*, ECtHR, 22 November 2012, Application No. 23419/07, § 41.

<sup>109</sup> Ibid., § 58., § 113.

<sup>110</sup> Ibid., § 8

<sup>111</sup> *Bataliny v. Russia*, ECtHR, 23 July 2015, Application No. 10060/07, § 3.

<sup>112</sup> Ibid., §§ 6-14.



mentioned under Merits in The Court’s assessment.<sup>113</sup> However, it declares the violation of Article 3 of ECHR, since the Government hasn’t “*advanced any explanation as to the origin of the first applicant’s injuries.*”<sup>114</sup>

Based on the case-law mentioned above, in involuntary detention, the ECtHR cites the articles of the CRPD among the Facts as relevant international law. It can be considered that the CRPD played a role as part of the legal framework that sets out the provision regulating disability law. The CRPD seems to have an interpretative impact in the *Stanev v. Bulgaria* and the *Mockutė v. Lithuania*, where the ECtHR mentioned the CRPD under Merits in The Court’s assessment. It is not possible to establish a trend in the application of the CRPD since the only common point is the citation as part of the international legal framework. Nevertheless, it is worthy of highlighting in the view of material protection that obligatory psychiatric treatment without consent is not necessarily enough to establish a violation of the ECHR.<sup>115</sup>

### 3.2. ‘Will and preference’ and access to justice

I decided to analyze the cases concerning will and preference together with access to justice because both of these cover legal capacity issues. By the restriction or deprivation of legal capacity, persons with disabilities lose their *de jure* ability to make or realize their wills and preferences and their right to access to justice is violated.

In *MS v. Croatia*, the case was about the deprivation of legal capacity of the applicants with persistent psychotic disorder who were legally decapacitated after committing some minor criminal offences.<sup>116</sup> The ECtHR has mentioned Article 12 of the CRPD in Facts among the relevant international law.<sup>117</sup> The CRPD was not mentioned in the rest of the judgment, but the ECtHR declared the violation of Article 8 of the ECHR because the domestic court did not grant certain guarantees during the guardianship procedures.<sup>118</sup>

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<sup>113</sup> *Ibid.*, § 54.

<sup>114</sup> *Ibid.*, §113.

<sup>115</sup> Article 15 1. Of the CRPD: “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.*”

<sup>116</sup> *MS v. Croatia*, ECtHR, App. No. 36337/10, 25 April 2013, §§ 4-53.

<sup>117</sup> *Ibid.*, § 57.

<sup>118</sup> *Ibid.*, § 108.

In *Ivanovic v. Croatia*, the matter was a restriction on the legal capacity of the applicant who had cerebral palsy.<sup>119</sup> The ECtHR mentioned Article 12 of the CRPD in the Facts under relevant international law but did not mention it in The Court's assessment where it established the violation of Article 8 of ECHR.<sup>120</sup>

In the *Lashin v. Russia* case, the applicant has schizophrenia who was deprived of his legal capacity and was hospitalized against his will.<sup>121</sup> Similarly to the previous case, the ECtHR mentioned Article 12 § 3-4 and Article 23 (a) of the CRPD among Facts under the relevant international law but did not include it under the Merits in The Court's assessment.<sup>122</sup> The ECtHR stated that the placement of the applicant under guardianship was disproportionate, therefore there has been a violation of Article 8 of ECHR.<sup>123</sup>

In *Mihailovs v. Latvia* the case involved an applicant with epilepsy who after losing his legal capacity was first placed to a social care institution followed by his admission to a psychiatric hospital.<sup>124</sup> The ECtHR cited again Article 12 and 14 of the CRPD in Facts under relevant international law.<sup>125</sup> The judgment mentioned a summary of the briefs handed in by third-party interveners, which "*set forth the latest standards of international human rights law concerning people with disabilities*".<sup>126</sup> The third-party interveners also "*endorsed a dynamic interpretation*" of the ECHR and highlighted the importance of the CRPD.<sup>127</sup> They mentioned that the Special Rapporteur considers any "*denial of liberty where disability is a factor to a deprivation of the right to liberty and thus in conflict with Article 14 of the CRPD*"<sup>128</sup>. The ECtHR did not mention the CRPD in the Merits under The Court's assessment. The ECtHR declared the violation of Article 5 §1 and §4 due to lack of proof regarding the acceptance of the applicant's placement in a shelter home and the lack of legal remedies<sup>129</sup>

In the *R.P. v. the UK* the case involved the applicant with mental disability who was receiving mental health care. His child was placed in foster care, because according to the authorities, he was unable to take care of her.<sup>130</sup> The ECtHR cited Article 1, 5, 12, 13 and 23

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<sup>119</sup> *Ivinovic v. Croatia*, ECtHR, 18 September 2014, Application no. 13006/13, § 6.

<sup>120</sup> *Ibid.*, §§ 21, 46

<sup>121</sup> *Lashin v. Russia*, ECtHR, 22 January 2013, Application No. 33117/02, §§ 7-11.

<sup>122</sup> *Ibid.*, at § 66.

<sup>123</sup> *Ibid.*, §§ 93 and 124

<sup>124</sup> *Mihailovs v. Latvia*, ECtHR 22 January 2013, 35939/10, §§ 1-59.

<sup>125</sup> *Ibid.*, § 62.

<sup>126</sup> *Ibid.*, § 123.

<sup>127</sup> *Ibid.*, § 123.

<sup>128</sup> *Ibid.*, §124.

<sup>129</sup> *Ibid.*, §§ 135-137; 152-153.

<sup>130</sup> *RP. v United Kingdom*, ECtHR, 9 October 2012, Application No. 38245/08, §§. 9-13.

of the CRPD under Facts in the section of relevant international law.<sup>131</sup> The ECtHR also referred to the CRPD under Merits in The Court's assessment, stating that "*in cases involving those with disabilities the Court has permitted the domestic courts a certain margin of appreciation to enable them to make the relevant procedural arrangements to secure the good administration of justice and protect the health of the person concerned. This is in keeping with the CRPD, which requires States to provide appropriate accommodation to facilitate the role of disabled persons in legal proceedings.*"<sup>132</sup> However, the ECtHR mentioned that in order to assess whether or not the state was keeping its margin of appreciation, it took into consideration "*all relevant factors, including the nature and complexity of the issue before the domestic courts and what was at stake for the applicant*".<sup>133</sup> Despite this, it decided that there has been no violation of the relevant articles of the ECHR.<sup>134</sup>

The case of AN v. Lithuania concerned a former member of the Soviet Union's Army, who was suffered from paranoid schizophrenia and was legally incapacitated. He wanted to restore his legal capacity but he had no right to start the restoration process and wasn't provided any legal aid from the state.<sup>135</sup> the ECtHR mentioned Article 12 and 13 of the CRPD under facts as a part of relevant international law.<sup>136</sup> Under Merits in The Court's assessment, it is mentioned that even though, the CRPD did not bind Lithuania at the time of the alleged violation of Article 6 and 8, the ECtHR highlights that the State is still obliged to guarantee the effective legal capacity of persons with disabilities. In this part, the ECtHR referred to Article 13 of the CRPD.<sup>137</sup> The ECtHR also refers to the relevant articles of the CRPD in the section of The Court's assessment, where it applies the relevant general principles to the case. It mentions that the state should ensure adequate access to legal capacity for persons with mental illness.<sup>138</sup> Furthermore, it mentions a decision of the Supreme Court of Lithuania as well where Article 12 of the CRPD and the fact that Lithuania is promoting support in the exercise of legal capacity was mentioned as a part of domestic law.<sup>139</sup> The ECtHR found the interference with the applicant's private life disproportionate,

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<sup>131</sup> Ibid., § 43.

<sup>132</sup> Ibid., § 65.

<sup>133</sup> Ibid., § 65.

<sup>134</sup> Ibid., §§ 79-90.

<sup>135</sup> AN v Lithuania, ECtHR, 31 May 2016, Application No. 17280/08, §§5-32.

<sup>136</sup> Ibid., § 44.

<sup>137</sup> Ibid., § 80.

<sup>138</sup> Ibid., § 102.

<sup>139</sup> Ibid., §§ 65. and 102.

and that the state did not provide effective access to court; therefore, it established a violation of Article 6 and 8.<sup>140</sup>

In the *Nikolyan v. Armenia* case, the applicant was deprived of his legal capacity, which stopped him from filing for divorce, and he turned to the ECtHR to declare the violation of the right to procedural fairness and right to private life.<sup>141</sup> The ECtHR mentioned Article 12 of the CRPD under Facts as relevant international law.<sup>142</sup> Under the Merits in *The Court's assessment*, in the section of applying the principle to the case, the ECtHR noted that Armenia obliged itself to respect the CRPD as a signatory state and highlighted the 'particular significance' of the principle of equal recognition before the law.<sup>143</sup> Despite mentioning this regarding the right to access to justice, the ECtHR did not mention the CRPD in connection with legal capacity issues. The ECtHR established a violation of Article 8.<sup>144</sup>

The case of *A.-M.V. v. Finland* involved an applicant with intellectual disabilities who was not deprived of legal capacity *per se*, but had a ward appointed next to him who made decisions for him occasionally, which resulted in him moving to a shelter home instead of staying with his foster parents.<sup>145</sup> The case mentioned Article 12 and 16 of the CRPD and the General Comment No. 1 of the CRPD Committee, which calls on the signatory states to abolish substitute decision-making systems under Facts among the relevant international law.<sup>146</sup> Under the Merits, The Mental Disability Advocacy Center as a third-party referred to CRPD as it made it clear that "*will and preferences of a person with disabilities should take precedence over other considerations when it came to decisions affecting that person*". Furthermore, there is a paradigm shift from 'best-interest' approach to the 'supported decision-making' approach, based on which the person with disabilities is provided assistance by having their autonomy recognized and their legal capacity preserved.<sup>147</sup> It further deserves a highlight that under the Merits in *The Court's assessment* when it applies the general principles to the factual elements, the ECtHR relied on the government's interpretation of the CRPD and supported decision-making. It accepted the Finnish government's argument, that they "*expressively considered*" that there was no need to amend domestic legislation where it is possible for a ward to legally represent the applicant on an occasional basis by not

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<sup>140</sup> *Ibid.*, § 105 and § 128.

<sup>141</sup> *Nikolyan v. Armenia*, 3 October 2019, ECtHR, Application no. 74438/14, § 3.

<sup>142</sup> *Ibid.*, § 73.

<sup>143</sup> *Ibid.*, § 95.

<sup>144</sup> *Ibid.*, § 127.

<sup>145</sup> *A.-M.V. v. Finland*, ECtHR, 23 March 2017, Application no. 53251/13, §§ 6-25.

<sup>146</sup> *Ibid.*, § 42-45.

<sup>147</sup> *Ibid.*, § 67.

depriving *per se* the applicant of legal capacity.<sup>148</sup> In the same section, despite relying on the interpretation of the CRPD Committee, the ECtHR took into consideration the way the Finland interpreted its conformity with international treaties. The ECtHR did not establish the violation of Article 8 of ECHR and Article 2 Protocol No. 4 of the ECHR.

On the topic of the will and preference, the CRPD is mentioned as part of the relevant international law, and it is also commonly invoked by third parties. However, the ECtHR reinforces its categorical statement that it is up to them to decide which international document they consider in their decision-making, making it less likely to see a predictive and steady practice regarding the application of the CRPD. The consideration of the interpretation of the governments instead of the CRPD Committee also reassures this practice. This is especially important in the *A.-M.V. v. Finland* case, where it took into consideration that the Finnish government considered that there was no need to modify its regulation on the supported decision-making. It is also worthy of highlighting from a material perspective that the ECtHR allows a certain margin of appreciation for the procedural safeguards for persons with disabilities.

### 3.3. Independent living

In the case of *MH v. the UK*, the lawfulness of detention of psychiatric hospital was contested which took place because the applicant's mother, who was her caretaker, became incapable of taking care of her.<sup>149</sup> The ECtHR mentions Article 5 12, 13, 25 and 26 of the CRPD in Facts among the relevant international law.<sup>150</sup> Furthermore, the ECtHR stated in the Merits in The Court's assessment, under the section where the ECtHR applies general principles to the case that in regards of persons with mental disabilities, "*who are not fully capable of acting for themselves, there is no doubt that special procedural safeguards may be called for*"<sup>151</sup>. The ECtHR then referred to the abovementioned articles of the CRPD.<sup>152</sup> The ECtHR has declared the violation of Article 5 § 4 because of procedural discrepancies on behalf of the domestic authorities.<sup>153</sup>

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<sup>148</sup> *Ibid.*, § 85.

<sup>149</sup> *MH v UK*, 22 October 2013, Application no. 11577/06, § 5.

<sup>150</sup> *Ibid.*, § 49.

<sup>151</sup> *Ibid.*, § 93.

<sup>152</sup> *Ibid.*, § 93.

<sup>153</sup> *Ibid.*, § 86.

McDonald v. the UK was the first time the ECtHR mentioned Article 19 of the CRPD<sup>154</sup>, which was cited alongside Article 3 and 17 in Facts among relevant international law.<sup>155</sup> The case concerned a woman who suffered a stroke and severe hip injuries, resulting in her being hospitalized. Due to her small and neurogenic bladder, she needed to use the bathroom frequently during the night but required assistance. The staff required her to use incontinence pads, however she was not suffering from incontinence. She only needed assistance to go to the bathroom. She alleged that this requirement was a severe interference with her private life, therefore she claimed a violation of Article 8 of ECHR.<sup>156</sup> Under Merits, the applicant mentioned that the CRPD “*made it clear that a person’s inherent dignity and individual autonomy should be at the heart of the Article 8 right to private life*”<sup>157</sup> as well as “*that Article 19 of the Disability Convention required State parties to provide the personal assistance necessary to support living and inclusion in the community.*”<sup>158</sup> .<sup>159</sup> The ECtHR did not mention CRPD in The Court’s assessment. The ECtHR further stated that States have a wide margin of appreciation for healthcare policies, especially when it involves balancing limited resources.<sup>160</sup>

Despite mentioning Article 19 of the CRPD, the ECtHR has not comprehensively analysed independent living. It ended up deciding in favour of the state, declaring that the policy applied by the state served a legitimate aim, which was the state's economic well-being, so there has been no violation established.<sup>161</sup>

The Guberina v. Croatia case involved discrimination based on the applicant’s son, who had disability. It regarded not granting tax-reduction to their building, which required an elevator to provide mobility for their son with disability.<sup>162</sup> Article 2, 3, 4, 5, 7, 9, 19, 20, 29 of the CRPD was cited in Facts among the relevant international law and the CRPD Committee General Comment No. 2 on Accessibility.<sup>163</sup> It was highlighted that “*accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society*”<sup>164</sup>. Under merits, the application of the CRPD was also requested by a third-party intervener, in particular, relating to non-discrimination, accessibility and

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<sup>154</sup> Lewis, In: Waddington, Lawson (eds), at 118.

<sup>155</sup> McDonald v. UK, ECtHR, 20 May 2014, 4241/12, § 30-32.

<sup>156</sup> Ibid. § 13.

<sup>157</sup> Ibid. § 41.

<sup>158</sup> Ibid., § 78

<sup>159</sup> Ibid., § 53.

<sup>160</sup> Ibid., § 54.

<sup>161</sup> Ibid., § 53.

<sup>162</sup> Guberina v. Croatia, ECtHR, 22 March 2016, Application No. 23682/13, §§.7-19.

<sup>163</sup> Ibid., § 34.

