

# The Right to Vote of Persons With Disabilities and the Difficult Relationship Between the CRPD and the European Court of Human Rights

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## ABSTRACT

*This Article addresses the question of the right to vote of persons with disabilities in light of the recent case-law of the European Court of Human Rights. The approach of the Court is critiqued from a general perspective of non-discrimination as well as tested against Article 29 of the United Nations Convention on the Rights*

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*of Persons with Disabilities, which provides for the right to vote as a foundational element of the participation in political and public life of persons with disabilities. This Article maintains that the European Court of Human Rights' approach, instead of creating the conditions for equality and inclusion, effectively acts as a further barrier to the access of persons with disabilities to society on an equal footing with all others. By reaffirming the states' margin of appreciation and leaving the decision on the extent to which persons with disabilities can exercise the right to vote, the European Court of Human Rights renounces its role as the guardian of human rights in the system of the Council of Europe, and allows for the perpetuation of the discriminatory aspects of international and domestic law that have historically affected persons with disabilities.*

## 1. INTRODUCTION

“All human beings are born free and equal in dignity and rights,” states Article 1 of the Universal Declaration of Human Rights,<sup>1</sup> which is recognized in a variety of human rights treaties, including the European Convention on Human Rights (hereinafter referred to as “ECHR” or “the Convention”),<sup>2</sup> as a foundational instrument for the realization of fundamental rights and freedoms.<sup>3</sup> Equality in dignity and rights, however, comes with an asterisk with regard to persons with disabilities. The preamble of the United Nations Convention on the Rights of Persons with Disabilities (“CRPD”) explicitly recalls, among the reasons for its creation, the fact that, despite “various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.”<sup>4</sup> As part of participation “as equal members of society,” Article 29 of the CRPD includes the participation of persons with disabilities in political and public life by means, among other things, of the right to vote and be elected.<sup>5</sup> The right to vote is indeed a fundamental aspect of equality—not only in rights, as inherent in any human rights instrument, but also and especially in dignity: the lack of electoral rights would entail that decisions on the life and rights of persons with disabilities are taken solely by persons without disabilities,

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1. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

2. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 4.XI.1950.

3. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

4. Convention on the Rights of Persons with Disabilities, May 3, 2008, No. 44910, 2515 U.N.T.S. 3.

5. *Id.*

as if the former would only deserve a restricted form of personhood in comparison with the latter.

Rights, however, are often merely theoretical until they are enforced judicially. International courts and tribunals are therefore vested with the critical task of ensuring that human rights do not remain empty words in solemnly drafted documents but become living things that positively impact their subjects and protect them from abuses of states—*rectius*, persons in power—and their entities.<sup>6</sup> Any time an international court limits the application of a human right, therefore, questions must be raised as to the reasoning that has led to such restriction; and rather pressing questions arise then the rights restricted are those pertaining the very possibility of a person to participate in the political and public life of their own communities through voting. In some recent cases, the European Court of Human Rights (hereinafter “ECtHR” or “the Court”) affirmed that the right to vote is not absolute,<sup>7</sup> and proceeded to address questions on the right to vote of persons with disabilities in a rather restrictive fashion, conceding that persons with disabilities may not be considered fit to express a political preference and renouncing the possibility to provide guidance on how to address the questions on the rights to vote of persons with disabilities, all but leaving the matter to the discretion of the state parties to the ECHR.<sup>8</sup> This approach, however, not only can lead to inconsistencies in the treatment of persons with disabilities within the ECHR, but also allows states to define to what extent they wish to involve persons with disabilities in crucial decisions about their own living conditions, needs, and interests. Moreover, and more concerning, the ECtHR does not appear to be always willing to take the CRPD into account on matters of the voting rights of persons with disabilities, in spite of the prominence of this instrument in the context of the human rights and the inclusion of such persons.<sup>9</sup> This Article is thus aimed at exploring the ECtHR’s approach

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6. See e.g., U.N. High Commissioner for Human Rights, Human Rights and the International Criminal Court (Nov. 30, 2002), <https://www.ohchr.org/en/statements/2009/10/default-title-54> [<https://perma.cc/MJ4E-ZH87>].

7. *The right to political participation of persons with mental health problems and persons with intellectual disabilities*, European Union Agency for Fundamental Rights, at 9 (Nov. 8, 2010) [hereinafter *The right to political participation*] [https://fra.europa.eu/sites/default/files/fra\\_uploads/1216-Report-vote-disability\\_EN.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/1216-Report-vote-disability_EN.pdf) [<https://perma.cc/JH2L-UNW8>].

8. *Id.*

9. *Caamaño Valle v. Spain*, No. 43564/17, ¶ 55 (May 11, 2021), <https://hudoc.echr.coe.int/fre/?i=001-210089> [<https://perma.cc/9QCV-NMY5>]; *Mathieu-Mohin and Clerfayt*,

to the right to vote of persons with disabilities, underscoring some questionable aspects and consequences of such approach in light of the CRPD and the worrying extent of the discriminations routinely suffered by persons with disabilities. After a short overview of the international law involving the voting rights of persons with disabilities in section 2, the case-law of the ECtHR on the matter will be investigated—underscoring the different treatment by the Court of intellectual disabilities (in section 3) and physical disabilities (in section 4). The findings of this enquiry shall be presented in section 5 before providing a few concluding remarks in section 6.

## II. THE RIGHT TO VOTE OF PERSONS WITH DISABILITIES: A BRIEF OVERVIEW

The right to vote is one of the foundations of democratic societies.<sup>10</sup> If the voices of all the groups composing a country's population are to be given a chance to be heard, it is vital that such groups have the opportunity, at regular intervals, to elect their representatives in the legislative—and, in certain cases, executive—organs of the state without interference from those in power at a given time.<sup>11</sup> The right to free elections is guaranteed by Article 3 of Protocol No. 1 of the ECHR, according to which the state parties to the ECHR “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>12</sup> The ECtHR has clarified that “fundamental human rights and freedoms are best maintained by ‘an effective political democracy,’”<sup>13</sup> and that such maintenance requires that states provide for effective rights to vote (the so-called “active” aspect of Article 3 of Protocol No. 1) and to stand for election (the “passive” aspect).<sup>14</sup> The right to vote, however, is not considered an absolute right in the ECHR system:<sup>15</sup> as it will be seen in detail in the

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No. 9267/81, ¶ 52; *Selahattin Demirtaş v. Turkey*, No. 14305/17, ¶ 387 (Dec. 22, 2020), <https://hudoc.echr.coe.int/fre?i=001-207173> [<https://perma.cc/98LT-JW3K>].

10. *The right to political participation*, *supra* note 7.

11. Ludvig Beckman, *The Right to Democracy and the Human Right to Vote: The Instrumental Argument Rejected*, 13(4) J. OF HUM. RTS. 381, 383 (2014).

12. Eur. Ct. H.R., *European Convention on Human Rights* (Aug. 1, 2021), [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) [<https://perma.cc/J3ZX-PR25>].

13. *Mathieu-Mohin and Clerfayt v. Belgium*, No. 9267/81, ¶ 47 (Mar. 2, 1987), <https://hudoc.echr.coe.int/eng?i=001-57536> [<https://perma.cc/8X8P-SWMJ>].

14. *Id.* at ¶¶ 50–51; see Eur. Ct. H. R., *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights* (Aug. 31, 2022), [https://www.echr.coe.int/Documents/Guide\\_Art\\_3\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_3_ENG.pdf) [<https://perma.cc/626P-CWDQ>].

