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Disenfranchisement of woman with a disability (yet again) reveals ECtHR's struggle with CRPD in Caamaño Valle v. Spain

🕒 June 23, 2021 June 23, 2021 👤 merelyrancken 📄 Article 1 of Protocol No. 12, Article 3 of Protocol No. 1, Caamaño Valle v. Spain, Disability, Prohibition of Discrimination
 By Merel Vrancken, PhD student and assistant in constitutional law at UHasselt.

In the case of Caamaño Valle v. Spain (<http://hudoc.echr.coe.int/eng?i=001-210089>), the ECtHR held that the disenfranchisement of a woman with a mental disability did not amount to a violation of her right to vote under art. 3 of Protocol No. 1, nor did it amount to discrimination under the Convention. In its reasoning, the Court explicitly rejected the principles laid down in the Convention on the Rights of Persons with Disabilities (<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html>). (hereinafter: CRPD). It came to the conclusion of non-violation by applying the principles it had devised some eleven years earlier, in the case of Alajos Kiss v. Hungary (<http://hudoc.echr.coe.int/eng?i=001-98800>). Concretely, a deprivation of the right to vote on the basis of an individual's mental capacities may only happen after an 'individualised judicial evaluation of the person's cognitive capacity'. While, at first glance, this may not seem like a ground-breaking judgment – it simply applies earlier devised principles and the conclusion they lead to may not seem unwarranted – the rejection it entails of the principles found in the CRPD is both remarkable and unusual. While the Court has had a somewhat conflicting relationship with disability rights for some time (see, for instance, Kargakis v. Greece (<http://hudoc.echr.coe.int/eng?i=001-207359>), + blogpost (<https://strasbourgobservers.com/2021/03/12/kargakis-v-greece-protection-in-substance-for-detainees-with-disabilities-but-a-web-of-missed-opportunities/>), and Delecolle v. France (<http://hudoc.echr.coe.int/eng?i=001-187187>), + blogpost (<https://strasbourgobservers.com/2018/12/03/loneliness-that-is-good-for-you-the-european-court-addresses-the-right-to-marry-of-people-with-disabilities/>)), it had never before explicitly rejected the CRPD and its provisions as a source of interpretation for the ECHR.

Facts

The current case concerns the disenfranchisement of M., a woman with a mental disability, during court proceedings on the deprivation of her legal capacity. The applicant in the case, the woman's mother, requested a court to extend the legal guardianship over her daughter upon her turning eighteen. In these proceedings, M.'s mother specifically requested the court not to deprive her daughter of the right to

vote. The first-instance judge granted the request for the legal guardianship of the applicant to be extended, but held that M.'s right to vote should be revoked. The reasoning for this deprivation was based on the specific circumstances of the case. More specifically, the judgment held that M. was highly influenceable and was not aware of the consequences of any vote that she might cast. Moreover, the judgment pointed to a difference between the CRPD and Spanish law when it came to their concepts of disability. According to an earlier judgment of the Spanish Supreme Court, this difference was compatible with the CRPD. On appeal, the applicant argued that her daughter was entitled to the right to vote under articles 12 and 29 of the CRPD and requested this right to be recognised. The appeals court upheld the first instance decision, confirming that a decision to deprive a person of their right to vote was compatible with the CRPD and emphasizing that M.'s intellectual ability was equivalent to that of a child aged between six and eight. A subsequent appeal to the Spanish Supreme Court was of no avail, as this Court also held that the possibility to deprive a person with a disability of the right to vote was not in violation of the CRPD.

Despite these judgments, in 2018, Spain amended its law to exclude the possibility of disenfranchisement for persons with disabilities. In the amendment, the following was stated: *'in order to adapt it to reflect the International Convention on the Rights of Persons with Disabilities, any limitations on the exercise of the right to vote established by judicial resolution [...] shall cease to have effect. Those persons whose right to vote has been limited or annulled owing to disability shall fully regain that right by virtue of the law.'* (§19) Since this amendment, M.'s right to vote has been reinstated.

Judgment

The applicant complained before the ECtHR that her daughter's right to vote under article 3 of Protocol No. 1 had been violated. Moreover, she also complained of a violation of article 3 of Protocol No. 1 in conjunction with article 14 ECHR and article 1 of Protocol No. 12, asserting that it had been discriminatory to prohibit persons with disabilities from voting. A third party submission by the Commissioner of Human Rights of the Council of Europe argued that article 3 of Protocol No. 1 should be interpreted in the light of the CRPD and invited the Court to find a violation (§48).