<sup>164</sup> Ibid., § 35.

reasonable accommodation; they emphasized “*the intimate link between accessibility and reasonable accommodation, which were both ultimately geared to ensuring the effective enjoyment and exercise of the rights of such people on an equal footing with others.*”<sup>165</sup> The ECtHR did not mention the CRPD in The Court’s assessment. The ECtHR declared the violation of Article 14 of the ECHR in conjunction with Article 1 of Protocol No. 1.<sup>166</sup>

The case of J.D. and A. v. the UK involved two applicants, one of them was a mother with a daughter with severe physical and learning disabilities, whose housing support was reduced by an amendment in the laws since they were living in a bigger apartment compared to their needs.<sup>167</sup> The case mentioned Article 23 of the CRPD among Fact as relevant international law.<sup>168</sup> A third-party intervener in general also mentioned the CRPD.<sup>169</sup> Although the ECtHR did not mention the CRPD in the Merits under The Court’s assessment, it stated that “*because of the particular vulnerability of persons with disabilities*”, the margin of appreciation of different treatment “*would require very weighty reasons to be justified*”.<sup>170</sup> It declared the violation Article 1 of Protocol No.1 because the Government did not provide “weighty reasons” for the prioritization.<sup>171</sup>

Belli and Arquier-Martinez v. Switzerland involved an applicant with communicational impairments receiving a special pension claiming that it is discriminatory to require a Swiss address to receive social insurance benefits.<sup>172</sup> The case referred to Article 2, 3, 5, 19 and 28 of CRPD under Facts among relevant international law, but it did not mention it in the Merits under The Court’s assessment.<sup>173</sup> The ECtHR did not declare any violation because the domestic regulation wasn’t disproportionate based on its argument.<sup>174</sup>

In Glor v. Switzerland, the ECtHR has found the violation of non-discrimination regarding disability and used the approach of reasonable accommodation for the first time.<sup>175</sup> In this case, the applicant was obliged to pay tax because he could not perform military training due to his disability, but he was not offered alternative training because he did not meet the

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<sup>165</sup> Ibid., § 63.

<sup>166</sup> Ibid., § 99.

<sup>167</sup> J.D. and V. V. UK, ECtHR, 24 October 2014, Applications Nos. 32949/17 and 34614/17, § 8.

<sup>168</sup> Ibid., § 48.

<sup>169</sup> Ibid., §§78-79

<sup>170</sup> Ibid., § 89.

<sup>171</sup> Ibid., § 104.

<sup>172</sup> Belli and Arquier-Martinez v. Switzerland, ECtHR, 11 December 2018, Application No. 65550/13, §§ 3., §8.

<sup>173</sup> Ibid., § 43.

<sup>174</sup> Ibid., § 124.

<sup>175</sup> Lewis, O., Council Of Europe, In: Waddington, L., Lawson, A., The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts, at 107.

criteria.<sup>176</sup> Interestingly, the CRPD was not mentioned in the Facts among the relevant international law. Although, in spite that the Swiss government was not a signatory of the CRPD at the time<sup>177</sup>, the ECtHR declared in The Court's assessment that "*there is a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment towards full social inclusion of people with disabilities*"<sup>178</sup>, which can be considered to be a reference to the central concept of the CRPD.

The case of Popovic v. Serbia involved an applicant who ended up with disabilities due to injuries suffered during accidents. He claimed the violation of Article 14 in conjunction with Article 1 of Protocol No. 1 and Article 6 because he received fewer benefits than a war veteran based on domestic laws with an equal level of disability.<sup>179</sup> The concluding observations on CRPD in regards to Serbia were mentioned among Facts under relevant international documents.<sup>180</sup> It is important to mention that the ECtHR states out in the Merits under The Court's assessment in the section of the application of the principles to the present case that the ECHR "*cannot be interpreted in a vacuum and should as far as possible be construed in harmony with other rules of international law concerning the international protection of human rights. However, even where the provisions of the Convention and those of another international human rights instrument are almost identical, the interpretation of the same fundamental right by another international body and by this Court may not always correspond.*"<sup>181</sup> The ECtHR did not establish the claimed violation because it had "*reasonable and objective justification*"<sup>182</sup>.

The case of Kocherov v. Russia involved an applicant with mild mental disability who was married to the second applicant who was deprived of legal capacity and later gave birth to their child; their marriage was then declared void, and they were deprived of the custody of their child due to their disability and low monthly income.<sup>183</sup> Article 5 and 23 of the CRPD was mentioned in Facts among the relevant international law documents.<sup>184</sup> Under the Merits, the third-party interveners – the Disability Alliance and the European Disability Forum

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<sup>176</sup> Ibid. 107.

<sup>177</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en)

<sup>178</sup> Glor v. Switzerland, ECtHR, 30 April 2009 *Application no. 13444/04*, § 53.

<sup>179</sup> Popovic v. Serbia, ECtHR, 30 June 2020, Applications nos. 26944/13, 14616/16, 14619/16, 22233/16, § 2-21.

<sup>180</sup> Ibid., § 39-41.

<sup>181</sup> Ibid., § 79.

<sup>182</sup> Ibid., § 80.

<sup>183</sup> Kocherov and Sergeyeva v. Russia, ECtHR, 26 March 2016, Application No. 16899/13 §§. 7-54.

<sup>184</sup> Ibid., § 57.



referred to the CRPD. They highlighted that it does “*address carefully the needs of parents and children with disabilities and provide measures of support for them to enable the former to acquire the necessary competence to fulfil their responsibilities towards their children and the latter to grow up with their families, to be included in the community and local children’s life and activities.*”<sup>185</sup> Despite this, the ECtHR did not mention the CRPD in The Court’s assessment, and even though the applicant’s claim was the violation of Article 8 in connection with Article 14, the ECtHR did not find it necessary to observe the non-discrimination claim, so it solely declared the violation of Article 8.<sup>186</sup>

The case of *S.S. v. Slovenia* involved an applicant diagnosed with paranoid schizophrenia who was deprived of her parental rights.<sup>187</sup> Article 1 and 23 of the CRPD was mentioned under Facts among relevant international law.<sup>188</sup> It is noteworthy that the Government has pointed out, that Article 23 of the CRPD was applied in a way to prevail the best interests of the child, for which the applicant would have needed 24-hour surveillance to do it by herself, which would have been a “far-reaching” requirement for the state.<sup>189</sup> The ECtHR mentioned this in the assessment, but it stated that a State is not required to take ‘endless attempts’ at family reunification, and the CRPD was not mentioned in the Merits in The Court’s assessment.<sup>190</sup> The ECtHR declared no violation because there were “*sufficient reasons*” to deprive the applicant of her parental rights.<sup>191</sup>

On this topic, the ECtHR mentioned the CRPD as a relevant international law, except for one case. The CRPD was also referred to it by the applicant in connection with Article 8 and domestic courts. Although, the ECtHR wasn’t urged to react to the possible interpretation of the ECHR in light of the CRPD, it is noteworthy that the ECtHR mentions a stricter margin of appreciation than it did in the topic of ‘will and preference’. It is also important to highlight that the ECtHR does not seem to analyze the principles such as independent living or reasonable accommodation, even though they are a crucial part of current disability law. This might show that it considers them to be interpreted in the light of the CRPD, which can prove a certain interpretative effect. It is vital to mention, though, that the ECtHR declares that its interpretation of an international document might not be aligned with the ECtHR,

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<sup>185</sup> *Ibid.*, § 85.

<sup>186</sup> *Ibid.*, §§ 122-124

<sup>187</sup> *S.S. v. Slovenia*, ECtHR, Application No. 40938/16, 30 October 2018, § 7-22.

<sup>188</sup> *Ibid.*, § 64.

<sup>189</sup> *Ibid.*, § 75.

<sup>190</sup> *Ibid.*, § 86.

<sup>191</sup> *Ibid.*, § 103

which is verifying that the ECtHR does not consider itself being bound by any other bodies' interpretation.

#### 3.4. Ill-treatment and denial of reasonable accommodation

The case of *Jasinkis v. Latvia* was the first case that mentioned reasonable accommodation regarding prisoners with a disability.<sup>192</sup> The case concerned a teenager who was deaf and unable to speak who got into a fight during a party at night. Instead of taking him to the hospital after losing his consciousness, he was arrested and died of his injuries.<sup>193</sup> The ECtHR mentioned Article 14 §2 of the CRPD in Facts as relevant international law and highlighted that Latvia has signed it. The ECtHR mentioned that in detention of persons with disabilities, the authorities are obliged to “*demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability*”.<sup>194</sup> Despite this, the ECtHR did not mention the CRPD in the Merits under The Court's assessment, however, it declared the violation of Article 2 §1.<sup>195</sup>

In *ZH v Hungary*, the applicant with a mental disability was arrested with robbery and suffered ill-treatment during his detainment.<sup>196</sup> The ECtHR mentioned Article 2, 13, 14 of CRPD among Facts as relevant international law. The Mental Disability Advocacy Center, as a third-party intervener, relied on the “*relevant provisions*” of the CRPD, including that “*the prevention of ill-treatment of detainees with disabilities must include the provision of 'reasonable accommodations' on an individualized basis.*”<sup>197</sup> Under the Merits, in The Court's assessment as a part of the application of the principles to the present case, the ECtHR noted that the “*authorities did not make any truly “reasonable steps” – a notion quite akin to that of “reasonable accommodation” in Articles 2, 13 and 14 of the CRPD*”. The ECtHR relied on CRPD as an interpretative tool since the paragraph declared the violation of Article 5 § 2 of the ECHR.<sup>198</sup>

In *Grimailovs v. Latvia*, the case concerned the applicant with severe disabilities who claimed that his rights under Article 3 of ECHR were violated due to the inadequate

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<sup>192</sup> Lewis, In Waddington, Lawson (eds), at 120.

<sup>193</sup> *Jasinkis v. Latvia*, ECtHR, 21 December 2010, Application No. 45744/08, §§ 5-17.

<sup>194</sup> *Ibid.*, § 59.

<sup>195</sup> *Ibid.*, § 68.

<sup>196</sup> *ZH v. Hungary*, ECtHR, 8 November 2012, Application no. 28973/11, §§ 3-17.

<sup>197</sup> *Ibid.*, § 27.

<sup>198</sup> *Ibid.*, § 43.

healthcare treatment he received from local police authorities during his detention.<sup>199</sup> Articles 2 and 14 of the CRPD were cited under Facts as relevant international law. Although it referred to the case of *Z.H. v. Hungary*, it did not mention the CRPD in the Merits under The Court's assessment.<sup>200</sup> According to the ECtHR, the circumstances that deprived the applicant of accessibility established a violation of Article 3.<sup>201</sup>

In the case of *Asalya v. Turkey*, the case involved the alleged violation of Article 3 of ECHR of the victim facing deportation from Turkey due to administrative mistakes.<sup>202</sup> The ECtHR cited Articles 2 and 14 as Facts under relevant international law.<sup>203</sup> The CRPD was not mentioned in the Merits under The Court's assessment, the ECtHR used the word 'special care' in relation to the obligations of the authorities towards detainees with disabilities<sup>204</sup> which is considered to be the language similar to the CRPD.<sup>205</sup> The ECtHR established the violation of Article 13 in conjunction with Article 8.<sup>206</sup>

*Semikhovostov v. Russia* concerned a wheel-chair user prisoner with visual impairment who wasn't receiving help from the workers at the prison and had to rely on the other prisoners.<sup>207</sup> It mentioned Articles 1, 14, 15 and 20 of the CRPD in Facts under relevant international law.<sup>208</sup> It mentioned again that authorities have to provide 'special care' to detainees with a disability to guarantee that the conditions meet their needs.<sup>209</sup> The ECtHR declared in the Merits as a part of The Court's assessment that "*by appointing fellow inmates to care for the applicant the State did not take the necessary steps to remove the environmental and attitudinal barriers which seriously impeded the applicant's ability to participate in daily activities with the general prison population which, in its turn, precluded his integration and stigmatized him even further.*"<sup>210</sup> Therefore, the violation was Article 3 of the ECHR was successfully established.<sup>211</sup>

*Butrin v. Russia* involved a blind detainee who was not provided with the necessary assistance and accommodation.<sup>212</sup> The judgement cited Articles 1, 14, 15 and 20 of CRPD as

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<sup>199</sup> *Grimailovs v. Latvia*, ECtHR, 25 June 2013 Application No. 6087/03, §§ 1-3.

<sup>200</sup> *Ibid.*, § 151.

<sup>201</sup> *Ibid.*, § 162.

<sup>202</sup> *Asalya v. Turkey*, ECtHR, 15 April 2014, Application No. 43875/09, §§ 10-33.

<sup>203</sup> *Ibid.*, § 35.

<sup>204</sup> *Ibid.*, § 50.

<sup>205</sup> Lewis, In: Waddington, Lawson, at 121.

<sup>206</sup> *Asalya v. Turkey*, § 120.

<sup>207</sup> *Semikhovostov v. Russia*, ECtHR, 6 February 2014 Application No. 2689/12, §§ 7-21

<sup>208</sup> *Ibid.*, § 43.

<sup>209</sup> *Ibid.*, § 72.

<sup>210</sup> *Ibid.*, § 85.

<sup>211</sup> *Ibid.*, § 85-86.

<sup>212</sup> *Butrin v. Russia*, ECtHR, 22 March 2016, Application No. 16179/14, §§ 9-15

Facts among relevant international law.<sup>213</sup> It mentioned ‘special care’, similarly to the case mentioned before and gave the same explanation of it.<sup>214</sup> Although, it did not mention the CRPD in The Court’s assessment, it declared the violation of Article 3 of ECHR.<sup>215</sup>

In *Topekhin v. Russia*, a case similar to the previous one stated the obligation of the states to provide ‘special care’ to detainees with disabilities.<sup>216</sup> Article 14 and 15 of CRPD is mentioned under Facts as relevant international law.<sup>217</sup> The ECtHR also declared the violation of Article 3 of ECHR but didn’t mention the CRPD in the Merits under The Court’s assessment.<sup>218</sup>

In the case of *Rooman v. Belgium*, the applicant was a detainee diagnosed with paranoid psychosis sentenced to imprisonment, charged with multiple serious crimes. The date for his conditional discharge was set, because the authorities wanted to find an institution to send him due to his psychosocial disability. As a result of the proceedings, the applicant had been in compulsory confinement for more than 10 years.<sup>219</sup> The judgement mentioned Articles 14 and 15 of the CRPD and the UN CRPD Committee Guidelines on the right to liberty and security of persons with disabilities under Facts as relevant international law, in which, e.g. the absolute prohibition of detention based on disability is declared and evaluated.<sup>220</sup> The CRPD was mentioned in the Merits under The Court’s assessment multiple times. Under the section of the general principles, the ECtHR observed under the general principles that the ECHR doesn’t prohibit detention based on any impairment; however, based on the CRPD Committee Guidelines, Article 14 of the CRPD does.<sup>221</sup> In its case-law, the ECtHR declares that the analysis was based on what extent detention fits Article 5§ (1) e). “*This wording shows that the Court did not rule out the possibility that specific situations might exist in which the aim of the measure in respect of which the Convention authorizes the restriction of the right to liberty, namely the protection of society and the administration of treatment, is no longer being genuinely pursued, and in which the link between the stated aim and the conditions of detention is therefore severed.*”<sup>222</sup> It was mentioned, that the ECtHR

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<sup>213</sup> *Ibid.*, § 27.

<sup>214</sup> *Ibid.*, § 49.

<sup>215</sup> *Ibid.*, § 67.

<sup>216</sup> *Topekhin v. Russia*, ECtHR, 10 May 2016, Application No. 78774/13, § 49.

<sup>217</sup> *Ibid.*, § 54.

<sup>218</sup> *Ibid.*, § 88.

<sup>219</sup> *Rooman v. Belgium*, ECtHR, Application No. 18052/11, at §§ 9-14.