15. *Caamaño Valle v. Spain*, No. 43564/17, ¶ 55 (May 11, 2021), <https://hudoc.echr.coe.int/fre?i=001-210089> [<https://perma.cc/9QCV-NMY5>]; *Mathieu-Mohin and Clerfayt*,

next section of this Article, states retain a wide margin of appreciation in this sphere with regard to possible limitations. Neither Article 3 of Protocol No. 1 nor other provisions in the ECHR and related protocols provide a list of ways in which states can limit the right to vote or to stand for election.<sup>16</sup> In general terms, the ECtHR has underscored that such limitations must neither be arbitrary nor disproportionate, and that any restriction must not interfere with the right of freedom of expression of the individual's opinions.<sup>17</sup> Other than that, any limitation to the right to free elections is to be assessed on a case-by-case basis: indeed, the Court has clarified that limitations implemented by states must be assessed by taking into account the social and political aspects of the states in question, which may entail that certain measures may be considered unacceptable in one legal system and perfectly justifiable in another.<sup>18</sup> With particular reference to the right to vote, the ECtHR has accepted that states could limit it on the basis of age to ensure that voters have reached the necessary maturity to understand the electoral process,<sup>19</sup> or that states may limit the right to vote on the basis of residence due to the reduced concern and knowledge that non-residents have with regard to their country of nationality.<sup>20</sup> The precise extent of limitations, as stated beforehand, falls within the margin of appreciation of states. However, in case of the effect of disability on the active aspect of the right to free elections—especially with regards to the right to vote—this leads to a collection of problems and questions as varied as the types of disabilities themselves. The issues presented are further aggravated by the fact that the ECtHR appears to adopt a different understanding of Article 3 of Protocol No. 1 depending on whether the individuals concerned have either a physical disability or an intellectual one.

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No. 9267/81, ¶ 52; *Selahattin Demirtaş v. Turkey*, No. 14305/17, ¶ 387 (Dec. 22, 2020), <https://hudoc.echr.coe.int/fre?i=001-207173> [<https://perma.cc/98LT-JW3K>].

16. *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights*, *supra* note 14, ¶ 12.

17. *Id.* ¶¶ 11–13.

18. *Mathieu-Mohin and Clerfayt*, No. 9267/81, ¶ 52; *Ždanoka v. Latvia*, App. No. 5287/00, ¶¶ 103–04 (Mar. 16, 2006), <https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-72794&filename=CASE%20OF%20ZDANOKA%20v.%20LATVIA.docx&logEvent=False> [<https://perma.cc/9SWF-DXC9>].

19. *Hirst v. United Kingdom (No. 2)*, App. No. 74025/01, ¶ 62 (Oct. 6, 2005), [https://eos.cartercenter.org/uploads/document\\_file/path/604/CASE\\_OF\\_HIRST\\_v.\\_THE\\_UNITED\\_KINGDOM\\_No.\\_2\\_.pdf](https://eos.cartercenter.org/uploads/document_file/path/604/CASE_OF_HIRST_v._THE_UNITED_KINGDOM_No._2_.pdf) [<https://perma.cc/5T9U-AKAM>].

20. *See e.g., X. v. the United Kingdom*, No. 7566/76, art. 3 (Dec. 11, 1976); *Enrico Lusch v. Germany*, No. 35385/97, art. 3 (May 21, 1997).

Even if one agrees that Article 3 of Protocol No. 1 to the ECHR impliedly allows for limitations to the right to vote, such limitations must nonetheless be consistent with the prohibition of discrimination under Article 14 of the ECHR and Article 1(1) of Protocol No. 12 of the ECHR.<sup>21</sup> The former, aptly named “Prohibition of discrimination,” states that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>22</sup> The latter reiterates the content of Article 14 by providing that “[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>23</sup> Disability is not expressly mentioned in either rule, but it is accepted that the reference to any “other status” in both provisions is wide enough to include: any characteristic common to a group which is capable of being discriminated against, and certainly one identifying a vulnerable—and often discriminated—category like the persons with disabilities.<sup>24</sup> The ECtHR, however, has recently pointed out in *Caamaño Valle v. Spain* that, even though “the Convention is an international treaty that is to be interpreted in accordance with the relevant standards and principles of public international law,”<sup>25</sup> it is “not bound by interpretations given to similar instruments by other bodies.”<sup>26</sup> This is a crucial element in the assessment of the extent of the right to vote of persons with disabilities as Article 29(a) of the CRPD provides that state parties must “[e]nsure 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.”<sup>27</sup> The obligation in Article 29(1) is a positive one, requiring states to enact it by “[e]nsuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use,” “[p]rotecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation,” and “[g]uaranteeing the free expression of the will of persons with disabilities

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21. Convention for the Protection of Human Rights, *supra* note 2, art. 14, Protocol No. 12, art. 1.

22. *Id.* art. 14.

23. *Id.* Protocol No. 12, art. 1.

24. *Caamaño Valle v. Spain*, App. No. 43564/17, ¶ 55 (May 11, 2021), <https://hudoc.echr.coe.int/eng?i=001-210089> [<https://perma.cc/X5FR-R7NX>].

25. *Id.* ¶ 52.

26. *Id.* ¶ 54.

27. Convention on the Rights of Persons with Disabilities, *supra* note 4, at 17.

as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.”<sup>28</sup>

On the other hand, the ECtHR adopts a different approach underscoring that “an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties” or “an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship . . . do[es] not fall within an acceptable margin of appreciation.”<sup>29</sup> Yet, it also “accepted as legitimate the aim of ‘ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs.’”<sup>30</sup>

The ECtHR has further affirmed this exclusive approach in cases concerning voting rights of persons with intellectual disabilities; the ECtHR is adamant that the ECHR is to be interpreted in light of the relevant provisions of other instruments of international law—including, *ça va sans dire*, the CRPD.<sup>31</sup> Whether the provisions on the right to vote in the ECHR and relative protocols must be interpreted in light of the CRPD remains in question—as does the validity of the reasoning of the ECtHR in a number of cases on the right to vote of persons with disabilities.

### III. INTELLECTUAL DISABILITIES AND THE PROBLEM OF THE MARGIN OF APPRECIATION

The case-law of the ECtHR on the electoral rights of persons with disabilities is not particularly rich, but it presents some noteworthy judgments which highlight the Court’s erratic—and at times questionable—approach with regard to disability. A recent case, *Strøbye and Rosenlind v. Denmark*, is a clear example; *Strøbye* deals with an application under Article 3 of Protocol No. 1 of the ECHR, alone or in conjunction with Article 14 of the Convention.<sup>32</sup> The two applicants in *Strøbye* argued these provisions were breached as a result of their deprivation of legal capacity and right

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28. *Id.*

29. *Caamaño Valle*, App. No. 43564/17, ¶ 60.

30. *Id.* ¶ 61.

31. *Toplak v. Slovenia*, App. Nos. 34591/19, 42545/19, ¶ 112 (Oct. 26, 2021), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-212693%22%5D%7D>; [<https://perma.cc/J9XB-VVWY>].

32. *Strøbye v. Denmark*, App. Nos. 25802/18, 27338/18, ¶ 2 (Feb. 2, 2021), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-207667%22%5D%7D>; [<https://perma.cc/7LT5-E99E>].

to vote due to disability. The Danish courts previously rejected their claims, noting that such deprivation was inconsistent with Article 29 of the Danish Constitution, the ECHR and the CRPD.<sup>33</sup> In its judgment, the Court referred to the wide margin of appreciation that states enjoy with regard to the right to vote under Article 3 of Protocol No. 1, as stated in *Hirst v. United Kingdom*.<sup>34</sup> Moreover, the Court recalled its own subsidiary role in the application of the ECHR, but stressed the importance of “the quality of the parliamentary and judicial review of the necessity of a general measure, such as the disputed disenfranchisement imposed as a consequence of declaring a person legally incompetent.”<sup>35</sup>

From this standpoint, the Court found the disenfranchisement of the two applicants to be lawful, as it was a measure prescribed by Article 29 of the Danish Constitution and the Danish law on parliamentary elections.<sup>36</sup> Additionally, the ECtHR found the measure to be proportionate, since the disenfranchisement of the two applicants was not an immediate consequence of the loss of legal capacity, but the result of an individual assessment of their circumstances evidenced by the fact that “the disenfranchisement in question therefore affected a small group of persons, amounting to 0.046% of the Danish population of voting age.”<sup>37</sup> It is, however, not convincing that the relatively small percentage of people is itself an indicator of the proportionality of the measure. “Proportionality” refers to the fact that the reasons for the measure limiting the rights of the individual concerned must be “relevant and sufficient for the purpose”—that is, they are justified by imperative necessities and measured upon their objective and against any conflicting interests.<sup>38</sup>

The fact that the measure of disenfranchisement only affects a small group does not *per se* entail that it is proportional or balanced. The ECtHR, however, seems to be sufficiently satisfied by the evaluation of the Danish courts, and not interested in pursuing an independent assessment of the

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33. *Id.* ¶¶ 1–2.