In the judgment, the Court notes that while the margin of appreciation regarding voting rights is generally broad, it becomes substantially narrower *'if a restriction on the right to vote applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, such as the mentally disabled'* (§55). The Court later clarifies that this consideration is translated as requiring *'an individualised judicial evaluation of the cognitive capacity'* of persons with a mental disability, where *'it must be demonstrated that the limitation is not solely based on a mental disability necessitating partial guardianship'* (§69). In addition, the Court points to the fact that *'there is at present no consensus among the States Parties to Protocol No. 1 in the sense of an unconditional right of persons with a mental disability to exercise their right to vote'* (§59), which leads it to conclude on a fairly broad margin of appreciation.

In its assessment, the ECtHR accepts as legitimate the aim of ensuring that only citizens capable of assessing the consequences of their decisions and of making conscious and judicious decisions should be allowed to participate in public affairs. It also stresses that the Spanish system did not entail an automatic bar on voting for persons under guardianship (in contrast to the earlier case of Alajos Kiss (<http://hudoc.echr.coe.int/eng?i=001-98800>)), but instead took into account the individual's personal situation. An assessment of the individual's voting rights was made separately from the assessment of legal capacity: a judicial decision had to specifically declare that the person in question was incapable of exercising the right to vote. In 2018, Spain adjusted its law, eliminating the possibility of disenfranchisement of disabled people. Nonetheless, according to the Court, this *'does not imply that the previous system was incompatible with the requirements of Article 3 of Protocol No. 1'* (§68). As M.'s voting

rights were removed based on an *'individualised judicial evaluation'*, which took into account her lack of understanding of the meaning of a vote and the susceptibility to being influenced, the ECtHR accepts that the restriction of her right to vote was proportionate (§73).

In addition to this, under article 3 of Protocol No. 1, any limitation of the right to vote must be in conformity with the overriding obligation of ensuring the free expression of the opinion of the people. The limitation should therefore not only be analysed from the perspective of the individual concerned, *'but also from the perspective of the democratic society as a whole, since each individual's right is embedded within the broader framework of the electoral system'* (§74). An electoral system must be aimed at identifying the will of the people through universal suffrage. It is, however, for each State to determine how this free expression is to be ensured and how to make sure the opinion expressed represents one *'of the people'*. The choice of a voting system falls within the margin of appreciation of the states. For this reason, the Spanish system that existed at the material time, which allowed for disenfranchisement of persons with a mental disability based on an individual examination, was in accordance with the obligation of ensuring the free expression of the opinion of the people (§75-76). The Court therefore concluded that there had been no violation of article 3 of Protocol No. 1.

The applicant also alleged a violation of article 14 of the Convention in conjunction with article 3 of Protocol No. 1 and a violation of article 1 of Protocol No. 12. Under these provisions, the ECtHR notes that M's right to vote was restricted because of her limited mental capacity, and the difference in treatment was thus based on person's mental capacity. This difference in treatment pursued a legitimate aim and was proportionate, as the assessment underlying the disenfranchisement *'took into account the applicant's daughter special status (that is to say the fact that the degree of her legal capacity had been modified)'* (§82). The Court therefore concluded there to be no violation of either article 14 of the Convention read in conjunction with article 3 of Protocol No. 1, or of article 1 of Protocol No. 1.

Judge Lemmens' dissent

Attached to this judgment is an eloquent and vigorous dissent by Judge Lemmens, who disagrees with the Court finding no violation on both accounts. While he admits that *'the majority's opinion is based on solid reasoning and that it is in line with the Court's existing case-law'* (§1 of the dissent), he advances that the Court's case-law in this area should be updated. He argues that the Court's current interpretation of the right to vote conflicts with articles 12 and 29 of the CRPD, from which the majority distances itself by relying on state consensus in the opposite direction. Judge Lemmens, however, argues that the Court should have aligned its approach to that of the CRPD Committee, which is that any disenfranchisement of persons with disabilities is contrary to their rights under the CRPD. Regarding the consensus, he argues that *'[in] a matter such as the one at issue, which is the subject of a specific treaty, adherence to that treaty should be a strong indicator of the existence or lack of consensus'* (§8 of the dissent). He indicates that the CRPD has been ratified by 45 out of 47 CoE member states and that a very large majority of States Parties to Protocol No. 1 unreservedly agreed with the principles contained in the CRPD.