<sup>220</sup> *Ibid.*, §§ 116-117.

<sup>221</sup> *Ibid.*, § 205.

<sup>222</sup> *Ibid.*, § 206.

„gradually, through its case-law, expanded the scope of Article 5 § 1 (e)”.<sup>223</sup> It further mentioned, that *”there exists a close link between the “lawfulness” of the detention of persons suffering from mental disorders and the appropriateness of the treatment provided for their mental condition.”*<sup>224</sup> The ECtHR states out, that persons in the situation similar to the applicant’s one, are not only entitled to ‘basic’ healthcare, but to an *“individualized therapy”*, and the ECtHR’s mandate based on this case is to assess whether this has been put in place.<sup>225</sup> In the section of the application of the principles to the present case, the ECtHR also referred to the *“growing importance which international instruments for the protection of people with mental disorders are now attaching to the need for persons placed in compulsory confinement to be able to benefit from personalised and appropriate treatment to fulfil the therapeutic aim of detention.”*<sup>226</sup> The CRPD was referred to in general as a whole regarding the *“protection of the human rights and dignity of persons with mental disorders”*.<sup>227</sup> The ECtHR *“accepts that it is natural to expect that persons in compulsory confinement should, in so far as possible, receive all necessary information on the individualized treatment proposals being offered to them”*.<sup>228</sup> Based the ECtHR’s analysis, though, violation of Article 5 §1 of ECHR was declared during the time between 2004 and 2017 of the detention period, but the period after was in conform with the ECHR since the medical staff has improved an individualized care-path for the applicant.<sup>229</sup>

The case of *Korovin v. Russia* involved the compulsory psychiatric treatment of the applicants as a result of being convicted with criminal charges.<sup>230</sup> The case did not mention any relevant international law, therefore the CRPD was not mentioned as a part of Facts. The case mentioned CRPD only among the third-party interveners under Merits, where the European Disability Forum made some comments on legal capacity, access to justice and the right of liberty and security of person, the right to be free from torture and ill-treatment and, concerning the latter, the right to free and informed consent in healthcare. The European Disability Forum stated out that *“ the right to legal capacity was a basic right which needed to be guaranteed on its own and ensure the realization of all other rights of persons with*

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<sup>223</sup> Ibid., § 207.

<sup>224</sup> Ibid., § 208.

<sup>225</sup> Ibid., § 209.

<sup>226</sup> Ibid., § 238.

<sup>227</sup> Ibid., § 238.

<sup>228</sup> Ibid., § 238.

<sup>229</sup> Ibid., §§ 244-253.

<sup>230</sup> *Korovin v. Russia*, ECtHR, 27 February 2014 Application No. 31974/11, §§ 7-8.

*disabilities.*"<sup>231</sup> The CRPD was not mentioned again in The Court's assessment, but it declared the violation of Article 3 of the ECHR purely relying on the facts of the case.<sup>232</sup>

The case of *Blokhin v. Russia* included a 12-year-old boy with ADHD, who was convicted of criminal offences and was placed under the inspectorate of juvenile offenders and was placed in a temporary detention centre.<sup>233</sup> The relevant international law section under Facts only mentioned the United Nations Convention on the Right of the Child (CRC) and other international treaties that involve juveniles criminals or detainees with disabilities.<sup>234</sup> Under Merits, Article 5§2 of CRPD was mentioned by the Mental Disability Advocacy Center as a third-party intervener. It explained that children with disabilities face a 'double disadvantage', being both children and mentally disabled as well, therefore they are more open to violation of their 'rights and additional needs'.<sup>235</sup> Similarly to some previously mentioned cases, the CRPD was not mentioned in The Court's assessment, and the ECtHR based its decision and argument on the pure analysis of the factual circumstances and declared the violation of Article 3.<sup>236</sup>

The CRPD is mentioned as a relevant international document almost in all of the cases. It was referred to by third party interveners as well. It is essential to highlight that the ECtHR relied on the CRPD regarding reasonable accommodation, which is a term used by the CRPD that still shows a sign of the interpretive influence of the CRPD.

When it comes to the deprivation of freedom, the ECtHR sees it differently than the CRPD therefore, the outcome of its assessment is different too. The whole concept of deprivation of liberty is significantly different between the CRPD and ECtHR. As opposed to the CRPD, based on the practice of the ECtHR the deprivation has to involve suffering and humiliation.<sup>237</sup> The CRPD's method is against individualized medical treatments. Meanwhile, the ECtHR considered this as a positivity in the *Rooman v. Belgium* case. The ECtHR does not touch upon the medicalization of disability and treats involuntary psychiatric treatment as a violation only if there is any proven element of 'torture' involved. It mentioned barriers that should be eliminated by the domestic authorities, which is close to the human rights

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<sup>231</sup> *Ibid.*, § 67.

<sup>232</sup> *Ibid.*, § 68.

<sup>233</sup> *Blokhin v. Russia*, ECtHR, 23 March 2016, Application No. 47152/06, §§ 11-12.

<sup>234</sup> *Ibid.*, §§ 77-89.

<sup>235</sup> *Ibid.*, § 134.

<sup>236</sup> *Ibid.*, §§ 146-150.

<sup>237</sup> R. K, Alex, Deprivation of liberty – appropriate places and appropriate treatment, 11 June 2019

<https://www.mentalcapacitylawandpolicy.org.uk/deprivation-of-liberty-appropriate-places-and-appropriate-treatment/>

approach of the CRPD, even if it does not expressly rely on its wording. It is also essential that the ECtHR actually ‘admits’ the difference from the CRPD regarding the interpretation of disability-based detention and declares that the ECHR does not prohibit it. Furthermore, when the ECtHR does not mention the CRPD, it refers to ‘special care’ as an obligation of the states towards detainees with disabilities, which shows similarity to the CRPD, but still the own wording of the ECtHR.

Therefore, it can be established that the language and principles of the CRPD can be found in the case law. However, at times, it is hard to see the level of interpretative effect of the CRPD in its assessment since it doesn’t always directly refer to it and might interpret certain ideas differently.

### 3.5. Right to life and freedom

The case of *Ada Rossi and Others v. Italy* involved the request to discontinue the artificial nutrition and hydration of the applicant’s daughter, who had a severe disability. Article 25 of CRPD was used by the applicants as a basis for their legal claim, but the case was rejected since the ECtHR found that the applicants cannot be considered victims based on Article 25 of ECHR. The CRPD, however, was not mentioned by the ECtHR.<sup>238</sup> The ECtHR didn’t establish any violation of the ECHR.<sup>239</sup>

In the case of *Dorđević v. Croatia*, the applicant with a mental disability was subjected to harassment by their neighbours<sup>240</sup>. The applicants argued that the legal system of Croatia did not offer remedies to the violations of their rights due to hate crime against persons with disabilities.<sup>241</sup> The decision mentioned Articles 1, 4, 5, 8, 15, 16 and 17 of CRPD under Facts as relevant international law.<sup>242</sup> The European Disability Forum, as a third-party intervener, looked at the case as a ‘disability hate crime’ and referred to Article 5 of the CRPD, which obliges the states to give protection to persons with disabilities “*on equal basis to others*”.<sup>243</sup> The ECtHR has not mentioned the CRPD under Merits in The Court’s

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<sup>238</sup> *Ada Rossi and Others v. Italy*, ECtHR, 16 December 2008, Application No. 55185/08, at 1. (<https://lovdata.no/static/EMDN/emd-2008-055185.pdf>, last accessed: 24<sup>th</sup> June 2021)

<sup>239</sup> *Ibid.*, at 7.

<sup>240</sup> *Dorđević v. Croatia*, Application No. 41526/10, 24 July 2012, §§ 5-60.

<sup>241</sup> *Ibid.*, §§ 84-85.

<sup>242</sup> *Ibid.*, § 79.

<sup>243</sup> *Ibid.*, §§ 113-115.

assessment. It declared the violation of Article 3 and 8 of ECHR because the government did not offer any remedies that can address the applicant's situation.<sup>244</sup>

In the following case, *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, an HIV-positive applicant with a mental disability was living in a psychiatric hospital under inhuman conditions and died as a result of cardiorespiratory issues.<sup>245</sup> Articles 5, 10, 12, 13 of the CRPD was stated among Facts in the relevant international law.<sup>246</sup> The ECtHR mentioned the requirement of 'special care' (which was used in the topic of criminal detention) by citing previous cases under Merits in The Court's assessment but has not cited the CRPD.<sup>247</sup> The ECtHR declared the violation of Article 2, 13 in conjunction with Article 2, because the state of Romania has failed to provide an 'appropriate legal framework' to have the violation of the rights laid down in Article 2 examined by an independent authority.<sup>248</sup> Despite the inhuman treatment the deceased applicant was subjected to, the ECtHR did not find a violation of Article 3.<sup>249</sup>

These cases have the least number of traces of the CRPD because it was not mentioned in The Court's assessment. The ECtHR relied on the 'special care' that the authorities have to provide for persons with disabilities which is not an expression of the CRPD but shows some familiarity with its method. It is also noteworthy that the applicants tend to rely on the CRPD in their application, however the ECtHR does not seem to address this part of their claim.

### 3.6. Right to vote

In *Alajos Kiss v. Hungary*, the applicant contested that his exclusion from the electoral registry based on partial guardianship violates Articles 13 and 14 of the ECHR.<sup>250</sup>

Based on the domestic court's decision, he could take care of himself, but he had manic depression, which was manifested in wasting money and having aggressive moments occasionally.<sup>251</sup> Article 1, 12 and 29 of the CRPD was mentioned under Facts among the

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<sup>244</sup> *Ibid.*, § 167.

<sup>245</sup> *Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, ECtHR, 17 July 2014, Application No. 47848/08, §§ 1-26.

<sup>246</sup> *Ibid.*, § 64.

<sup>247</sup> *Ibid.*, § 131.

<sup>248</sup> *Ibid.*, § 153.

<sup>249</sup> *Ibid.*, § 154.

<sup>250</sup> *Kiss Alajos v. Hungary*, ECtHR, Application No. 38832/06, 20 May 2010, § 3.

<sup>251</sup> *Ibid.*, §8.



relevant international law.<sup>252</sup> Under the Merits it was mentioned by the applicant “*that according to modern legislation (such as the CRPD) intellectual or mental disabilities should be recognized as much as possible, especially in the field of the right to vote*”.<sup>253</sup> The ECtHR declared in The Court’s assessment under the section where it applies the general principles to the present case that the restriction serves a legitimate aim, which was to ensure “*that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs*”;<sup>254</sup> . However, it did not refer to the CRPD. In the present case, the ECtHR decided that the “*indiscriminate removal*” of the right to vote in the absence of “*individualized judicial evaluation*” and based solely on the mental disability of the person is a violation of the right in Article 3 Protocol No. 1.<sup>255</sup>

In *Ströbye and Rosenlind v. Denmark*, based on the Danish regulation, legally incompetent persons can participate in local, regional and European Parliamentary elections, but not in national Parliamentary elections.<sup>256</sup> They filed for the violation of Article 3 Protocol No.1 of ECHR alone and in conjunction with Article 14 of the ECHR.<sup>257</sup> Later, in Denmark, they introduced the system of partial guardianship for persons who are “*barred only in part from managing*” their assets. They could retain their right to vote in general elections.<sup>258</sup> As an outcome, “*only*” persons who are fully deprived of their legal capacity are deprived of the right to vote.<sup>259</sup> Under Danish laws, those who were both subjected to guardianship and had been deprived of their legal capacity under the Guardianship Act were deprived of the right to vote.<sup>260</sup>

The applicants filed for the violation of Article 3 Protocol No.1 of ECHR alone and in conjunction with Article 14 of the ECHR.<sup>261</sup>

Under the Merits in The Court’s assessment under the general principles, the ECtHR mentioned that “*Article 29 of the CRPD sets out that States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others.*”<sup>262</sup> It also mentions a report of the CRPD Committee where the concern was expressed in relation that persons who were deprived of their legal capacity were not allowed,

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<sup>252</sup> Ibid., § 14.

<sup>253</sup> Ibid., § 32.

<sup>254</sup> Ibid., § 38.

<sup>255</sup> Ibid., § 44.

<sup>256</sup> Ibid., §11.

<sup>257</sup> *Ströbye and Rosenlind v. Denmark*, ECtHR, 2 February 2021, Applications Nos. 25802/18 and 27338/18

<sup>258</sup> Ibid., § 19.

<sup>259</sup> Ibid., § 22.

<sup>260</sup> Ibid., § 86.

<sup>261</sup> *Ströbye and Rosenlind v. Denmark*, § 2.

<sup>262</sup> Ibid., § 112.

at the time, to vote or to stand for election.<sup>263</sup> However, the Court observes that the Venice Commission in its Opinion no. 190/2002 had a more cautious approach, accepting that under certain cumulative conditions, provision may be made for depriving individuals of their right to vote. Regarding the possible burden of the amendment of the Constitution, *“the issue of disenfranchisement was carefully assessed by the legislature in its laudable effort throughout many years to limit the restrictions on the right to vote”*.<sup>264</sup> *“The fact that the development obtained required thorough legal reflection and time, cannot be held against the Government to negate the justification and proportionality of the restriction at issue.”*<sup>265</sup> The ECtHR did not establish any violation.<sup>266</sup>

Both cases mention the same articles of the CRPD as relevant international law. In *Alajos Kiss v. Hungary* the ECtHR used the CRPD in the reasoning to argue against the classification of mentally disabled persons as a “single class”.<sup>267</sup> In *Ströbye and Rosenlind v. Denmark*, the ECtHR did the same. The ECtHR mentioned the CRPD in the Merits under The Court’s assessment only in the Danish case. Despite that, according to the CRPD, states are obliged to ensure equal political rights of persons with disabilities it continued the argumentation using the *“more cautious”*<sup>268</sup> wording of the Venice Commission that under certain circumstances, it is possible to imply restrictions on the right to vote. Even though, both state parties are signatories to the CRPD, the ECtHR used both times the Venice Commission’s less restrictive interpretation on the right to vote. This seems to be aligned with the idea of the ECtHR, that they might rely on an interpretation that does not necessarily follow another international body articulated under the previous categories. Also, it reassures the ECtHR principle, which states that it is up to the ECtHR which international document it would use in its judgment.

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<sup>263</sup> *Ibid.*, §112.

<sup>264</sup> *Ibid.*, § 119.

<sup>265</sup> *Ibid.*, § 119.

<sup>266</sup> *Ibid.*, §113.

<sup>267</sup> *Alajos Kiss v. Hungary* . § 44. *Ströbye and Rosenlind v. Denmark*, § 66.

<sup>268</sup> *Ströbye and Rosenlind v. Denmark*, *Ibid.* § 112.

#### 4. Right to vote

##### 4.1. Restrictions on the right to vote of persons with disabilities

###### 4.1.1. Restrictions in international law on the right to vote

The right to political life is essential in every international instrument. Article 21 of the Universal Declaration of Human Rights<sup>269</sup> and Article 25 of the International Covenant of Civil and Political Rights<sup>270</sup> oblige states to provide the “*opportunity*” ... “*without any unreasonable*” restrictions to participate in public affairs and the right to passive and active right to vote.<sup>271</sup> The UDHR states that the people's will “*shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage*”<sup>272</sup>. The ICCPR declares that every citizen without any “*unreasonable restriction*” shall have the right to vote and be elected by “*universal and equal suffrage*”<sup>273</sup>. The Convention on the Elimination of the Discrimination Against Women<sup>274</sup> obliges states to ensure that women have the right to vote on an equal basis with men.<sup>275</sup>

Despite universal suffrage being a cornerstone for democratic systems, certain social groups were excluded from this right throughout history, for example, women or persons with mental disabilities.<sup>276</sup> However, international human rights instruments highlight the universality of the right to vote, most democratic states tend to treat it as it is only allowed to practice for those individuals who are qualified for it. If someone does not qualify, the right to vote can be *legally* taken away.<sup>277</sup> Regarding intellectual and other types of psychosocial disabilities, international human rights adjudication might permit certain restrictions on the right to vote, which do not amount to discrimination. This entails, for instance, that restrictions in regards of certain categories, which are not covered by Article 2 of the ICCPR,

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<sup>269</sup> Hereinafter: UDHR

<sup>270</sup> Hereinafter: ICCPR

<sup>271</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, Article 25. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, Article 21.