34. *Id.* ¶ 91; *Hirst*, App. No. 74025/01, ¶¶ 57–62.

35. *Strøbye*, App. Nos. 25802/18, 27338/18, ¶¶ 92–93.

36. *Id.* ¶ 96.

37. *Id.* ¶¶ 102–07.

38. *See, e.g., S.H. and Others v. Austria*, 57813/00 Eur. Ct. H.R. 20, (2011); *Parillo v. Italy*, 46470/11 Eur. Ct. H.R. 88 (2015) (<https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2246470/11%22%2C%22itemid%22:%5B%22001-157263%22%2D%22%22%7D>) [<https://perma.cc/8H3Y-B9HF>]. *See also A, B and C v. Ireland*, 25579/05 Eur. Ct. H.R. 63 (2010) (<https://hudoc.echr.coe.int/fire#%7B%22itemid%22:%5B%22001-102332%22%2D%22%22%7D>) [<https://perma.cc/8T9M-V5AF>] (in which the Court stated they must “examine whether there existed a pressing social need for the measure in question and, in particular, whether the interference was proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests in respect of which the State enjoys a margin of appreciation.”).

measure *vis-à-vis* Denmark's obligations under the ECHR.<sup>39</sup> Indeed, the Court underscored that the Danish "Supreme Court had thoroughly examined the proportionality and justification of the" measure limiting the applicant's voting rights, and did so in consideration of the case-law of the ECtHR—an approach that "militate in favour of a wide margin of appreciation."<sup>40</sup> Such an orientation is reinforced, in the eyes of the Court, by the lack of consensus among the state parties to the ECHR, as well as internationally; in particular, while the CRPD provides at Article 29 that state parties must "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,"<sup>41</sup> it was also noted that the Venice Commission had underscored that, "under certain cumulative conditions, provision may be made for depriving individuals of their right to vote."<sup>42</sup> Once again, the approach of the ECtHR seems questionable, especially in light of the aforementioned judgment in *Hirst v. United Kingdom*, where the Court did not quite rely on a shared approach amongst the states of the Council of Europe, stating in fact that "even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue."<sup>43</sup> One may struggle to understand how the lack of consensus went from being almost irrelevant to becoming the decisive factor in allowing such a wide margin of appreciation that there seems to have been very little thought to the European dimension of the problem. Indeed, even though elections are a fundamentally domestic matter (if the requirements to be considered a democratic society are respected),<sup>44</sup>

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39. *Strøbye*, App. Nos. 25802/18, 27338/18.

40. *Id.* ¶ 110.

41. *Id.* ¶ 66.

42. *Id.* ¶ 112; see also Opinion no. 190/2002 of the European Commission for Democracy through Law ("Venice Commission") on the Code of Good Practice in Electoral Matters, Guideline I.1.1.d: "i. provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions: ii. it must be provided for by law; iii. the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them; iv. The deprivation must be based on mental incapacity or a criminal conviction for a serious offence. v. Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law." (<https://rm.coe.int/090000168092af01>) [<https://perma.cc/4R44-RYRA>].

43. *Hirst*, App. No. 74025/01, ¶ 81.

44. See Susan Marks, *The European Convention on Human Rights and its 'Democratic Society'*, 66 BRIT. Y.B. INT'L L. 209–38 (1995); see also Steven Wheatley

the rights of persons with disabilities are a global issue, and certainly one of substantial significance in the context of a regional human rights protection system. The lack of a European consensus could have led the ECtHR, rather than stating that the matter is essentially left to the member states' discretion,<sup>45</sup> to finally address the issue with the objective of providing at least common guidelines.

Alas, it declined to do so: in fact, the Court made things even worse from the perspective of the promotion of the rights of persons with disabilities. Even though the margin of appreciation should not be as wide when a restriction on rights is applied to a particularly vulnerable group, the Court argued that the disenfranchisement of the two applicants fell within such margin of appreciation as it resulted from “an individualised judicial evaluation” and not a blanket restriction of the right to vote.<sup>46</sup> This argument, however, is problematic from many standpoints. First, the use of the concept of “vulnerability” is rather outdated and dangerous. Traditionally, the label vulnerable has been the basis of political oppression affecting marginalized groups: once a group is legally considered vulnerable, rules and procedures are necessary for their protection—rules and procedures that ultimately affect the living conditions and social position of the members of such group, not necessarily for the best.<sup>47</sup> In this case, the Court used vulnerability precisely to establish two tiers of margin of appreciation. While in theory the reasoning seems correct, a blanket approach applied to a group entails a much narrower margin of appreciation, the practical outcome is that the rights of vulnerable individuals are left to the discretion of the state. Furthermore, even if one condones the use of vulnerability as determinant, the Court's reasoning suggests consideration of vulnerability is relevant only when it is a characteristic of a group.<sup>48</sup> Individuals subjected to a *ad personam* evaluation may be deprived of

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*The Construction of the Constitutional Essentials of Democratic Politics By the European Court of Human Rights Following Sejdic and Finci*, CAMBRIDGE UNIV. PRESS, 153, 157 (2012); Adriana Di Stefano, “Spazio pubblico e diritti individuali: pluralismo culturale e società democratica nel sistema della Convenzione europea dei diritti umani”, in *LA TUTELA DEI DIRITTI UMANI IN EUROPA: TRA SOVRANITÀ STATALE E ORDINAMENTI SOVRANAZIONALI* 475–91 (Andrea Caligiuri, Giuseppe Cataldi, Nicola Napoletano eds., CEDAM, 2010).

45. See Wheatley, *supra* note 44.

46. *Strøbye*, App. Nos. 25802/18, 27338/18, ¶ 113.

47. See *ex multis* Beverley Clough, *Disability and Vulnerability: Challenging the Capacity/Incapacity Binary*, 16 *SOCIAL POLICY AND SOCIETY* 469–81 (2017); Inger Marie Lid, *Vulnerability and Disability: A Citizenship Perspective*, 30 *DISABILITY & SOCIETY* 1554–67 (2015); Thomas Casadei, *Soggetti in contesto: vulnerabilità e diritti umani*, in *DIRITTI UMANI E SOGGETTI VULNERABILI: VIOLAZIONI, TRASFORMAZIONI, APORIE* 90–116 (Thomas Casadei ed., GIAPPICHELLI 2012); Erinn C. Gilson, *The Ethics of Vulnerability*, ROUTLEDGE (2014).

