

# THE EUROPEAN COURT OF HUMAN RIGHTS AND THE HUMAN RIGHTS MODEL OF DISABILITY

## Convergence, Fragmentation and Future Perspectives

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*The human rights model focuses on the inherent dignity of the human being [...].*

*It places the individual centre stage in all decisions affecting him/her and, most importantly, locates the main 'problem' outside the person and in society. The 'problem' of disability under this model stems from a lack of responsiveness by the State and civil society to the difference that disability represents.<sup>1</sup>*

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\* This contribution is the product of a joint reflection, and both authors contributed equally to its elaboration.

<sup>1</sup> G. QUINN and T. DEGENER, *Human Rights and Disability*, United Nations, New York and Geneva 2002, p. 14.

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## ABSTRACT

The adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) marked a paradigm shift in the field of international human rights law, recognising people with disabilities as holders of human rights (as opposed to passive beneficiaries of charity and rehabilitation). Since its entry into force, the CRPD has played a crucial role in the advancement of disability equality within the European human rights system. In the Council of Europe (CoE), the European Court of Human Rights (ECtHR or Strasbourg Court) has slowly begun to apply a standard of protection of disability rights similar to that contained in the CRPD in certain areas, such as with regard to the interpretation of the non-discrimination norm and, until recently, the right to education under the European Convention on Human Rights (ECHR) and its Additional Protocols. This indicates a certain level of convergence between the two legal systems. However, in other fields, such as legal capacity, and, more generally, with regard to the rights of persons with intellectual and psychosocial disabilities, the approach of the Strasbourg Court diverges quite considerably from the interpretation accorded to the CRPD by the Committee on the Rights of Persons with Disabilities (CRPD Committee) in its General Comments. Against this background, this contribution analyses the most recent and, sometimes, contentious case law of the ECtHR on disability, and discusses emerging and future perspectives regarding the influence of the CRPD on the Strasbourg Court's jurisprudence. It contributes to the academic debate on the human rights of persons with disabilities by reflecting on the convergences and divergences that are evident between the protection afforded by the CRPD and the ECHR (as interpreted by the ECtHR), and on the underlying rationale for those convergences and divergences. This contribution analyses the extent to which the ECtHR has shifted towards the human rights model of disability embedded in the CRPD and situates that discussion within the wider debate on fragmentation in international law. In doing so, it ultimately reflects on the willingness of the ECtHR to incorporate progressive international human rights standards into its jurisprudence.

## 1. INTRODUCTION

Since the early 2000s<sup>2</sup> and, in particular, after the publication of the 2006 report of the International Law Commission,<sup>3</sup> the ‘fragmentation of international law’ has been a core theme of international scholarship. Fragmentation refers to ‘the dynamic growth of new and specialized subfields of international law’.<sup>4</sup> In essence, it denotes ‘the rise of specialized rules and rule-systems that have no clear relationship to each other’,<sup>5</sup> and encompasses ‘ideational fragmentation’ – in other words, the fact that different treaties or bodies pursue different objectives and values.<sup>6</sup> In recent years, Broude has pointed to the fact that ‘fragmentation itself is alive and [...] technical and often controversial interpretative issues continue to arise’; however, fragmentation as a phenomenon is no longer the subject of ‘heated arguments’.<sup>7</sup> Instead, scholars have shifted towards discussions surrounding the growing phenomenon of ‘convergence’.<sup>8</sup> Some authors observe that international courts have ‘developed an extensive case law establishing synergies and links between the treaty under their jurisdiction and other treaties’, and that these synergies ‘are attuned to the goal of pursuing coherence in international law’.<sup>9</sup> This appears to be the case for the European Court of Human Rights (ECtHR or Strasbourg Court), which has consistently held that the principles underlying the European Convention on Human Rights (ECHR) ‘cannot be interpreted and applied in a vacuum’.<sup>10</sup> The ECtHR has also vowed to ‘determine State responsibility in conformity with the governing principles of international law’<sup>11</sup> and has held that its jurisprudence should ‘take the

<sup>2</sup> On this timeline, see M. KOSKENNIEMI and P. LEINO, ‘Fragmentation of International Law? Postmodern Anxieties’, (2002) 13(3), *Leiden Journal of International Law*, p. 553.

<sup>3</sup> UN General Assembly (UNGA), ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission’, UN Doc. A/CN.4/L.682, 13.04.2006, p. 245.

<sup>4</sup> A. PETERS, ‘The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization’, (2017) 15(3), *International Journal of Constitutional Law*, p. 671.

<sup>5</sup> UN GA, ‘Fragmentation of International Law’, *supra* note 3.

<sup>6</sup> A. PETERS (2017), ‘The Refinement of International Law’, *supra* note 4, p. 671.

<sup>7</sup> T. BROUDE, ‘Keep Calm and Carry on: Martti Koskeniemi and the Fragmentation of International Law’, (2013) 27, *Temple International & Comparative Law Journal*, p. 280. On conflicting interpretations, see M. AJEVSKI, ‘Fragmentation in International Human Rights Law – Beyond Conflict of Laws’, (2014) 32 *Special Issue – Nordic Journal of Human Rights*, p. 87.

<sup>8</sup> M. ANDENAS and E. BJORGE (eds.), *A Farewell to Fragmentation: Reassertion and Convergence in International Law*, Cambridge University Press, Cambridge-New York 2015.

<sup>9</sup> A. RACHOVITSA, ‘The Principle of Systemic Integration in Human Rights Law’, (2017) 66, *International and Comparative Law Quarterly*, p. 557.

<sup>10</sup> ECtHR, *Banković and others v Belgium*, no 52207/99, 12.12.2001, para. 57.

<sup>11</sup> *Ibid.*

relevant rules of international law into account'.<sup>12</sup> However, despite these assertions, the Strasbourg Court has yet to adopt a consistent approach towards international law.

In analysing how the ECHR interacts with general international law and with thematic international law regimes, Forowicz discerns two opposing paradigms between which the ECtHR has oscillated.<sup>13</sup> On the one hand, she identifies the 'closed paradigm', which results in the maintenance of fragmentation between the ECHR and other regimes of international law, by not allowing 'the penetration of external sources into the Court's case law'.<sup>14</sup> On the other hand, Forowicz refers to the 'open paradigm', whereby the Court 'remains open to external influences and cross-fertili[s]ation'.<sup>15</sup> She suggests that the need to fill gaps in the text of the ECHR can constitute a significant factor in encouraging the Strasbourg Court to align itself with international law standards and that this may prompt the Court to embrace the 'open paradigm'.<sup>16</sup>

Since the entry into force of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD or UN Convention) in 2008, growing synergies have slowly emerged between the interpretation accorded by the Strasbourg Court to the ECHR and the human rights norms contained in the CRPD. Thus, the time is ripe to examine the extent to which convergence has occurred between the protection accorded to people with disabilities<sup>17</sup> by the Strasbourg Court's jurisprudence and that provided by the CRPD in the past ten years or so. Moreover, recent case law of the ECtHR concerning the rights of people with disabilities offers a renewed opportunity to analyse the openness of the Strasbourg Court to incorporating international law standards in its jurisprudence.

Against this background, this contribution critically discusses the extent to which the Strasbourg Court has embraced the human rights model of disability

<sup>12</sup> ECtHR, *Fogerty v United Kingdom*, no 37112/97, 21.11.2001, para. 35. The Court's vow to take into account 'relevant rules of international law' is in line with Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).

<sup>13</sup> In her writings, Forowicz focuses on six thematic regimes of international law, namely children's rights, civil and political rights, the prohibition of torture and ill-treatment, refugee rights, state immunity and international humanitarian law. See M. FOROWICZ, *The Reception of International Law in the European Court of Human Rights*, Oxford University Press, Oxford-New York 2010.

<sup>14</sup> *Ibid.*, p. 5.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> This contribution uses people-first language ('persons/people with disabilities') for the most part, in line with the CRPD. However, the authors refer occasionally to 'disabled persons/people', but always in line with the CRPD's understanding of disability. On people-first language, see generally P. FOREMAN, 'Language and Disability', (2005) 30(1), *Journal of Intellectual and Developmental Disability*, p. 57.

that underpins the CRPD. Following the introductory remarks above, section 2 provides an overview of the most relevant aspects of the CRPD and identifies the conceptual tenets of the human rights model of disability embraced by the UN Convention. Section 3 contextualises the analysis of the ECtHR's case law within the broader realm of the Council of Europe's (CoE) disability policy, examining the extent to which that context has created fertile terrain for convergence. Section 4 discusses the case law of the Strasbourg Court related to non-discrimination, reasonable accommodation in detention and the right to education – where some convergence is evident – and the Court's legal capacity case law – where a degree of fragmentation persists. Section 5 examines the potential explanations that lie behind convergence and divergence in these areas. Building on Forowicz's analysis, it is argued that the relative alignment of the case law of the ECtHR with the CRPD's human rights model of disability has been prompted by the Strasbourg Court's desire to fill gaps within the ECHR system. In that vein, section 5 explores the doctrine of the margin of appreciation as one of the main contributing factors to the remaining fragmentation. Section 6 offers some brief concluding remarks, tying together the different strands of argumentation explored throughout this contribution.

## 2. THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

### 2.1. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES IN A NUTSHELL

Adopted in 2006 by the UN General Assembly (UNGA) and with entry into force in 2008, the CRPD currently represents the global normative standard with regard to the rights of individuals with disabilities. According to Article 1, the purpose of the CRPD is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. The UN Convention endorses the shift from the outdated medical model of disability – which views functional limitations as a consequence flowing from impairment – to the social-contextual model of disability.<sup>18</sup> In that connection,

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<sup>18</sup> The social-contextual model is a more refined elaboration of the 'pure' social model. The latter model was first articulated in the mid-1970s by the Union of Physically Impaired People Against Segregation (UPIAS), a British organisation advocating for the rights of people with physical disabilities. According to the interpretation provided by the UPIAS, society disables people with impairments, and a distinction needs to be made between the 'impairment' itself and the social 'situation' of people with impairments, the latter giving

it recognises that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others’.<sup>19</sup>

Article 3 CRPD outlines the general principles upon which the UN Convention is based and which are intended to guide States Parties in its implementation, serving as a benchmark against which Parties should assess the conformity of domestic laws with the CRPD. Among them is the principle of non-discrimination, which has been described as the ‘leitmotif’ of the CRPD.<sup>20</sup> It can be considered the cornerstone of the UN Convention, as it cuts across both civil and political rights, such as the rights to liberty and to legal capacity, and economic, social and cultural rights, such as the right to education. Article 2 CRPD provides a broad definition of discrimination on the basis of disability, highlighting that such discrimination includes the denial of a reasonable accommodation. The duty to reasonably accommodate is also defined in Article 2 CRPD as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.<sup>21</sup>

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rise to a ‘disability’. See C. BARNES and G. MERCER (eds.), *The Social Model of Disability: Europe and the Majority World*, Disability Press, Leeds 2005. This model contrasts sharply with the medical model of disability, which views disability as a ‘problem’ stemming from the functional limitations of the disabled person, rather than as a societal problem arising from disabling and discriminatory barriers. Since its first elaboration, criticisms of the social model have been put forward by some authors, who alleged, *inter alia*, that the social model focused on societal barriers (physical, attitudinal and legislative barriers, among others) and neglected the role of impairment in disabling the individual concerned (among the critical views, see T. SHAKESPEARE and N. WATSON, ‘The Social Model of Disability: An Outdated Ideology?’, (2001) 2, *Research in Social Science and Disability*, p. 9). The CRPD’s social-contextual model implicitly recognises these criticisms, and considers disability as an interactive process between people with impairments and societal barriers (see A. BRODERICK and D. FERRI, *International and European Disability Law and Policy: Text, Cases and Materials*, Cambridge University Press, Cambridge 2019). The term ‘social-contextual model’ was coined by A. BRODERICK, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities*, Intersentia, Cambridge-Antwerp 2015, p. 77. Several authors still refer to the CRPD as purporting the social model of disability, see e.g. A. ARSTEIN-KERSLAKE, *Restoring Voice to People with Cognitive Disabilities. Realizing the Right to Equal Recognition before the Law*, Cambridge University Press, Cambridge-New York 2017, p. 72.