<sup>272</sup> UDHR, Article 21

<sup>273</sup> ICCPR, Article 25.

<sup>274</sup> Hereinafter: CEDAW

<sup>275</sup> UN General Assembly, *Convention on the Elimination of Discrimination Against Women*, 18 December 1979, Article 7.

<sup>276</sup> Blais, A. Massicotte, L., Yoshinaka, A., Deciding who has the right to vote: a comparative analysis of election laws, *Electoral Studies*, Volume 20, No. 1 (2001) 41-62. at 41.

<sup>277</sup> Anderson, J., Intellectual Disability and the Human Right to Vote: Evolving Conceptions of the Universality of Suffrage, In: Anderson, J., Philips J. (eds) *Disability and Universal Human Rights: Legal, Ethical, and Conceptual Implications of the Convention on the Rights of Persons with Disabilities*, A Netherlands Institute of Human Rights (SIM), Utrecht University (October, 2012), at 108.

such as intellectual disabilities, do not count as discrimination, therefore it considered to be allowed.<sup>278</sup>

Article 2 of ICCPR prohibits discriminations on prescribed conditions. The ICCPR also allows restrictions on the right to vote “*without any unreasonable*” restrictions.<sup>279</sup> This is usually used to implement a prohibition on the right to vote of minors or mentally ill individuals.<sup>280</sup> The ICCPR Committee accepted young age and mental and intellectual disability as a ‘reasonable’ restriction. Despite this, physical disability, educational census or literacy was not accepted as a reason for restrictions.<sup>281</sup> A further condition for the suspension or restriction of rights in ICCPR is that they have to be ‘*objective and reasonable*’.<sup>282</sup> It is important that every reason that is used as an explanation for the ‘reasonableness’ is acceptable (only) if the relation between the restriction and its reason is well explained.<sup>283</sup> A similar method to the ICCPR is reinforced in the Venice Commission’s Code of Good Practice, used by the ECtHR<sup>284</sup>. This document is a code of good conduct drafted by the CoE.<sup>285</sup> Based on this method, restrictions on the right to vote might be verified under the following circumstances: it is stated by law, it is proportionate, it is declared by court order and based on mental capacity.

There are contradictions in the way international human rights law see the right to vote. For example, based on the international legal environment, the right to vote should not be discriminatory, e.g., for sex or race. However, as previously discussed, based on the ICCPR, ‘reasonable restrictions’ are allowed. This suggests that the right to vote shall be given based on certain criteria, and only those individuals can exercise this right who fit into these categories. Therefore as a critique, it can be said that the idea of universal suffrage does not exist in its very meaning.<sup>286</sup> Despite that mental capacity has been accepted as a justification to restrict the right to vote, the CRPD categorically sticks to that decision-making ability

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<sup>278</sup> Fox, G.H., The Right to Political Participation in International Law, Yale Journal of International Law, Vol.17, No. 2 (1992), 539-608, at 554.

<sup>279</sup> Article 2 of ICCPR states all rights shall be respected "without distinction of any kind." Explicitly prohibited distinctions include "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>280</sup> Fox, at 554.

<sup>281</sup> General Comment No. 25. Adopted By The Human Rights Committee Under Article 40, Paragraph 4, Of The International Covenant On Civil And Political Rights CCPR/C/21/ Rev.1/Add.7, 27 August 1996, § 10.

<sup>282</sup> Ibid., § 4

<sup>283</sup> Beckman L., Introduction: The Universal Suffrage on Trial, In: Beckman, L., The Frontiers of Democracy. Palgrave Macmillan, London, 2009, at 12.

<sup>284</sup> See, e.g. in *Ströbye v. Rosenlind v. Denmark*, §112

<sup>285</sup> European Commission for Democracy through Law (Venice Commission), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, Council of Europe, 19 October 2002, at 1(1)d; cf. the appendix “Explanatory Report,” at § 6(d)).

<sup>286</sup> Beckman, Introduction, In: Beckman, at 2.

cannot be a reason for any deprivation of the right to vote.<sup>287</sup> In 2011, the CCPR Committee argued in its general comment that due to the ‘dramatic’ change in international human rights law, most voting rights restrictions are not compatible with human rights law standards.<sup>288</sup>

#### *4.1.2. Restrictions in domestic law on the right to vote*

Restrictions on the right to vote and legal capacity usually are implemented in a democratic legal context of equality and prohibition of discrimination and universal suffrage. This creates an “internal dissonance” between these universal principles and excluding certain social groups from fundamental rights.<sup>289</sup> Only 4 countries, Sweden, Canada, Ireland and Italy, do not restrict the right to vote of persons with disabilities. In Bulgaria, Chile, Estonia, Guyana, Jamaica and the Netherlands, the restrictions on the right to vote of mentally and intellectually disabled persons are enshrined on a constitutional level.<sup>290</sup> The restrictions usually have a very generic and archaic wording<sup>291</sup>. For example, the Jamaican constitution declares that an ‘insane’ person or someone who is ‘adjudged to be of an unsound mind’ cannot be registered for voting. In Norway, election officers can deny access to the election polls of an individual lacking the ‘necessary soundness of mind’.<sup>292</sup>

#### 4.2. Provisions on the right to vote and the general description of the right to participate in political life in the CRPD

Article 29 of the CRPD:

*“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:*

*(a) 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:*

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<sup>287</sup> Cera, R., Article 29, In: Della Fina, Cera, Palmisano (eds), at 532.

<sup>288</sup> UN Human Rights Council, Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities, HRC, A/HRC/19/36, 21 December 2011, § 28.

<sup>289</sup> Cera, R., In: Della Fina, Cera, Palmisano (eds), at 531.

<sup>290</sup> Blais, Massicotte, Yoshinaka, at 51.

<sup>291</sup> Raad, R., Karlawish, J., Appelbaum, P. S. The capacity to vote of persons with serious mental illness. *Psychiatric Services*, Vol.60 No.5 (2009), 624–628. at 624.

<sup>292</sup> Beckman, Disability, Dependence and Democracy, In: Beckman, 149.

- (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;*
- (b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:*
- (i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;*
- (ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.*<sup>293</sup>

Even though the right to vote is essential in international human rights law, persons with disabilities have still been outside of the protection in regional and international human rights law. Therefore, Article 29 is overcoming this in the CRPD.<sup>294</sup>

To have a right to take part in political rights is a crucial element of citizenship.<sup>295</sup> The provision on the right to vote in the CRPD targets state obligations concerning political rights. Political rights are essential to enjoy other rights enshrined by the CRPD. Through participation in political life, persons with disabilities have the actual opportunity to take part in making changes in law and policymaking.<sup>296</sup> During the negotiation of the CRPD, this article aimed to overcome all the barriers that persons with disabilities face regarding access to political life to realise full inclusion.<sup>297</sup>

Even though the text of the CRPD does not explain what effective participation in” political and public life” or “in the conduct of public affairs” mean, ‘the ordinary meaning’ allows the

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<sup>293</sup> CRPD, Article 29.

<sup>294</sup> Cera, R, Article 29 In: Della Fina, Cera, Palmisano (eds), at 530.

<sup>295</sup> Ibid., at 526.

<sup>296</sup> Ibid., 526.

<sup>297</sup> Ibid., 527.

interpreter to get to the conclusion that it covers all aspects of political and public life in their country.<sup>298</sup>

Article 29, therefore, mentions not just the right to vote but every sphere of political and public life. The basis of the provision is equality which gives a solid framework to ensure the right to vote of persons with disabilities on an equal basis with others.<sup>299</sup> It uses a holistic approach, by which the CRPD goes through all the barriers persons with disabilities face while they pursue to exercise their political rights.<sup>300</sup>

#### 4.2.1. *Negative and positive state obligations under Article 29 of the CRPD*

Usually, negative and positive obligations are divided depending on which category a particular human right belongs. For example, civil and political rights usually belong to the category “negative rights”, because in their case, the state is obliged to ‘abstain’ from any interference. “Positive rights” are usually the economic, social, and cultural rights because they oblige the state to provide. This categorization might differ in persons with disabilities since they are entitled to request assistance to enjoy political rights. Assistance ensures that persons with disabilities have a life full of dignity and autonomy at its full potential.<sup>301</sup>

Article 29 concludes a series of positive and negative rights and provisions against ‘group-based discrimination’ under the concept of universality of the right to vote.<sup>302</sup>

##### 4.2.1.1. *Positive obligations*

The aim of including positive obligations under the right to political participation is to ensure that state parties actively participate in the endorsement of the political participation of persons with disabilities. Therefore, it is not enough if states only abstain from the deprivation of political rights, but they must fulfil certain obligations to improve persons with disabilities' political participation actively.<sup>303</sup>

In the *chapeau* of Article 29, it is declared that states ‘*shall guarantee the right*’ and the ‘*opportunity*’ to enjoy political rights. This obliges states to implement favourable domestic

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<sup>298</sup> Ibid, § 18

<sup>299</sup> Cera, R, Article 29 In: Della Fina, Cera, Palmisano (eds), at 528.

<sup>300</sup> Ibid., 528.

<sup>301</sup> Weele, E. v., The UN Convention on the Rights of Persons with Disabilities in the Context of Human Rights Law, In: Anderson, J., Philips, J. (eds) at 25.

<sup>302</sup> Anderson, J. In: Anderson, Philips, (eds), at 104.

<sup>303</sup> Ibid., at 106.

regulations which enhance the participation of persons with disabilities.<sup>304</sup> Hence, it is not enough to only extend political rights to persons with disabilities formally, but it has to include measurements that help to realize the rights in practice, e.g. provide assistance or make poll stations accessible.<sup>305</sup>

Following the *chapeau*, Article 29 can be broken down into three parts. Firstly, it introduces the positive state obligations regarding electoral rights based on non-discrimination and equality. In addition, it includes all those accommodations that states have to implement to realize the effective enjoyment of political rights by persons with disabilities.<sup>306</sup> The second paragraph is dedicated to participation in public administration and public affairs. During the drafting, it has been emphasised that it has to be a participation in all sphere of public affairs, not just disability-related issues.<sup>307</sup> This part is vital because it poses a positive obligation on states to boost the active participation of persons with disabilities by forming or becoming members of organizations or political parties.<sup>308</sup>

Participation is a significant value in the whole CRPD, and it covers persons with disabilities and their organizations. States are obliged to build a society that is based on full inclusion.<sup>309</sup> Full inclusion means that persons with disabilities are considered “*valued and equal*” members of society, and their needs are not looked at as ‘special’. In order to reach these aims all the barriers in the society shall be removed<sup>310</sup>, which includes political rights as well. Besides the general obligations of recognising the equal right to vote, the CRPD contains for states to remove physical and other obstacles that might stop a person with disabilities from the enjoyment of universal suffrage. The CRPD states that states must make materials, procedures, and facilities accessible for persons with disabilities. These are, for example, easy-to-read signs and information, wide-enough pathways for wheelchair users or sheets available in Braille.<sup>311</sup> Reading Article 19 and other provisions of the CRPD also creates an obligation for reasonable accommodation and an obligation to implement regulations to realize accessibility to ease the political participation of persons with disabilities.<sup>312</sup>

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<sup>304</sup> Cera, R., In: Della Fina, Cera, Palmisano (eds), at 529.

<sup>305</sup> Ibid., at 529.

<sup>306</sup> Ibid., at 528.

<sup>307</sup> Ibid., at 528.

<sup>308</sup> Human Rights Commission, Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities, A/HRC/19/36, 11 Dec 2011, at § 19.

<sup>309</sup> Ibid., § 19.

<sup>310</sup> Ibid., § 21.

<sup>311</sup> Cera, R., Article 29 In: Della Fina, Cera, Palmisano (eds), at 533.

<sup>312</sup> Ibid., 534.



It is essential to highlight that states have a ‘margin of appreciation’ regarding the concrete measurements to implement the right to vote ‘on an equal basis with others.’<sup>313</sup> However, in states that do not make domestic laws to realize their positive obligations, their bare passivity can amount to a violation of the right to vote of persons with disabilities.<sup>314</sup>

#### *4.2.1.2. Negative obligations*

Negative obligations relate to rights where states are prohibited from any interference with the individual.<sup>315</sup> Despite the substantial positive obligations in most countries with democratic systems, the right to vote for intellectual disabilities is limited or restricted. They either exclude their citizens based on their diagnosis using a blanket regulation or put them through individual assessments of their capability to make decisions about political matters. It is also possible that the legal and physical environment will deprive persons with disabilities of the effective enjoyment of the right to vote, e.g. setting up specific administrative barriers or avoiding easy-to-read information.<sup>316</sup>

When it comes to persons with disabilities, negative state obligations under the CRPD usually cover removing restrictions regarding political rights.<sup>317</sup> The CRPD highlights that the disenfranchisement of people from political rights because of their disability is wrong, and it is an imminent part of the fight against prejudice towards persons with disabilities.<sup>318</sup>

It is also essential to highlight that general and individual assessment of the capacity to exercise political rights is prohibited.<sup>319</sup>

It is essential to highlight that states are also obliged to ensure that the secrecy of voting for persons with disabilities is guaranteed. It would allow them to vote without being afraid of being under any surveillance. It is noteworthy that the CRPD establishes assisted voting, which must be allowed in case of necessity.<sup>320</sup> This is in accordance with the further analyzed Article 12, which states that states have to ensure the effective practice of legal capacity beyond its formal declaration.<sup>321</sup>

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<sup>313</sup> HRC, A/HRC/19/36 , at § 16.

<sup>314</sup> Ibid., §16.

<sup>315</sup> Anderson, In: Anderson, Philips (eds), at 99.

<sup>316</sup> Barclay, L., Cognitive Impairment and the Right to Vote: A Strategic Approach, *Journal of Applied Philosophy* Vol. 30 No.2 (2013), 146-159, at 147.

<sup>317</sup> Ibid., at 92.

<sup>318</sup> Ibid., at 105.

<sup>319</sup> Lord, J. E., Stein, M. A., Fiala-Butora, J., Facilitating an Equal Right to Vote for Personswith Disabilities, *Journal of Human Rights Practice*, Volume 6, No. 1 (2014), Pages 115–139, at 119.

<sup>320</sup> Cera, R., Article 29 In: Della Fina, Cera, Palmisano (eds), 534.

<sup>321</sup> Ibid., 535.