48. See CORINA HERI, *RESPONSIVE HUMAN RIGHTS* 32–25 (Hart Publishing 2021).

their right to vote as long as such evaluation is carried out in respect of the principle of due process:<sup>49</sup> does it mean that persons with disabilities are not to be deemed vulnerable when standing before a judge in charge of their right to vote? The Court's approach implies that vulnerability is not an individual characteristic.<sup>50</sup> Finally, the reasoning of the Court seems quite contradictory in its own assessment of the width of the margin of appreciation. The ECtHR argues that the margin of appreciation "is substantially narrower when a restriction on fundamental rights applies to a particularly vulnerable group in society, such as the mentally disabled;"<sup>51</sup> while simultaneously stating that a situation in which "only those persons [with an intellectual disability], who, after an individualised judicial evaluation, had also been found legally incompetent by a court [. . .] were subject to disenfranchisement," the margin of appreciation remains quite wide.<sup>52</sup> Disenfranchisement is not a slight limitation of cosmetic rights: it is the deprivation of the right to influence the legal- and decision-making processes of one's country, and it should be treated with extreme care when applied to individuals already subject to various levels of both *de jure* and *de facto* discrimination. A wide margin of appreciation should not be an option in advanced human rights protection systems.

Finally, the Court took a rather worrisome stance on the nature of electoral rights. In addressing the Danish government's submission that restrictions on the right to vote for those in need of guardianship had been gradually reduced over the years, the Court deemed such efforts "laudable" in consideration of "the changing perspective in society, which makes it difficult to criticise that the legislation only changed gradually."<sup>53</sup> This statement may be acceptable from a political perspective, but has no standing in a judgment issued by a human rights court. The scope and purpose of a fundamental human right is inexplicably linked to the fluctuation of its consideration in society—which is a sophisticated disguise for the perspective of the non-disabled majority in society. Moreover, and more problematically, the Court seems to suggest that the extension—or, more correctly, the

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49. GUIDE ON ARTICLE 3 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2022).

50. Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11 INT'L J. OF CONST. L. 1056, 1064 (2013).

51. *Strøbye*, App. Nos. 25802/18, 27338/18, ¶ 113.

52. *Id.*

53. *Id.* ¶ 119.

lifting of restrictions—to the right to vote of persons with disabilities should be done gradually, taking into account the views of society with an eye to considerations of practicality<sup>54</sup> (a term that recalls echoes of the rather questionable definition of “reasonable accommodation” as “not imposing a disproportionate or undue burden” in the CRPD).<sup>55</sup>

The ECtHR reaffirmed its debatable findings in *Strøbye and Rosenlind v. Denmark* in *Caamaño Valle v. Spain*. *Caamaño Valle* was brought forward by the mother of a mentally disabled young woman.<sup>56</sup> Around her 18th birthday, the mother requested that her daughter be placed under her legal guardianship but not deprived of her right to vote.<sup>57</sup> The Spanish courts, however, argued that, even though the intellectual capacity of an individual was not *per se* an automatic determinant of the restriction of the right to vote, in the case at hand the applicant's daughter “was highly influenceable and not aware of the consequences of any vote that she might cast.”<sup>58</sup> The applicant claimed that, in depriving her daughter of her right to vote because of her disability, the Spanish authorities had acted in violation of Article 3 of Protocol No. 1,<sup>59</sup> in conjunction with Article 14 of the ECHR<sup>60</sup> and Article 1 of Protocol No. 12.<sup>61</sup> Unlike in *Strøbye and Rosenlind v. Denmark*,<sup>62</sup> the Commissioner for Human Rights of the Council of Europe intervened in the proceedings in *Caamaño Valle* to clarify that Article 3 of Protocol No. 1 to the Convention should be interpreted in the light of both Article 29 of the CRPD and other international standards providing persons with disabilities right to vote should be upheld without exception.<sup>63</sup> The submission of the Commissioner was not merely aimed at reminding the Court of the significance of the CRPD in the context of the protection of human rights of persons with disabilities, but also underscored the dramatic effects of disenfranchisement. The restriction or exclusion of the right to vote does not affect the disenfranchised person only, but also society as a whole. The right to vote is a necessary element of democracy, and limitations to the rights protected by the ECHR are only allowed insofar as they are necessary “in a democratic society:”<sup>64</sup> besides the lack of any

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54. *See id.* ¶ 115.

55. Convention on the Rights of Persons with Disabilities, *supra* note 4, art. 2.

56. *Caamaño Valle*, App. No. 43564/17, ¶ 2.

57. G.A. Res. 61/106, art. 2 (Jan. 24, 2007).

58. *Caamaño Valle*, App. No. 43564/17, ¶ 1.

59. *Id.* ¶ 5.

60. *Id.* ¶ 8.

61. *Id.* ¶ 1.

62. *Strøbye*, App. Nos. 25802/18, 27338/18, ¶ 17.

63. *Caamaño Valle*, App. No. 43564/17, ¶ 48.

64. *See, e.g.*, Protocol to Amend the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, ¶ 3, Apr. 16, 1968, E.T.S. (“No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and

explicit indication on when the right to vote may be limited in the ECHR or its protocol, it is furthermore doubtful that a democratic society is best protected by limiting the representation of its—not to mention the highly discriminatory policy of depriving persons affected by certain disabilities “of any possibility of influencing the political process and the chance of shaping the policies and measures that directly affected their lives.”<sup>65</sup>

The Court, however, took a rather different approach. It began with underscoring that its jurisdiction is limited to the ECHR, and that it is not bound by the case-law of other bodies interpreting different instruments—even those that offer wider protection of the same rights protected by the ECHR like, in this case, the CRPD.<sup>66</sup> Moreover, it explicitly reaffirmed the concept at the basis of its judgment in *Strøbye and Rosenlind*, that the rights guaranteed under Article 3 of Protocol No. 1 are not absolute, and subject to the margin of appreciation of the ECHR member states.<sup>67</sup> The Court’s role, therefore, seems to be not one of protector of rights, but rather of guardian of a certain minimum threshold of application of the rights listed in the ECHR and its protocols: the restrictions adopted by a state must “not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness,” they must have been implemented “in pursuit of a legitimate aim,” and they must not be disproportionate.<sup>68</sup> In addition to this test, however, the Court added an

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are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, ¶ 2, June 4, 1950 (“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”); Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, ¶ 2, June 4, 1950 (“Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”).

65. *Caamaño Valle*, App. No. 43564/17, ¶ 47.

66. *Id.* ¶ 54.

67. *Id.* ¶ 55; *Strøbye and Rosenlind v. Denmark*, App. Nos. 25802/18 & 27338/18, ¶ 2 (Feb. 2, 2021), <https://hudoc.echr.coe.int/eng?i=001-207667> [<https://perma.cc/5DKW-G4UF>].

68. *Caamaño Valle*, App. No. 43564/17, ¶ 56; *see also Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, ¶ 52 (Mar. 2, 1987), <https://hudoc.echr.coe.int/eng?i=001->

intricate argument on the fact that any conditions imposed must not frustrate the free expression of the people in their choice of legislature as required by Article 3 of Protocol No. 1 to the ECHR.<sup>69</sup> This reference to the free choice of legislature by the people is explained as maintaining the integrity and effectiveness of an electoral procedure based on universal suffrage, considered as the necessary underpinning of the democratic validity of the legislature. The exclusion of groups of categories, however, is not seen as a contradiction to this principle, but rather as a possibility insofar as it guarantees the free expression of the people.<sup>70</sup> One may question what the Court means by “people”, in light of the fact that this argument on universal suffrage is immediately followed by the specification that Article 3 of Protocol No. 1 does not guarantee “to persons with a mental disability an absolute right to exercise their right to vote”:<sup>71</sup> the ECtHR argues in fact that “these persons” may be subject to limitations to their right to vote, and as long as the “free expression of the opinion of the people in the choice of the legislature” is preserved the states enjoy a certain margin of appreciation.<sup>72</sup> It is puzzling that the Court tries to support this reasoning by means of a reference to its own judgment in *Hirst v. United Kingdom*, in which the Court stated “the right to vote is not a privilege”;<sup>73</sup> and yet, the ECtHR’s position seems to be that persons with intellectual disabilities should only be allowed to vote as long as an individualized judicial evaluation confirms that they are “capable of assessing the consequences of their decisions and making conscious and judicious decisions.”<sup>74</sup> This is hardly consistent with the definition of right, and much more similar to that of privilege, especially in light of the difference of treatment between persons with disabilities and persons without. The latter, indeed, are guaranteed the right to vote as long as they have reached the age defined in the domestic law of their state and have not been stripped of their electoral rights as a result of criminal convictions.<sup>75</sup> Even though the ECtHR does not find a blanket restriction of the right to vote of persons with disabilities to be consistent with Article 3 of Protocol

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57536 [<https://perma.cc/5NSG-PACY>]; *Selahattin Demirtaş v. Turkey* (No. 2), App. No. 14305/17, ¶ 387 (Dec. 22, 2020), <https://hudoc.echr.coe.int/eng?i=001-207173> [<https://perma.cc/Q3HT-JHDQ>].