<sup>19</sup> Preamble para. (e) of the CRPD. The Preamble must be read in conjunction with Article 1 CRPD, which has been termed a ‘non-definition of disability’. See A. BRODERICK and D. FERRI (2019), *International and European Disability Law and Policy*, *supra* note 18.

<sup>20</sup> O.M. ARNARDÓTTIR, ‘A Future of Multidimensional Disadvantage Equality’, in O.M. ARNARDÓTTIR and G. QUINN (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Martinus Nijhoff, The Hague-New York 2009, p. 41.

<sup>21</sup> The reasonable accommodation duty is subject to a defence, namely that the duty-bearer is not required to provide an accommodation where to do so would impose a disproportionate or undue burden on that duty-bearer. Article 5(3) CRPD links the equality and

The duty to provide reasonable accommodation must be distinguished from legal obligations to achieve accessibility, which is also a general principle of the CRPD, mentioned in Article 3 and elaborated on in Article 9. The latter provision requires States Parties to take appropriate measures to ensure that people with disabilities have access to the physical environment, transportation, information and communications, and to facilities and services open or provided to the public on an equal basis with others. Contrary to the individualised nature of reasonable accommodation obligations, accessibility duties are generalised (group-based) and anticipatory (not triggered by an individual request).<sup>22</sup>

The principle of participation and inclusion of people with disabilities in society is also a core feature of the UN Convention. The CRPD Committee has stated that the principle of full and effective participation requires ‘engaging with all persons, including persons with disabilities, to provide for a sense of belonging to and being part of society’ and, furthermore, that it represents a ‘transformative tool for social change’ that can ‘promote agency and empowerment of individuals.’<sup>23</sup> Ensuring participation of persons with disabilities is particularly important in fostering awareness-raising and promoting respect for their rights and dignity.<sup>24</sup>

As noted above, the CRPD is extremely broad in its scope and covers a wide spectrum of both civil and political rights, as well as economic, social and cultural rights. Unlike other core international human rights law instruments, the UN Convention highlights, as Mégret suggests, ‘sometimes with considerable detail, how the rights it proposes to protect are to be implemented and guaranteed.’<sup>25</sup> In this vein, Kayess and French argue that the CRPD incorporates a disability-specific interpretation of existing human rights.<sup>26</sup> Although it is generally claimed that the CRPD does not establish new rights for people with disabilities, the UN Convention has

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non-discrimination norms with the duty to accommodate. Article 5(3) provides that: ‘In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.’

<sup>22</sup> EUROPEAN COMMISSION, ‘Disability Law and the Duty to Reasonably Accommodate Beyond Employment: A Legal Analysis of the Situation in EU Member States’, 2016, written by L. WADDINGTON and A. BRODERICK with the assistance of A. POULOS, p. 45, available at [http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/16/reasonable\\_accomodation\\_beyond\\_employment\\_final.pdf](http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/16/reasonable_accomodation_beyond_employment_final.pdf), last accessed 13.08.2019.

<sup>23</sup> CRPD COMMITTEE, General Comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organi[s]ations, in the implementation and monitoring of the Convention, UN Doc. CRPD/C/GC/7 (2018), para. 27 and para. 33.

<sup>24</sup> *Ibid.*, para. 76.

<sup>25</sup> F. MÉGRET, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’, (2008) 30(2), *Human Rights Quarterly*, p. 510.

<sup>26</sup> R. KAYESS and P. FRENCH, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’, (2008) 8(1), *Human Rights Law Review*, p. 32.

‘modified, transformed and added to traditional human rights concepts in key respects’.<sup>27</sup> In doing so, and as noted by Stein,<sup>28</sup> the CRPD challenges the traditional gap between (immediately realisable) civil and political rights, and (progressive) socio-economic rights. Moreover, as suggested by de Beco, the CRPD blurs the distinction between these traditional categories of rights. De Beco argues that the CRPD has ‘compounded the different categories of rights’ throughout its provisions.<sup>29</sup> On the one hand, several CRPD rights which fall within the traditional category of socio-economic rights contain reasonable accommodation requirements (which need to be immediately realised).<sup>30</sup> On the other hand, many civil and political rights in the CRPD require positive measures and expenditure on the part of States.<sup>31</sup> De Beco goes even further and argues that the CRPD ‘has generated a new understanding of the indivisibility of human rights, insofar as it considers civil and political and economic and social rights as inextricably bound together.’<sup>32</sup> In sum, all rights provided for in the CRPD are essential for people with disabilities to meaningfully participate in society on an equal basis with others.

## 2.2. THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND THE HUMAN RIGHTS MODEL OF DISABILITY

### 2.2.1. *Distinctive Features of the Human Rights Model*

The CRPD is considered a ground-breaking treaty, in the sense that it goes even further than the social-contextual model, to embrace the human rights model of disability. Legal scholarship has not been consistent in the use of terminology on the various models of disability that exist. As most recently noted by Retief and Letšosa, some scholars consider variants of the social model (including the social-contextual model) and the human rights model as synonymous.<sup>33</sup>

<sup>27</sup> Ibid., However, for arguments related to the novelty of certain CRPD rights and obligations, see generally F. MÉGRET, *supra* note 25. See also A. BRODERICK, ‘Of Rights and Obligations: The Birth of Accessibility’ (2019) *The International Journal of Human Rights*.

<sup>28</sup> M.A. STEIN, ‘Disability Human Rights’, (2007) 95, *California Law Review*, p. 75.

<sup>29</sup> G. DE BECO, ‘The Indivisibility of Human Rights in Light of the Convention on the Rights of Persons with Disabilities’, (2019) 68(1), *International and Comparative Law Quarterly*, p. 141.

<sup>30</sup> See e.g. Articles 24 and 27 CRPD on education and employment.

<sup>31</sup> In that regard, the right to liberty and security of the person (Article 14 CRPD), the right to freedom of expression (Article 21 CRPD) and the right to participate in political and public life (Article 29 CRPD) all place obligations on States Parties to ensure the provision of reasonable accommodation.

<sup>32</sup> G. DE BECO (2019), ‘The Indivisibility of Human Rights’, *supra* note 29, p. 160.

<sup>33</sup> M. RETIEF and R. LETŠOSA, ‘Models of disability: A Brief Overview’, (2018) 74(1), *HTS Teologiese Studies/Theological Studies*, available at [https://www.researchgate.net/publication/323608473\\_Models\\_of\\_disability\\_A\\_brief\\_overview](https://www.researchgate.net/publication/323608473_Models_of_disability_A_brief_overview), last accessed 13.08.2019.



However, Degener authoritatively argues that the latter presents distinctive features.<sup>34</sup> Firstly, the human rights model does not focus merely on social barriers; rather, it places emphasis on the human dignity of persons with disabilities. Secondly, it ‘encompasses both sets of human rights, civil and political as well as economic, social and cultural rights’.<sup>35</sup> Thirdly, it values impairments as part of human diversity.<sup>36</sup> Fourthly, according to Degener, social models of disability neglect ‘identity politics as a valuable component of disability policy, whereas the human rights model offers room for minority and cultural identification’, thus allowing for action to be taken against intersectional discrimination.<sup>37</sup> Fifthly, the human rights model acknowledges the importance of public health policies that aim to prevent impairments.<sup>38</sup> Finally, Degener suggests that while the social model of disability can helpfully explain the marginalisation of people with disabilities, it does not offer adequate solutions to overcome it. By contrast, the human rights model is ‘a tool to implement the CRPD’<sup>39</sup> and to achieve social justice.<sup>40</sup> In that connection, Quinn and Degener clarify that ‘the end goal from the perspective of the human rights model is to build societies that are genuinely inclusive, societies that value difference and respect the dignity and equality of all human beings regardless of difference’.<sup>41</sup> These distinctive features of the human rights model seem to be acknowledged by the CRPD Committee in its General Comment No. 6,<sup>42</sup> which asserts that the human rights model of disability revolves around two intertwined conceptual tenets – dignity and inclusive equality. Both of these tenets are discussed below.

### 2.2.2. *Disability as Part of Human Diversity and the Inherent Dignity of Persons with Disabilities*

The human rights model of disability builds on the social-contextual model in that it recognises that ‘disability is a social construct’; however, as mentioned above, it goes further than a social model approach, in the sense that it conceives of disability as ‘one of several layers of identity’.<sup>43</sup> This is reflected in Article 3(d) CRPD, which includes ‘respect for difference and acceptance of

<sup>34</sup> T. DEGENER, ‘A New Human Rights Model of Disability’, in V. DELLA FINA, R. CERA and G. PALMISANO (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary*, Springer, Cham 2017, pp. 41–60.

<sup>35</sup> *Ibid.*, p. 44.

<sup>36</sup> *Ibid.*, p. 47.

<sup>37</sup> *Ibid.*, p. 49.

<sup>38</sup> *Ibid.*, p. 52.

<sup>39</sup> *Ibid.*, p. 41.

<sup>40</sup> *Ibid.*, p. 54.

<sup>41</sup> G. QUINN and T. DEGENER (2002), *Human Rights and Disability*, *supra* note 1, p. 14.

<sup>42</sup> CRPD COMMITTEE, General Comment No. 6 on Equality and Non-Discrimination, UN Doc. CRPD/C/GC/6, 26.04.2018, para. 11.

<sup>43</sup> *Ibid.*, para. 9.

persons with disabilities as part of human diversity and humanity’ as a general principle of the UN Convention. In *S.C. v Brazil*, an individual communication that was ultimately declared inadmissible,<sup>44</sup> the CRPD Committee argues that the diversity of persons with disabilities needs to be taken into account,<sup>45</sup> in combination with attitudinal and environmental barriers, in all matters pertaining to disability. In that regard, it affirms that ‘the difference between illness and disability is a difference of degree and not a difference of kind’, and that a ‘health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity’.<sup>46</sup>

In embracing impairments as part of human diversity, the human rights model recognises the inherent dignity of people with disabilities, who are to be valued because of their self-worth.<sup>47</sup> Dignity is linked to individual autonomy and independence, which are listed among the general principles of the UN Convention and underpin several of its substantive provisions. The most relevant provision for the purpose of this analysis is Article 12 CRPD, according to which people with disabilities are entitled to equal recognition before the law (legal capacity).<sup>48</sup> In particular, Article 12(2) recognises that persons with disabilities enjoy legal capacity on an equal basis with others in all areas of life, meaning that they have legal standing and legal agency simply by virtue of being human.<sup>49</sup> Under Article 12 CRPD, perceived or actual deficits in mental capacity must not be used as a justification for denying legal capacity. In its General Comment No. 1, the CRPD Committee highlights that “unsoundness of mind” and other

<sup>44</sup> CRPD COMMITTEE, *S.C. v Brazil*, Communication No. 10/2013, UN Doc. CRPD/C/12/D/10/2013, 28.10.2014.