#### 4.2.2. *Equality and non-discrimination in the point of view of the right to vote*

While the CRPD obliges states to implement regulations that can actively help persons with disabilities to take part in political life, it also prohibits every discrimination regarding political rights based on disability.<sup>322</sup> Article 3 (general principles), Article 4 (general obligations) and Article 5 (non-discrimination) of the CRPD can serve as a tool to interpret further state obligations under Article 29 of the CRPD. Considering the guiding principles of autonomy, inclusion, equality, and non-discrimination can serve as an additional guarantee against all restrictions on political rights based on disability.<sup>323</sup>

Equality and non-discrimination are some of the most fundamental values in regards to human rights law.<sup>324</sup> They are rights and principles at the same time. Furthermore, they also serve as an interpretative tool for all the other rights and principles of the CRPD. It is also important to highlight that they cannot be subjected to “progressive realization”. Therefore they imply an immediate obligation for the member states of the CRPD.<sup>325</sup> They protect against any de jure discrimination in any field regulated by public entities as an independent right.<sup>326</sup>

Equality before the law means the entitlement of persons to equal treatment by the law itself and during its application. Equality under the law means the possibility of establishing a legal relationship, therefore getting benefits from the law itself. A legal system should grant adequate protection that persons with disabilities are capable of engaging with others legally. Therefore, persons with disabilities are entitled to be protected effectively, so every signatory state is obliged to guarantee the de jure equality of persons with disabilities within their jurisdiction. This means that there should not be any regulation in force that allows any denial, restriction or limitation on the rights of persons with disabilities and that disability should be mainstreamed in domestic legislations.<sup>327</sup>

Discrimination in the CRPD is prohibited based on any perceived and actual disability under Article 5. Discrimination based on disability covers every situation when a person faces any

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<sup>322</sup> Lord, Stein, Fiala-Butora, at 118.

<sup>323</sup> Ibid., 119.

<sup>324</sup> CRPD Committee General comment No. 6. § 4.

<sup>325</sup> Ibid., § 12.

<sup>326</sup> Ibid., § 13.

<sup>327</sup> Ibid., § 14.

disadvantage because of their disability compared to another person who does not have a disability.<sup>328</sup>

Discrimination based on perceived disability means a person is subjected to disadvantages because the person has an impairment prejudicially associated with incapability. This impairment is usually associated with an incapability to do certain things, such as deciding whom to vote for. This is a crucial aspect, especially when it comes to political rights, since it aims at certain prejudice that society has towards persons with disabilities. For instance, common misconceptions are used against a person with disabilities, such as ‘unsound mind’ to deprive them of the right to vote.<sup>329</sup>

When it comes to the right to vote, it is important to highlight that states are obliged to ensure that persons with disabilities “*have a voice but also that one’s voice not be seen as of lesser worth than that of others.*”<sup>330</sup> However, this can only be realised if their right is not subjected to arbitrary exclusions and restrictions. Moreover, every state must express concern for every resident. Therefore, non-discrimination regarding the right to vote is connected closely to respect and the ‘enforcement of equality.’

The right to vote is generally established in equality, which guarantees persons with disabilities to enjoy political rights on an equal basis with others.<sup>331</sup>

States should express that every person is an equal member of society. Therefore, any restriction on the right to vote would end up labelling persons with disabilities as second-class citizens, which is the exact issue the CRPD is trying to overcome by listing the state obligations regarding political participation.<sup>332</sup>

Discriminatory regulation commonly manifests in the deprivation of persons with disabilities from the right to vote to ‘preserve the political community’ or ‘preserve the integrity of the election process’ or prevent fraud.<sup>333</sup> Many states have a blanket regulation in force about the deprivation of persons with intellectual or mental disabilities. Discriminatory laws can also restrict or ban persons with intellectual disabilities from running for office or even political

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<sup>328</sup> Riegel, W., Non-discrimination, Accommodation, and Intersectionality under the CRPD: New Trends and Challenges for the UN Human Rights System, Max Planck Yearbook of United Nations Law Online, Volume 20 No. 1 (2017), 98-130, at 112.

<sup>329</sup> Ibid., at 114-115.

<sup>330</sup> Anderson, J. In: Anderson, Philips (eds), at 103.

<sup>331</sup> Cera, R. In: Della Fina, Cera, Palmisano (eds), at 531.

<sup>332</sup> Anderson, J. In: Anderson, Philips (eds), at 104.

<sup>333</sup> Cera, R. In: Della Fina, Cera, Palmisano (eds), at 531.

parties and campaigns and reinforce social stigmas by refusing persons with disabilities to get positions or not including disability-related agendas in their programs.<sup>334</sup>

The CRPD Committee called states to ‘urgently’ adopt laws that guarantee the enjoyment of the right to vote of persons under guardianship or persons without legal capacity on an equal basis with others. The CRPD, therefore, made it clear that the right to vote cannot be restricted based on disability, the type of impairment, institutionalization and legal capacity.<sup>335</sup>

It is essential to highlight that excluding any social group from any human rights would also deprive the rest of the society of reaching full justice in a democratic society because it does not include all members of the society in the decision-making.<sup>336</sup>

### 4.3. Legal capacity and individual decision-making skills in the view of the CRPD

#### 4.3.1. *Personal and Environmental Factors influencing decision-making skills*

It is essential to highlight the idea of critical disability theory that disability is not a “static condition inherent to the person”, but an outcome of the interaction of certain external and internal circumstances.<sup>337</sup> Decision-making ability varies from person to person. Therefore legal capacity should be separated from the individual skills to make a decision.<sup>338</sup> It can also be affected by many external and internal factors such as environment, emotions and society, attitude, and other skills.<sup>339</sup>

These categories of factors also involve a variety of circumstances that influence individual decision-making. For example, environmental factors cover the following: accessibility of information,<sup>340</sup> which is very important, especially when it comes to the right vote. The most straightforward example for this is whether the person with intellectual disabilities has been provided easy-to-read information on the voting itself or the candidates' programs.

Another factor here is the complexity of the decision, which is important for financial decisions and whether the decision is long-term or short-term. Further factors, for instance,

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<sup>334</sup> Ibid., 531.

<sup>335</sup> Ibid., 531.

<sup>336</sup> Anderson, J. In: Anderson, Philips (eds), at 104.

<sup>337</sup> Shogren, K., Wehmeyer, M., Lassmann, H., Forber-Pratt, A. Supported Decision Making: A Synthesis of the Literature across Intellectual Disability, Mental Health, and Aging. *Education and Training in Autism and Developmental Disabilities*, Vol.52. No. 2 (2017)144-157. at 145.

<sup>338</sup> Flynn, E., Arstein-Kerslake, A., *Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity*, *International Journal of Law in Context*, Volume 10, Issue 1 (2014) 81-104, at 83.

<sup>339</sup> Keys, M., Article 12, In: Cera, Della Fina, Palmisano (eds), at 269.

<sup>340</sup> Shogren, Wehmeyer, Lassmann, Forber-Pratt, at 151.

the relationship with the providers in one's life, can also affect decision-making skills in one's living arrangement and opportunities for decision-making and family attitudes regarding decision-making.<sup>341</sup>

Personal factors cover socio-demographic characteristics, covering gender, age, ethnicity, language, and communication preferences. For example, older persons are more likely to know about the risks of their decision than the younger population. Decision-making experience can also have an impact, especially if the person has not made decision in the same context before in their life. Characteristics of disabilities might influence decisions especially if the disability occurs with episodic and non-episodic nature, which is typical for mental disabilities. Co-occurring conditions can also influence decision-making, such as secondary medical factors, side-effects of medications. Emotional factors can manifest in regards to the aging society as they are afraid of being a burden and might not be comfortable using assistive technology.<sup>342</sup>

The analysis of these factors gives ground to replace restrictions of legal capacity with supported-decision-making systems. The aim of these is to provide the support tailored to the individual needs of a person with disabilities to enhance their personal autonomy and, by this, their legal capacity, instead of making decisions for them.<sup>343</sup>

#### *4.3.2. The normative content of the provisions on legal capacity under the CRPD*

##### Article 12 of the CRPD

*“1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*

*2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*

*3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*

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<sup>341</sup>Ibid., at 151.

<sup>342</sup> Ibid., at 150.

<sup>343</sup> Ibid., at 144-145.

4. States Parties 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. 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 circumstances, 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.

5. Subject to the provisions of this article, States Parties shall 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 equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.”

Article 12 can be considered the “heart” of the protection of persons with intellectual disabilities.<sup>344</sup> Legal capacity is a fundamental human right, and it is “indispensable” to the effective enjoyment of other human rights.<sup>345</sup> Legal capacity has a “universal attribute”, and it is inevitable to practice other human rights such as voting, parental and reproductive rights.<sup>346</sup>

According to the CRPD Committee, legal capacity is a ‘threshold right’<sup>347</sup>. Legal capacity is to be entitled to have rights and duties and to be able to exercise the rights and fulfil these duties.<sup>348</sup>

Scholars also call legal capacity the “*possession of individuality*”. It means to be a holder of rights and to have one's actions to be legally recognized. Having legal capacity means that the state has an obligation to protect it and enforce it and recognize it.<sup>349</sup> It also protects against any unwanted intervention in personal integrity.<sup>350</sup>

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<sup>344</sup> Flynn, Arstein-Kerslake, at 136.

<sup>345</sup> CRPD Committee General Comment No. 1., § 1.

<sup>346</sup> Ibid., § 8.

<sup>347</sup> Degener, T., A New Human Rights Model of Disability, In: Cera, Della Fina, Palmisano, G. (eds), at 47.

<sup>348</sup> Ibid., at 13.

<sup>349</sup> Flynn, Arstein-Kerslake, at 83.

<sup>350</sup> Keys, In: Della Fina, Cera, Palmisano, G. (eds), at 266.

Just like the right to vote, equal recognition before the law is guaranteed by the UDHR and the ICCPR.<sup>351</sup> The ICCPR mentions, for instance, that “*everyone shall have the right to recognition everywhere as a person before the law*”, although disability was not mentioned as a specific category for discrimination, therefore the ‘the claim of universality’ was not fulfilled, which was one of the reasons to draft the CRPD as a disability-specific convention.<sup>352</sup>

Legal capacity, however, is firstly mentioned in CEDAW. This declares that women have the equal capacity with men and “the same opportunities to exercise that capacity”.<sup>353</sup>

Article 12 ensures that persons with disabilities have the full legal capacity, and it should “*not be restricted on an unequal basis with others.*”<sup>354</sup> The normative content of Article 12 is that persons with disabilities should be recognized as persons in front of the law. This ensures that every human being bears a legal personality, which is an essential element in recognizing a person’s legal capacity.<sup>355</sup> Article 12 contains those ‘issues’ that states have to tackle to achieve the equal legal capacity of persons with disabilities.<sup>356</sup> Firstly, it recognizes the right to full legal capacity on an equal basis with others. Secondly, it lists those steps the states need to make to realize the full enjoyment of legal capacity. Article 12 considers supported decision-making as an institution that can help realise ‘universal legal capacity.’<sup>357</sup> The CRPD categorically rejects every system where persons with intellectual disabilities are restricted of their legal capacities, such as guardianship<sup>358</sup>, including partial and full guardianship and judicial interdiction.<sup>359</sup> In order to establish that a legal system guarantees legal capacity, both strands of legal capacity shall be effectively implemented. This covers the legal recognition and the right to act with legal effect.<sup>360</sup>

In order to fulfil the obligations under Article 12, states should carry out a holistic review of their legal systems to see if the legal capacity of persons with mental disabilities is not restricted on an unequal basis with others, and they must abolish those regulations which are not in conformity with the CRPD.<sup>361</sup> It is important to highlight that persons with disabilities form a heterogeneous social group. Therefore each individual has different needs when it

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<sup>351</sup> ICCPR Article 26, UDHR Article 7

<sup>352</sup> Keys, M. In: Cera, Della Fina, Palmisano (eds), at 267.

<sup>353</sup> CEDAW, Article 15. 2.

<sup>354</sup> CRPD Committee General Comment No. 1. § 8.

<sup>355</sup> *Ibid.*, § 11.

<sup>356</sup> Keys, M. In: Cera, Della Fina, Palmisano (eds), at 267.

<sup>357</sup> *Ibid.* 267.

<sup>358</sup> CRPD Committee General comment No. 1. § 7.

<sup>359</sup> *Ibid.*, § 27.

<sup>360</sup> *Ibid.*, § 14

<sup>361</sup> *Ibid.*, § 7.

comes to assistance.<sup>362</sup> The diversity of persons with disabilities and different fields of rights (right to vote, prohibition of psychiatric treatment against the person's will) do not mean that states can pick and choose from the areas where to realize the right to full legal capacity equal basis with others. Legal capacity has to be implemented in every area in order to ensure the meaningfulness of this right.<sup>363</sup> Article 12 is based on the importance of "self-direction", where the focus is on the person with disabilities who realize their wills and preferences and make their own decisions.<sup>364</sup> The attention on legal capacity and the importance of individual making of choice echoes the other provisions of the CRPD. It highlights the 'individual autonomy', the freedom to make one's own choices and the opportunity to be actively involved in decision-making.<sup>365</sup>

Based on the argument of the CRPD Committee, the ICCPR has already laid down the basics of the right to equality before the law, and it creates immediate obligation by the ratification and "progressive realization" is not applicable.<sup>366</sup> The implementation of legal capacity without any restrictions is a mandate of the State to achieve reasonable accommodation. Reasonable accommodation in the framework of legal capacity means to provide the necessary support based on individual needs to achieve the goals of Article 12. In this regard, states have to recognize the legal personality of persons with intellectual and mental disabilities and provide them with the necessary assistance to enjoy it effectively.<sup>367</sup> The guiding principle of CRPD is dignity, autonomy and freedom to make individual choices and full participation without any discrimination because of disability. These manifest through the recognition of legal capacity and the effective participation of persons with disability in society.<sup>368</sup>

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<sup>362</sup> Flynn, Arstein-Kerslake, at 90.

<sup>363</sup> Flynn, Arstein-Kerslake, at 90.

<sup>364</sup> Keys, M., In: Della Fina, Cera, Palmisano (eds), 267.

<sup>365</sup> Dinerstein, R. D, 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, Vol. No. 2 (2012) 8-12., at 9.

<sup>366</sup> CRPD Committee General Comment No. 1. § 30.

<sup>367</sup> Keys, M. In: Cera, Della Fina, Palmisano (eds), at 266.

<sup>368</sup> *Ibid.*, at 265.



#### 4.3.3. *Legal capacity in the CRPD – a “new paradigm.”*

There has been a social debate about the possible restrictions of legal capacity based on decision-making skills, of which the latest manifest is Article 12 of the CRPD. Society has been opposing giving full legal capacity to persons with mental and intellectual disabilities.<sup>369</sup> Historically, legal personhood has been connected with cognitive skills and rationality. Mental capacity, however, covers decision-making, which usually varies by each individual and social and political conceptions, but it is not a scientific and objective phenomenon.<sup>370</sup> States usually connect the two and deprive the person who has a mental disability of their legal capacity because of their mental impairment.<sup>371</sup> Those who were thought not to bear (enough) cognitive skills could not have autonomy; therefore, they did not have legal personality either. Despite science knowing so little about how the brain works and still not having discovered everything about it, society and law-making paired cognitive functions with entitlements to rights, especially to the right of legal capacity. It was assumed that ‘rational’ individuals are entitled to the full set of rights. Because of this relationship that has been built up in society between cognitive skills and rationality, persons with intellectual disabilities have been a target of historical disadvantage in terms of denied legal capacity. The CRPD became a catalyst to an emerging international consensus that recognises that every individual has the same right regardless of their ‘rationality.’<sup>372</sup> Recently, the support of the legal capacity of person with intellectual disabilities gained more popularity. The CRPD challenges disability as one of the final obstacles to equal recognition of legal capacity for each individual.<sup>373</sup>

The CRPD gives a profoundly new idea about legal capacity for persons with intellectual or mental disabilities since it set forth full legal capacity for every person. This means that every single human being has the right to decide about any matters regarding their life.<sup>374</sup>

The CRPD contains steps for the member states to achieve the “new paradigm” concerning legal capacity and guardianship<sup>375</sup>. Based on the “new paradigm”, persons with intellectual disabilities are ensured to enjoy legal capacity on an “equal basis with others” and shall be provided with the assistance they need to enjoy full legal capacity. This is based on the

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<sup>369</sup> Flynn, Arstein-Karslake, at 88.