69. *Caamaño Valle*, App. No. 43564/17, ¶ 57.

70. *Id.*

71. *Id.* ¶ 59.

72. *Id.* ¶¶ 77–78

73. *Hirst v. United Kingdom*, App. No. 74025/01, ¶ 59 (Oct. 6, 2005), <https://hudoc.echr.coe.int/eng?i=001-70442> [<https://perma.cc/W5VG-JSZE>].

74. *Caamaño Valle*, App. No. 43564/17, ¶ 61.

75. See generally Laleh Ispahani, *Voting Rights: A Comparative Analysis of Criminal Disenfranchisement Laws*, in *CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE* 25–28 (Alec C. Ewald & Brandon Rottinghaus eds., 2009).

No. 1, it does accept that the margin of appreciation of states may extend to allow for a “negative” ban—that is, the assumption that persons with intellectual disabilities as severe as to require guardianship with regard to certain matters are not capable of understanding the consequences of their vote. Such assumption is hardly consistent with Article 14 of the ECHR:<sup>76</sup> even though the Court argued in *Caamaño Valle* that “the difference in treatment between [the applicant’s daughter] (whose right to vote was restricted) and persons who had the right to vote was [. . .] based on the respective mental capacity of each person,” no other person’s intellectual capacity was actually tested by the Spanish authorities.<sup>77</sup> The Court, therefore, accepts on one hand the assumption that persons without intellectual disabilities are by definition “capable of assessing the consequences of their decisions and making conscious and judicious decisions” and thus entitled to the right to vote regardless of their ability to understand the consequences of voting;<sup>78</sup> on the other hand, it requires an individualized assessment of such abilities in persons belonging to a different category. Inconsistent with Article 14 of the Convention, such reasoning appears dangerously close to the textbook definition of discrimination—as rightly underscored by the Commissioner for Human Rights.<sup>79</sup>

Despite these questionable findings, it appears that the approach taken in the two aforementioned cases has been embraced by the Court. Indeed, the arguments in the *Strøbye and Rosenlind* and *Caamaño Valle* have been reproduced (at times *verbatim*) in the recent judgment in *Anatoliy Marinov v. Bulgaria*.<sup>80</sup> The ECtHR first confirmed that the rights established by Article 3 of Protocol No. 1 are not absolute, as there is room for “implied limitations” as well as a certain margin of appreciation for the states.<sup>81</sup> The Court also reiterated that such margin of appreciation is to be considered significantly narrower with regard to the right to vote of persons with intellectual disabilities, who already suffer “considerable discrimination” in society, and that measures of due process are necessary to neutralize

76. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 14.

77. *Caamaño Valle*, App. No. 43564/17, ¶ 82.

78. *Id.* ¶ 3.

79. *Id.* ¶ 48 (“[T]he practice of depriving persons with intellectual and psychosocial disabilities of their right to vote on the basis of a judicial decision could not be considered to be compatible with a legitimate aim in a modern democracy and amounted to discrimination.”).

80. *Anatoliy Marinov v. Bulgaria*, App. No. 26081/17, ¶ 16 (Feb. 15, 2022; rectified on Feb. 28, 2022), <https://hudoc.echr.coe.int/eng?i=001-215603> [<https://perma.cc/T5WL-TY65>].

81. *Id.* ¶ 44.

the effect that prejudices on the abilities of such individuals may have on the state's legislation.<sup>82</sup> However, the confirmation of the inconsistency of a blanket restriction of the right to vote solely based on the presence of an intellectual disability with Article 3 of Protocol No. 1 was again accompanied by the qualification of such right to vote as conditional to the ability of "assessing the consequences of their decisions and of making conscious and judicious decisions."<sup>83</sup> The substantive difference between the judgment in *Anatoliy Marinov* and those in *Strøbye and Rosenlind* and *Caamaño Valle* is, in the former, the Court found that the restriction of the right to vote of the applicant was the result of "an automatic, blanket restriction on the franchise of those under partial guardianship (with no option for an individualised judicial evaluation of his fitness to vote),"<sup>84</sup> while in the latter cases the ECtHR was satisfied that an individualized judicial assessment of the abilities of the persons in question had been carried out satisfying the trifecta of requirements of not impairing the essence of the right to vote, being imposed in pursuit of a legitimate aim, and not being disproportionate. In terms of approach, however, the Court did not depart from its own approach: while "an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties,"<sup>85</sup> would fall outside an acceptable margin of appreciation, states retain the power to restrict the right to vote on persons with disabilities if they ascertain judicially that they may not be capable of assessing and understanding the consequences of their vote.

Besides the double-standard that has been mentioned beforehand—the ability to understand the consequences of the vote of persons without a certified disability is never mistrusted—the approach of the ECtHR seems questionable from three perspectives. The first is the fact that the lack of consensus on where to "draw the line" on the right to vote of persons with disabilities should have pushed the Court to draw such a line itself, rather than confirming a margin of appreciation of states that is narrow in name only. Indeed, the ECtHR refrained from providing any guideline on how the assessment of one's ability to understand the consequences of voting should be conducted: the only requirement seems in fact to be a logistical one—namely, that the assessment must be individualized and judicial. States, in other words, not only retain the power to restrict the right to vote of a person with an intellectual disability as long as such person is subjected to an individualized assessment, but also to set the criteria against which

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82. *Id.*

83. *Id.* ¶ 50.

84. *Id.* ¶ 50.

85. *Alajos Kiss v. Hungary*, App. No. 38832/06, ¶ 49 (May 20, 2010), <https://hudoc.echr.coe.int/eng?i=001-98800> [<https://perma.cc/TQB5-X2FQ>].

such person is to be assessed. An individualized judicial assessment, therefore, is hardly a guarantee that persons with disabilities will have their rights protected and shall not be discriminated.

The second is the drastic downplaying of the significance of the CRPD in the case-law, despite the facts that the CRPD is the only specialized instrument of international law on the rights of persons with disabilities and that its provisions are rather consistent with those of the ECHR (especially Article 14 on non-discrimination). The approach of the ECtHR with regard to restrictions of the right to vote on the basis of disability is radically inconsistent with that of the Committee on the Rights of Persons with Disabilities.<sup>86</sup> The Committee has confirmed that, under the CRPD, states are bound to ensure that persons with disabilities “can effectively and fully participate in political and public life on an equal basis with others,” and such right cannot be restricted for any group of persons with disabilities.<sup>87</sup> Moreover, and most importantly, the Committee also stated that “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.”<sup>88</sup> A discriminatory approach cannot, by definition, be legitimate or proportional “to the aim of preserving the integrity of the State party’s political system.”<sup>89</sup> It is difficult to understand the *rationale* behind the approach of the ECtHR. Even if one recognizes the necessary independence of international tribunals and the fact that the ECtHR is a regional court—as opposed to the Committee on the Rights of Persons with Disabilities, which is a UN body—most of the states in the Council of Europe have ratified the CRPD which cannot be overlooked. The significance of the lack of consensus on the right to vote of persons with disabilities in the ECHR system is considerably reduced: the ECtHR may not want to take the lead and recommend a uniform approach to the treatment of persons with intellectual disabilities in electoral matters, but willingly ignoring the

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86. *Caamaño Valle*, App. No. 43564/17, ¶¶ 55, 82 (The ECtHR allowing restrictions on the right to vote based on the “respective mental capacity of each person”), *with* U.N., Comm. on the Rights of Persons with Disabilities, Commc’n No. 4/2011, *Zsolt Bujdosó v. Hungary*, (Sept. 9, 2013), CRPD/C/10/D/4/2011, ¶ 9.4 (the CRPD not foreseeing any reasonable restriction on any group of persons with disabilities’ right to vote).