When it comes to the obligation to ensure the free expression of the opinion of the people, Judge Lemmens emphasises the collective dimension of *'the opinion of the people'*. He argues that

'excluding a large category of persons [...] from the electoral process, not only deprives these persons "of any possibility of influencing the political process and the chance of shaping the policies and measures that directly [affect] their lives", but also deprives "society as a whole ... of a legislature that [reflects] its full diversity". An electoral system providing for the disenfranchisement of a whole category of vulnerable persons is hardly able to ensure "the free expression of the opinion of the people".'

(§§13-14 of the dissent)

Finally, he states that the difference in treatment under article 14 *cf.* article 3 Protocol No. 1 and article 1 Protocol No. 12 cannot be justified. Judge Lemmens thus concludes that there has been a violation of both article 3 of Protocol No. 1 read alone and in conjunction with article 14 of the Convention and article 1 of Protocol No. 12.

Commentary: one step forward and two steps back

This case represents yet another hurdle in the conflicting approach of the ECtHR towards the rights of persons with disabilities and the CRPD. While in some judgments the Court has embraced the CRPD and has taken substantive steps forward regarding the rights of persons with disabilities (such as G.L. v. Italy (<http://hudoc.echr.coe.int/eng?i=001-204322>), + [blogpost \(https://strasbourgobservers.com/2020/10/01/substantive-equality-as-the-driving-force-behind-reasonable-accommodations-for-pupils-with-disabilities-the-case-of-g-l-v-italy/\)](https://strasbourgobservers.com/2020/10/01/substantive-equality-as-the-driving-force-behind-reasonable-accommodations-for-pupils-with-disabilities-the-case-of-g-l-v-italy/)), Enver Şahin (<http://hudoc.echr.coe.int/eng?i=001-180499>), + [blogpost \(https://strasbourgobservers.com/2018/03/09/disability-and-university-pragmatic-activism-the-pros-and-cons-of-enver-sahin-v-turkey/\)](https://strasbourgobservers.com/2018/03/09/disability-and-university-pragmatic-activism-the-pros-and-cons-of-enver-sahin-v-turkey/)), and Guberina v. Croatia (<http://hudoc.echr.coe.int/eng?i=001-161530>), + [blogpost \(https://strasbourgobservers.com/2016/05/17/guberina-and-gherghina-the-two-sides-of-the-courts-disability-jurisprudence/#more-3222\)](https://strasbourgobservers.com/2016/05/17/guberina-and-gherghina-the-two-sides-of-the-courts-disability-jurisprudence/#more-3222)), in cases such as the current one, the Court retraces the progress it has made. The Court's approach is in line with the famous song by the Desert Rose Band (<https://www.youtube.com/watch?v=i5ZO78FINOY>): one step forward and two steps back. The current judgment clearly represents several steps backward in the quest for disability rights. Judge Lemmens' fierce dissent moreover points to a lack of internal unanimity on the approach the Court should take regarding disability rights. This comment first discusses the Court's struggle with the CRPD, which is made apparent in its consensus reasoning and the margin of appreciation it subsequently grants to the state party, and afterwards critically considers the Court's approach to the principle of equality.

1. The ECtHR's struggle with the CRPD

In the current judgment, the ECtHR reaches the conclusion that there is a lack of consensus regarding persons with disabilities' 'unconditional right to exercise their right to vote'. It was, however, also established in the judgment that the CRPD includes this exact unconditional right. Following articles 12 and 29 of the CRPD, all persons with disabilities, without exception, should have the right to vote and no one should be deprived of that right on the basis of any perceived or actual intellectual disability (see also Judge Lemmens' dissent, §4). In spite of this clear international obligation, the Court establishes the lack of consensus based on state practice, indicating that *'one of the relevant factors in determining the scope of the authorities' margin of appreciation may be the existence or non-existence of common ground between the laws of the Contracting States'* (§58) and pointing to an FRA report (<https://fra.europa.eu/en/publication/2014/right-political-participation-persons-disabilities-human-rights-indicators>), according to which a majority of the Member States allow for restrictions based on the mental capacity of the individual concerned. In addition, the ECtHR explicitly states the following:

*'The Court acknowledges that other instruments can offer wider protection than the Convention (regarding the CRPD, for example, see *Rooman v. Belgium* [GC], no. 18052/11, § 205, 31 January 2019), but the Court is not bound by interpretations given to similar instruments by other bodies, having regard to the possible difference in the contents of the provisions of other international instruments and/or the possible difference in role of the Court and the other bodies.'*

(§54)

While explicitly acknowledging the broader protection granted to persons with disabilities' voting rights under the CRPD, a convention which 45 of the 47 Member states ratified^[i] and in accordance to which Spain amended its legislation in 2018, the Judges in the present case choose to limit the ECHR's protection of disability rights to a lower standard.