<sup>45</sup> See also CRPD Committee, *X v Tanzania*, Communication No. 22/2014, UN Doc. CRPD/C/18/D/22/2014, 31.08.2017, para. 7.6, where the Committee recalls that a ‘human rights-based model of disability requires the diversity of persons with disabilities to be taken into account’ in all matters related to disability. See also CRPD Committee, *Y v Tanzania*, Communication No. 23/2014, UN Doc. CRPD/C/20/D/23/2014, 31.08.2018, para. 7.5.

<sup>46</sup> CRPD COMMITTEE (2013), *S.C.*, *supra* note 44, para. 6.3. The human rights model also recognises that a person with a disability may have other layers of identity, i.e. a person with a disability is also a woman and/or she may be part of an ethnic minority. In that regard, the CRPD acknowledges intersectional experiences and intersectional discrimination.

<sup>47</sup> T. DEGENER, ‘Disability in a Human Rights Context’, (2016) 3 *Laws*, citing G. QUINN, and T. DEGENER (2002), *Human Rights and Disability*, *supra* note 1, p. 14.

<sup>48</sup> On this provision see A. ARSTEIN-KERSLAKE and E. FLYNN, ‘The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a Roadmap for Equality Before the Law’, (2016) 20, *The International Journal of Human Rights*, p. 471; see also C. DE BHAILÍS and E. FLYNN, ‘Recognising Legal Capacity: Commentary and Analysis of Article 12 CRPD’, (2017) 13(1), *International Journal of Law in Context*, p. 6.

<sup>49</sup> CRPD COMMITTEE, General Comment No. 1, 19 May 2014, UN Doc. CRPD/C/GC/1, 19.05.2014, para. 12. For a critical overview of the Committee’s interpretation of Article 12 CRPD, see among others M. SCHOLTEN and J. GATHER, ‘Adverse Consequences of Article 12 of the UN Convention on the Rights of Persons with Disabilities for Persons with Mental Disabilities and an Alternative Way Forward’, (2018) 44, *Journal of Medical Ethics*, p. 226.

discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency).<sup>50</sup> Article 12(3) obliges States Parties to the UN Convention to provide disabled people with access to support in the exercise of their legal capacity. It envisages the shift from the substitute decision-making paradigm to one that is based on supported decision-making.<sup>51</sup> The former is not compliant with the UN Convention and needs to be abolished according to the CRPD Committee.<sup>52</sup> Article 12(4) requires States Parties to ensure that measures relating to the exercise of legal capacity respect the rights and the 'will and preferences' of people with disabilities, are proportional and tailored to individual circumstances, apply for the shortest time possible, and are subject to review by an independent and impartial authority or judicial body. In doing so, the CRPD Committee prohibits the use of the 'best interests standard'; instead, the 'will and preferences' of people with disabilities must be discerned in all situations.<sup>53</sup> On the whole, Article 12 CRPD plays a pivotal role in the realisation of the human rights model of disability and is vital to ensuring respect for the inherent dignity of people with disabilities.<sup>54</sup>

### 2.2.3. *Inclusive Equality*

Models of disability are often mirrored in corresponding models of equality, and the human rights model can be aligned with the model of 'inclusive equality' that underpins the substantive provisions of the CRPD.<sup>55</sup> According to the CRPD Committee, inclusive equality goes even further than substantive equality

<sup>50</sup> Ibid. CRPD COMMITTEE (2014), General Comment No. 1, *supra* note 49, para. 13.

<sup>51</sup> Ibid., para. 3.

<sup>52</sup> Ibid., paras. 26 and 28.

<sup>53</sup> On the 'best interests standard' and its compatibility with the CRPD, see generally P. GOODING, *A New Era for Mental Health Law and Policy: Supported Decision-Making and the UN Convention on the Rights of Persons with Disabilities*, Cambridge University Press, Cambridge-New York 2017, pp. 129 et seq.

<sup>54</sup> However, since the entry into force of the CRPD, it has been considered a contentious provision, in that it 'challenges the popular notion that people with disabilities lack decision-making skills'. See A. ARSTEIN-KERSLAKE (2017), *Restoring Voice to People with Cognitive Disabilities*, *supra* note 18, p. 73. It has also been considered contentious, in that it seems to go 'further than recommending governments end guardianship' and 'calls on countries to abolish mental health laws', see J. CRAIGIE et al., 'Legal Capacity, Mental Capacity and Supported Decision-Making: Report from a Panel Event', (2019) 62, *International Journal of Law and Psychiatry*, p. 160. In that connection Lewis suggests, in J. CRAIGIE et al., that '[i]n seeking to put an end to the horrors of guardianship, the interpretation of Article 12 has created a new problem: If states enacted laws that complied with [General comment No. 1], harm would be usefully reduced in one group but shifted onto another group because the disabled person's contemporaneous wishes and feelings would be determinative of any decision about them: finances, care, health, residence and contact with others'.

<sup>55</sup> Inclusive equality is a term that had previously been coined by authors such as Sally Witcher. See S. WITCHER, *Inclusive Equality: A Vision for Social Justice*, Bristol University Press, Bristol 2014.

(which focuses not only on equal treatment but on uncovering covert forms of discrimination), in that it embraces:

- (i) a fair redistributive dimension: to address socio-economic disadvantages;
- (ii) a recognition dimension: to combat stigma, stereotyping, prejudice and violence, and to recognise the dignity of human beings and their intersectionality;
- (iii) a participative dimension: to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
- (iv) an accommodating dimension: to make space for difference as a matter of human dignity.<sup>56</sup>

Inclusive equality seeks to ensure equal opportunities for persons with disabilities as well as equal results. Ensuring equal opportunities requires the removal of discriminatory barriers, so that each disabled person is facilitated in developing his/her full potential and is enabled to participate in society on an equal basis with others. Equality of results, on the other hand, seeks to place disabled individuals in the same position as their non-disabled counterparts, regardless of individual merit or capacity.<sup>57</sup>

Inclusive equality promotes, *inter alia*, the adoption of widespread positive measures, in the form of awareness-raising, reasonable accommodations, accessibility measures and preferential treatment for persons with disabilities in certain circumstances.<sup>58</sup> Moreover, the CRPD Committee affirms that States Parties ‘must identify areas or subgroups of persons with disabilities – including those who face intersectional discrimination – that require specific measures to accelerate or achieve inclusive equality’.<sup>59</sup>

On the whole, inclusive equality acknowledges the fact that a barrier-free society (encompassing attitudinal, environmental and other barriers, such as legal barriers) is essential in ensuring full and effective participation and inclusion of persons with disabilities in society.

### 3. DISABILITY RIGHTS IN THE COUNCIL OF EUROPE: SETTING THE SCENE FOR CONVERGENCE

It is commonly acknowledged that the CoE framework does not include any binding human rights instrument protecting disability rights specifically, and

<sup>56</sup> CRPD COMMITTEE (2018), General Comment No. 6, *supra* note 42, para. 11.

<sup>57</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law and Policy: Text, Cases and Materials*, *supra* note 18.

<sup>58</sup> Article 5(4) CRPD.

<sup>59</sup> CRPD COMMITTEE (2018), General Comment No. 6, *supra* note 42, para. 32.

direct references to disability within CoE treaties are scant. The ECHR does not contain any express reference to the rights of persons with disabilities and only includes ‘an indirect reference to mental disability’<sup>60</sup> in Article 5(1)(e), which concerns the lawful detention of ‘persons of unsound mind’. The European Social Charter (ESC)<sup>61</sup> included only one provision requiring States Parties to undertake to adopt adequate measures to provide training facilities to disabled persons and to adopt measures to encourage the employment of individuals with disabilities. The revised ESC,<sup>62</sup> which was adopted in 1996, updated this original formulation by providing for the right of persons with disabilities to independence, social integration and participation in the life of the community in Article 15. The explanatory report to the revised ESC clarifies that, pursuant to Article 15, States Parties ‘must aim to develop a coherent policy for persons with disabilities’.<sup>63</sup> It also provides that Article 15 ‘takes a modern approach to how the protection of the disabled shall be carried out, for example by providing that guidance, education and vocational training be provided whenever possible in the framework of general schemes rather than in specialised institutions [...]’, and ‘to a large extent obliges Parties to adopt positive measures’ for disabled people.<sup>64</sup>

The lack of reference to disability in the ECHR is, according to Favalli, ‘justified by the temporal and historical context in which the Convention was drafted’, and links back to the ‘mere welfare and paternalistic approach’ which was predominant at that time.<sup>65</sup> The wording of the original ESC was also reflective of that approach. By contrast, and as noted elsewhere,<sup>66</sup> the revised Charter reflects the CoE’s move towards the human rights model of disability, a move that commenced in the early 1990s. Such a move is particularly evident in the CoE’s wide-ranging disability policies. Starting with Recommendation No. R (92)(6) on a Coherent Policy for Persons with Disabilities,<sup>67</sup> the CoE progressively aligned its policies to the human rights model, prompted by the fast-paced changes taking place at the UN level. In the same year in which the

<sup>60</sup> S. FAVALLI, ‘The United Nations Convention on the Rights of Persons with Disabilities in the Case Law of the European Court of Human Rights and in the Council of Europe Disability Strategy 2017–2023: from Zero to Hero’, (2018) 18(3), *Human Rights Law Review*, p. 517.

<sup>61</sup> European Social Charter of 18 October 1961, in force 26 February 1965, ETS No. 35.

<sup>62</sup> European Social Charter (Revised) of 03 May 1996, in force 01 July 1999, ETS No. 196 of 1996.

<sup>63</sup> Explanatory Report to the European Social Charter (Revised), para. 63, available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/163.htm>, last accessed 03.06.2019.

<sup>64</sup> *Ibid.*, para. 64.

<sup>65</sup> S. FAVALLI (2018), ‘The United Nations Convention on the Rights of Persons with Disabilities’, *supra* note 60, pp. 522–523.

<sup>66</sup> A. BRODERICK and D. FERRI (2019), *International and European Disability Law and Policy*, *supra* note 18.

<sup>67</sup> CoE Committee of Ministers (CoM), Recommendation No. R 92(6) on a Coherent Policy for Persons with Disabilities, 09 April 1992.