<sup>370</sup> CRPD General comment No. 1. § 14.

<sup>371</sup> *Ibid.*, at § 15.

<sup>372</sup> Flynn, Arstein-Kerslake, at 82.

<sup>373</sup> *Ibid.*, at 84.

<sup>374</sup> *Ibid.*, at 91.

<sup>375</sup> Glenn, K., B., Changing paradigms: Mental capacity, legal capacity, guardianship, and beyond, *Columbia Human Rights Law Review*, , Vol. 44. No. 93 (2012), 93-169., at 155.

slogan of ‘Nothing about us without us!’.<sup>376</sup> Therefore, the ‘philosophy’ of this international regulation is to give “support” instead of the replacement in decision-making.<sup>377</sup> Looking at mental and intellectual disability purely by a medical approach is not acceptable anymore, the aim now is to remove barriers to participation in order to realize an essential part of equality.<sup>378</sup>

The CRPD introduces the human rights approach of disability policy-making by declaring legal personhood to persons with intellectual disabilities and recognizes that some individuals need support to fully enjoy legal capacity. According to the CRPD Committee, persons with intellectual disability shall be provided assistance, instead of the deprivation of legal capacity.<sup>379</sup> Despite making decisions for the person with mental disability in their “best interest”, there should be an approach aiming at the “best interpretation of will and preferences” in order to declare the enjoyment of legal capacity on the “equal basis with others”.<sup>380</sup> In order to comply with international legislation, States are obliged to abolish substitute decision-making systems with supported decision-making systems.<sup>381</sup> The need for assistance in decision-making cannot serve as a reason to deprive someone of their legal capacity since these differences create diversity which is the obligation of the states to preserve.<sup>382</sup> Deprivation of legal capacity cannot be done on an “assimilationist basis”.<sup>383</sup>

During the negotiation procedure of the CRPD, the question came up whether persons with intellectual disabilities (e.g. communicational impairments or the ones who are in a coma) can be the holder of certain rights but not exercising them; however, this would not fit the human rights approach of the CRPD. The reason for it is that selective legal capacity would reassure the stereotype that creates a relation between disability and inability with decision-making. However, incapacity in decision-making is not the sole attribute of intellectual disability.<sup>384</sup>

Despite thematic treaties (e.g. CEDAW), the CRPD puts a “*double shield*” on the right of persons with disabilities by declaring the enjoyment of the rights stated out in general human rights treaties in addition to the specific rights of persons with disabilities.<sup>385</sup> Other

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<sup>376</sup> Ibid., at 135.

<sup>377</sup> Flynn, Arstein-Kerslake, at 82.

<sup>378</sup> Keys, M., In: Della Fina, Cera, Palmisano, G (eds), at 265.

<sup>379</sup> CRPD General Comment No. 1., § 17.

<sup>380</sup> Ibid., § 21.

<sup>381</sup> Ibid., § 28.

<sup>382</sup> Ibid., § 33.

<sup>383</sup> Ibid., § 33.

<sup>384</sup> Keys, M, In: Cera, Della Fina, Palmisano (eds), at 268.

<sup>385</sup> Cera, R, Preamble In: Della Fina, Cera, Palmisano (eds), at 82.

international documents do not detail the difference between mental and legal capacity. The CRPD declares that the deprivation of legal capacity because of mental disability cannot be justifiable.<sup>386</sup>

Therefore, the CRPD has a vital nature in overcoming the historical presumption that only adults with typical mental functions can make certain decisions. It aims to replace guardianship which was considered to be a protective measurement for persons with disabilities.<sup>387</sup>

#### 4.4. The right to vote in the view of guardianship and assessment procedures in the view of the CRPD

##### *4.4.3. Guardianship in general*

Guardianship systems are rooted in Roman Law, where the person with intellectual disabilities was supposed to be under the protection of his relatives and later under a tutor.<sup>388</sup>

The reason for guardianship systems is that the person who has a disability is considered to be in a status where someone else has to make decisions based on that person's 'best interest'.<sup>389</sup> In many legal systems, the diagnosis of mental disability automatically deprives persons of their legal capacity based on the assumption that they do not have the necessary decision-making skills.<sup>390</sup> Guardianship can cause partial or full deprivation of legal capacity, which violates self-determination due to all the undesirable interventions with private life.<sup>391</sup> Guardianship is usually a delegated decision-making system that is most commonly imposed by a court decision, and it substitutes the individual with a guardian to decide about different matters in the name of the individual.<sup>392</sup> The guardian acts thinking that the person would have made that decision if the person was in a legal situation where they had the opportunity to make that decision.<sup>393</sup>

##### *4.4.2. The CRPD on guardianship*

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<sup>386</sup> General Comment No. 1. § 13.

<sup>387</sup> Dinerstein, at 9.

<sup>388</sup> Glen, at 102.

<sup>389</sup> Keys, M., In: Cera, Della Fina, Palmisano (eds), at 268.

<sup>390</sup> *Ibid.*, at 269.

<sup>391</sup> *Ibid.*, at 270.

<sup>392</sup> Dinerstein, at 2.

<sup>393</sup> Flynn, Arstein-Kerslake, at 84.

The wording of the CRPD does not mention the abolishment of the guardianship system expressively<sup>394</sup>. However, according to the CRPD Committee, the CRPD has to be interpreted so that guardianship, substituted decision-making and decision-making based on ‘the best interest’ are human rights violations. Therefore, they should be replaced by supported decision-making in all domestic legal systems.<sup>395</sup> Consequently, the deprivation of legal capacity and placement under guardianship ends up violating other rights such as the right to vote.<sup>396</sup> Despite how common the guardianship systems are world-wide<sup>397</sup>, the CRPD is a “game-changer”<sup>398</sup> in that it obliges states to replace guardianship systems with supported decision-making.<sup>399</sup> Article 12 of the CRPD declares that “*states must take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*”<sup>400</sup> However, this is not the only provision of the CRPD that urges against guardianship systems. Multiple articles refer to the right of persons with disabilities to have legal capacity and living without being placed under guardianship.<sup>401</sup> Article 19 states that “*persons with disabilities to live in the community, with choices equal to others*”<sup>402</sup>, and Article 18 declares that persons with disabilities have “*freedom to choose their residence and to a nationality, on an equal basis with others.*”<sup>403</sup> It also connects to the right to health under Article 25 and Article 17, which protects personal integrity. The right to full legal capacity and the right to health can protect, for instance, against involuntary medical treatment; meanwhile, its application in the light of physical integrity can cover involuntary (psychiatric) detention. Together with independent living, it can promote the deinstitutionalisation of persons with intellectual disabilities and replace institutions with independent living with assistance based on personal needs.<sup>404</sup>

The most problematic part of guardianship is that it requires more criteria to be fulfilled by persons diagnosed with disabilities than those who are not. By the placement, under guardianship, these individuals are deprived of the right to learn from their mistakes since

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<sup>394</sup> Ibid. at 89.

<sup>395</sup> Glen, at 100.

<sup>396</sup> General comment No. 1. § 8

<sup>397</sup> Perlin, M. L. (2013). Striking for the guardians and protectors of the mind: The convention on the rights of persons with mental disabilities and the future of guardianship law. *Penn State Law Review*, Vol. 117 No. 4, 1159-1190., at 1159.

<sup>398</sup> Ibid., 1172.

<sup>399</sup> Ibid., 1176.

<sup>400</sup> CRPD, Article 12.

<sup>401</sup> Perlin, at 1176.

<sup>402</sup> CRPD, Article 19.

<sup>403</sup> CRPD, Article 18

<sup>404</sup> Keys, M, In: Della Fina, Cera, Palmisano (eds), at 268.

they are presumed to be unable to make decisions.<sup>405</sup> It can be argued that this makes guardianship discriminative since it puts the individual under the assessment of its decision-making skills based on a diagnosis that deprives them of their autonomy, which would not happen without the person having a (perceived) disability.

#### 4.4.3. *The assessment of an individual's capacity to practice the right to vote*

There are multiple ways to exclude persons with mental and intellectual disabilities from the right to vote. Most commonly, persons placed under guardianship lose their right to vote due to the deprivation of their legal capacity, which can be considered a 'blanket' regulation. In these systems, the person might not be denied the right to vote by law, but the legal system allows to deprive individuals of the right to vote who do not have 'legal personality'. Another method is when the legal system includes rules on assessment procedure that targets the individual's political decision-making skills.<sup>406</sup> The trend has moved to this method, which sets up a 'functional standard of capacity' and a method that includes applying it in practice. For example, in the state of Maine in the USA, individuals are considered to be incapable of voting if "*they lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice*"<sup>407</sup>.

The core of assessment procedures is that the systems assume a link between autonomy and decision-making. Since persons with disabilities might rely on help when it comes to decision-making, it has been argued (e.g. by philosophers of the enlightenment) that they should not exercise the right to vote based on an individual decision. They said that moral freedom which is equal to autonomy can be only realized by individually made decisions.<sup>408</sup> It was also argued that helpers could manipulate persons with mental and intellectual disabilities. Therefore, restrictions on the right to vote are inevitable because only independent preferences can be accepted as votes.<sup>409</sup> However, it is important to see that a decision made in the poll station does not necessarily show our personal will and interest, for example, when it comes to tactical voting. Therefore, political decisions are usually 'adaptive' because the political system is becoming less autonomous by not adapting to the diversity of preferences of the members of the society. Thus, the nature of the political

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<sup>405</sup> Ibid. at 274.

<sup>406</sup> Beckman, Disability, Dependence and Democracy In: Beckman, at 148-149.

<sup>407</sup> Raad, Karlawish, Appelbaum, at 624.

<sup>408</sup> Beckman, at 152-153.

<sup>409</sup> Ibid., 155.

system has more impact on what the person decides than the personal decision on the political system.<sup>410</sup> Assessment approaches observe whether the person's decisions align with the caretakers' views, and the functional test checks the person's cognitive functions. During the assessment, the person is given information and is expected to weigh their importance and then communicate the decision. Testing of rationality is highly problematic because it looks at the decision-making at a particular time in a particular matter, and it does not take into account the previously mentioned (external and internal) factors of decision-making. These approaches usually use objective measurements to assess subjective decision-making and deprive the person of self-determination since the approach determines oneself by disregarding individuality.<sup>411</sup> Therefore, every mental capacity assessment approach is clearly against the CRPD based on General Comment No.1. The CRPD Committee states that assessment of legal capacity is a violation of Article 12 of the CRPD.<sup>412</sup>

When assessing one's ability to make decisions, the CRPD aims to switch from those traditional approaches, where authorities stereotype persons with certain mental disabilities that they cannot make decisions.<sup>413</sup> It is important to see how the individualized assessment and the denial of the right to vote appear in Article 8 of the CRPD. It states that states shall "*foster respect for the rights and dignity of persons with disabilities*"<sup>414</sup>. Using wording such as 'unsound mind' or 'insane' can already be a violation of the CRPD. Furthermore, the capacity assessment can also be contrary to the principle of dignity. It is because the assessment only required by law when someone has a medical diagnosis about their disability. Besides, it violates dignity, and it also affects substantive equality since it is only applied to persons diagnosed with a disability.<sup>415</sup>

Based on the above analysis, it can be stated that the CRPD considers every form of guardianship as a human rights violation. The CRPD further rejects any form of assessment procedure of individual decision-making skills, which covers the right to vote.

#### 4.5. The practice of the right to vote in international adjudication

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<sup>410</sup> Ibid., 156.

<sup>411</sup> Ibid., at 276.

<sup>412</sup> Ibid., at 276.

<sup>413</sup> Keys, M., In: Cera, Della Fina, Palmisano (eds), 276.

<sup>414</sup> Article 8 of CRPD

<sup>415</sup> Savery, J., Voting Rights and Intellectual Disability in Australia: An Illegal and Unjustified Denial of Rights, Sydney Law Review Vol. 37, No. 2 (2015), at 295.

#### 4.5.1. The practice of the right to vote according to the CRPD Committee - The case of Bujdosó v. Hungary

##### 4.5.1.1. *Factual circumstances*

The case was initiated at the CRPD Committee by 6 citizens of Hungary with intellectual disabilities. Due to their placement under guardianship, their names were deleted from the electoral registry of Hungary based on the Constitution, which states out that persons under guardianship do not have the right to vote.<sup>416</sup> The authors stated that they did not have any remedy in the national system because the only possibility for them was to initiate a procedure to restore their legal capacity under the Civil Code of Hungary; there was no separate procedure aiming to restore their right to vote. On September 14 2011, the authors initiated the procedure in front of the CRPD Committee.<sup>417</sup>

##### 4.5.1.2. *Legal issue*

The authors complained that as persons under guardianship, they were automatically deleted from electoral registers by direct application of article 70(5) of the Constitution. Their ability to vote was not addressed as the Constitutional provision automatically and indiscriminately disenfranchised them. The authors argued that they understood politics and would participate in elections if they were allowed. They claimed that the automatic ban is unjustified and breaches article 29, read alone and in conjunction with article 12 of the Convention.<sup>418</sup>

##### 4.5.1.3. *Decision*

The CRPD Committee declared in its communication that the domestic laws are against Article 12 and 29 of the CRPD. The CRPD Committee declared that Hungary is under the obligation to “*enact laws that recognize, without any “capacity assessment”, the right to vote for all persons with disabilities, including those with more need of support, and provide for adequate assistance and reasonable accommodation in order for them to be able to exercise their political rights*”. It further declared that the State Party is obliged to “*uphold and to guarantee in practice the right to vote to persons with disabilities, on an equal basis with*

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<sup>416</sup> Committee on the Rights of Persons with Disabilities, Communication No. 4/2011, CRPD/C/10/D/4/2011, 14 September 2011, (Bujdosó v. Hungary), § 2.

<sup>417</sup> Ibid., § 3.3.

<sup>418</sup> Ibid., § 3.1.

*others, by ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use, and where necessary, at their request, allowing assistance in voting by a person of their choice.*"<sup>419</sup>

#### 4.5.1.4.Reasoning

The authors claimed, more specifically, that their automatic disenfranchisement, regardless of the nature of their disability and their individual abilities was discriminatory and unjustified, which the CRPD Committee agreed with.<sup>420</sup>

The CRPD Committee declared, that Article 29 of the CRPD obliges states *"to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including by guaranteeing their right to vote"*<sup>421</sup>.

The CRPD Committee doesn't accept any restrictions and exceptions in regards of persons with disabilities.<sup>422</sup> *Therefore, an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability, within the meaning of article 2 of the Convention.*"<sup>423</sup>

States have the obligation to provide and ensure the enjoyment of political rights, including the right to vote *"on an equal basis with others in all aspects of their lives"*.<sup>424</sup>

According to the CRPD Committee, by depriving the authors of their right to vote "based on actual or perceived intellectual disability", the State party has failed to comply with its obligations under Article 29 and Article 12 of the CRPD.

Based on the argument of the CRPD Committee, the assessment of the individual's capacity is *'discriminatory in nature'*; *therefore, it cannot be considered legitimate nor proportionate to protect the integrity of the political system.*<sup>425</sup>

The state's responsibility here is to ensure that the voting system is appropriate, accessible, and easy to understand and use, and they have to allow assistance if necessary upon request of the person with a disability. To comply with this, the state can fulfil its obligation to ensure

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<sup>419</sup> Ibid., § 10.2.

<sup>420</sup> Ibid., § 9.2.

<sup>421</sup> Ibid., § 9.2.

<sup>422</sup> Ibid., § 9.2.

<sup>423</sup> Ibid., §9.4.

<sup>424</sup> Ibid., § 9.5.