87. *Zsolt Bujdosó*, CRPD/C/10/D/4/2011, ¶ 9.4.

88. *Id.* (emphasis added).

89. *Id.* ¶ 9.6.

CRPD and the interpretation of its Article 29 by the Committee is a decision that has substantive discriminatory effects.

Finally, the approach of the ECtHR is questionable in that it seems to contradict its own consideration of the right to vote when the relevant disability is physical rather than intellectual. As it will be seen in the next section, not only the Court's views on the right to vote of persons with physical disabilities is in line with the approach of the Committee on the Rights of Persons with Disabilities, but also the CRPD is taken into account in the assessment of the treatment accorded to persons with disabilities by the states parties to the ECHR.

#### IV. THE RIGHT TO VOTE OF PERSONS WITH PHYSICAL DISABILITIES

In the previous section, the approach of the ECtHR to the right to vote of persons with disabilities has been defined as exclusive, in that the Court does not consider itself “bound by interpretations given to similar instruments by other bodies, having regard to the possible difference in the contents of the provisions of other international instruments and/or the possible difference in role of the Court and the other bodies.”<sup>90</sup> It is thus puzzling that, in a judgment issue a few months later, the Court itself argued that “the Convention should, as far as possible, be interpreted in harmony with other rules of international law, of which it forms a part,” and that “the provisions regarding the rights of people with disabilities set out in the CRPD should [ . . . ] be taken into consideration.”<sup>91</sup> Considering the nature of the claims in the latter case, it appears that the Court adopts two different approaches depending on the type of disability concerned: when the applicant is a person with an intellectual disability, the Court argues for the independence of the ECHR and the irrelevance of the case-law of other bodies applying the CRPD; when the applicant has a physical disability, the CRPD and its case law come into play as an aid to the application of the ECHR.<sup>92</sup> In the judgment on *Toplak and Mrak v. Slovenia*, the ECtHR contradicted its findings in *Strøbye and Rosenlind v. Denmark*, as it stated that “since the

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90. *Caamaño Valle*, App. No. 43564/17, ¶ 54; *see also* United Nations, View the ratification status by country or treaty, United Nations Human Rights Treaty Bodies, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en) [<https://perma.cc/K9YM-XR4M>].

91. *Toplak and Mrak v. Slovenia*, Apps. Nos. 34591/19 & 42545/19, ¶ 112 (Oct. 26, 2021), <https://hudoc.echr.coe.int/eng?i=001-212693> [<https://perma.cc/4KVX-ZMUG>].

92. *See id.* ¶ 55 (“The right to access for persons with disabilities is ensured through strict implementation of accessibility standards. Barriers to access to existing objects, facilities, goods and services aimed at or open to the public shall be removed gradually in a systematic and, more importantly, continuously monitored manner, with the aim of achieving full accessibility.” (quoting Comm. On the Rights of Persons with Disabilities on its Eleventh Session, U.N. Doc. CRPD/C/GC/2, ¶ 14 (2014))).

Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved.”<sup>93</sup> Such consensus and standard directly point to the CRPD: it is indeed an established approach for the Court to take into account developments in international and European law, and it is not contested that “[t]he European Convention on Human Rights should, as far as possible, be interpreted in the light of the provisions of the Disability Convention, which reflects an international consensus on the rights of persons with disabilities.”<sup>94</sup> Indeed, the ECtHR also clarified that, on matters of physical disability, Article 14 of the ECHR must be interpreted in conjunction with the provisions on reasonable accommodation in the CRPD, particularly with reference to the objective of allowing persons with disabilities to participate to the public life of their states on an equal basis with all others.<sup>95</sup> In practical terms, this entails that states have an obligation “to react with the requisite diligence” to ensure the possibility for persons with disabilities to vote freely and secretly as prescribed by Article 3 of Protocol No. 1 to the ECHR.<sup>96</sup>

It is worth noting, however, that the extent of such “requisite diligence” seems to differ in the interpretation of the ECtHR and the Committee on the Rights of Persons with Disabilities—and, once again, the approach of the ECtHR raises substantive questions as to whether persons with disabilities are granted the possibility to participate to public life on an equal basis with persons without disabilities. According to the Court, even though the inclusion of persons with disabilities in political life dictates that, when needed, accessible voting procedures must be provided, the use of assistive technologies is “not as a necessary requirement that would need to be immediately implemented.”<sup>97</sup> One may object to this assessment as potentially frustrating the right to vote of persons with certain disabilities—for instance, those who would otherwise need the assistance of another person to vote, thus compromising the secrecy and perhaps even the

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93. *Id.* ¶ 113.

94. *Enver Şahin v. Turkey*, No. 23065/12, Dissenting Opinion of Judge Lemmens, ¶ 4 (Jan. 30, 2018), <https://hudoc.echr.coe.int/eng?i=001-180499> [<https://perma.cc/JFE3-R37H>].

95. *See Toplak and Mrak v. Slovenia*, Nos. 34591/19 and 42545/19, ¶ 114 (Oct. 26, 2021), <https://hudoc.echr.coe.int/eng?i=001-212693> [<https://perma.cc/CQ68-LPX3>].

96. *See id.* ¶ 121.

97. *See id.* ¶ 127.

expression of free will; indeed, the Committee on the Rights of Persons with Disabilities had found that “the obligation to implement accessibility is unconditional,” and stated that “[s]tates parties must prohibit all disability-based discrimination and provide persons with disabilities effective and equal protection against discrimination on all grounds.”<sup>98</sup> The way the ECtHR interpreted the committee’s decision, however, is somehow controversial: the Court argued the decision in question leads to its own conclusion that assistive technologies are not a strict requirement, perhaps by virtue of the fact that, unlike in Slovenia, in the case before the Committee assistive technologies were already offered in the state but not made available to the applicant.<sup>99</sup> This, however, seems more a convenient reading of the Committee’s decision than a proper application of the principle of non-discrimination. Moreover, the Court referred to the lack of consensus among the states of the Council of Europe on assistive technologies in voting booths (and, again quite conveniently, to the different needs of persons with disabilities in terms of assistance) to argue the decision on whether to provide voting machines falls within the margin of appreciation of states, and that the possibility for a person with a disability to be assisted by a person of their choice in the act of voting strikes “a fair balance between the protection of the interests of the community and respect for the first applicant’s rights and freedoms, as safeguarded by the Convention.”<sup>100</sup>

Ultimately, persons with physical disabilities seem to enjoy a greater deal of protection than persons with intellectual disabilities in the context of the ECHR. While the latter are subject to a rather discriminatory judicial process to be granted the right to express their choices regarding their representation in spite of what the CRPD prescribes in terms of equal treatment, the former see at least their right to reasonable accommodation and more established in the CRPD considered by the ECtHR. Considered, surely, but not necessarily implemented: as clarified in *Toplak and Mrak*, the definitive decision remains a prerogative of the state, and the reference, once again, to a lack of consensus among the states of the Council of Europe has taken the Court to refrain from exercising any leadership as to what should be considered “reasonable accommodation” in the context of the European system of human rights.<sup>101</sup>

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98. U.N., Comm. on the Rights of Persons with Disabilities, Commc’n No. 19/2014, *Fiona Given v. Australia*, ¶¶ 8.8–8.9, U.N. Doc. C/19/D/19/2014 (Mar. 29, 2018), available at <https://www.ag.gov.au/sites/default/files/2020-03/given-v-australia-192014-views-16-february-2018.pdf> [<https://perma.cc/8YUY-TYDK>].