CRPD was adopted, the CoE launched its first comprehensive Disability Action Plan 2006–2015 (Action Plan).<sup>68</sup> That Action Plan sought ‘to translate the aims of the Council of Europe with regard to human rights, non-discrimination, equal opportunities, full citizenship and participation of people with disabilities into a European policy framework on disability [...]’.<sup>69</sup> One of the key objectives of the Action Plan was ‘to serve as a practical tool to develop and implement viable strategies to bring about full participation of people with disabilities in society and ultimately mainstreaming disability’ throughout all policy areas of the CoE Member States.<sup>70</sup> The principles upon which the Action Plan was based reflect the core tenets of the human rights model of disability, and include, among others, non-discrimination, equality of opportunities, respect for difference and acceptance of disability as part of human diversity, as well as dignity and individual autonomy – all principles which underpin the CRPD.<sup>71</sup> Following the Action Plan, non-binding recommendations and issue papers relating to disability have been adopted within the CoE, and they show a substantial convergence towards CRPD norms.<sup>72</sup> Among them, the Recommendation on the Participation of Persons with Disabilities in Political and Public Life<sup>73</sup> demonstrates the influence of the CRPD on the CoE’s approach to disability, in that it draws explicitly on several provisions of the CRPD, namely Article 2 CRPD (containing key definitions)<sup>74</sup> and Article 12 CRPD (on equal recognition before the law). The most recent Strategy on the Rights of Persons with Disabilities 2017–2023 (Strategy),<sup>75</sup> which was adopted on 30 November 2016 and supersedes the Action Plan, shows a remarkable convergence towards the human rights model of disability. As noted by Favalli and as the Strategy itself expressly states, ‘there is a perfect juxtaposition of the commitments of the Strategy [...] and of the [CRPD], with the difference that the Strategy does

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<sup>68</sup> The CoE Disability Action Plan was adopted pursuant to Committee of Ministers, Recommendation No. (2006) (5) on the Council of Europe Disability Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006–2015, 05 April 2006.

<sup>69</sup> CoE Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006–2015, p. 4.

<sup>70</sup> *Ibid.*, p. 5.

<sup>71</sup> *Ibid.*, p. 11.

<sup>72</sup> See e.g. CoE Parliamentary Assembly (PA), Recommendation No. 2064 on Equality and Inclusion for People with Disabilities, 30 January 2015.

<sup>73</sup> CoE CoM, Recommendation CM/Rec(2011)(14) on the Participation of Persons with Disabilities in Political and Public life, 16 November 2011.

<sup>74</sup> With particular reference to the definition of reasonable accommodation and discrimination on the basis of disability.

<sup>75</sup> CoE, ‘Human Rights: A Reality for All – Council of Europe Disability Strategy 2017–2023’, 30 November 2016, available at <https://www.coe.int/en/web/disability/strategy-2017-2023>, last accessed 13.08.2019.

not create legal obligations while the UN Convention is legally binding.’<sup>76</sup> There seems no doubt that the overall goal of that Strategy, which is to achieve dignity and equal opportunities for persons with disabilities in all areas of the CoE’s field of action, is informed by the conceptual tenets of the human rights model, identified above in section 2.

As will be outlined in section 4, this policy context has played a role in the development of synergies between the interpretation of the ECHR accorded by the Court and the human rights norms contained in the CRPD. It is not accidental that the ECtHR has often quoted CoE policy documents in its decisions, alongside the UN Convention;<sup>77</sup> nor is it accidental that the Strategy, drawing a sort of circular relationship, explicitly requires for it to be interpreted and acted upon ‘in line with’ the CRPD, the ECHR, the ESC, the developing case law of the ECtHR and the evolving body of decisions, guidelines and General Comments of the CRPD Committee.<sup>78</sup>

#### 4. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE HUMAN RIGHTS MODEL OF DISABILITY: BETWEEN CONVERGENCE AND FRAGMENTATION

In the most recent jurisprudence of the Strasbourg Court, growing synergies have become apparent between the interpretation of the ECHR accorded by the Court and the human rights norms contained in the CRPD. Moreover, the Court has stated that it views the UN Convention as indicating ‘a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment.’<sup>79</sup> Often, the Court has drawn on the CRPD and its substantive provisions as an aid to interpretation of the ECHR.<sup>80</sup> This tale of convergence, which is apparent in the Strasbourg Court’s case law on non-discrimination and in decisions concerning, broadly speaking, reasonable accommodation, is discussed in sub-section 4.1. The Strasbourg Court has, by contrast, struggled to translate the human rights model of disability that underpins the CRPD to its interpretation of ECHR rights in cases concerning legal capacity. This tale of fragmentation is discussed in sub-section 4.2.

<sup>76</sup> S. FAVALLI (2018), ‘The United Nations Convention on the Rights of Persons with Disabilities’, *supra* note 60, p. 535.

<sup>77</sup> E.g. ECtHR, *Guberina v Croatia*, no 23682/13, 22.03.2016, para. 38.

<sup>78</sup> CoE (2016), *Human Rights: A Reality for All*, *supra* note 75, para. 23.

<sup>79</sup> ECtHR, *Glor v Switzerland*, no 13444/04, 30.04.2009, para. 53.

<sup>80</sup> See, *inter alia*, ECtHR, *DD v Lithuania*, no 13469/06, 14.02.2012; ECtHR, *Mihailovs v Latvia*, no 35939/10, 22.01.2013; ECtHR, *Lashin v Russia*, no 33117/02, 22.01.2013. On the use of the CRPD by the ECtHR, see generally O. LEWIS, ‘Council of Europe’, in L. WADDINGTON and A. LAWSON (eds.), *The UN Convention on The Rights of Persons with Disabilities in practice. A Comparative Analysis of the Role of Courts*, Oxford University Press, Oxford 2018, pp. 89–130.

## 4.1. A TALE OF CONVERGENCE

### 4.1.1. Case Law on Non-Discrimination

The first tale of convergence between the ECHR and the CRPD emerges from the Strasbourg Court's burgeoning disability jurisprudence on the non-discrimination norm. The prohibition of discrimination under the ECHR is contained in Article 14 and is supplemented by Protocol 12. Article 14 ECHR lists a number of grounds on the basis of which discrimination is prohibited. This open-ended list has been interpreted by the Court to include disability.<sup>81</sup> In recent judgments concerning people with disabilities, the Strasbourg Court has embraced certain aspects of inclusive equality, showing deference to the human rights model of disability.

*Glor v Switzerland* is the first authority in relation to the ECHR's non-discrimination norm. In that case, the ECtHR found disability discrimination contrary to Article 14, in conjunction with Article 8 ECHR (on the right to respect for private and family life) by virtue of the fact that the State had failed to carve out exemptions to a rule that imposed a penalty tax on individuals deemed unfit to perform military service on grounds other than that of severe disability. The Court adopted a heightened standard of scrutiny, ruling that Contracting States to the ECHR have a 'considerably reduced' margin of appreciation in establishing different legal treatment for persons with disabilities on account of the 'need to prevent discrimination against people with disabilities and foster their full participation and integration in society'.<sup>82</sup> Linking that remark to the CRPD<sup>83</sup> and narrowing the State's margin of appreciation, the Court enquired as to what prevented the authorities from 'setting in place special forms of service for people in a situation comparable to that of the applicant' and gave examples of what it considered to be viable alternatives for the applicant.<sup>84</sup> This demonstrates, at the very least, 'the Court's willingness to consider the potential special measures that States can take in order to accommodate the needs, and facilitate the rights, of disabled applicants'.<sup>85</sup> In that regard, the case of *Glor v Switzerland*<sup>86</sup> represents the first step forward in the Strasbourg Court's disability equality jurisprudence towards a more inclusive approach to equality, and can be viewed as giving rise to some degree of convergence between the interpretation of the ECHR and the human rights model of disability that underpins the CRPD.

<sup>81</sup> ECtHR, *Glor*, *supra* note 79.

<sup>82</sup> *Ibid.*, para. 84.

<sup>83</sup> *Ibid.*, para. 53.

<sup>84</sup> *Ibid.*, para. 94.

<sup>85</sup> A. BRODERICK (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities*, *supra* note 18, pp. 322–323.

<sup>86</sup> ECtHR, *Glor*, *supra* note 79.



In the subsequent case of *Kiyutin v Russia*,<sup>87</sup> the Court concluded that a distinction made on account of one's health status, including an individual's HIV diagnosis, should be covered – either as a form of disability or alongside with it – by the term 'other status' in the text of Article 14 ECHR.<sup>88</sup> In the course of its judgment, the ECtHR cited several CRPD articles in the context of relevant international law.<sup>89</sup> The Court classified HIV-positive individuals as 'a vulnerable group with a history of prejudice and stigmatisation'.<sup>90</sup> This resulted in the ruling by the Court that the State should only be afforded a narrow margin of appreciation in choosing measures that single out that group for differential treatment on the basis of their HIV status.<sup>91</sup> It also led to a finding that the applicant had been a victim of discrimination on account of his health status, in violation of Article 14 taken in conjunction with Article 8 ECHR.<sup>92</sup> The implicit acknowledgement of the diversity of persons with disabilities, the recognition of the entrenched stereotyping and discrimination experienced by individuals with HIV, as well as the adoption of a standard of strict scrutiny, could be considered to be an endorsement of aspects of the human rights model of disability. This approach appears to be mirrored in the case of *IB v Greece*,<sup>93</sup> in which the Strasbourg Court does not, however, cite the CRPD. In that decision, the ECtHR seems to employ a human rights approach to disability once again. In finding a violation of both Articles 8 and 14 ECHR (following the applicant's dismissal from his employment on the ground of his HIV status),<sup>94</sup> the Court extensively recalled the difficulties faced by those diagnosed with HIV in terms of stigmatisation and discrimination,<sup>95</sup> and concluded that the applicant was a victim of discrimination in breach of Article 8 in conjunction with Article 14 ECHR.

<sup>87</sup> ECtHR, *Kiyutin v Russia*, no 2700/10, 10.03.2011.

<sup>88</sup> *Ibid.*, para. 57.

<sup>89</sup> Article 5 (equality/non-discrimination), Article 18 (liberty of movement and nationality) and Article 23 (respect for home and the family) CRPD.

<sup>90</sup> ECtHR, *Kiyutin*, *supra* note 87, para. 64. While categorising HIV as a form of disability is not uncontroversial, the Court in *Kiyutin* made the link between HIV and disability in its judgment.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, para. 74.

<sup>93</sup> ECtHR, *IB v Greece*, no 552/10, 03.10.2013.

<sup>94</sup> The applicant in *IB* alleged that his dismissal (following complaints by fellow employees that they may be exposed to the HIV virus as a result of the applicant's presence in the workplace) violated his right to private life under Article 8 ECHR. The applicant also alleged discriminatory treatment, contrary to Article 14 ECHR, on account of the dismissal itself and also in view of the fact that the reason given by the Greek Supreme Court for justifying the dismissal (namely, his HIV status and the necessity to preserve an amicable work environment) constituted unjustified discrimination.

<sup>95</sup> ECtHR, *IB*, *supra* note 93, paras. 72, 80 and 81.

In *Guberina v Croatia*,<sup>96</sup> the Court held that there had been a violation of Article 14 ECHR taken in conjunction with Article 1 of Protocol No. 1 (on the right to property), on foot of a complaint by the father of a severely disabled child regarding the tax authorities' failure to take account of the needs of his child when determining his eligibility for a tax exemption on the purchase of property adapted to his child's needs. The case is noteworthy on account of the fact that a strict standard of scrutiny was applied by the Court in the area of taxation because the restriction concerned a 'particularly vulnerable group', namely people with disabilities.<sup>97</sup> In deciding the case, the ECtHR referred to CRPD provisions addressing reasonable accommodation, equality and non-discrimination, and accessibility (among others), as well as the CRPD Committee's General Comment No. 2 on Accessibility.<sup>98</sup> Waddington asserts that 'this case is unusual for the extensive range of references to the CRPD and related instruments', and for the fact that the Court used the CRPD as more than mere 'relevant legal background material'.<sup>99</sup> Moreover, in establishing the normative context of its decision, the ECtHR referred to several CoE policy documents. When citing the Action Plan, the Strasbourg Court referred to its fundamental principles and to the need for the CoE 'to work within anti-discriminatory and human rights frameworks to enhance independence, freedom of choice and the quality of life of people with disabilities and to raise awareness of disability as a part of human diversity'.<sup>100</sup> *Guberina* appears to indicate a true move towards the human rights model of disability, as the Court placed particular emphasis in its judgment on the key role that accessibility played in the life of the applicant's son, by facilitating his personal development and enabling him to participate fully in education, as well as in cultural and social activities. Moreover, the Court clarified, for the first time in its jurisprudence, that Article 14 ECHR covers discrimination by association (because of a relationship with a person with a disability), akin to the CRPD. This appears to be an attempt by the Court to build another bridge between the UN Convention and the ECHR. Nonetheless, as Waddington rightly points out, 'no positive duties to render the environment more accessible were at stake' in *Guberina*, 'but rather the discriminatory application of an apparently neutral tax provision'.<sup>101</sup> In this respect, the Court's incorporation of the concept of 'reasonable accommodation' into its jurisprudence appears to represent a significant move towards inclusive equality.<sup>102</sup>

<sup>96</sup> ECtHR, *Guberina*, *supra* note 77.