<sup>425</sup> Ibid., § 9.6.



that persons with disability vote competently on an equal basis with others, while the state guarantees the secrecy of voting.<sup>426</sup>

#### 4.5.2. The practice of the right to vote according to the ECtHR I. - Alajos Kiss v. Hungary

##### *4.5.2.1. Factual and procedural circumstances*

The applicant had manic depression and was placed under partial guardianship in 2005. Even though, this form of guardianship only affected financial decision-making, the domestic court decision deprived the applicant from the right to vote.<sup>427</sup> He appealed against the deprivation of the right to vote in 2006, which was rejected because it was based on the Hungarian Constitution that the ward is deprived of the right to vote due to the placement under guardianship.<sup>428</sup> After this rejection, the applicant turned to the ECtHR in 2006.<sup>429</sup>

##### *4.5.2.2. Legal issue*

The applicant complained that the infringement of his right to vote because of his partial guardianship was “unjustified and discriminatory deprivation” of his right to vote. He claimed that he could not get any legal remedy because the deprivation of the right to vote was based on the Constitution. He claimed the violation of Article 3 Protocol No. 1 and Articles 13 and 14 of the ECHR.<sup>430</sup>

##### *4.5.2.3. Decision*

According to the ECtHR, 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.*” The ECtHR concluded “*that an indiscriminate removal of voting rights, without an individualized judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate*

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<sup>426</sup> Ibid., § 9.6.

<sup>427</sup> Alajos Kiss v. Hungary, §§ 6-7.

<sup>428</sup> Ibid., §§ 8-10.

<sup>429</sup> Ibid., § 3.

<sup>430</sup> Ibid., § 18.

*grounds for restricting the right to vote. There has accordingly been a violation of Article 3 of Protocol No. 1 to the Convention.*"<sup>431</sup>

#### 4.5.2.4.Reasoning

The applicant argued for a narrow margin of appreciation and required that every restriction of any right of persons with mental disability shall be subject to "*strict scrutiny*".<sup>432</sup> It was also argued that during the placement of the applicant under guardianship, there was no assessment done regarding his capacity to vote. Also, it was mentioned that his mental disability could not even affect his ability to vote.<sup>433</sup>

Although the legislature should decide what procedure should assess the ability to vote of mentally disabled persons, the ECtHR observed: "*no evidence that the Hungarian legislature has ever sought to weigh the competing interests or to assess the proportionality of the restriction*".<sup>434</sup>

The ECtHR stated that Article 3 Protocol No 1. does not specify nor limit the possible aims of a restriction made by domestic laws. The ECtHR, therefore, accepted the legitimate aim provided by the Government, which is to ensure "*that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs.*"<sup>435</sup>

The ECtHR pointed out that "*relying on the margin of appreciation, it must be permissible for the legislature to establish rules ensuring that only those who are capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs.*"<sup>436</sup>

The ECtHR also accepted the wide margin of appreciation in regards to the right to vote.<sup>437</sup>

The ECtHR didn't accept that "*an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, falls within an acceptable margin of appreciation.*"<sup>438</sup> Despite the margin of appreciation is wide, as the ECtHR argued, it is still not "*all-embracing*".<sup>439</sup> It is also mentioned that when it comes to a historically

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<sup>431</sup> Ibid., § 44.

<sup>432</sup> Ibid., § 28.

<sup>433</sup> Ibid., § 30.

<sup>434</sup> Ibid., § 41

<sup>435</sup> Ibid., § 38.

<sup>436</sup> Ibid., § 40.

<sup>437</sup> Ibid., § 41.

<sup>438</sup> Ibid., § 42.

<sup>439</sup> Ibid., § 42.

disadvantaged group such as persons with mental disability, the state's margin of appreciation should be narrower and *"it must have very weighty reasons for the restrictions in question"*.<sup>440</sup> The applicant lost his right to vote as an outcome of *"the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship."*<sup>441</sup> Based on the argument of the ECtHR, 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."*<sup>442</sup>

#### 4.5.3. The practice of the right to vote according to the ECtHR II. - Ströbye and Rosenlind v. Denmark

##### 4.5.3.1. Factual and procedural circumstances

The first applicant was deprived of his legal capacity in 1984 and was placed under guardianship regarding financial and personal matters. The second applicant was placed under guardianship in regards to financial decisions in 2009. There were two types of guardianship laws in Denmark: one when the ward was deprived of legal capacity and one when they were not. In addition, based on the Danish Constitution, if a person was deprived of legal capacity, they were also automatically deprived of voting. Since both of the applicants were deprived of their legal capacity, they were both deprived of their right to vote.<sup>443</sup>

The applicants filed a joint case at the domestic courts to claim that the deprivation of the right to vote is against the Constitution. However, after multiple appeals against the rejection of their claim, it was upheld by the Supreme Court.<sup>444</sup> This started a political debate, which ended up in the amendment of some statutory provisions and made it possible to limit guardianship to only financial matters and only persons with full guardianship were deprived of the right to vote.<sup>445</sup>

In the meantime, the applicants' right to vote was restored because of the full abolishment of guardianship in the first applicant and partial abolishment regarding the second applicant.<sup>446</sup>

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<sup>440</sup> Ibid., § 42.

<sup>441</sup> Ibid., § 43.

<sup>442</sup> Ibid., § 44.

<sup>443</sup> Ströbye and Rosenlind v. Denmark, §§ 1-10.

<sup>444</sup> Ibid., §18.

<sup>445</sup> Ibid., § 22.

<sup>446</sup> Ibid., §§ 23-24.

#### 4.5.2.2. Legal issue

Based on the applicants' complaint, the Supreme Court judgment of 18 January 2018 had breached their right to vote under Article 3 of Protocol No. 1 to the Convention, according to which "*The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.*"<sup>447</sup>

#### 4.5.2.3. Decision

The ECtHR declared that the deprivation of the right to vote of persons under guardianship pursued a legitimate aim and was proportionate in the light of the aim to be reached, therefore there was no violation of Article 3 of Protocol No. 1.<sup>448</sup>

#### 4.5.2.4. Reasoning

In the case of *Ströbye and Rosenlind v. Denmark*, the ECtHR reassured that the States should enjoy a narrow margin of appreciation when it comes to the exclusion of persons with mental disabilities from public life "whether such exclusion was compatible with international human rights guarantees".<sup>449</sup> The deprivation of the right to vote of the applicants was an "automatic consequence", and there was no "clear and absolute" link between the ability to manage financial matters and the access to political rights.<sup>450</sup> The ECtHR declared that the authorities were aware that "*there was no clear and absolute link between a person's ability to organise his or her own finances and that person's political rights*"<sup>451</sup>.

However, the Ministry of Justice of Denmark refused to incorporate the amendment because it would require the modification of the Constitution.<sup>452</sup> The Danish government argued that deprivation is not automatic, and during the assessment of guardianship procedures, the laws provide "the person in question was able to foresee the consequences of his or her decisions and make conscious and judicious decisions" therefore, it can be considered proportionate. They argued that the system offers clear criteria to be qualified to have to right to vote.<sup>453</sup>

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<sup>447</sup> Ibid., § 73.

<sup>448</sup> Ibid., § 130.

<sup>449</sup> Ibid., § 78.

<sup>450</sup> Ibid., § 79.

<sup>451</sup> Ibid., § 80.

<sup>452</sup> Ibid., §81.

<sup>453</sup> Ibid., § 87.

According to the ECtHR, the margin of appreciation should be narrower, especially regarding historically disadvantaged groups. Although the fact that not every person is deprived of the right to vote, only those who were declared fully legally incompetent based on the individualised procedure made the ECtHR rule that the case “significantly differs” from the *Alajos Kiss v. Hungary* where all persons regardless.<sup>454</sup>

The infringement was considered to be lawful by the ECtHR since the law prescribed it.<sup>455</sup> Similarly to the *Alajos Kiss v. Hungary* case, the ECtHR declared that the ECHR does not limit the aims that the restriction of a certain right can reach.<sup>456</sup> The first condition was that the person in question had to be unable to manage his or her affairs due to mental unsoundness or mental disability. The second condition was that a legal incapacitation order was necessary to prevent the relevant person from exposing his or her assets, income or other financial interests to the risk of a significant loss or preventing financial exploitation.<sup>457</sup>

It is important to highlight that the ECtHR recalled that Article 29 of the CRPD obliges state parties to guarantee the political rights and the opportunity to enjoy them for persons with disabilities on an equal basis with others. Furthermore, it mentioned that the CRPD Committee was concerned that persons deprived of their legal capacity were deprived of their right to vote. However, the ECtHR relied on the Venice Commission in its Opinion no. 190/2002, which used a “*more cautious approach*”, which made it acceptable to restrict the right to vote of persons with disabilities under certain conditions.<sup>458</sup>

The ECtHR highlighted that the margin of appreciation is “*generally wide*” under Article 3 of Protocol No. 1, but it is “*substantially narrower when a restriction on fundamental rights applies to a particularly vulnerable group in society, such as the mentally disabled*”. It is stated that persons with intellectual disabilities and persons under guardianship were not subjected to the deprivation of the right to vote in general. It only affected those who “*after an individualised judicial evaluation, had also been found legally incompetent by a court*”. This made the ECtHR declare that the present case was different from the *Alajos Kiss v. Hungary*, where everyone under full or partial guardianship was deprived of the right to vote.<sup>459</sup>

The ECtHR also stated that it is not a requirement for the deprivation of the right to vote that a specific and individual assessment of their voting capacity has to be carried out. The

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<sup>454</sup> *Ibid.*, § 86.

<sup>455</sup> *Ibid.*, § 96.

<sup>456</sup> *Ibid.*, § 97.

<sup>457</sup> *Ibid.*, §100.

<sup>458</sup> *Ibid.*, § 112.

<sup>459</sup> *Ibid.*, § 113.

ECtHR mentioned that it could be more feasible to use a general process than a case-by-case examination to achieve a legitimate aim.<sup>460</sup> The ECtHR acknowledged that one of the main burdens to the right to vote of persons with disabilities is the Danish Constitution.<sup>461</sup>

The ECtHR acknowledged that the Danish legislation was putting a “*laudable effort*” to limit the restrictions on the right to vote, and the “*development obtained required thorough legal reflection and time, cannot be held against the Government to negate the justification and proportionality of the restriction at issue.*”<sup>462</sup> The case was considered to be significantly different from the *Alajos Kiss v. Hungary*, because in that one, the ECtHR did not see that the domestic legislator had ever sought to weigh the competing interests or assess the proportionality of the restriction in question.<sup>463</sup>

#### 4.5.4. *Summary of the practice in regards of the right to vote of persons with intellectual disabilities according to the ECtHR in comparison with the CRPD and the CRPD Committee’s approach*

The right to vote was given a wide margin of appreciation in both cases.<sup>464</sup> The ECtHR though, declared a narrower margin of appreciation and strict scrutiny regarding the rights of persons with intellectual disabilities.<sup>465</sup>

It is noteworthy that the ECtHR gives big importance to whether the state is attempting to limit the restrictions on the right to vote.<sup>466</sup> It is also vital to point out that in the *Ströbye v. Denmark* case, the fact that they did not modify the relating laws, including the Danish constitution, was appreciated in favour of Denmark<sup>467</sup>, regarding such a fundamental civil right as the right to vote.

It is vital to throw attention to how the ECtHR looks at assessing the right to vote. The *Alajos Kiss v. Hungary* stated that the ‘indiscriminate’ application of a ‘blanket statement’ violates Article 3 Protocol No.1. of the ECHR. The ECtHR suggested there could have been an individualized assessment that measures persons with intellectual disabilities.<sup>468</sup> In the *Ströbye v. Denmark* case, the individual judicial assessment was carried out for only those

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<sup>460</sup> *Ibid.*, § 114.

<sup>461</sup> *Ibid.*, § 118.

<sup>462</sup> *Ibid.*, § 119.

<sup>463</sup> *Ibid.*, § 120

<sup>464</sup> *Alajos Kiss v. Hungary*, § 41. *Ströbye v. Rosenlind*, §113.

<sup>465</sup> *Alajos Kiss v. Hungary*, § 42, *Ströbye v. Rosenlind*, §78.

<sup>466</sup> *Ströbye v. Rosenlind*, § 119, *Alajos Kiss v. Hungary*, §41.

<sup>467</sup> *Ströbye and Rosenlind v. Denmark*, §120.

<sup>468</sup> *Alajos Kiss v. Hungary*, §44.

who already lost their legal capacity, made the case significantly different from the *Alajos Kiss v. Hungary*.<sup>469</sup>

Even though both cases highlighted the wording of Article 29 of the CRPD, the ECtHR did not find problematic the fact that the applicants were deprived of the right to vote. It suggested as well that a general assessment can be applied to make the procedure more feasible.<sup>470</sup> I believe that it is a significant detail that in the *Alajos Kiss v. Hungary* case, the ECtHR finds a blanket regulation to be a violation of the ECHR. However, in the later case of *Ströbye and Rosenlind v. Denmark*, it has suggested implementing a general assessment to make it easier to assess if someone is capable of voting. This even creates a contradiction with the judgment of *Alajos Kiss v. Hungary*, where it declared that ‘blanket statements’ are human rights violations. The ECtHR made this declaration despite citing Article 29 of the CRPD and referring to it in its assessment, which is categorically against any restriction of human rights based on disability.

It is important to highlight how the ECtHR looks at the state's positive obligations when it comes to the right to vote of persons with intellectual disabilities. The CRPD Committee highlights that the state must provide assistance based on the individual need or request of the person with intellectual disabilities. Furthermore, the state can realise its obligation to ensure the secrecy and integrity of voting if it provides the necessary assistance.<sup>471</sup> Therefore, the restrictions on rights do not and cannot serve a legitimate aim. The state has a positive obligation to enhance the enjoyment of the rights of those with a need for assistance instead of deprivation.

Despite the CRPD’s assessment, the ECtHR did not assess the state’s obligation to provide assistance but made it a legitimate aim to restrict access to the right to vote to guarantee the secrecy and make sure only persons with certain capacities can participate in voting.<sup>472</sup>

It is also didn’t apply it as an interpretative tool when it made its decision. In the case of *Ströbye and Rosenlind v. Denmark* it even highlighted that it would follow the “*more cautious approach*”<sup>473</sup> of the Venice Commission. The ECtHR observed both the CRPD and the Venice Commission and declared that it “*cannot discern any common ground*” between the international and European and international regulations.<sup>474</sup>

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<sup>469</sup> *Ströbye and Rosendlind v. Denmark*, § 113.

<sup>470</sup> *Ibid.*, § 114.

<sup>471</sup> *Bujdosó v. Hungary*, §10.2.

<sup>472</sup> *Alajos Kiss v. Hungary*, § 38. *Ströbye and Rosendlind v. Denmark*, §97, §130.

<sup>473</sup> *Ströbye and Rosendlind v. Denmark*, § 112.

<sup>474</sup> *Ibid.*, at §112.

## 5. Conclusion

The first research question was whether or not the ECtHR applies the CRPD, and if it does, to what extent does the CRPD play an interpretative role, and how much weight does it have in the adjudication.

It can be established that the main mandate of the ECtHR is to apply the ECHR and to find whether the domestic measures conform with the ECHR. During its adjudication, it applies values and interpretative tools which assist its decision-making. The ECtHR has a lot of leeways to apply other international treaties. Many principles are evaluated during its practice, which has the potential to guarantee an adjudication system that adapts to new international standards. For instance, these practices and principles are the ‘living instrument’ doctrine and can lead to an autonomous interpretation. The respect for values such as dignity and autonomy could improve the protection of ‘historically disadvantaged’ groups such as persons with disabilities. These are values that can be used in the interpretation process of the ECtHR, which can make the ECHR to be applied in the light of the new international standards. Furthermore, the margin of appreciation is considered narrower regarding persons with disabilities, although this did not affect the way the ECtHR applied the CRPD.