99. *Toplak and Mrak v. Slovenia*, Nos. 34591/19 and 42545/19, ¶¶ 126–27 (Oct. 26, 2021), <https://hudoc.echr.coe.int/eng?i=001-212693> [<https://perma.cc/3GJM-5PYG>].

100. *Id.* ¶¶ 129–31.

101. *Id.* ¶¶ 35–36, 93.

## V. IS THE ECtHR APPROACH TO DISABILITY DISCRIMINATORY?

As underscored above, the ECtHR adopts different approaches when faced with applications on the right to vote of persons with intellectual disabilities and persons with physical disabilities. Even though such difference is never openly mentioned, the case-law shows how the ECtHR tends to grant states a wider margin of appreciation when the application is based on an intellectual disability—*de facto* requiring merely the respect of a loose version of the principles of due process—while requiring a certain diligence in assessing the access to ballot booths and the expression of preferences by persons with physical disabilities.<sup>102</sup> The difference in approach is evident by the references to the CRPD, which appears to inform—at least theoretically—the ECtHR's attitude towards physical disabilities, while being set aside when the claim before the court is based on the right to vote of persons with intellectual disabilities.<sup>103</sup> Echoes of the medical model of disability are loud and clear at the ECtHR:<sup>104</sup> the focus of the Court is on what a person with a disability can or cannot do, how their ability affects their possibility to do things in the same way as those without a medically certified disability, and to what extent the abilities of the applicants

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102. See generally, e.g., U.N., Comm. on the Rights of Persons with Disabilities, Commc'n No. 19/2014, *Fiona Given v. Australia*, 16 February 2018, CRPD/C/19/D/19/2014; *Toplak and Mrak v. Slovenia*, App. Nos. 34591/19 and 42545/19, Judgment, (Oct. 21, 2019), <https://hudoc.echr.coe.int/eng?i=001-212693> [<https://perma.cc/3GJM-5PYG>].

103. See generally, e.g., U.N., Comm. on the Rights of Persons with Disabilities, Commc'n No. 19/2014, *Fiona Given v. Australia*, 16 February 2018, CRPD/C/19/D/19/2014; *Toplak and Mrak v. Slovenia*, App. Nos. 34591/19 and 42545/19, Judgment, (Oct. 21, 2019) <https://hudoc.echr.coe.int/eng?i=001-212693> [<https://perma.cc/3GJM-5PYG>].

104. The legal literature on the medical model of disability is somehow scarce, as disability had seldom been considered a legal problem until the introduction of the social model of disability, upon which the CRPD is based. A useful, although dated, overview of the models of disability can be found in Peggy Quinn, *Understanding Disability: a Lifespan Approach*, SAGE xix–xx (1997). Questions on the appropriateness of the medical model were being raised much earlier than the emergence of the social model, as noted by Harlan Hahn, *The Politics of Physical Difference: Disability and Discrimination*, 44 J. SOC. ISSUES 39, 41 (1988). More contemporary and thorough reflections on the medical model are the studies of Anita Silvers, *An Essay on Modeling: The Social Model of Disability*, and Christopher Boorse, *Disability and Medical Theory*, both in *PHILOSOPHICAL REFLECTIONS ON DISABILITY* (D. Christopher Ralston, Justin Hubert Ho eds., Springer 2010), at 19–36 and 55–88 respectively. An insightful critique on the lasting effects of the medical model on domestic legislations has been provided by Angélica Guevara, *The Need to Reimagine Disability Rights Law because the Medical Model of Disability Fails Us All*, 2021 WIS. L. REV. 269–92 (2021).

can be compared to those commonly identified as “able-bodied”. Little is done, in cases on intellectual disability, in terms of assessing how and in what measure the state and its entities, communities, and society at large contribute to the marginalization of persons with disabilities. This is in fact true for both intellectual and physical disabilities: as clarified by the Court in *Toplak and Mrak v. Slovenia*, domestic courts are considered in a better position to carry out the cost/benefit analysis of any measure taken to accommodate the needs of persons with intellectual or physical disabilities alike and, as long as due process is respected, they can decide whether or not inclusion is worth the effort.<sup>105</sup> Neither the CRPD nor the Committee on the Rights of Persons with Disabilities distinguish between physical and intellectual disabilities.<sup>106</sup> The doctrine of reasonable accommodation applies equally to any type and form of disability, and both the CRPD and the Committee focus on the removal of social and physical barriers to the participation of persons with disabilities in the public life of the state, rather than to what their ability would allow them to do in comparison with a person without disabilities.

It would be too simplistic to pretend that there are no differences between intellectual and physical disabilities. In fact, one may quote the Court when it underscored that “assistance to people with disabilities may take a variety of forms,” and add that disability itself may take a variety of forms.<sup>107</sup> Regardless of the differences, each disability has something in common with all others: law, society, and the judiciary prevent the full inclusion of persons with disabilities in the public life of the state. It makes therefore sense that the CRPD does not distinguish between various forms of disability, and does not even contemplate the distinction between intellectual and physical disabilities that seem to inform the approach of the ECtHR to disability.<sup>108</sup> Truth be told, the Court does not make an explicit distinction

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105. See generally *Toplak and Mrak v. Slovenia*, Nos. 34591/19 and 42545/19 (Oct. 26, 2021), <https://hudoc.echr.coe.int/eng?i=001-212693> [<https://perma.cc/3GJM-5PYG>].

106. See Theresia Degener, *A New Human Rights Model of Disability*, in *The United Nations Convention On The Rights Of Persons With Disabilities: A COMMENTARY* 41 (Valentina Delia Fina et al. eds., Springer 2017); Alicia Ely Yamin, *The Alchemy of Agency: Reflections on Supported Decision-Making, the Right to Health and Health Systems as Democratic Institutions*, in *MENTAL HEALTH, LEGAL CAPACITY, AND HUMAN RIGHTS* 17, 21–24 (Michael Ashley Stein et al. eds., Cambridge Univ. Press 2021); Tania Burchardt, *Capabilities and Disability: the Capabilities Framework and the Social Model of Disability*, 19 *DISABILITY & SOC'Y* 735, 751 (2004); see Anna Lawson & Mark Priestley, *The Social Model of Disability: Questions for Law and Legal Scholarship?*, in *ROUTLEDGE HANDBOOK OF DISABILITY LAW AND HUMAN RIGHTS* 3, 15 (Peter Blanck & Ellionóir Flynn eds., Routledge 2016).

107. *Toplak and Mrak v. Slovenia*, Nos. 34591/19 and 42545/19, ¶ 129 (Oct. 26, 2021), <https://hudoc.echr.coe.int/eng?i=001-212693> [<https://perma.cc/3GJM-5PYG>].

108. Theresia Degener, *A New Human Rights Model of Disability*, in *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY*

between the two types of disability: one may argue that the ECtHR has not yet received an application based on issues of both physical accessibility and intellectual ability.<sup>109</sup> However, the distinction exists in practice, as evidenced by the different considerations of the CRPD depending on the nature of the claim and the disability of the applicant. Such distinction, has no legal basis: neither the ECHR nor—especially—the CRPD distinguish different categories of disability or call for distinctive assessment or treatment. Such distinction does exist, however, several of society's cultures remain permeated of the medical model of disability: societies in which, in spite of the CRPD, the definition of person with a disability is still “any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capacities.”<sup>110</sup> Society and culture change with time, but not by themselves. The ECtHR's refusal to take the lead and guide the states of the Council of Europe towards a shared and inclusive definition of disability enables the medical model of disability not only to remain rooted in societies, but also in domestic and international law. One may wonder what good does the ECHR do for persons with disabilities, because their discrimination is *de facto* enabled by the guardian of its application.