<sup>97</sup> *Ibid.*, para. 73.

<sup>98</sup> CRPD COMMITTEE, General Comment No. 2 (2014). Article 9: Accessibility, UN Doc. CRPD/C/GC/2, 22.05.2014.

<sup>99</sup> L. WADDINGTON, 'Europees Hof voor de Rechten van de Mens, *Guberina* tegen Kroatië', (2016) 17(6) *European Human Rights Cases*, No. 23682/13, para. 3.

<sup>100</sup> ECtHR, *Guberina*, *supra* note 77, para. 38.

<sup>101</sup> *Ibid.*, para. 14.

<sup>102</sup> *Ibid.*, paras. 57 and 93.

#### 4.1.2. Case Law on Reasonable Accommodation in Detention

The second example of convergence between the ECHR and the CRPD emerges from the Strasbourg Court's case law on ill-treatment of prisoners with disabilities. Since the early 2000s, when considering the inadequate conditions of detention of disabled detainees,<sup>103</sup> the Court has consistently held that the failure to consider the specific needs of persons with disabilities amounted to a violation of the ECHR.<sup>104</sup> In *Price v United Kingdom* (a case that was decided before the CRPD entered into force),<sup>105</sup> the ECtHR acknowledged, for the first time, that reasonable accommodation is an essential element in protecting human dignity and preventing inhuman treatment in detention settings.<sup>106</sup> The case concerned the inadequate conditions of detention of Ms Price, an individual who was rendered severely physically disabled due to Thalidomide. During her stay in prison, she had to sleep in her wheelchair and had serious difficulties using toilet facilities. The ECtHR held that the conditions in which Ms Price was confined amounted to degrading treatment, regardless of any evidence of an intention to humiliate her.<sup>107</sup> With this ruling, the Strasbourg Court provided

<sup>103</sup> In several cases, the Strasbourg Court has also considered that inadequate conditions of detention expose prisoners to health risks or deteriorate their health conditions. See e.g. ECtHR, *Ilaşcu and Others v Moldova and Russia*, no 48787/99, 08.07.2004; ECtHR, *Modârcă v Moldova*, no 14437/05, 10.05.2007. See also ECtHR, *Florea v Romania*, no 37186/03, 14.09.2010. See also ECtHR, *Bamouhammad v Belgium*, no 47687/13, 17.11.2015. In that case, the applicant alleged, *inter alia*, that he had been subjected to inhuman treatment while in prison, which had affected his mental health. The Strasbourg Court held that there had been a violation of Article 3 ECHR and found that the manner of execution of the applicant's detention, involving continuous transfers between prisons and various special measures, together with the prison authority's delay in providing him with therapy and refusal to consider any alternative to custody despite the decline in his state of health, had subjected him to excessive distress. See also ECtHR, *Keenan v United Kingdom*, no 27229/95, 04.03.2001, paras. 111–115. In *Blokhin (Blokhin v Russia)*, no 47152/06, 23.03.2016), the Court concluded that there had been a violation of Mr Blokhin's rights under Article 3 on account of the lack of necessary medical treatment, having regard to his young age and particularly vulnerable situation (as he was suffering from a psychosocial and neuro-behavioural impairment). Notably, in that decision, the ECtHR made several references to the UN Convention on the Rights of the Child, but it did not refer to the CRPD.

<sup>104</sup> The ECtHR has considered Article 2 (the right to life), and Article 3 (the prohibition of inhuman and degrading treatment) alongside other provisions such as Article 5 (the right to liberty and security). See A. LAWSON, 'Disability Equality, Reasonable Accommodation and the Avoidance of Ill-treatment in Places of Detention: The Role of Supranational Monitoring and Inspection Bodies', (2012) 16(6), *The International Journal of Human Rights*, p. 845.

<sup>105</sup> ECtHR, *Price v United Kingdom*, no 33394/96, 10.07.2001.

<sup>106</sup> R. BROWN and J. LORD, 'The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities', in M.H. RIOUX, L. BASSER and M. JONES (eds.), *Critical Perspectives on Human Rights and Disability Law*, Martinus Nijhoff, Leiden-Boston 2011, pp. 273–307.

<sup>107</sup> ECtHR, *Price*, *supra* note 105, para. 30.

an evolutive interpretation of the factors relevant to determining a violation of Article 3 ECHR (i.e. the ‘minimum level of severity’ of the treatment received and the purpose to humiliate and debase the person concerned). A similar approach was adopted in *Vincent v France*,<sup>108</sup> whereby the Court, citing *Price*,<sup>109</sup> held that the confinement of a paraplegic prisoner in a cell that was not adapted to his disability amounted to a violation of Article 3 ECHR.<sup>110</sup> In a similar vein, in *Engel v Hungary*,<sup>111</sup> the ECtHR held that the detention of a paraplegic person in an inaccessible cell where he ‘was left at the mercy of his cellmates in receiving assistance to relieve himself, bathe and get dressed or undressed’ amounted to a violation of Article 3 ECHR.<sup>112</sup>

On foot of the entry into force of the CRPD, the Strasbourg Court has placed a growing emphasis on the essential role played by reasonable accommodation in protecting the dignity of persons with disabilities in detention. In *Grimailovs v Latvia*,<sup>113</sup> the Court held that there had been a violation of Article 3 ECHR (on the prohibition of torture and inhuman or degrading treatment or punishment) due to the fact that the applicant had been detained in a regular detention facility that was not adapted for wheelchair-users, and had to rely on his fellow inmates to assist him with his daily routine and mobility around the prison. In its decision, the Strasbourg Court argued that the ‘the help offered by the applicant’s cellmate did not form part of any organised assistance by the State to ensure that the applicant was detained in conditions compatible with respect for his human dignity’ and could not be considered suitable in view of the applicant’s disability.<sup>114</sup> The Court cited the duty of reasonable accommodation in Articles 2 and 14 CRPD (on liberty and security of the person),<sup>115</sup> demonstrating its move towards a human rights-oriented approach to disability.

In *Jasinskis v Latvia*,<sup>116</sup> the ECtHR focused attention on the consequences of the failure to make adjustments for a detainee with a sensory impairment. The applicant was the father of a deaf and mute detainee who complained about the death of his son in police custody. Valdis Jasinskis had sustained serious head injuries in a fall outside a student party. He was taken to the local police station and placed in a cell for several hours. Further to several requests made

<sup>108</sup> ECtHR, *Vincent v France*, no 6253/03, 24.10.2006.

<sup>109</sup> *Ibid.*, paras. 96 and 97.

<sup>110</sup> The ECtHR argued that placing a person with disabilities in a prison where he could neither move nor leave his cell independently amounted to degrading treatment, *ibid.*, para. 103.

<sup>111</sup> ECtHR, *Engel v Hungary*, no 46857/06, 20.05.2010.

<sup>112</sup> *Ibid.*, para. 27. See also ECtHR, *Farbtuhs v Latvia*, no 4672/02, 02.12.2004; ECtHR, *Arutyunyan v Russia*, no 48977/09, 10.01.2012.

<sup>113</sup> ECtHR, *Grimailovs v Latvia*, no 6087/03, 25.06.2013.

<sup>114</sup> *Ibid.*, para. 161.

<sup>115</sup> *Ibid.*, paras. 78 and 79.

<sup>116</sup> ECtHR, *Jasinskis v Latvia*, no 45744/08, 21.12.2010.

by his father, he was brought to hospital but died shortly thereafter. In finding a violation of Article 2 ECHR, the Strasbourg Court noted that:

[p]ersons in custody are in a vulnerable position and the authorities are under a duty to protect them. Where the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to his *special needs resulting from his disability*.<sup>117</sup>

In its decision, the Court referred (as relevant legal sources) to Article 2 CRPD, as well as to the 2008 Interim Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, which reaffirmed that ‘the denial or lack of reasonable accommodation for persons with disabilities may create detention [...] conditions that amount to ill-treatment and torture’.<sup>118</sup>

In *Z.H. v Hungary*,<sup>119</sup> the Court went one step further and expressly relied on the notion of ‘reasonable accommodation’ included in Article 2 CRPD in its reasoning. The applicant in the case – a person who was deaf, mute, unable to use sign language or to read or write, and having a learning disability – complained that his detention in prison amounted to inhuman and degrading treatment. In finding a violation of Article 5(2) ECHR (on the right to be informed of the reasons for one’s arrest), alongside Article 3 ECHR, the Court held that the Hungarian authorities did not ensure that the applicant was provided with suitable and understandable information to enable him to challenge his detention and:

[found] it regrettable that the authorities did not make any truly ‘reasonable steps’ [...] – a notion quite akin to that of ‘reasonable accommodation’ in Articles 2, 13 and 14 of the UN Convention on the Rights of Persons with Disabilities [...] – to address the applicant’s condition, in particular by procuring for him assistance by a lawyer or another suitable person.<sup>120</sup>

By placing emphasis on the duty of Contracting States to take into account the different needs of prisoners with disabilities, the ECtHR’s case law on detention embraces the human rights model of disability. It is worth noting in this regard that *Z.H.* is the only case in which the convergence between the ECHR and the CRPD is made explicit, in that the Strasbourg judges overtly incorporated the CRPD in their reasoning.

<sup>117</sup> Ibid., para. 59. Emphasis added.

<sup>118</sup> Ibid., para. 41. See also ECtHR, *Asalya v Turkey*, no 43875/09, 15.04.14 and ECtHR, *Helhal v France*, no 10401/12, 19.02.2015. Those decisions mention the CRPD and refer to reasonable accommodation in detention.

<sup>119</sup> ECtHR, *Z.H. v Hungary*, no 28973/11, 08.11.2012.

<sup>120</sup> Ibid., para. 43.