It can, however, also be argued (as Judge Lemmens does in his dissent, §8) that the high ratification rate of the CRPD reflects the actual consensus of the member states, in spite of the reality that many states have not yet amended their legislation to be in accordance with the principles laid down therein. The Court could have taken an integrated approach to human rights (<https://www.elgar.com/shop/gbp/integrated-human-rights-in-practice-9781786433794.html>), which implies seeing human rights as a whole from the perspective of the rights holder. A similar approach is also taken by the Inter-American Court of Human Rights (see Advisory Opinion OC-1/82 (https://www.corteidh.or.cr/docs/opiniones/seriea_01_ing1.pdf)) and Advisory Opinion OC-25/18 (https://www.corteidh.or.cr/corteidh/docs/opiniones/seriea_25_esp.pdf), §§33-45).^[ii] In line with this example, the ECtHR should reconsider its approach to Convention rights, and more specifically to the establishment of a consensus between member states. Ratification of a convention may also be of particular relevance for the establishment of an applicable human rights standards among member states, and is in fact of utmost relevance when considered from the individual rights holder's perspective.

2. A promise of equality?

One of the more recent cases concerning disability rights, G.L. v. Italy (<http://hudoc.echr.coe.int/fre?i=001-204322>), was lauded (<https://strasbourgobservers.com/2020/10/01/substantive-equality-as-the-driving-force-behind-reasonable-accommodations-for-pupils-with-disabilities-the-case-of-g-l-v-italy/>) for holding a promise of substantive equality. The current case, however, seems to crush that promise for people with a disability. In its reasoning under the principle of equality, the Court fails to explicitly identify the difference in treatment based on 'limited mental capacity' for what it is, namely a difference in treatment on the basis of disability. In the past, the Court has specifically included disability as protected as a ground under 'other status' of article 14 of the Convention (Glor v. Switzerland (<http://hudoc.echr.coe.int/eng?i=001-92525>), §80) and has treated this ground as suspect when it is the basis for a difference in treatment (Alajos Kiss v. Hungary (<http://hudoc.echr.coe.int/eng?i=001-98800>), §42). Moreover, as the Court repeated in the instant case, *'if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question'* (Alajos Kiss v. Hungary (<http://hudoc.echr.coe.int/eng?i=001-98800>), §42; see the current judgment at §55). By identifying a difference in treatment based on 'mental capacity', the Court consequently circumvents its own case law on differences in treatment on the basis of disability.

Conclusion

With this judgment, the Court continues down its internally contradictory path regarding disability rights. While, as Judge Lemmens notes, this judgment indeed largely consists of a sound reasoning and is in line with a large part of the Court's previous case-law, it seems to become possible to discern two lines of case-law regarding disability rights: one restrictive approach, within which we can place the current judgment, and one more progressive approach that embraces the CRPD and the concept of substantive equality for persons with a disability.

While to someone not closely acquainted with disability rights, the current judgment may not seem immediately problematic, the ECtHR did embark upon a clear path regarding disability rights: the path away from the CRPD, which is a widely lauded Convention that has been ratified by 45 of the CoE's 47 member states. In approaching the right to vote in a manner clearly contrary to the principles laid down in the CRPD and in not finding any issue with the difference in treatment based on disability, the Court has sketched a gloomy future for disability rights under the ECHR. The current judgment might have a dissuasive effect on people wishing to bring cases on disability rights before the Court, due to its departure from international human rights standards on disability. Nonetheless, Judge Lemmens' compelling dissent may leave a spark of hope for advocates of disability rights.

[i] Of the 45 CoE member states who have ratified the CRPD, the following six states have made a reservation (https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4) regarding article 12: Estonia, Georgia, Ireland, the Netherlands, Norway and Poland.

[ii] In accordance with article 64.1 of the American Convention on Human Rights (<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>), the Inter-American Court may be consulted '*regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states*'. In the past, this has made the Inter-American Court interpret and apply '*any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever the principal purpose of such a treaty is, and whether or not non-Member States of the Inter-American system are or have the right to become parties thereto*' (see Advisory Opinion OC-1/82 (https://www.corteidh.or.cr/docs/opiniones/seriea_01_ing1.pdf), Advisory Opinion OC-24/17 (https://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf) and Advisory Opinion OC-25/18 (https://www.corteidh.or.cr/corteidh/docs/opiniones/seriea_25_esp.pdf)). The Inter-American Court thus has a very extensive view of its scope of competence regarding the interpretation of human rights, which is comparable to the integrated approach to human rights.

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