In light of these considerations, it appears indispensable that the ECtHR clarifies not only its own approach towards the CRPD, but also the relationship between the CRPD and the ECHR. The point that the ECtHR is not formally bound by the CRPD is unquestionable—as is the fact that the Court does not have to necessarily adhere to the views of the Committee on the Rights of Persons with Disabilities.<sup>111</sup> Nevertheless, the relationship between the CRPD and ECHR cannot be reduced to a formalistic acknowledgment of their respective independence from one another. Both instruments pertain to the complex—and sometimes contradictory—body of international law

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41, 42–43 (Valentina Delia Fina, Rachele Cera, Giuseppe Palmisano eds., 2017); see *Toplak v. Slovenia*, Nos. 34591/19 and 42545/19 (2022).

109. See *Toplak and Mrak v. Slovenia*, Nos. 34591/19 and 42545/19, ¶ 129 (Oct. 26, 2021), <https://hudoc.echr.coe.int/eng?i=001-212693> [<https://perma.cc/6362-AVJT>].

110. G.A. Res. 3447 (XXX), Declaration on the Rights of Disabled Persons (Dec. 9, 1975).

111. Lisa Waddington, *The Domestication of the Convention on the Rights of Persons with Disabilities: Domestic Legal Status of the CRPD and Relevance for Court Judgments*, in *THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN PRACTICE: A COMPARATIVE ANALYSIS OF THE ROLE OF COURTS* 538, 553–54 (Lisa Waddington & Anna Lawson eds., 2018).

aimed at preserving, protecting, and promoting human rights; and while the ECHR is a generalist instrument providing a framework of rights for persons in the territory of the states of the Council of Europe, the CRPD is an instrument of *lex specialis*, the wide ratification of which is evidence of its worldwide prominence with regard to the rights of persons with disabilities.<sup>112</sup> The ECtHR's choice to ignore its substance and its case-law when dealing with applications submitted by persons with disabilities that lament discrimination based on such disabilities is, at the very least, short-sighted—in spite of the fact that, may we repeat ourselves, issues of jurisdiction and applicable law may justify, from a formal standpoint, the ECtHR's approach to the matter. The concern is that this is merely one of two approaches of the ECtHR: as it has been shown in the previous section of this Article, in cases based on physical disabilities the ECtHR has in fact embraced the leading role of the CRPD in the definition of the rights of persons with disabilities. Such erratic behaviour, however, is beneficial neither to persons with disabilities, nor to the ECHR system: it undermines the ECtHR's authoritativeness and the ECHR's role as chief instrument of protection of human rights in Europe, especially the rights of whom have been ignored (when not openly denied) for decades and are, in many countries, still seen as a concession the cost of which must be not too burdensome.<sup>113</sup>

## VI. CONCLUDING REMARKS

Writing about disability and how it is addressed in the law and the judiciary is never an easy undertaking, and the risk of crossing the legal question over into matters of politics is an ever-present one. The legal aspects of disability branch out and intersect with its social, medical, and, let us not forget, emotional elements; making a systematic and-so to speak —“spurious” inquiry on questions of disability represents a further challenge with respect to the already complex analysis of the ECHR rulings. At the same time, it is difficult-and perhaps not wholeheartedly justifiable-to try and isolate the legal aspects from the other salient elements of disability if one considers the fact that persons with disabilities are still considered persons with a *minus*: they are indeed the only persons, together with minors, whose legal capacity can be limited or revoked on the basis of their physical

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112. For a count on states that have ratified the CRPD, see U.N. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

113. Theresia Degener & Andrew Begg, *From Invisible Citizens to Agents of Change: A Short History of the Struggle for the Recognition of the Rights of Persons with Disabilities at the United Nations*, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 1, 15 (Valentina Delia Fina et al. eds. 2017).

or intellectual characteristics, the only group whose agency can be subjected and blocked after a judicial evaluation, and the only people whose participation in the social life of their communities “on an equal basis with others” is subject to the fact that any accommodation needed to ensure such participation does not impose ‘a disproportionate or undue burden.’<sup>114</sup>

Considerations of such nature are thus as social and political as they are legal, and they require further research and a much livelier debate. From a strictly legal perspective, it is crucial that inconsistencies in the interpretation and application of the rules of international law specifically drafted to tackle the discrimination historically suffered by persons with disabilities are underscored and addressed. As evidenced in this Article, in the ECHR system there are internal inconsistencies as well as external ones—the former arising out of the margin of appreciation doctrine, the latter coming from the erratic approach of the ECtHR to the CRPD. The margin of appreciation doctrine has created the conditions for the states of the Council of Europe to ease in a system of protection of human rights that can adapt, to a certain extent, to their social, political, and constitutional traditions. Unfortunately, it allows for different degrees of protection of human rights within the same region, as it opens the door for considerations other than the welfare of the subjects of those rights. Sometimes such considerations are of financial nature; other times they are of socio-political character, as shown in *Strøbye and Rosenlind v. Denmark* and in *Caamaño Valle v. Spain*.<sup>115</sup> As hideous pondering whether the participation of persons with disabilities to social life is financially viable is, it may not be as repugnant as arguing that the full participation of persons with disabilities to the life of their communities is something that should be achieved gradually. The margin of appreciation doctrine applied to the rights of persons with disabilities not only creates inequalities in how such persons enjoy their human rights in the different states of the ECHR system: it also gives states the power to restrict the agency of persons with disabilities, confirming that, in spite of any goodwill, discrimination based on personal characteristics is not even entirely unlawful when it affects a certain historically unprivileged group.

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114. Convention on the Rights of Persons with Disabilities, Human Rights Office of the High Commissioner on Its Sixty-First Session, U.N. Doc. A/RES/61/106, art. 2 (Dec. 13, 2006), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities> [<https://perma.cc/U6LT-AM4Z>].

115. *Strøbye*, App. Nos. 25802/18, 27338/18, ¶ 17; *Caamaño Valle*, App. No. 43564/17, ¶¶ 74–76.

The attitude of the ECHR towards the CRPD is also cause for concern. The CRPD is not an expression of the Council of Europe—formally, it is an external instrument the interpretation of which lies outside of the ECtHR’s jurisdiction. However, it is the primary instrument of international law with regard to the rights of persons with disabilities, and it has been ratified by all the states of the Council of Europe with the exception of Liechtenstein.<sup>116</sup> The ECtHR may not have jurisdiction to apply the CRPD, but it has the power to interpret the relevant provisions of the ECHR in light of the CRPD—especially in light of it being the ultimate *lex specialis* on matters of disability.<sup>117</sup> In fact, ignoring the CRPD in cases on the treatment of persons with disabilities is hardly justifiable: it gives the impression that the ECtHR considers the ECHR system as a regional system separate from the global human rights system—which would be acceptable if persons with disabilities enjoyed a more favourable treatment under the ECHR than the CRPD. Unfortunately, the case-law shows that they do not. The CRPD is far from perfect, but it is designed to ensure that persons with disabilities are actually—and not just theoretically—put in a position to enjoy life on an equal basis with any other person. The ECHR is not as explicit, being an instrument of *lex generalis*, but it nonetheless prohibits discrimination “on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>118</sup> It is, however, quite hard to understand why the extent to which Article 14 applies to persons with disabilities is left to the domestic courts of each ECHR member state.

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116. Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

117. *Id.*

118. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 14, Nov. 4, 1950, ETS 5.