#### 4.1.3. Case Law on the Right to Education

The third example of convergence stems from the Strasbourg Court's case law on inequality related to the exclusion of students with disabilities from (non-compulsory) education. In the case of *Çam v Turkey*,<sup>121</sup> the Court dealt with the refusal of the Turkish National Music Academy to enrol the applicant as a student because she was blind. The applicant complained of a violation of her right to education, submitting that the State had failed to provide people with disabilities with the same opportunities as everyone else. She also complained of disability-based discrimination due to her treatment at the hands of the Academy stemming from her visual impairment. The Court unanimously held that there had been a violation of Article 14 in conjunction with Article 2 of Protocol No. 1 ECHR (on the right to education). It is of particular note that, in its decision, the Court extended the definition of discrimination on the ground of disability to include the refusal to provide a reasonable accommodation to facilitate access by people with disabilities to education. In that connection, the Court referred to the definition of reasonable accommodation enshrined in Article 2 CRPD. Interestingly, the applicant had not even raised an argument claiming a denial of reasonable accommodation.<sup>122</sup> The Court in *Çam* ultimately ruled that by refusing to enrol the applicant without considering the possibility of accommodating her disability, the national authorities had prevented her, without any objective and reasonable justification, from benefiting from the right to education. This was held to be in breach of Article 2 of the first Protocol to the ECHR and also in breach of Article 14 ECHR. The Court's decision in *Çam* certainly provides evidence of some level of convergence between the norms contained in the ECHR and the CRPD, respectively, with regard to non-discriminatory access to education.

Such a convergence was confirmed in *Enver Şahin v Turkey*,<sup>123</sup> a case which was brought before the Strasbourg Court by Mr Şahin – a student who had been rendered paraplegic following an accident in 2005. The case arose out of the applicant's inability to access the building of Firat University in Turkey due to the lack of facilities adjusted to his impairment. The applicant alleged, *inter alia*, a discriminatory interference with his right to education under Article 2 of Protocol No. 1 in conjunction with Article 14 ECHR, due to the fact that he had been obliged to give up his studies following the refusal

<sup>121</sup> ECtHR, *Çam v Turkey*, no 51500/08, 23.02.2016.

<sup>122</sup> See J. DAMAMME, 'Disability Discrimination because of Denial of "Reasonable Accommodations": A Very Positive Connection between the ECHR and the UNCRPD in *Çam v Turkey*', 09.03.2018, available at <https://strasbourgobservers.com/category/cases/cam-v-turkey>, last accessed 13.08.2019.

<sup>123</sup> ECtHR, *Enver Sahin v Turkey*, no 23065/12, 30.01.2018. See A. BRODERICK, *Enver Sahin v Turkey: 'Verbod op Discriminatie op Grond van Handicap, Recht op Onderwijs, VN-Gehandicaptenverdrag, Doeltreffende Aanpassingen'*, (2018) *European Human Rights Cases* No. 23065/12.

of his request for adaptation of the relevant facilities. The Strasbourg Court placed a strong emphasis on the importance of the fundamental principle of non-discrimination in the exercise of the right to education. The ECtHR concluded that inclusive education is, unquestionably, a component of the international responsibility of States.<sup>124</sup> Most notably for the purpose of this analysis, the Court affirmed that the ECHR must be read in light of the CRPD.<sup>125</sup> In finding a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 1 to the ECHR,<sup>126</sup> the Court ruled, *inter alia*, that the university had neglected to look for alternative solutions that would have enabled the applicant to resume his studies under conditions as close as possible to those provided to non-disabled students, without imposing an undue or disproportionate burden.<sup>127</sup> In many respects, the ECtHR's finding in *Şahin* 'consolidates' the approach adopted by the Court in the *Çam* decision.<sup>128</sup> However, the Court went further than it had done in *Çam*, in the sense that it drew quite extensively on the CRPD, citing the accessibility duty (Article 9), the right to personal mobility (Article 20) and the right to education (Article 24), as well as the reasonable accommodation duty (Articles 2 and 5), showing the interdependence among those provisions. Moreover, the Strasbourg Court placed a particular emphasis on the dignity of persons with disabilities and their autonomy,<sup>129</sup> blatantly embracing the human rights model of disability purported by the CRPD.<sup>130</sup>

In the more recent case of *Stoian v Romania*,<sup>131</sup> however, the ECtHR demonstrated a more cautious approach to the interpretation of the right to

<sup>124</sup> Ibid., para. 55.

<sup>125</sup> Ibid., para. 60.

<sup>126</sup> Ibid., para. 68.

<sup>127</sup> Ibid., para. 67.

<sup>128</sup> J. DAMAMME, 'Disability and University (pragmatic) Activism: The Pros and Cons of *Enver Şahin v Turkey*', *Strasbourgobservers*, 09.03.2018, available at <https://strasbourgobservers.com/2018/03/09/disability-and-university-pragmatic-activism-the-pros-and-cons-of-enver-sahin-v-turkey/>, last accessed 13.08.2019.

<sup>129</sup> See ECtHR, *Enver Şahin*, *supra* note 123, para. 63: 'In that regard, the Court reiterates that the ability of persons with disabilities to live autonomously with a fully-developed sense of dignity and self-respect is of cardinal importance and is central to the CRPD (Articles 3(a), 9(1), 20 *in limine* and 24(1)(a) – para. 25 above), and is also one of the considerations highlighted in the recommendations adopted by the Council of Europe. Similarly, the Court itself has ruled that the very essence of the Convention is respect for human dignity and human freedom, which necessarily includes a person's freedom to make his or her own choices.'

<sup>130</sup> Interestingly, in its decision, at para. 21, the ECtHR does not cite the CoE Action Plan or the Strategy, but it recalls the CoE Recommendation No. R (92)(6) of 9 April 1992 on a coherent policy for persons with disabilities (see above section 3, note 67), in which it invites Member States to 'guarantee the right of people with disabilities to an independent life and full integration into society' and to 'recognise society's duty to make this possible', in order to give persons with disabilities proper 'equality of opportunity' with others.

<sup>131</sup> ECtHR, *Stoian v Romania*, no 289/14, 25.06.2019.

education under the ECHR and, arguably, a step backwards in its interpretation of that right. The applicants in the case, Mr Ştefan-Moshe Stoian, a quadriplegic child, and his mother, Mrs Luminița Stoian, alleged that the authorities had failed to take the requisite measures in compliance with their obligations under both domestic law and the CRPD to ensure, *inter alia*, that Mr. Stoian enjoyed the right to quality education without discrimination. For that component of their claim, the applicants relied on Article 8 ECHR (on the right to respect for private and family life) and Article 14, as well as on Article 2 of Protocol No. 1 to the ECHR.<sup>132</sup> They argued that the assistance received by Mr. Stoian in the relevant schools had been ‘superficial’ and that the schools attended by the applicant had lacked adapted curricula and timetables. Furthermore, it was alleged that those schools had failed to provide him with the therapy and assistance that he needed, despite the national court decisions ordering the schools to do so.<sup>133</sup> In rendering its judgment, the ECtHR made reference to the fact that Contracting States have an obligation to provide reasonable accommodation to people with disabilities.<sup>134</sup> However, the Court affirmed (like it had done in *Çam*) that it was not its task to define the resources to be employed in order to meet the educational needs of children with disabilities, stating that ‘the national authorities, by reason of their direct and continuous contact with the vital forces of their countries, are in principle better placed than an international court to evaluate local needs and conditions in this regard.’<sup>135</sup> In that vein, the Court ruled that the domestic authorities had complied with their obligation to provide reasonable accommodation, not imposing a disproportionate or undue burden, and had acted within the applicable margin of appreciation.<sup>136</sup> The judgment of the Court arguably lacks meaningful scrutiny of the relevant issues. While the national authorities had put in place several measures of accommodation for the benefit of the applicant, the Strasbourg Court failed to adequately engage with the distinct elements of the duty of reasonable accommodation, primarily the disproportionate and undue burden criterion and the individual circumstances of the case, seemingly giving more credence to the Government’s arguments in the case. Furthermore, the Court failed to mention the CRPD at all in the merits of the judgment. This judgment can therefore be deemed to represent divergence with the human rights model of disability that underpins the CRPD.

<sup>132</sup> The Court decided not to consider the arguments of ill-treatment raised by the first applicant under Article 3 ECHR. It also declined to examine the arguments that the first applicant had been denied access to justice under Article 13 ECHR, without providing any reasons.

<sup>133</sup> ECtHR, *Stoian*, *supra* note 131, para. 80.

<sup>134</sup> *Ibid.*, para. 98. See also *Çam*, *supra* note 121, paras. 54 and 65.

<sup>135</sup> *Ibid.*, para. 109. See also *Çam*, *supra* note 121, para. 66.

<sup>136</sup> *Ibid.*, para. 110.



## 4.2. A TALE OF FRAGMENTATION: CASE LAW ON LEGAL CAPACITY

### 4.2.1. *One Step Forward: From Shtukaturv v Russia to Stanev v Bulgaria*

Legal capacity, and more generally the autonomy of persons with disabilities, is at the heart of several decisions of the Strasbourg Court in connection with various ECHR provisions, including but not limited to Article 5 (on the right to liberty and security), Article 6 (on the right to a fair trial), Article 8, Article 13 (on the right to an effective remedy) and Article 14. Some degree of convergence between the ECHR and the CRPD norms has emerged in the Court's case law related to Articles 5 and 6.

With regard to Article 5, the Court has outlined, in *Winterwerp v Netherlands*,<sup>137</sup> the conditions that must be satisfied in order for the detention of 'a person of unsound mind' to be lawful within the meaning of Article 5(1) ECHR, to avoid a finding of arbitrary institutionalisation of persons with intellectual and psychosocial disabilities.<sup>138</sup> In recent cases, however, the Court has firmly condemned the detention of persons with disabilities in psychiatric hospitals and the lack of domestic remedies available to them to challenge incapacitation decisions adopted by domestic courts. Among the first notable cases in that regard is *Shtukaturv v Russia*.<sup>139</sup> Mr Shtukaturv, who had a psychosocial impairment, had been deprived of his legal capacity without his knowledge and had been placed in a psychiatric hospital by his mother. The ECtHR found that the legal incapacitation of the applicant violated his right to a fair trial under Article 6 and his right to respect for his private life pursuant to Article 8. The Court also found that the subsequent involuntary placement of the applicant in a psychiatric hospital, without court review, violated his right to liberty under Article 5 ECHR. While the ECtHR noted that Contracting States enjoy a wide margin of appreciation 'in such a complex matter as determining somebody's

<sup>137</sup> ECtHR, *Winterwerp v Netherlands*, no 6301/73, 24.11.1979. In particular, in this case, the ECtHR held that: aside from emergency cases, the individual concerned must be reliably shown to be of unsound mind before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder. In its subsequent case law, the Court has emphasised the need to provide appropriate treatment to persons who have been deprived of their liberty, for the purpose of relieving their mental illness or reducing their dangerousness due to psychiatric disorder. See in that respect, ECtHR, *Rooman v Belgium*, no 18052/11, 31.01.2019, para. 194 et. seq. In this case, however, the Court considered that 'Article 5, as currently interpreted, does not contain a prohibition on detention on the basis of impairment, in contrast to what is proposed by the UN Committee on the Rights of Persons with Disabilities ...' (para. 205).

<sup>138</sup> *Ibid.*, para. 38.