During its disability-related adjudication, the ECtHR refers to the CRPD as a factual element as a part of international law. It is cited in the Merits, as a part of The Court’s assessment as well; either as general principles or as an application of the general principles on the case. It is also commonly referred to by third parties and even by the applicant as well. Despite the frequent presence of the CRPD in the judgements of the ECtHR, it is still hard to identify any steady tendency in relation to its interpretative effect. Based on the analysis of each categories of rights it can be said, that the level of impact of the CRPD varies in each category, even on a case by case basis. However, it can be established that since the CRPD is cited as a factual element, the ECtHR attributes a certain level of importance to it. It also appears in the Merits, but less frequently.

Despite its presence in the judgments, the ECtHR states out that, “*even where the provisions of the Convention and those of another international human rights instrument are almost identical, the interpretation of the same fundamental right by another international body and by this Court may not always correspond.*”<sup>475</sup> It also declared, that it is up to the ECtHR to decide which international treaty to apply as well as “*it is for the Court to decide which international instruments and reports it considers relevant and how much weight to attribute*

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<sup>475</sup> Ibid. § 79.



*to them*”<sup>476</sup>. This shows that the ECtHR still considers the ECHR as its main and only binding guidance in its adjudication and has the autonomy to decide when and how to apply international treaties. This manifests for instance in that the ECtHR develops certain concepts which might show similarities with the CRPD but different from its wording. This is, for example, the use of ‘special care’ in regards of disabled detainees.

Based on the analysis of the use of the CRPD, it can be established, therefore, that the CRPD is widely used in disability-related cases in different parts of the judgement, but the ECtHR does not consider itself to be bound by it. Therefore, it is hard to see any clear tendency what level of interpretational effect it has. It seems that the ECtHR decides autonomously in every case the level of impact the CRPD should have on its interpretation.

The second research question of the thesis is if the protection of the right to vote of persons with disabilities in the ECtHR’s practice considers the added value of the CRPD's provisions about the protection of the right to vote and the practice of the CRPD Committee.

Regarding the protection of the right to vote, it can be established that there are significant differences between the protection provided by the ECtHR and what it is offered by the CRPD. The CRPD’s human rights approach can be considered an ‘added value’ to protecting the right to vote because the CRPD obliges states to abolish all restrictions on the right to vote of persons with disabilities. The CRPD finds that instead of the deprivation of the right to vote based on disability, the states should provide assistance based on individual’s request. It is against any relation made between mental and intellectual disability and the ability to make a political decision. It also rejects any assessment of decision-making skills based on the diagnosis of intellectual or mental disability. Based on the CRPD it is a human rights violation to connect the enjoyment of certain rights to decision-making skills. The state's obligation is “*to ensure that persons with intellectual disability cast a competent vote, on an equal basis with others, while guaranteeing the secrecy of the vote*”<sup>477</sup>. Based on the CRPD, therefore, the state should protect and assist instead of restricting fundamental human rights.

In comparison with the CRPD, the ECtHR doesn’t find restrictions on rights problematic. Although it relies on the narrow margin of appreciation when it comes to the restrictions on the rights of persons with disabilities, it accepts the assessment of the capability of the right to vote. It is essential to highlight that based on the case-law analysis, it denies treating persons with disabilities as a ‘single class’, which shows some an acceptance and promotion of diversity. However, in the field of the right to vote, it can be said that the ECtHR does not

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<sup>476</sup> A. M.-V. v. Finland, § 74.

<sup>477</sup> Bujdosó v. Hungary, § 9. 6.

rely on the CRPD in the judgement as an interpretative tool. This is based on the following two points: Firstly, the *Alajos Kiss v. Hungary* doesn't mention the CRPD in the Merits. Secondly, in *Ströbye and Rosenlind v. Denmark*, the ECtHR mentioned that even though the CRPD prohibits restrictions on voting, the Venice Commission follows a "more cautious" approach, which makes restrictions on the right to vote possible.

Therefore, it can be said that the level of protection provided by the CRPD of the right to vote of persons with disabilities is significantly higher than the one provided by the ECtHR. However, the ECtHR fails to implement this in its adjudication. The fact that the ECtHR even relies on the more cautious approach in its latest judgement on the right to vote shows a small chance to implement the CRPD's human right approach in its adjudication in the near future.

## Bibliography

- Beckman, L., *The Frontiers of Democracy*. Palgrave Macmillan, London, 2009
- Della Fina, V., Cera, R., Palmisano, G. (eds.), *The United Nations Convention on the Rights of Persons with Disabilities, A Commentary*, Springer, 2017
- Gerards, J., *General Principles of the European Convention of Human Rights*, Cambridge University Press, 2019
- Anderson, J., Philips J. (eds) *Disability and Universal Human Rights: Legal, Ethical, and Conceptual Implications of the Convention on the Rights of Persons with Disabilities*, A Netherlands Institute of Human Rights (SIM), Utrecht University (October, 2012)
- Wadington, L., Lawson, A. (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice*, Lawson Commentary, Oxford University Press 2018
- Barclay, L., *Cognitive Impairment and the Right to Vote: A Strategic Approach*, *Journal of Applied Philosophy* Vol. 30 No.2 (2013), 146-159
- Blais, A. Massicotte, L., Yoshinaka, A., *Deciding who has the right to vote: a comparative analysis of election laws*, *Electoral Studies*, Volume 20, No. 1 (2001) 41-62.
- Conversations between judges*, European Court of Human Rights, at 7. , Strasbourg 2012, [https://www.echr.coe.int/Documents/Dialogue\\_2012\\_ENG.pdf](https://www.echr.coe.int/Documents/Dialogue_2012_ENG.pdf) (last accessed: 10<sup>th</sup> June 2021)
- Dinerstein, R. D, *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*, Vol. No. 2 (2012) 8-12.
- Flynn, E., Arstein-Kerslake, A., *Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity*, *International Journal of Law in Context*, Volume 10, Issue 1 (2014), 81-104.
- Fox, G.H., *The Right to Political Participation in International Law*, *Yale Journal of International Law*, Vol.17, No. 2 (1992), 539-608
- Gewirth, A., *Why Rights Are Indispensable*, *Mind*, New Series, Vol. 95 No.379 (1986), 329-44.
- Glenn, K., B., *Changing paradigms: Mental capacity, legal capacity, guardianship, and beyond*, *Columbia Human Rights Law Review*, , Vol. 44 No. 93 (2012), 93-169.
- Harpur, P, *Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities*, *Disability & Society* Volume 27, No.1 (2012), 1-14.
- Hosking, D. L., *Critical Disability Theory*, A paper presented at the 4th Biennial Disability Studies Conference at Lancaster University, UK, Sept. 2-4, (2008)

Kayess, R., French, P. Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities, *Human Rights Law Review*, Volume 8, No.1 (2008), 1–34

Lawson, A., Beckett, A. E. (2021) The social and human rights models of disability: Towards a complementarity thesis, *The International Journal of Human Rights*, Vol. 25. No. 2, 348-379

Letsas, G., Strasbourg's Interpretive Ethic: Lessons for the International Lawyer, *The European Journal of International Law* Vol. 21 No. 3 (2010), 509–541

Lord, J. E., Stein, M. A., Fiala-Butora, J., Facilitating an Equal Right to Vote for Persons with Disabilities, *Journal of Human Rights Practice*, Volume 6, No. 1 (2014), Pages 115–139.

Perlin, M. L. (2013). Striking for the guardians and protectors of the mind: The convention on the rights of persons with mental disabilities and the future of guardianship law. *Penn State Law Review*, Vol. 117 No. 4, 1159-1190.

R. K, Alex, Deprivation of liberty – appropriate places and appropriate treatment, 11 June 2019 <https://www.mentalcapacitylawandpolicy.org.uk/deprivation-of-liberty-appropriate-places-and-appropriate-treatment/> (last accessed: 10<sup>th</sup> June 2021)

Raad, R., Karlawish, J., Appelbaum, P. S. The capacity to vote of persons with serious mental illness. *Psychiatric Services*, Vol.60 No.5 (2009), 624–628.

Reaume, G., Understanding Critical Disability Studies, *Canadian Medical Association Journal*, Vol. 186 No.16, (2014),1248–1249.

Riegel, W, Non-discrimination, Accommodation, and Intersectionality under the CRPD: New Trends and Challenges for the UN Human Rights System, *Max Planck Yearbook of United Nations Law Online*, Volume 20 No. 1 (2017), 98-130

Savery, J., Voting Rights and Intellectual Disability in Australia: An Illegal and Unjustified Denial of Rights, *Sydney Law Review* Vol. 37, No. 2 (2015), 287-300.

Shogren, K., Wehmeyer, M., Lassmann, H., Forber-Pratt, A. Supported Decision Making: A Synthesis of the Literature across Intellectual Disability, Mental Health, and Aging. *Education and Training in Autism and Developmental Disabilities*, Vol.52. No. 2 (2017)144-157.

Spano, R, Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, *Human Rights Law Review*, Vol.14 No.3 (2014) 487–502.

Waddington, L., Priestly, M., A human rights approach to disability assessment *Journal of International and Comparative Social Policy* Vol. 37 No.1. (2021) 1–15,

A.-M.V. v. Finland, ECtHR, 23 March 2017, Application No. 53251/13

Ada Rossi and Others v. Italy, ECtHR, 16 December 2008, Application No. 55185/08 (<https://lovdata.no/static/EMDN/emd-2008-055185.pdf>, last accessed: 24<sup>th</sup> June 2021)

Airey v. Ireland, ECtHR 9 October 1979, App. No. 62891/73

AN v Lithuania, ECtHR, 31 May 2016, § 44, Application No. 17280/08

Asalya v. Turkey, ECtHR, 15 April 2014, Application No. 43875/09

Bataliny v. Russia, ECtHR, 23 July 2015, Application No. 10060/07

Belli and Arquier-Martinez v. Switzerland, ECtHR, 11 December 2018, Application No. 65550/13

Blokhin v. Russia, ECtHR, 23 March 2016, Application No. 47152/06

Butrin v. Russia, ECtHR, 22 March 2016, Application No. 16179/14

Case "Relating To Certain Aspects Of The Laws On The Use Of Languages In Education In Belgium" v. Belgium, 9 February 1967, ECtHR, App. Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 Belgian Linguistics Case I.B.10.

Chassagnou and Others v. France, ECtHR (GC) 29 April 1999 25088/94  
Committee on the Rights of Persons with Disabilities, Communication No. 4/2011  
CRPD/C/10/D/4/2011, 14 September 2011, (Bujdosó v. Hungary)

DD v Lithuania, ECtHR, 14 February 2012, App. No. 13469/06

Demir and Baykara v. Turkey, ECtHR (GC) 12 November 2008, App. No. 34503/97

Dorđević v. Croatia, Application no. 41526/10, 24 July 2012

Evans v, the IJnited Kingdom, ECtHR 7 March 2006, App. No. 6339/05

Fernandes Oliveira v. Portugal, ECtHR (GC), 31 January 2019, Application No. 78103/14  
Glor v. Switzerland, ECtHR, 30 April 2009 Application no. 13444/04

Goodwin v. the United Kingdom, ECtHR (GC) 11 July 2002, App. No. 28957/95

Grimailovs v. Latvia, ECtHR, 25 June 2013 Application no. 6087/03

Guberina v. Croatia, ECtHR, 22 March 2016, Application No. 23682/13

Ivinovic v. Croatia, ECtHR, 18 September 2014, Application No. 13006/13

J.D. and V. V. UK, ECtHR, 24 October 2014, Applications Nos. 32949/17 and 34614/17

Jasinkis v. Latvia. ECtHR, 21 December 2010, Application No. 45744/08

Jehovah's Witnesses of Moscow and Others v. Russia, ECtHR 10 June 2010, Application No. 302/02

Kiss Alajos v. Hungary, ECtHR, Application No. 38832/06, 20 May 2010

Kocherov and Sergeyeva v. Russia, ECtHR, 26 March 2016, Application No. 16899/13

Koroviny v. Russia, ECtHR, 27 February 2014 Application No. 31974/11

Lashin v. Russia, ECtHR, 22 January 2013, Application No. 33117/02

Legal Resources on Behalf of Valentin Câmpeanu v. Romania, ECtHR, 17 July 2014, Application No. 47848/08

McDonald v. UK, ECtHR, 20 May 2014, App. No. 4241/12

MH v UK, 22 October 2013, Application no. 11577/06

Mihailovs v. Latvia, ECtHR 22 January 2013, Application No. 35939/10

Mockutė V. Lithuania, ECtHR, 27 February 2018, Application No. 66490/09

MS v. Croatia, ECtHR, App. No. 36337/10, 25 April 2013

Nikolyan v. Armenia, 3 October 2019, ECtHR, Application No. 74438/14

Plesó v. Hungary, ECtHR, 2 October 2012, Application No. 41242/08

Popovic v. Serbia, ECtHR, 30 June 2020, Applications Nos. 26944/13, 14616/16, 14619/16, 22233/16

Pretty v. UK, ECtHR, 29 July 2002, Application No. 2346/02

R.B. v. Hungary, ECtHR, 12 April 2016, Application No. 64602/12

Rooman v. Belgium, ECtHR, Application No. 18052/11

RP. v UK, ECtHR, 9 October 2012, Application No. 38245/08

S.S. v. Slovenia, ECtHR, 30 October 2018 Application No. 40938/16

Selmouni v. France, EctHR, (GC) 28 July 1, Application No. 25803/94

Semikhvostov v. Russia, ECtHR, 6 February 2014 Application No. 2689/12

Stanev v. Bulgaria, ECtHR, 6 November 2012, Application No. No. 36760/06

Ströbye and Rosenlind v. Denmark, ECtHR, 2 February 2021, Applications Nos. 25802/18 and 27338/18

Sykora v. Czech Republic, ECtHR, 22 November 2012, Application No. 23419/07

Topekhin v. Russia, ECtHR, 10 May 2016, Application No. 78774/13

Tyrer v. the United Kingdom, ECtHR 25 April 1978, App. No. 5856/172

X and Y v. the Netherlands, ECtHR 26 March 1985, App. No. 8978/80

ZH v. Hungary, ECtHR, 8 November 2012, Application No. 28973/1

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950

Un General Assembly, Convention on the Elimination of Discrimination Against Women, 18 December 1979

UN General Assembly, Convention on the Rights of Persons with Disabilities, 24 January 2007

UN General Assembly, Convention on the Rights of the Child, 20 November 1989

UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948

United Nations, Vienna Convention on the Law of Treaties, 23 May 1969

European Commission for Democracy through Law (Venice Commission), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, Council of Europe, CDL-AD (2002) 23 rev., adopted 19 October 2002,

General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) CCPR/C/21/Rev.1/Add.7 (July 12, 1996)

Human Rights Commission, Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities, A/HRC/19/36

UN Committee on the Rights of Persons with Disabilities, General Comment No. 6. On Equality and Non-discrimination, CRPD/C/GC/6, Adopted 9 March 2018

UN Committee on the Rights of Persons with Disabilities, General Comment No. 1. On Article 12 (Equal Recognition Before the Law), CRPD/C/GC/1, Adopted 11 April 2014

UN Human Rights Council, Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities, HRC, A/HRC/19/36, 21 December 2011

Council of Europe, Interpretative mechanisms of ECHR case-law: the concept of European consensus, <https://www.coe.int/en/web/help/article-echr-case-law> (last accessed: 10<sup>th</sup> June 2021)

Entry into Force of the CRPD, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/entry-into-force.html> (last accessed: 10th June 2021)