<sup>139</sup> ECtHR, *Shtukaturv v Russia*, no 44009/05, 27.03.2008.

mental capacity’,<sup>140</sup> it also stated that ‘the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation.’<sup>141</sup>

The most famous case in this context<sup>142</sup> is *Stanev v Bulgaria*,<sup>143</sup> which is arguably a milestone in the jurisprudence of the ECtHR on legal capacity, in that the Court clarifies that the recognition of an individual’s legal capacity is vital for the exercise of all human rights and fundamental freedoms.<sup>144</sup> Having been diagnosed with schizophrenia, Mr Stanev was placed under partial guardianship and placed in a home for individuals with psychosocial impairments. His attempts (through his lawyer) to apply to the regional court to have his legal capacity restored and to put an end to his confinement were unsuccessful. He finally brought a case to the ECtHR, whereby he alleged a violation of, *inter alia*, Article 5 ECHR. In its decision, the ECtHR acknowledged ‘the growing importance’ that international instruments accord to individuals with psychosocial impairments and their autonomy.<sup>145</sup> It also referred explicitly to the CRPD and to the necessity for adequate procedural safeguards to be put in place to protect legally incapacitated individuals to the greatest extent possible.<sup>146</sup> In addition, the Court recognised the necessity to ensure periodic reviews of the status of those who reside in institutions and to make appropriate remedies available for breach of their rights.<sup>147</sup> Ultimately, the ECtHR concluded that Bulgaria had violated Articles 5 and 6 ECHR.<sup>148</sup> This case demonstrates considerable convergence towards CRPD norms.

Another notable decision is *Kiss v Hungary*,<sup>149</sup> in which the Strasbourg Court found a violation of the right to vote of persons with intellectual disabilities. The applicant had been placed under partial guardianship and taken off the electoral register as a result. His request to be put back on the register was unsuccessful, since, under the Hungarian Constitution applicable at the time of the decision, individuals placed under guardianship were denied the right to vote. The applicant submitted an application to the ECtHR, alleging an unjustified deprivation of

<sup>140</sup> Ibid., para. 87.

<sup>141</sup> Ibid., para. 94.

<sup>142</sup> Another relevant decision is ECtHR, *Lashin v Russia*, no 33117/02, 22.04.2013.

<sup>143</sup> ECtHR, *Stanev v Bulgaria*, no 36760/06, 12.01.2012.

<sup>144</sup> See also ECtHR, *DD v Lithuania*, no 13469/06, 14.02.2012.

<sup>145</sup> Ibid., para. 244.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> The Court held, in particular, that Bulgaria violated Article 5(1), since Mr Stanev had been illegally detained in the institution in question; Article 5(4), because Mr Stanev could not bring proceedings to have the lawfulness of his detention decided upon speedily by a court; and Article 5(5) concerning the impossibility for him to apply for compensation for his illegal detention as well as the lack of review by a court of the lawfulness of his detention. The Strasbourg Court also held that there had been a violation of Article 6, which provides for the right to a fair trial, in that the applicant had been denied access to a court to seek restoration of his legal capacity.

<sup>149</sup> ECtHR, *Kiss v Hungary*, no 38832/06, 20.05.2010.

his right to vote. The Strasbourg Court held that there had been a violation of Article 3 of Protocol No. 1 to the ECHR (on the right to free elections), finding that the indiscriminate removal of voting rights on the ground of psychosocial disability alone (and the ensuing partial guardianship) could not be considered compatible with the legitimate grounds for restricting the right to vote. This case also shows a degree of convergence towards CRPD norms, although, in contrast with the CRPD, which requires the provision of support to a disabled person exercising their right to vote, the Court in *Kiss* seems to have accepted the fact that an individualised assessment of a person's fitness to vote could legitimately lead to that person being denied the right to vote.<sup>150</sup>

In the foregoing cases, the Court did not ban guardianship regimes (*de facto* allowing for full guardianship regimes).<sup>151</sup> In addition, the doctrine of the margin of appreciation leaves Contracting States to the ECHR relatively wide leeway with respect to sensitive issues such as determining capacity, as will be further discussed in section 5. However, according to O'Mahony, these decisions show that 'the ECtHR has been edging closer to the core of legal capacity and has [...] explicitly invoked the CRPD as an interpretive aid' to the ECHR.<sup>152</sup> On the whole, these cases show a slow move towards the human rights model of disability.

#### 4.2.2. *Two Steps Back: A.-M.V. and Delecalle*

To date, the issue of legal capacity has proven to be a contentious one for the ECtHR and a field in which a trend towards convergence with the human rights model is not yet consolidated. Recent case law, namely *A.-M.V. v Finland*<sup>153</sup> and *Delecalle v France*,<sup>154</sup> highlights considerable fragmentation and the difficulty for the Strasbourg Court to fully embrace the content of Article 12 CRPD, as interpreted by the CRPD Committee, an interpretation which remains, in itself, very contentious among legal scholars.<sup>155</sup> These decisions also show the difficulty in applying the core tenets of the human rights model of disability, in

<sup>150</sup> Ibid., para. 44. On this point, see A. BRODERICK (2015), *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities*, *supra* note 18, pp. 324–325.

<sup>151</sup> See also ECtHR, *Ivinović v Croatia*, no 13006/13, 18.09.2014, para. 44. In this case, the Court affirmed that 'deprivation, even partial, of legal capacity should be a measure of last resort, applied only where the national authorities, after carrying out a careful consideration of possible alternatives, have concluded that no other, less restrictive, measure would serve the purpose or where other, less restrictive measure, have been unsuccessfully attempted'.

<sup>152</sup> C. O'MAHONY, 'Legal Capacity and Detention: Implications of the UN Disability Convention for the Inspection Standards of Human Rights Monitoring Bodies', (2012) 16(6), *The International Journal of Human Rights*, p. 892.

<sup>153</sup> ECtHR, *A.-M.V. v Finland*, no 53251/13, 23.03.2017.

<sup>154</sup> ECtHR, *Delecalle v France*, no 37646/13, 28.10.2018.

<sup>155</sup> See the references in *supra* note 54.

particular the principles of autonomy and independence, ultimately casting a shadow of doubt on the likelihood of the model being further incorporated into the ECHR system.

*A.-M.V. v Finland* arose from the complaint raised by a man with an intellectual disability concerning the Finnish courts' refusal to replace his guardian, who had prevented him from deciding where and with whom he would live. The applicant alleged, in particular, a violation of Article 8 ECHR. At the beginning of its decision, the Strasbourg Court referred to Article 12 CRPD as well as the CRPD Committee's General Comment No. 1 on Equal Recognition before the Law in the context of relevant international law. The Court also noted that States Parties to the CRPD must 'take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences'.<sup>156</sup> In addition, the Court quoted at length the CoE Strategy 2017–2023, alongside other CoE policy documents, and recalled the duty of CoE bodies, to 'support Member States in their efforts to improve their legislation, policies and practices with regard to ensuring legal capacity of persons with disabilities'.<sup>157</sup> The ECtHR did not limit itself to an initial citation; rather, it considered the CRPD and the other CoE documents to be 'relevant' to the case.<sup>158</sup> Notwithstanding this formal convergence, the ECtHR held that there had been no violation of Article 8 ECHR and that the applicant's guardian was entitled to decide on the applicant's behalf as he was unable to understand the significance of the specific matter at hand.<sup>159</sup> While highlighting the importance of balancing the right to autonomy of people with disabilities and the need to protect them, the Strasbourg Court applied a 'best interests standard', which is outlawed by Article 12 CRPD, rather than the 'will and preferences' approach which pertains to the human rights model of disability.

<sup>156</sup> ECtHR, *A.-M.V.*, *supra* note 153, paras. 42 et seq.

<sup>157</sup> *Ibid.*, para. 48.

<sup>158</sup> *Ibid.*, para. 74.

<sup>159</sup> The Court noted that 'under Finnish law, the appointment of a mentor does not entail a deprivation or restriction of the legal capacity of the person for whom the mentor is designated [...]. The powers of the mentor to represent the ward cover the latter's property and financial affairs to the extent set out in the appointing court's order, but these powers do not exclude the ward's capacity to act for him- or herself. If, like in the present case, the court has specifically ordered that the mentor's function shall also cover matters pertaining to the ward's person, the mentor is competent to represent the ward in such a matter only where the latter is unable to understand its significance [...]. In a context such as the present one, the interference with the applicant's freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended on the assessment of the applicant's intellectual capacity in conjunction with and in relation to all the aspects of that specific issue'. The Court also noted that Finland, having ratified the CRPD, ascertained that there was no need or cause to amend the current legislation in these respects (*ibid.*, para. 85).

A substantially divergent approach from the CRPD norms can also be found in *Delecalle v France*. Interestingly in that case, and in contrast with *A.-M.V.*, the Court did not consider nor did it mention the UN Convention. This appears to be in stark contrast with a consolidated trend on the Court's part of citing the CRPD,<sup>160</sup> with the explicit aim to interpret the ECHR in light of, and in compliance with, the UN Convention. The applicant in *Delecalle* was an elderly man who had been placed under partial guardianship (*curatelle renforcée*), upon the request of his adoptive daughter and on account of the fact that he had a cognitive disorder and psychological difficulties. Mr Delecalle requested authorisation from his curator to marry a friend whom he had known for several years, but his guardian refused this request. Mr Delecalle then requested the guardianship judge to override the guardian's decision. However, he was again refused permission to get married on the basis of a medical expert's opinion and a social welfare report, because the proposed marriage was considered to run counter to the applicant's best interests. Since Mr Delecalle's appeals against that decision were rejected, he brought a complaint before the ECtHR, arguing a violation of Article 12 ECHR (on the right to marry). The Strasbourg Court highlighted that Article 12 ECHR permits restrictions of the right to marry based on public interest considerations, in so far as those restrictions would not impair the very essence of the right. Along this line of reasoning, the ECtHR stated that limitations on the right to marry based on a restriction of legal capacity fall within the margin of appreciation of Contracting States.<sup>161</sup> The Court also argued that the obligation on the applicant to apply for authorisation prior to his marriage (as a result of the fact that he was the subject of a measure of legal protection) did not deprive him of the right to marry. In line with what the French Constitutional Council had already held, the Court concluded that the French curatorship system is intended to protect the interests of the person with disabilities and, as far as possible, to promote his autonomy, and that, in the case at stake, there was no violation of Article 12 ECHR. In a timely annotation of the case, Cojocariu notes that the Court did not engage with the facts of the case; rather, it focused on the procedural safeguards available to the applicant, which were considered comprehensive.<sup>162</sup> In doing so, the Court avoided the

<sup>160</sup> Although it must be noted that the Strasbourg Court has not been consistent in citing the CRPD in all areas of its disability case law, such as with regard to the detention cases, in which the Court sometimes makes reference to the UN Convention, while other times it does not.

<sup>161</sup> ECtHR, *Delecalle*, *supra* note 154, para. 63 et seq.

<sup>162</sup> C. COJOCARIU, 'Loneliness that is good for you: the European Court addresses the Right to Marry of People with Disabilities', *Strasbourgobservers*, 03.12.2018, available at <https://strasbourgobservers.com/2018/12/03/loneliness-that-is-good-for-you-the-european-court-addresses-the-right-to-marry-of-people-with-disabilities/#more-4264>, last accessed 13.08.2019. See also C. COJOCARIU, '*A.-M.V. v Finland*. Independent Living: A Bridge too

discussion of guardianship regimes and substitute decision-making systems. The Court, albeit implicitly and similarly to its approach in *A.-M.V.*, embraced the long-standing ‘best interests’ approach, moving away from the human rights model of disability to a significant degree.

## 5. EVOLUTIVE INTERPRETATION AND THE MARGIN OF APPRECIATION

The decisions discussed above in section 4 suggest that, despite an apparent convergence towards the CRPD’s standard of protection in the realm of non-discrimination, detention settings and, until recently, education, the Strasbourg Court has struggled to translate the human rights model of disability that underpins the CRPD to its interpretation of ECHR rights in some instances (mainly in the field of legal capacity). It might be argued that the remaining fragmentation in the Court’s case law is due to the fact that CRPD and the ECHR diverge significantly in terms of the scope of the rights contained in both texts. While the CRPD ‘contains widespread positive duties [that] span both civil and political as well as economic, social and cultural rights’, the ‘fundamental aim of the ECHR is to protect civil and political rights’.<sup>163</sup> Moreover, the ECHR ‘places primarily negative restraints on governmental action and does not contain any specific provisions for the protection of the rights of persons with disabilities’.<sup>164</sup> By way of contrast with the wide-ranging positive obligations and the human rights model of disability that underpin the CRPD, the ECHR contains more limited obligations. Nonetheless, the evidently diverse nature of these legal instruments does not seem to be the main reason for fragmentation *per se*.

Although it may seem *prima facie* contradictory, despite being constrained by the nature and scope of the ECHR itself, the Strasbourg Court has recognised that the equal enjoyment of ECHR rights by persons with disabilities will, in many cases, necessitate positive obligations, specifically in the form of a

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far for the European Court of Human Rights’, *Strasbourgobservers*, 10.05.2017, <https://strasbourgobservers.com/2017/05/10/a-m-v-v-finland-independent-living-a-bridge-too-far-for-the-european-court-of-human-rights/>, last accessed 13.08.2019. In that blog post, Cojocariu argues that ‘the *A.-M.V. v. Finland* judgment is part of [a] trend towards articulating at the European level a [...] more conservative view of Article 12 that would considerably stunt its transformative potential and safeguard the status quo’.

<sup>163</sup> With the exception of the First Protocol to the ECHR (concerning the right to property and the right to education), the ECHR addresses the traditional canon of civil and political rights.

<sup>164</sup> A. BRODERICK, ‘The Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights: A Tale of Two Halves or a Potentially Unified Vision of Human Rights?’, (2018) 7(2), *Cambridge International Law Journal*, pp. 202–203.

reasonable accommodation.<sup>165</sup> The extension of the protection afforded by the ECHR to people with disabilities has been prompted by an evolutive and dynamic interpretation favoured by the open-textured nature of several ECHR provisions, in particular Article 14 ECHR. The evolutive interpretation of the Convention was also more easily achieved due to the fact that legal concepts, such as that of ‘inhuman and degrading treatment’ in Article 3 ECHR, lack an explicit definition in the text of the ECHR. By using an evolutive interpretive approach, the Strasbourg Court has overcome the limits of a relatively old text, going far beyond the letter of the provisions of the ECHR, to incorporate the rights of persons with disabilities in its jurisprudence. It has done so by using the CRPD as an interpretive support. In that respect, the case law of the ECtHR on the rights of persons with disabilities confirms Forowicz’s suggestion that the Strasbourg Court is more receptive to international law when it aims to interpret the ECHR far beyond *littera legis*. *Glor*, *Çam*, *Guberina* and other judgments show that the endorsement of the human rights model of disability has been prompted by an attempt by the ECtHR to fill gaps in the text of the ECHR. The Strasbourg Court seems to have embraced one of the main conceptual tenets of the human rights model, that of inclusive equality, which encompasses, *inter alia*, the duty to take account of the needs of people with disabilities and to accommodate those needs accordingly. Some of the ECtHR’s jurisprudence places an emphasis on the necessity to consider the specific and individual circumstances of people with disabilities when applying domestic legislation. Although the Strasbourg Court affords a wide margin of appreciation with regard to the socio-economic policies that are adopted by national authorities<sup>166</sup> and avoids deriving from the CRPD a right that was not included in the ECHR to begin with, the jurisprudence on the ill-treatment of disabled detainees confirms the potential for evolutive interpretation to expand the duties of Contracting States. By that token, there is potential to interpret the provisions of the ECHR so as to incorporate new concepts, such as that of ‘reasonable accommodation’. Notwithstanding this, the Strasbourg Court is at a relatively early stage in its enunciation of reasonable accommodation-types measures, and it is unclear whether the Court will require reasonable accommodations with regard to all of the rights enunciated in the ECHR, nor is it clear whether the Court will attempt to engage with the concept of ‘disproportionate burden’ in its future case law.

<sup>165</sup> D. FERRI, ‘Reasonable Accommodation as a Gateway to the Equal Enjoyment of Human Rights: From New York to Strasbourg’, (2018) 6(1), *Social Inclusion*, p. 40. See also D. FERRI, ‘L’accomodamento ragionevole per le persone con disabilità in Europa: dal “Transatlantic Borrowing” alla “Cross-Fertilization”’, (2017) 2, *Diritto Pubblico Comparato ed Europeo*, p. 381.

<sup>166</sup> On this point, see D. XENOS, ‘The Human Rights of the Vulnerable’, (2009) 13(4), *The International Journal of Human Rights*, p. 610.

On the whole, as Waddington suggests, the Court seems to run ‘hot and cold’<sup>167</sup> in its case law on disability rights. It is argued that this remark can be applied, in particular, to the Court’s decisions on legal capacity. In that field, which falls squarely within the scope of the ECHR and which is traditionally considered to belong to the spectrum of civil and political rights, the use of the margin of appreciation doctrine has proven to be the main stumbling block on the road to convergence. That doctrine allows Contracting States to pursue actions which the Court vows not to interfere with, provided that those actions can be deemed to fall within the acceptable margin. The Court’s rationale is that, in principle, national authorities are best placed to assess the necessity for restrictions of, and limitations on, certain rights.<sup>168</sup> As most recently noted by Gerards, ‘[t]he doctrine’s underlying – and usually unexpressed – idea is that a distinction can be made between the definition of fundamental rights and the possibilities for limitations of these rights’, and the strength of this doctrine is its flexibility.<sup>169</sup> However, the realm of discretion left by the Strasbourg Court to Contracting States in fulfilling certain obligations under the ECHR, namely those inherent in Article 12 ECHR, has resulted in the Court’s implicit acceptance of substitute decision-making regimes, which are in stark contrast with the CRPD, as they deny legal capacity. An attempt to comply with Article 12 CRPD has been made in *Shtukaturov* and *Stanev*. However, in *A.-M.V. and Delecalle*, the Strasbourg Court seems to accept that the deprivation of legal capacity can be legitimate in some cases, where it is intended to pursue the aim of protecting the interests of the person affected by the measure. It can also be argued that, despite the lip-service paid to the CRPD’s Committee General Comment No. 1, the ECtHR seems to be cognisant of the contentious nature of Article 12 CRPD. As noted by other authors, the ECtHR has generally resorted to the doctrine of the margin of appreciation in relation to issues perceived as highly divisive and controversial, the result being the deferral of the decision on the relevant issue to the national authorities.<sup>170</sup> This also seems to be the case in *A.-M.V. and Delecalle*. However, the doctrine of the ‘margin of appreciation’ and its use by the Court in relation to legal capacity is somewhat difficult to marry with the principle of autonomy and, more specifically, with the wide-ranging and ground-breaking obligations imposed on States Parties by Article 12 CRPD.

Overall, evolutive interpretation is at the heart of the convergence between the Court’s case law and the interpretation accorded to the human rights norms

<sup>167</sup> L. WADDINGTON, ‘Handicap, Discrimination by association, Indirect onderscheid, Toegankelijkheid, VN-gehandicaptенverdrag’, (2016) 130, *European Human Rights Cases*, para. 18.

<sup>168</sup> J. GERARDS, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’, (2018) 18(3), *Human Rights Law Review*, p. 498.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*



contained in the CRPD. This convergence has certainly been favoured by the CoE in its policy documents. Although the positive strides made in the CoE's policies fade into the background when compared with the steps backwards that the Court has taken in certain decisions, they undoubtedly created fertile terrain for the Court to embrace the human rights model of disability. The 'Trojan-Horse-like character'<sup>171</sup> of the margin of appreciation doctrine has, however, been a contributing factor to the continued existence of divergences between the Court's case law and the CRPD norms. It is argued that the doctrine is also likely to be the main reason why the ECtHR may never fully (or even largely) converge with the understanding of disability endorsed by the CRPD, and with the spirit and tenor of the UN Convention's human rights model of disability.

## 6. CONCLUDING REMARKS

The Strasbourg Court has consistently argued that the ECHR is a living instrument that 'must be interpreted in the light of present-day conditions'.<sup>172</sup> Such an evolutive interpretation cannot help but be influenced by international law, and this inevitably contributes to the convergence among global standards of protection. The ECtHR has always had due regard to the 'consensus and common values emerging from the practices of European States and specialised international instruments' as well as 'the evolution of norms and principles in international law'.<sup>173</sup> As discussed throughout this contribution, the foregoing is particularly evident in the Strasbourg Court's case law concerning disability rights, where the CRPD has largely been used as an interpretive aid to the ECHR norms, since it represents a common standard between CoE Member States, as clarified in the CoE Disability Action Plan and in the subsequent Strategy.

The Court's openness with regard to the CRPD has resulted in a shift towards the human rights model of disability. In its interpretation of the non-discrimination norm and of the right to education under the ECHR and its Additional Protocols, the ECtHR has progressively applied a standard of protection of disability

<sup>171</sup> I. DE LA RASILLA DEL MORAL, 'The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine', (2006) 7(6), *German Law Journal*, p. 611.

<sup>172</sup> See, for example, ECtHR, *Tyrer v United Kingdom*, no 5856/72, 25.04.1978, para. 31. See A. MOWBRAY, 'The Creativity of the European Court of Human Rights', (2005) 5(1), *Human Rights Law Review*, pp. 57–79. Scholarship has also suggested that since its early days, the ECtHR has used the 'living instrument' doctrine in order to advance its own case law, even overruling its own precedents. On the letter aspect, see A. MOWBRAY, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law', (2009) 9(2), *Human Rights Law Review*, pp. 179–201.

<sup>173</sup> ECtHR, *Opuz v Turkey*, no 33401/02, 9.06.09, para. 164.

rights similar to that which is contained in the CRPD. In that connection, it seems that the Court's disability case law confirms what Mowbray had already suggested in a seminal article, namely that: 'the Court has willingly embraced the radically different natures of contemporary European societies [...] from those existing when the founding States drafted the Convention in the early days of the Cold War', and has changed its standards of protection accordingly.<sup>174</sup> While the full transformative potential of the CRPD remains untapped within the ECHR system, especially in relation to accessibility obligations, a certain level of convergence has appeared in the two legal systems in the fields of non-discrimination, detention settings and education. In those areas, the Strasbourg Court's decisions provide evidence of a shift towards the human rights model of disability that underpins the UN Convention. Up until the recent *Stoian* case, the Court was particularly cognisant of accommodating the difference that is inherent to disability, and seemed willing to expand the ECHR norms to incorporate key CRPD concepts, such as that of 'reasonable accommodation'. By contrast, in the field of legal capacity, and notably with regard to the rights of people with intellectual and psychosocial disabilities, the approach of the Strasbourg Court diverges quite considerably from the CRPD provisions, as interpreted and expanded upon by the CRPD Committee. The interpretation of the relevant ECHR provisions in the context of guardianship, being limited by the doctrine on the margin of appreciation, has resulted in a conservative approach that falls short of the human rights model of disability purported by the CRPD. On the whole, it is contended that the Court's case law shows a growing (but inconsistent) influence of the CRPD on the Strasbourg jurisprudence concerning disability.

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<sup>174</sup> A. MOWBRAY (2005), 'The Creativity of the European Court of Human Rights', *supra* note 172, p. 79.